NORTH CAROLINA REPORTS

VOL. 232

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1950

FALL TERM, 1950

REPORTED BY

JOHN M. STRONG

RALEIGH
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PRINTERS TO THE SUPREME COURT
1951

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Rule 46 of the Supreme Court is as follows:

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2 " "	"	37	"
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" Eq.	"	45	"
1 Jones Law	"	46	"
2 " "	"	47	"
3 " "	"	48	"
4 " "	"	49	"
5 " "	"	50	"
6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
5 " "	"	58	"
6 " "	"	59	"
1 and 2 Winston	"	60	"
Phillips Law	"	61	"
" Eq.	"	62	"

☞ In quoting from the *reprinted* Reports, counsel will cite always the marginal (*i.e.*, the original) paging.

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

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1950—FALL TERM, 1950

CHIEF JUSTICE:

WALTER P. STACY.

ASSOCIATE JUSTICES:

WILLIAM A. DEVIN,
M. V. BARNHILL,
J. WALLACE WINBORNE,
A. A. F. SEAWELL,[1]
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,
JOHN HILL PAYLOR.

SUPREME COURT REPORTER:

JOHN M. STRONG.

CLERK OF THE SUPREME COURT:

ADRIAN J. NEWTON.

MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

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[1]Died 14 October, 1950. Murray G. James appointed by Governor 19 October, 1950, to fill vacancy until next election. Jeff. D. Johnson, Jr., nominated by Executive Committee and elected regular election, 1950, for unexpired term.

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.
WILLIAM I. HALSTEAD	South Mills.
WILLIAM T. HATCH	Raleigh.
HOWARD G. GODWIN	Dunn.

WESTERN DIVISION

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

SPECIAL JUDGES

GEORGE B. PATTON	Franklin
A. R. CRISP	Lenoir.
HAROLD K. BENNETT	Asheville.
SUSIE SHARP	Reidsville.

EMERGENCY JUDGES

HENRY A. GRADY	New Bern.
FELIX E. ALLEY, SR.	Waynesville.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
WALTER W. COHOON	First	Elizabeth City.
GEORGE M. FOUNTAIN	Second	Tarboro.
ERNEST R. TYLER	Third	Roxobel.
W. JACK HOOKS	Fourth	Kenly.
W. J. BUNDY	Fifth	Greenville.
WALTER T. BRITT	Sixth	Clinton.
WILLIAM Y. BICKETT	Seventh	Raleigh.
CLIFTON L. MOORE	Eighth	Burgaw.
MALCOLM B. SEAWELL	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[1]	Fifteenth	Statesville.
JAMES C. FARTHING	Sixteenth	Lenoir.
AVALON E. HALL	Seventeenth	Yadkinville.
C. O. RIDINGS	Eighteenth	Forest City.
W. K. MCLEAN	Nineteenth	Asheville.
THADDEUS D. BRYSON, JR.	Twentieth	Bryson City.
R. J. SCOTT	Twenty-first	Danbury.

[1]Resigned 1 September, 1950. Succeeded by Zeb. A. Morris, Concord, N. C.

SUPERIOR COURTS, FALL TERM, 1950

The numbers 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 Harris

Beaufort—Sept. 18* (A); Sept. 25†; Oct. 9†; Nov. 6* (A); Dec. 4†.
Camden—Aug. 28.
Chowan—Sept. 11; Nov. 27.
Currituck—Sept. 4.
Dare—Oct. 23.
Gates—Nov. 20.
Hyde—Aug 21†; Oct. 16.
Pasquotank—Sept. 18†; Oct. 9† (A) (2); Nov. 6†; Nov. 13*.
Perquimans—Oct. 30.
Tyrrell—Oct. 2.

SECOND JUDICIAL DISTRICT

Judge Burney

Edgecombe—Sept. 11; Oct. 16; Nov. 13† (2).
Martin—Sept. 18 (2); Nov. 20† (A) (2); Dec. 11.
Nash—Aug. 28; Sept. 18† (A) (2); Oct. 9†; Nov. 27*; Dec. 4†.
Washington—July 10; Oct. 23†.
Wilson—Sept. 4; Oct. 2†; Oct. 23* (A); Oct. 30† (2).

THIRD JUDICIAL DISTRICT

Judge Nimocks

Bertie—Aug. 28 (2); Nov. 13 (2).
Halifax—Aug. 14 (2); Oct. 2† (A) (2); Oct. 23* (A); Nov. 27 (2).
Hertford—July 31; Oct. 16 (2).
Northampton—Aug. 7; Oct. 30 (2).
Vance—Oct. 2*; Oct. 9†.
Warren—Sept. 18*; Sept. 25†.

FOURTH JUDICIAL DISTRICT

Judge Carr

Chatham—July 31† (2); Oct. 23.
Harnett—Sept. 4* (A); Sept. 18†; Oct. 2† (A) (2); Nov. 13* (2).
Johnston—Aug. 14*; Sept. 25† (2); Oct. 16 (A); Nov. 6†; Nov. 13† (A); Dec. 11 (2).
Lee—July 17*; July 24†; Sept. 11†; Sept. 18† (A); Oct. 30*; Dec. 11† (A).
Wayne—Aug. 21; Aug. 28† (2); Oct. 9† (2); Nov. 27 (2).

FIFTH JUDICIAL DISTRICT

Judge Morris

Carteret—Oct. 16; Dec. 4†.
Craven—Sept. 4; Oct. 2† (2); Nov. 20† (2).
Greene—Dec. 4 (A); Dec. 11 (2).
Jones—Aug. 14†; Sept. 18; Dec. 11 (A).
Pamlico—Nov. 6 (2).
Pitt—Aug. 21†; Aug. 28; Sept. 11†; Sept. 25†; Oct. 23†; Oct. 30; Nov. 20† (A).

SIXTH JUDICIAL DISTRICT

Judge Bone

Duplin—July 24*; Aug. 28† (2); Oct. 2*; Dec. 4† (2).
Lenoir—Aug. 21*; Sept. 11 (A); Sept. 25†; Oct. 30 (A); Nov. 6† (2); Nov. 27 (A).
Onslow—July 17‡; Oct. 9; Nov. 20† (2).
Sampson—Aug. 7 (2); Sept. 11† (2); Oct. 23† (2).

SEVENTH JUDICIAL DISTRICT

Judge Parker

Franklin—Sept. 18† (2); Oct. 9*; Nov. 27† (2).
Wake—July 10*; Sept. 4* (2); Sept. 18† (A) (2); Oct. 2*; Oct. 16† (3); Nov. 6*; Nov. 13† (2); Nov. 27† (A); Dec. 4* (A); Dec. 11*; Dec. 18†.

EIGHTH JUDICIAL DISTRICT

Judge Williams

Brunswick—Sept. 4; Sept. 18†.
Columbus—Aug. 28*; Sept. 4* (A); Sept. 25† (2); Oct. 23* (A) (2); Nov. 13*; Nov. 20† (2).
New Hanover—July 24*; Aug. 21*; Sept. 4† (A) (2); Oct. 9† (2); Oct. 30*; Nov. 6; Dec. 4† (2).
Pender—July 17†; Sept. 11*; Oct. 23†.

NINTH JUDICIAL DISTRICT

Judge Frizzelle

Bladen—Aug. 7†; Aug. 14*; Sept. 18*.
Cumberland—Aug. 28*; Sept. 25† (2); Oct. 9* (A); Oct. 23† (2); Nov. 20* (2).
Hoke—July 31†; Aug. 21; Nov. 13.
Robeson—July 10† (2); Aug. 28† (A); Sept. 4* (2); Sept. 25* (A); Oct. 9† (2); Oct. 23* (A); Nov. 6*; Nov. 13† (A); Dec. 4† (2); Dec. 18.*

TENTH JUDICIAL DISTRICT

Judge Stevens

Alamance—July 31†; Aug. 14*; Sept. 4† (2); Nov. 13† (A) (2); Nov. 27*.
Durham—July 17*; July 31† (A) (2); Sept. 4* (A) (2); Sept. 18† (2); Oct. 2† (A); Oct. 9*; Oct. 16† (A) (2); Oct. 30† (2); Dec. 4*.
Granville—July 24; Oct. 23†; Nov. 13 (2).
Orange—Aug. 21; Aug. 28†; Oct. 2† Dec. 11.
Person—Aug. 7; Oct. 16.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Judge Moore

Ashe—July 24† (2); Oct. 23*.
Alleghany—Aug. 14; Oct. 2.
Forsyth—July 3* (2); Sept. 4* (2); Sept. 18† (2); Oct. 2† (A); Oct. 9* (2); Oct. 23† (A) (2); Nov. 13*; Nov. 20† (2); Dec. 4* (2).

TWELFTH JUDICIAL DISTRICT

Judge Clement

Davidson—Aug. 21; Sept. 11† (2); Oct. 2† (A) (2); Nov. 20 (A) (2).
Guilford, Greensboro Division—July 10*; July 31*; Aug. 28† (2); Sept. 11*; Sept. 25* (A); Sept. 25† (3); Oct. 16*; Oct. 30* (3); Nov. 20† (2); Dec. 4† (2); Dec. 4*; Dec. 18*.
Guilford, High Point Division—July 17*; Aug. 7†; Aug. 28*; Sept. 18*; Oct. 23*; Oct. 30† (A) (2); Dec. 11*.

THIRTEENTH JUDICIAL DISTRICT

Judge Sink

Anson—Sept. 11†; Sept. 25*; Nov. 13†.
Moore—Aug. 14*; Sept. 18†; Sept. 25† (A); Nov. 20† (A).
Richmond—July 17†; July 24*; Sept. 4†; Oct. 2*; Nov. 6†.
Scotland—Aug. 7; Oct. 30†; Nov. 27 (2).
Stanly—July 10; Sept. 4† (A) (2); Oct. 9†; Nov. 20.
Union—Aug. 21 (2); Oct. 16 (2).

FOURTEENTH JUDICIAL DISTRICT

Judge Phillips

Gaston—July 24*; July 31† (2); Sept. 11* (A); Sept. 18† (2); Oct. 23*; Oct. 30† (A); Nov. 27* (A); Dec. 4† (2).
Mecklenburg—July 10* (2); July 31* (A) (2); Aug. 14* (2); Aug. 28*; Sept. 4† (2); Sept. 4† (A) (2); Sept. 18† (A) (2); Sept. 18* (A) (2); Oct. 2*; Oct. 2† (A) (2); Oct. 9† (2); Oct. 16† (A) (2); Oct. 30† (A) (2); Oct. 30† (2); Nov. 13† (A) (2); Nov. 13*; Nov. 30† (2); Nov. 27† (A) (2); Dec. 4* (A) (2); Dec. 11† (A); Dec. 18†.

FIFTEENTH JUDICIAL DISTRICT

Judge Gwyn

Alexander—Aug. 28 (A) (2).
Cabarrus—Aug. 21*; Aug. 28†; Oct. 16 (2); Nov. 13† (A); Dec. 4† (A).
Iredell—July 31 (2); Nov. 6 (2).
Montgomery—July 10; Sept. 25†; Oct. 2; Oct. 30†.
Randolph—July 17† (2); Sept. 4*; Oct. 23† (A) (2); Dec. 4 (2).
Rowan—Sept. 11 (2); Oct. 9†; Oct. 16† (A); Nov. 20 (2).

SIXTEENTH JUDICIAL DISTRICT

Judge Bobbitt

Burke—Aug. 7 (2); Sept. 25 (3); Dec. 11 (2).
Caldwell—Aug. 21 (2); Sept. 4† (A) (2); Oct. 2† (A) (2); Nov. 27 (2).
Catawba—July 3 (2); Sept. 4† (2); Nov. 13 (2); Dec. 4† (A).
Cleveland—July 24 (2); Sept. 11† (A) (2); Oct. 30 (2).
Lincoln—July 17; Oct. 16; Oct. 23†.
Watauga—Sept. 18*; Nov. 13† (A) (2).

SEVENTEENTH JUDICIAL DISTRICT

Judge Armstrong

Avery—July 3 (2); Oct. 16 (2).
Davie—Aug. 28; Dec. 4†.
Mitchell—July 24† (2); Sept. 18 (2).
Wilkes—July 17†; Aug. 7 (3); Sept. 11†; Oct. 2† (2); Oct. 30† (2); Dec. 11 (2).
Yadkin—Sept. 4; Nov. 20† (2).

EIGHTEENTH JUDICIAL DISTRICT

Judge Rudisill

Henderson—Oct. 9 (2).
McDowell—July 10† (2); Sept. 4 (2).
Polk—Aug. 21 (2).
Rutherford—Sept. 25† (2); Nov. 6 (2).
Transylvania—July 24 (2); Dec. 4 (2).
Yancey—Aug. 7 (2); Oct. 23† (2).

NINETEENTH JUDICIAL DISTRICT

Judge Rousseau

Buncombe—July 10† (2); July 24*; July 31; Aug. 7† (2); Aug. 21*; Sept. 4† (2); Sept. 18*; Oct. 2† (2); Oct. 30; Nov. 6† (2); Nov. 20*; Dec. 4† (2); Dec. 18 (A) (2).
Madison—Aug. 28; Nov. 27.

TWENTIETH JUDICIAL DISTRICT

Judge Pless

Cherokee—Aug. 7 (2); Nov. 6 (2).
Clay—Oct. 2.
Graham—Sept. 4 (2).
Haywood—July 10 (2); Sept. 18† (2); Nov. 20 (2).
Jackson—Oct. 9 (2).
Macon—Aug. 21 (2); Dec. 4 (2).
Swain—July 24 (2); Oct. 23 (2).

TWENTY-FIRST JUDICIAL DISTRICT

Judge Nettles

Caswell—July 3; Nov. 13 (2).
Rockingham—Aug. 7* (2); Sept. 4† (2); Oct. 23†; Oct. 30* (2); Nov. 27† (2); Dec. 11*.
Stokes—Aug. 21; Oct. 9*; Oct. 16†.
Surry—July 10 (2); Sept. 18 (3); Dec. 18.

*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—WILSON WARLICK, *Judge*, Newton.

EASTERN DISTRICT

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

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

Fayetteville, third Monday in March and September. T. L. HON, Deputy Clerk.

Elizabeth City, third Monday after the second Monday in March and September. SADIE A. HOOPER, Deputy Clerk, Elizabeth City.

Washington, sixth Monday after the second Monday in March and September. GEO. TAYLOR, Deputy Clerk, Washington.

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

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

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

OFFICERS

JOHN HALL MANNING, U. S. Attorney, Raleigh, N. C.
HOWARD H. HUBBARD, Clinton, LOGAN D. HOWELL, Raleigh, N. C., 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.
R. KENNEDY HARRIS, Assistant United States Attorney, Greensboro.
MISS EDITH HAWORTH, Assistant United States Attorney, Greensboro.
THEODORE C. BETHEA, Assistant United States Attorney, Reidsville.
WILLIAM D. KIZZIAH, United States Marshal, Greensboro, N. C.
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; MRS. NOREEN WARREN FREEMAN, Deputy Clerk.

Charlotte, first Monday in April and October. CHAS. A. RHINEHART, Deputy Clerk, Charlotte.

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

Shelby, Third Monday in April and third Monday in October. OSCAR L. MCLURD, Clerk.

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

OFFICERS

THOS. A. UZZELL, JR., United States Attorney, Asheville.
FRANCIS H. FAIRLEY, Assistant United States Attorney, Charlotte.
JAMES B. CRAVEN, JR., Assistant United States Attorney, Asheville.
JACOB C. BOWMAN, United States Marshal, Asheville.
OSCAR L. MCLURD, Clerk United States District Court, Asheville.

LICENSED ATTORNEYS

FALL TERM, 1950

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 August, 1950:

ARLEDGE, ADRIAN JERVIS ..... Rutherfordton.

BAILEY, ALLEN ..... Roseboro.
BAILEY, CARL LEROY, JR. ..... Plymouth.
BEAM, WILLIAM BRYAN ..... Shelby.
BEHRENDS, SAMUEL, JR. ..... Wilmington.
BELTMAN, LAURENCE JOHN ..... Durham.
BITTLE, CLAUDE EHRESMANN ..... Durham.
BLUE, LACY WILSON ..... Parkton.
BOROUGHS, LEWIS EDWARD ..... Seagrove.
BRASWELL, EDWIN MAURICE ..... Rocky Mount.
BRIDGERS, KATHARINE BOONE ..... Lumberton.
BROWN, BACHMAN STORCH, JR. ..... China Grove.
BRYAN, JOSEPH SHEPARD, JR. ..... Dunn.
BRYANT, VICTOR S., JR. ..... Durham.
BUNN, THOMAS DAVIS ..... Raleigh.
BURROW, WILLIAM VANCE ..... Chapel Hill.
BYERLY, WILLIAM BERNICE, JR. ..... High Point.
BYRD, JOSEPH KINCAID, SR. ..... Morganton.

CALDWELL, BRUCE KERMIT ..... Maiden.
CARDEN, JULIUS GARLAND, JR. ..... Durham.
CASH, CRAWLEY BAXTER, JR. ..... Wake Forest.
CLONTZ, RALPH CLAYTON, JR. ..... Charlotte.
COGBURN, MAX OLIVER ..... Candler.
COOKE, WILLIAM LEON ..... Aulander
CORNE, STANLEY JAMES ..... Newton.
CUTLER, MARTIN ALVIN ..... Lexington.

DAVIS, ROBERT MONROE ..... China Grove.
DENNY, EMERY BYRD, JR. ..... Raleigh.
DOUGLASS, CLYDE AUGUSTUS, II ..... Raleigh.

EASTWOOD, ROLAND HERBERT ..... Henderson.
ECK, JOHN EDGAR, JR. ..... Gastonia.
EPPS, HAROLD THOMAS ..... Asheville.
EVERETT, ROBINSON OSCAR ..... Durham.

FINGER, CALVIN BANKS, JR. ..... Maiden.
FLOYD, ROBERT FRANCIS ..... Fairmont.
FRIDAY, RUTHERFORD ROWAN ..... Dallas.
FULTON, CHARLES LESTER ..... Franklin.

GARDNER, ROBERT RANDOLPH ..... Durham.
GASH, ROBERT TALIAFERO ..... Brevard.
GRAY, ARBOR WILLIAM ..... Washington.
GRIFFIN, CHARLES FRANKLIN ..... Monroe.

HAMLIN, GUY ANDREWS ..... Durham.
HAMRICK, CLAUDE MEREDITH ..... Avondale.

HANCOCK, CHARLES EDWARD, JR. ..... New Bern.
HARRIS, EDGAR MAYES ..... Norwood.
HARRIS, WILLIAM SHAKESPEARE, JR. ..... Mebane.
HARRISON, HENRY DAVID, JR. ..... Williamston.
HAWORTH, JOHN RICHARDSON ..... High Point.
HAYWORTH, RUFUS KING, JR. ..... Randleman.
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HESTER, WORTH HUTCHINSON ..... Bladenboro.
HOLLOMAN, CHARLES ROBERT ..... Kinston.

JAFFA, SOL ARTHUR ..... Charlotte.
JACKSON, ROBERT ELLIS ..... Kinston.
JOHNSON, LAWRENCE MCNEILL ..... Aberdeen.

KEEN, HAROLD ALLEN ..... Chapel Hill.
KENNEDY, JOHN PRESSLY, JR. ..... Charlotte.
*KNUDSEN, ARTHUR KNUTE, JR. ..... Durham.

LARSEN, ROBERT DIHU ..... Fayetteville.
LLOYD, ROBERT BLACKWELL, JR. ..... Greensboro.
LONG, NICHOLAS ..... Roanoke Rapids.

MCCOWN, SUE VICK ..... Durham.
MCDERMOTT, JAMES PATRICK ..... Chapel Hill.
MCDONALD, JOHN BRUCE, JR. ..... Wake Forest.
MCLENDON, MORAN DORITH, JR. ..... Morven.
MCLEOD, WILLIAM FRANKLIN ..... Raleigh.

MARTIN, PERRY WHITEHEAD ..... Conway.
MASON, LOSTER LEE, JR. ..... Murphy.
MORDECAI, SAMUEL FOX ..... Raleigh.
MORGAN, ROBERT BURREN ..... Lillington.
MOSER, DANIEL WESCOTT ..... Asheboro.

OSBORNE, WALLACE SHERRILL ..... Durham.

PATTERSON, GRADY SILER, JR. ..... Wake Forest.
PENLAND, GLEN RUDOLPH ..... Asheville.
PERRY, WARREN SEIPP ..... Kinston.
POE, WILLIAM EDWARD ..... Oxford.
POWELL, CHARLES GREGORY, JR. ..... Raleigh.
PURSER, EARLE RUPERT ..... Raleigh.

RANDLEMAN, CHARLES HENRY ..... Mount Airy.
RANKIN, FRANK BATTLEY ..... Mount Holly.
RENNICK, JOHN HAMLIN ..... Durham.
RILEY, DONALD STANLEIGH ..... Raleigh.
ROBERTSON, JOHN ALFRED ..... Raleigh.
RODENBOUGH, STANLEY LEIGH, III ..... Walnut Cove.
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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1950

HERBERT B. HENDERSON v. CAROLYNE RICH HENDERSON.

(Filed 3 May, 1950.)

1. Divorce § 4—

That plaintiff in an action for divorce on the ground of two years separation should have lived separate and apart from his spouse for two years and should have resided in the State of North Carolina for a period of one year prior to the commencement of the action are jurisdictional requirements, and a decree on this ground is void if either of these requirements is lacking. Chap. 72, Public Laws of 1931, as amended by Chap. 163, Public Laws of 1933; Chap. 100, Public Laws of 1937 (G.S. 50-6).

2. Judgments § 25—

A judgment obtained by means of fraud upon the jurisdiction of the court may be attacked by motion in the cause.

3. Same: Attorney and Client § 8—

Nothing else appearing, an attorney of record continues in this relationship to the client not only until the rendition of final judgment but also so long as the opposing party has the right, by statute or otherwise, to challenge the validity of the judgment, and therefore such attorney may be served with notice of motion in the cause to set aside the judgment on the ground of fraud upon the jurisdiction of the court, and such notice is notice to the party. G.S. 1-586.

4. Divorce § 22: Judgments § 26—

It appeared from the findings of the court that plaintiff obtained decree of divorce by fraud upon the jurisdiction of the court, that thereafter plaintiff continued to live with defendant as husband and wife and concealed from defendant information as to the divorce decree for over five

years, and that defendant moved to set aside the decree within two years after knowledge that it had been rendered. *Held:* Defendant's right to move in the cause to set aside the divorce decree on the ground of fraud perpetrated upon the jurisdiction of the court is not barred by laches.

APPEAL by plaintiff from *Patton, Special Judge*, at 28 November, 1949, Extra Civil Term of MECKLENBURG.

Civil action for divorce from the bonds of matrimony existing between plaintiff and defendant on the grounds of two years separation,—heard upon motion of plaintiff made upon special appearance to set aside an order theretofore entered setting aside the judgment of divorce.

The record on this appeal discloses these basic facts:

Plaintiff, Herbert B. Henderson, instituted an action against defendant, Carolyne Rich Henderson, on 7 January, 1942, in Superior Court of Mecklenburg County, North Carolina, to dissolve the bonds of matrimony existing between them. In the complaint, verified by plaintiff, and signed by "L. P. Harris, attorney for plaintiff" and filed the same day, it is alleged that plaintiff and defendant were married to each other 15 April, 1938, in Jersey City, New Jersey; that the plaintiff had been a resident of Mecklenburg County, North Carolina, for more than one year next preceding the filing of the complaint; and that defendant, on or about 10 November, 1939, in pursuance of a mutual agreement, separated from plaintiff, and that they have lived separate and apart from each other for more than two years next preceding the filing of the complaint.

The summons, having been returned by the sheriff of Mecklenburg County, 7 January, 1942, endorsed "After due and diligent search the defendant Carolyne Rich Henderson is not to be found in Mecklenburg County," service of notice of summons and complaint was made by publishing notice in a newspaper published weekly in the city of Charlotte in said county.

And at May Term, 1942, the action was tried before a jury, and upon verdict on appropriate issues, judgment for absolute divorce was entered under date of 18 May, 1942.

Thereafter on 27 May, 1949, defendant Carolyne Rich Henderson, pursuant to provisions of G.S. 1-220, filed a motion in the cause, supported by affidavits and exhibits, to set aside said judgment of divorce, on the ground, summarily stated, that it was procured by means of fraud perpetrated upon the court by plaintiff, in that at the time of the institution of the action plaintiff was not a resident of North Carolina and had not resided in the State one year next preceding, and in that he and she had not separated, but from date of their marriage, 22 April, 1938, at Jersey City, New Jersey, until March, 1947, had been living together as husband and wife, save and except the involuntary separation during

time plaintiff was in the Army of the United States, all as set forth in detail.

Notice of this motion, dated 27 May, 1949, and addressed to "Herbert B. Henderson, plaintiff, and Leon P. Harris, plaintiff's attorney of record," given pursuant to G.S. 1-586, was served on 30 May, 1949, by the sheriff of Mecklenburg County, delivering a copy of same and of the motion to Leon P. Harris, attorney. In the notice so served plaintiff was notified that defendant would ask that the motion be heard by the Judge Presiding at the May 30th, Extra Civil Term of Superior Court of Mecklenburg County, N. C., on 6 June, 1949, at 10 o'clock a.m., or as soon thereafter as counsel could be heard by the court.

When the motion came on for hearing at 13 June Extra Civil Term of Superior Court of Mecklenburg County, before McSwain, Judge Presiding, and being heard on 16 June, 1949, the court found these facts:

"That the above action was instituted by the plaintiff against the defendant under date of January 7, 1942, asking for a divorce absolute between the above named plaintiff and above named defendant wherein the plaintiff alleged that he and the defendant had been separated for more than two years immediately prior to the institution of the above entitled action; that service of summons was obtained upon the defendant by publication, and that under date of May 18, 1942, the Judgment was signed in said cause by the Honorable Sam J. Ervin, Judge Presiding over the Mecklenburg County Superior Court for the State of North Carolina.

"The court further finds that the above named plaintiff filed the statutory affidavit to his Complaint in which affidavit the plaintiff stated under oath that he had been a resident of North Carolina for more than one year immediately prior to the institution of the above entitled action; that at the time the action was filed and up until the 28th day of June, 1947, the above named defendant had no actual knowledge of the institution of the above action for a divorce absolute; that at the time service was made by publication, the above plaintiff knew where the defendant was living but that no substitute service other than publication was attempted by the plaintiff.

"The court further finds that the above named defendant employed counsel for the purpose of having the Judgment of May 18, 1942, set aside on account of fraud and for other reasons and that a motion to set aside said Judgment together with supporting affidavits was filed in the office of the Clerk of Superior Court of Mecklenburg County under date of May 17, 1949, and that thereafter, on the 30th day of May, 1949, a copy of said motion was served upon L. P. Harris, Esq., Attorney of Record in the above cause for the plaintiff, said motion notifying the plaintiff that said matter would be heard before the Honorable Luther

Hamilton, Judge Presiding over the May 30, 1949, Extra Civil Term of Mecklenburg County Superior Court; that due to the pending cases the motion was continued and during the continuance of said motion the Attorney of Record for the plaintiff was furnished with the last known business and office address of the above named plaintiff and that the said attorney was notified in ample time that the motion would be heard before the undersigned Judge during the June 13, 1949, Extra Civil Term of Superior Court.

"That L. P. Harris, Esq., attorney for the above named plaintiff, advised the court that he had, upon receipt of the address of the above named plaintiff furnished to him by the attorneys for the defendant, notified the above named plaintiff at his last known address of the filing of such motion and the hearing to be heard thereon, but that he had heard nothing from said plaintiff.

"That the court finds as a fact that the plaintiff was inducted into service from the State of New York on March 11, 1941, and that the plaintiff had been a citizen and resident of the State of New York immediately prior to the time he was inducted into military service; that the plaintiff was assigned to Camp Lee, Virginia, on June 12, 1941, where he remained until on or about September 15, 1941, and was thereupon assigned to Fort Bragg, North Carolina, on or about September 15, 1941, where he remained in the military service until on or about November 14, 1941, at which time the plaintiff was discharged and became a resident physician at the North Carolina Sanatorium from December 1941, until March, 1942; that when the plaintiff instituted his action for divorce against the defendant on the 7th day of January, 1942, he was not a resident of the State of North Carolina for more than one year immediately prior to said date of January, 1942, and that his affidavit attached to the Complaint in the above cause was false and is a fraud upon the courts of the State of North Carolina.

"That the court finds as a fact that at the time the plaintiff was inducted into the military service he was living with the defendant as husband and wife in New York City and that, between the time of his entry in military service and the time of his filing the action for divorce in Mecklenburg County Superior Court, the plaintiff corresponded regularly with the defendant, promised to send her money, and, in fact, visited with the defendant. All such acts occurred within one year from the date the plaintiff filed his action for divorce against the defendant; that the plaintiff and the defendant had not lived separate and apart continuously for more than two years immediately prior to the institution of the above action for divorce and that the allegations contained in the plaintiff's Complaint pertaining to separation were false, and resulted in a fraud being perpetrated upon the courts of North Carolina.

"That the court finds as a fact that, after the plaintiff obtained the purported divorce of May 18, 1942, the plaintiff did thereafter continue to live with the defendant, sent her money, paid her transportation out to the State of California where they lived together as husband and wife until the plaintiff went overseas; that while the plaintiff was overseas, he wrote the defendant numerous letters in which he stated his love for the defendant, sent her money, and held out to the defendant a promise for a home and happiness upon his release from military service; that, when the plaintiff was released from military service in January 1946, the plaintiff and defendant lived together as husband and wife at Roanoke, Virginia, from about June 1946, until about March 1947, at which time on March 18, 1947, the plaintiff informed the defendant that he was in love with another woman and that he had divorced the defendant but would not give her information as to the time and place of the divorce action; whereupon the defendant instituted a suit for separate maintenance on March 20, 1947, in the Hustings Court for the City of Roanoke, Virginia. When the separate maintenance action was filed, the plaintiff recognized that he and the defendant were husband and wife and that the defendant would receive from the plaintiff certain money and other considerations in the settlement of property rights; and the contract of May 25, 1947, (?) was approved by a decree entered in the Hustings Court for the City of Roanoke, Virginia, on May 3, 1947.

"That the court finds as a fact that the plaintiff left shortly thereafter for the State of California and refused to comply with the alimony payments as the same were set forth in the contract of March 25, 1947; and it became necessary for the defendant to institute suit in the State of California for the enforcement of the alimony payments; and in defense of the suit the plaintiff for the first time pleaded in bar the North Carolina purported divorce of May 18, 1942.

"That the court finds as a fact that the plaintiff has set about upon a course of conduct to mislead and perpetrate a fraud upon the courts of the State of North Carolina by a false affidavit pertaining to residence and the false allegations contained in his Complaint relating to two years' separation; and the plaintiff, after procuring the purported divorce, continued to live with his lawful wife, recognized the defendant as his lawful wife on March 25, 1947, at the time the aforesaid contract was entered into; and the plaintiff has misled and perpetrated a deliberate fraud upon the defendant in attempting to obtain a divorce and in living with her thereafter."

And, thereupon, the court (McSwain, J.) adjudged and decreed (1) that the judgment signed by his Honor, Sam J. Ervin, under date of 18 May, 1942, was procured through fraud on the part of plaintiff,—constituting a fraud upon the court, and also the plaintiff's attorney of

record; and (2) that the judgment be and it is set aside and declared to be void and of no effect.

Thereafter, on 16 November, 1949, plaintiff, by and through his attorney, Frank H. Kennedy, entered "a special appearance herein, solely for the purpose of making this motion, and, upon such appearance, shows unto the court . . .": After reciting the facts as to the institution of the action and judgment of divorce, and as to the filing of motion by defendant to set aside the judgment for fraud, and as to the order setting aside, and declaring the judgment void,—that plaintiff moved the court to vacate and set aside the order setting aside the said judgment, and to reaffirm the judgment of absolute divorce, upon the ground:

"That the plaintiff had no notice of the motion filed by defendant to set aside said judgment, and that he received no notice of the hearing, and that the plaintiff did not know until August of 1949 that the judgment of divorce had been set aside; that Attorney L. P. Harris represented the plaintiff in his action for divorce against the defendant, and that the defendant caused a copy of her motion to set aside said judgment to be served upon Attorney L. P. Harris on May 30, 1949, more than seven (7) years after said divorce judgment was entered, and after plaintiff's employment of said attorney in said cause had terminated; that defendant failed to notify plaintiff of the pendency of said motion by publication, as by law allowed, but relied solely upon service of a copy of said motion upon said Attorney L. P. Harris; that the plaintiff's divorce from the defendant was not obtained by fraud, and that the plaintiff has a good and valid defense to the defendant's motion to set said judgment aside."

Notice of the above motion and fixing date of hearing, to wit, 1 December, 1949, or as soon thereafter as plaintiff can be heard upon special appearance, was accepted by attorneys for defendant on 16 November, 1949, and also substituted service was made upon defendant personally on 22 November, 1949, by deputy sheriff of New York County, in State of New York.

In support of his motion, plaintiff filed an affidavit, in which, among other things, the following appears:

"That your affiant alleges that he had no notice of the motion filed on the 27th day of May, 1949, to set aside said judgment of divorce; that he received no notice of the hearing, that no communications were received by him through the United States Mail or otherwise relating to said motion, that he received no information by telephone or otherwise relating to said motion;

"That in the first week of August, 1949, your affiant was informed that the judgment of divorce entered in the above captioned court had been set aside, that this information was the first intelligence received by your

affiant relating to the motion to set aside the judgment of divorce or the order made by this honorable court relating to the motion to set aside the judgment of divorce;

"That on the 9th day of August, 1949, Van H. Pinney, Esquire, a member of the State Bar of California and one of the attorneys representing your affiant in litigation now pending in the Superior Court of the State of California in and for the City and County of San Francisco, received a copy of the notice of motion heretofore referred to and notified your affiant thereof."

(And it is noted that the affidavit makes no reference to the attorney and client relationship between plaintiff and L. P. (or Leon P.) Harris, attorney of record for plaintiff in this divorce action.)

Plaintiff also filed affidavits of others in respect of his residence, and of his relations to defendant.

The cause being heard, upon special appearance and motion to vacate order as above set forth, at 28 November, 1949, Extra Civil Term of Superior Court, the Presiding Judge, Patton, "upon examination of the pleadings and the affidavits submitted by the plaintiff and by the defendant as appear in the record, found these facts:

"1. That on the 7th day of January, 1942, the plaintiff purportedly filed a complaint and summons wherein the plaintiff sought to obtain an absolute divorce from the defendant on the ground of two years' separation; that the summons filed in the action was not dated nor signed by the Clerk of Superior Court and thereafter the plaintiff obtained an Order from the Clerk of Court for service of summons to be obtained by publication.

"2. That on the 17th day of May, 1949, the defendant filed a motion in the cause, which motion appears of record, wherein the defendant sought to set aside the decree of divorce entered in the cause on May 18, 1942; the basis of the defendant's motion being that the plaintiff had perpetrated a fraud upon the court as the same is set out in defendant's motion.

"3. At the time the divorce decree was entered on May 18, 1942, L. P. Harris was the attorney of record for the plaintiff; that when the defendant filed the motion in the cause, which motion was served by the sheriff of Mecklenburg County, N. C., upon L. P. Harris, attorney of record for the plaintiff, due notice was given to the plaintiff and the plaintiff's attorney of record that the motion would be heard on May 30, 1949, before Judge Luther Hamilton.

"4. At the time the motion was to be heard on May 30, 1949, a continuance was granted to the 16th day of June, 1949, and in the meantime the attorneys for the defendant furnished to the attorney for the plaintiff the business and home address of the plaintiff in San Francisco, Cali-

fornia, in order that the plaintiff could be notified by his attorney of the pendency of the motion.

"5. On the 16th day of June, 1949, the motion was heard before the Honorable Peyton McSwain, Judge Presiding over the June 13, 1949, Extra Civil Term of Superior Court for Mecklenburg County, N. C., at which time an Order was entered setting said judgment aside and declaring same to be void and of no effect.

"6. That on the 16th day of November, 1949, Frank H. Kennedy, attorney for plaintiff, served upon Ralph V. Kidd and Warren C. Stack, attorneys for defendant, a copy of the Notice of the Special Appearance and Motion to Vacate and, also, that a copy of the Notice was served upon the defendant by the sheriff of New York County, State of New York;

"That Ralph V. Kidd and Warren C. Stack were employed as attorneys for the defendant to resist any motion to set aside the Order of Judge McSwain and in so far as said motion is concerned are her attorneys of record; that said employment existed at the time the motion was filed and the notice served upon Ralph V. Kidd and Warren Stack as attorneys for the defendant; that Frank H. Kennedy and P. D. Kennedy were employed by the plaintiff to make the motion to set aside the Order of Judge McSwain and were at the time of the filing of said motion and have at all times since been the attorneys for the plaintiff in so far as said motion is concerned.

"7. That the defendant did not have actual knowledge of the divorce decree and the jurisdiction in which same was entered until on or about June 28, 1947.

"8. That the defendant's attorneys furnished a home and business address to the plaintiff's attorney of record, L. P. Harris, and no evidence appears in the record as to whether said home or business address so furnished was correct."

Upon these findings of fact the court concluded:

"1. That the plaintiff was given legal notice of the motion to set aside the divorce decree theretofore entered, by service of notice upon plaintiff's attorney of record.

"2. That the Superior Court of Mecklenburg County, North Carolina, on the sixteenth day of June, 1949, had jurisdiction of both the plaintiff and defendant for the purpose of hearing the motion before Judge Peyton McSwain and that the Order of Judge McSwain should be affirmed."

And, thereupon, on 9 December, 1949, the court "ordered and adjudged" "that the special appearance and motion to dismiss as filed by the plaintiff be, and the same is hereby denied and the order of Judge McSwain entered on 16 June, 1949, is to remain in full force and effect."

Plaintiff objecting and excepting to the court's findings of fact Numbers 1, 3, 4 and 7, and to the conclusions of law 1 and 2, and to the failure

of the court to make certain findings of fact, and to make certain conclusions of law requested by plaintiff, and to the failure of the court to sign order vacating the order of Judge Peyton McSwain, and to the signing of the order of 9 December, 1949, appeals to the Supreme Court, and assigns error.

Frank H. Kennedy and P. Dalton Kennedy, Jr., for plaintiff, appellant.
Ralph V. Kidd and Warren C. Stack for defendant, appellee.

WINBORNE, J. Confining consideration of this appeal within the bounds of the express terms of the motion of plaintiff, made on special appearance, as hereinabove quoted, decision here is determinable upon the answer to this question: Is the notice of the motion made by defendant in May 1949 to set aside the judgment of divorce entered in May 1942 and served on the attorney of plaintiff of record in the action, notice to plaintiff? The judge from whom appeal is taken was of opinion, and held that it was. And, in the light of the purpose of the motion so made by defendant, and of the grounds on which it is based, and upon the findings of fact made by the judge on hearing of the motion, we concur.

In this connection, the purpose of the motion of defendant was to set aside the judgment of divorce upon the ground that plaintiff had procured it by fraudulent imposition on the court. In this State at the time the action was instituted by plaintiff, marriages might be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for two years, and the plaintiff in the suit for divorce had resided in the State for a period of one year. P.L. 1931, Chapter 72, as amended by P.L. 1933, Chapter 163, and P.L. 1937, Chapter 100. Under this statute, in order to maintain an action for divorce, the husband and wife shall have (1) lived separate and apart for two years; and (2) the plaintiff, husband or wife, shall have resided in the State of North Carolina for a period of one year. These two requirements are jurisdictional. *Oliver v. Oliver,* 219 N.C. 299, 13 S.E. 2d 549; *Young v. Young,* 225 N.C. 340, 34 S.E. 2d 154; *Sears v. Sears,* 92 F. 2d 530. If either one or the other of these elements were not existent, the court would not have jurisdiction to try the action, and to grant a divorce. And if the court has no jurisdiction over the subject matter of the action, the judgment in the action is void. A void judgment is one which has a mere semblance, but is lacking in some of the essential elements which would authorize the court to proceed to judgment. *Harrell v. Welstead,* 206 N.C. 817, 175 S.E. 283; *Monroe v. Niven,* 221 N.C. 362, 20 S.E. 2d 311.

Moreover, if a judgment be obtained by means of a fraud practiced upon the court, the question may be raised by motion in the cause. McIntosh N. C. P. & P., 745, Judgments, Sec. 656. *Roberts v. Pratt,* 152 N.C. 731, 68 S.E. 240; *Massie v. Hainey,* 165 N.C. 174, 81 S.E. 135; *Cox v. Boyden,* 167 N.C. 320, 83 S.E. 246; *Young v. Young, supra; King v. King,* 225 N.C. 639, 35 S.E. 2d 893; *Ledford v. Ledford,* 229 N.C. 373, 49 S.E. 2d 794.

It is the established practice in court actions in this State that a notice of a motion to set aside a judgment may be served on the attorney of record of the opposing party, and that notice to such attorney in an action is notice to the party. *Walton v. Sugg,* 61 N.C. 98; *Branch v. Walker,* 92 N.C. 87; *In re Gibson,* 222 N.C. 350, 23 S.E. 2d 50. See also *United States v. Curry,* 6 How. 106, 12 L. Ed. 363.

Therefore, in keeping with the established practice in such cases, it would seem that, since L. P. Harris was the attorney of record for plaintiff, nothing else appearing of record, notice of defendant's motion to set aside the judgment of divorce entered in the action might be served upon him, and that notice so served is notice to plaintiff.

But the question now arises as to when the relation of an attorney of a party to the action ceases.

In this connection, it is noted that a party may appear either in person or by attorney in actions or proceedings in which he is interested. G.S. 1-11. And while an attorney who claims to enter an appearance for any party to an action may be required to produce and file a power or authority as provided in G.S. 84-11, it is held by this Court that after an attorney has entered an appearance and has been recognized by the court as the attorney in the cause, the opposite party may not call in question his authority. *New Bern v. Jones,* 63 N.C. 606.

And, speaking to the subject in the case of *United States v. Curry, supra,* the Supreme Court of the United States, in an opinion by *Chief Justice Taney,* had this to say: "No attorney or solicitor can withdraw his name after he has once entered it on the record without the leave of the court. And while his name continues there the adverse party has a right to treat him as the authorized attorney or solicitor, and the service of notice upon him is as valid as if served on the party himself." This principle has been quoted and applied in the cases of *Walton v. Sugg, supra; Branch v. Walker, supra,* and *In re Gibson, supra.* See also *Allison v. Whittier,* 101 N.C. 490, 8 S.E. 338; *Coor v. Smith,* 107 N.C. 430, 11 S.E. 1089.

Moreover, it is uniformly held in this State that after an attorney has been admitted by the court to represent a party to an action, he cannot, unless with the consent of the court, be discharged before the end of the suit. *Walton v. Sugg, supra; Rogers v. McKenzie,* 81 N.C. 164; *Branch*

v. Walker, supra; Ladd v. Teague, 126 N.C. 544, 36 S.E. 45; *Roediger v. Sapos,* 217 N.C. 95, 6 S.E. 2d 801; *In re Gibson, supra.* See also *United States v. Curry, supra.*

And, "It may be said, generally, that the relation of counsel to the action does not cease, in any case, until the judgment in the court where it is pending is consummated, that is, made permanently effectual for its purpose as contemplated by law," *Merrimon, J.,* in *Branch v. Walker, supra.* See also *Walton v. Sugg, supra; Ladd v. Teague, supra; In re Gibson, supra; Allison v. Whittier, supra.*

Too, the rule may be stated in this general way: The relation of the attorney of record to the action, nothing else appearing, continues so long as the opposing party has the right, by statute or otherwise, to challenge the validity of the judgment.

Therefore, in the light of this principle, applied to the case in hand, it is held that the relation of L. P. Harris, as attorney of record for plaintiff, did not terminate upon the rendition of the judgment of divorce, but it continued, nothing else appearing, so long as defendant has the right to move in the cause to have the judgment set aside on the ground of fraud upon jurisdiction of the court, and to have the motion heard and finally determined.

Even so, it is the contention of appellant that defendant has been guilty of laches in asserting whatever rights she may have had, and was, therefore, barred of such right at the time she moved in the cause to set aside the judgment of divorce.

In this connection, comment is made in 154 A.L.R. 818, that although the principle is that, upon proper showing being made, a court of equity may give relief from a judgment even after the expiration of the term, this presupposes that the party applying for the relief was not guilty of laches. And further statement is there made that "the doctrine of the finality of judgments and its corollary which prohibits the opening or vacating of a judgment after the expiration of the term at which it was rendered, however, presupposes the validity of the judgment, the jurisdiction of the court over the subject matter and the parties, and the competency of the court to render the judgment in question. Consequently, it is recognized by almost the unanimous consensus of judicial authority that the doctrine and its corollary have no application to void judgments such as judgments rendered by a court having no jurisdiction over either the subject matter of the action or the parties, or both, . . . and that such judgments may be opened or vacated by the court rendering them on motion made at any time, even after the expiration of the term at which they were rendered, or after the expiration of the period allowed by statute for opening or vacating judgments on certain grounds," citing

Keaton v. Banks, 32 N.C. 381; *Wolfe v. Davis,* 74 N.C. 597, and *Massie v. Hainey, supra.*

But because of judicial respect for the finality of judgments and the resulting reluctance to interfere with judgments, it is said that "Courts in many instances refuse to exercise their power to open or vacate a judgment where it does not appear that the applicant acted with reasonable diligence. Under this rule, unexplained laches on the part of the applicant is deemed sufficient ground for refusing relief to which he might otherwise be entitled. What constitutes laches sufficient to deprive an applicant of his right to relief is impossible of dogmatic definition. The decisions vary widely, since there must be taken into consideration not only the period of the delay but also the circumstances of the particular case. Mere delay does not necessarily constitute sufficient laches to bar relief." 31 Am. Jur. 278, Judgments, Sec. 733.

In the light of these principles, it is seen from the findings of fact (1) that in obtaining the judgment of divorce 18 May, 1942, plaintiff practiced a fraud upon the jurisdiction of the court; (2) that after obtaining the judgment, plaintiff continued to live with defendant as husband and wife, and concealed from her information as to the divorce judgment until 28 June, 1947; (3) that defendant had no knowledge of the divorce action until that date; and (4) that she moved to set aside the judgment in May, 1949.

Therefore, it is apparent that defendant acted within a reasonable time, after obtaining information of the judgment, and is not guilty of laches, which would bar her right to have the judgment set aside as void.

Indeed, it is appropriate to note that in this State the period prescribed by statute for the commencement of actions for relief on the ground of fraud is three years—the cause of action not being deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. G.S. 1-46 and G.S. 1-52.

Moreover, all assignments of error, material to the motion of plaintiff, made on special appearance, have been given consideration, and fail to show cause for disturbing the decision reached in the court below.

Hence the judgment there is

Affirmed.

LUCY P. ELMORE AND HUSBAND, JERRY P. ELMORE, v. EDWARD U. AUSTIN, ADMINISTRATOR C. T. A. OF EDWARD R. PACE, DECEASED; LOUISE P. AUSTIN, WIDOW; ISABELLE A. ARMSTRONG AND HUSBAND, L. C. ARMSTRONG; EDWARD U. AUSTIN AND WIFE, MARJORIE B. AUSTIN.

(Filed 3 May, 1950.)

1. Wills § 31—

The objective of construction is to effect the intent of testator as expressed in the instrument, either explicitly or implicitly.

2. Same—

Where the language of a will is plain and its import obvious, the words of testator must be taken to mean exactly what they say.

3. Same—

Where the intention of testator is obscure because of ambiguous language or the use of inconsistent clauses or words, the court may resort to canons or rules of testamentary construction.

4. Same—

A devise will be construed to be in fee simple unless an intent to convey an estate of less dignity is apparent from the language of the instrument. G.S. 31-38.

5. Wills § 33c—

The law favors that construction which results in the vesting of the estate at the earliest possible moment that testator's language will permit, and to this end doubtful conditions will be construed as conditions subsequent rather than precedent.

6. Same—

Conditions of defeasance will be construed so as to vest the fee simple absolute as soon as the language of the will permits.

7. Same—

A contingent limitation over upon the death of any person without issue will be construed to take effect upon the death of such person without issue living at the time of his death unless a contrary intent appear upon the face of the will. G.S. 41-4.

8. Same—

A devise of an estate which may last forever but which may end upon the happening of a specified event creates a fee simple defeasible.

9. Same—

An estate in fee simple defeasible may be either (1) an estate in fee simple determinable, or (2) an estate in fee simple subject to a condition subsequent, or (3) an estate in fee simple subject to an executory limitation.

10. Same—

A fee simple determinable is an estate in fee simple which automatically expires upon the occurrence of a stated event.

11. Same—

A fee simple determinable constitutes the entire estate until the happening of the stated event by which it is determined, or until it is converted into a fee simple absolute, which occurs when the stated event upon which it is limited becomes impossible of occurrence.

12. Same—

A fee simple determinable gives rise to a possibility of reverter, which is not an estate in land but is a mere possibility of acquiring an estate in land at a future time upon the happening of the stated event.

13. Same—

Upon the happening of the stated event terminating a defeasible fee, the property reverts to those who are the eligible heirs of testator as of the time of the happening of the event.

14. Same—Fee simple determinable held rendered absolute upon happening of either of two events specified by testator.

Testator devised lands to his daughter with further provision that the gift should become absolute if she improved the land by erecting a dwelling or if she should die leaving issue, but that if she should fail to improve the lot or should die without living issue, then the lands should be disposed of as directed in a subsequent item. *Held:* The devise created a fee simple determinable, and under the rule of construction requiring that the fee simple absolute should vest as soon as the language of the testator permits, the ambiguous provisions for defeasance must be read so as to require both of the specified contingencies to occur before the fee should be defeated, and therefore upon the erection of a dwelling house upon the property by the daughter her fee became absolute.

15. Same—

A devise for life should the devisee die without living issue, but should the devisee leave issue living at her death the estate should become absolute, creates a fee simple determinable upon the death of the devisee without issue living at the time of her death.

16. Same—

The devisee of a fee simple determinable upon her death without issue her surviving cannot become the owner of a part of the fee simple absolute by inheritance as an heir of testator since she could not qualify as an eligible heir of testator upon the happening of the condition of defeasance.

17. Estates § 4—

A merger of estates occurs when two distinct estates of greater and lesser rank meet in the same person or class of persons at the same time, without any intermediate estate.

18. Same—

Since the possibility of reverter is not an estate in lands, there can be no merger of an estate in fee simple determinable and the possibility of reverter.

19. Trusts § 4b: Wills § 38—Where executors sell lands under discretionary power, land purchased with proceeds of sale belongs to those beneficially entitled to proceeds.

Where the will directs that certain lands might be sold at any time at the discretion of the executors, and directs that in the event of sale the proceeds should be invested in bonds and the income therefrom be paid to testator's wife during widowhood and after her death the bonds be divided among testator's children, *held* upon the sale of lands and the investment of the proceeds of sale in other lands, a resulting trust arises in favor of the persons beneficially entitled to the funds, and therefore upon the death of the wife, testator's children are entitled to the lands purchased by the executors in fee simple absolute, and such lands do not come within the provisions of a subsequent item of the will disposing of real estate "not herein disposed of and not sold under the powers hereinbefore granted."

APPEALS by plaintiffs, Lucy P. Elmore and husband, Jerry P. Elmore, and the defendant, Martin R. Peterson, Guardian *Ad Litem,* from *Burgwyn, Special Judge,* at January Term, 1950, of the Superior Court of WAKE County.

Civil action under Article 26 of Chapter 1 of the General Statutes for a declaratory judgment construing a will and declaring the rights of the plaintiffs in property passing thereunder.

1. Edward R. Pace, a resident of Wake County, North Carolina, died testate April 24, 1920. These are the pertinent items of his will:

Third: I give to my wife, Ludie Pleasants Pace, lot No. 1 of my Bloomsbury property, to my daughter, Louise Pace Austin, lot No. 2 of said property; to my daughter Lucy Pace Thompson, lot No. 3 of said property; to my son, James Thaddeus Pace, lot No. 4 of said property, all of said lots being located on and facing the Mills Road. It being my desire and purpose to provide a site for a home for my wife and for each of my children, I further direct that if the lots hereby given to each of my daughters is improved by the erection of a proper dwelling house thereon, or if my daughters or either of them should die leaving issue, then the gift of lots shall become absolute as to the daughter or daughters fulfilling said conditions; but should either or both of my daughters fail to improve the lots hereby given in the manner hereinbefore directed, or should either or both of them die without leaving issue, then the estate in the lots hereby given to them shall be for life as to the daughter or daughters failing to fulfill said conditions, and at the death of each or either of them, as the case may be, the lots shall be disposed of as directed

in section 5 hereof. The lots herein devised to my wife and son are given in fee simple.

Fourth: I give to my wife my homeplace at the corner of Saunders and Johnson Streets to be held and enjoyed by her during her lifetime if she shall remain single; but in the event of her remarriage her estate therein shall cease and determine. During her widowhood the property may be sold with the consent of all my children, the proceeds safely invested, and the income thereof paid to my said wife. At the death or remarriage of my said wife the said property shall be disposed of as directed in section seven; but if prior thereto said property shall have been sold then the proceeds thereof shall be divided equally among my children.

Fifth: All of my Bloomsbury property not included in the bequests in section three hereof may be sold at any time in the discretion of my executors, the proceeds invested in four and one-fourth per cent. Liberty Bonds, and the income thereof paid to my said wife during her widowhood. After her death said bonds shall be divided among my children. In the event of her remarriage the income from said bonds shall be divided into two parts, whereof one part shall be paid to her and the other part divided among my children.

Sixth: All of my real estate not disposed of in any of the foregoing sections I hereby bequeath to my wife, to be held and enjoyed by her during her widowhood.

Seventh: At the death or remarriage of my wife I direct that my real estate not herein disposed of and not sold under the powers hereinbefore granted shall be divided equally among my three children, subject to the following conditions, to-wit: That the shares given to my daughters shall be for life should they die without leaving issue; but should they have issue living at their death the estate in the shares herein given to them shall be absolute.

Eleventh: I hereby appoint my wife, Ludie Pleasants Pace, and my son, James Thaddeus Pace, executors of this my last will and testament, and it is my will and desire that they shall act as such without giving bond.

2. Edward R. Pace was survived by his widow, Ludie Pleasants Pace, and three children: (1) a son, James Thaddeus Pace; (2) a daughter, Lucy Pace Thompson, now the *feme* plaintiff, Lucy P. Elmore; and (3) a daughter, Louise Pace Austin, now the defendant, Louise P. Austin. James Thaddeus Pace died intestate on June 3, 1920, without having married, and Ludie Pleasants Pace died intestate on June 1, 1947, without having remarried.

3. This action was originally brought against the following defendants: (1) Edward U. Austin, Administrator *c. t. a.* of Edward R. Pace since

June 19, 1947; (2) Louise P. Austin, a widow; (3) Isabelle A. Armstrong, a daughter of Louise P. Austin, and her husband, L. C. Armstrong; and (4) Edward U. Austin, a son of Louise P. Austin, and his wife, Marjorie B. Austin. Subsequently Ann Joy Armstrong, Betsy Josephine Armstrong, and James Edward Armstrong, infant children of Isabelle A. Armstrong, and Edward Robert Austin, infant child of Edward U. Austin, were made party defendants. The defendant, Martin R. Peterson, is guardian *ad litem* for these children, and for the unborn issue of the *feme* plaintiff and of Louise P. Austin. The parties entered into a stipulation as to the facts, and the court entered a judgment thereon construing the will of Edward R. Pace and declaring the rights of the parties in the property passing thereunder. The original defendants do not prosecute an appeal from the judgment, and consequently the appeals involve no questions except those raised by the plaintiffs and the guardian *ad litem*.

4. Subsequent to the probate of the will the *feme* plaintiff went into possession of Lot No. 3 of the Bloomsbury property mentioned in the third item of the will, and improved said lot by the erection of a dwelling house thereon. No issue has been born to her. The judgment entered in the court below declares "that by the third item of the will of Edward R. Pace, his daughter, Lucy Pace Thompson, now Lucy Pace Elmore, takes a life estate in Lot No. 3 of the Bloomsbury property devised to her by said item of the will, becoming absolute upon her death having erected a dwelling house thereon and leaving surviving her issue." The plaintiffs excepted to this adjudication.

5. Ludie Pleasants Pace acted as Executrix of the will of Edward R. Pace at all times between the probate of the will and her death on June 1, 1947. Acting under the power of sale vested in her in such capacity by the fifth item of the will, she sold portions of the property mentioned in such item; but she did not invest the proceeds arising from such sales in "four and one-fourth per cent. Liberty Bonds." Instead of so doing, she used such proceeds in the purchase of three pieces of real estate, taking title thereto in the name of "Mrs. Ludie P. Pace, Executrix of E. R. Pace." The judgment declares that these three pieces of real estate "belong to Louise Pace Austin and Lucy Pace Thompson, now Lucy Pace Elmore, one-half interest each in fee simple." The guardian *ad litem* excepted to this adjudication, asserting that the court ought to have adjudged that these pieces of realty passed under the seventh item of the will as "real estate not herein disposed of and not sold under the powers hereinbefore granted."

6. The homeplace mentioned in the fourth item of the will, and certain portions of the Bloomsbury property named in the fifth item of the will have not been sold. For convenience of narration, this property is here-

after called the residuary realty. The judgment declares that this realty belongs to the *feme* plaintiff and the defendant, Louise P. Austin, in the following estates and proportions: "one-sixth to Louise Pace Austin in fee simple, having inherited the same from her brother, James Thaddeus Pace; one-sixth to Lucy Pace Thompson, now Lucy Pace Elmore, having inherited the same from her brother, James Thaddeus Pace; one-third to Louise Pace Austin for the term of her natural life, becoming absolute in fee simple upon her death leaving issue surviving her; one-third to Lucy Pace Thompson, now Lucy Pace Elmore, for the term of her natural life, becoming absolute upon her death leaving issue surviving her." The plaintiffs excepted to this adjudication in so far as it declared that the *feme* plaintiff took a one-third share in the residuary realty "for the term of her natural life, becoming absolute upon her death leaving issue surviving her."

The plaintiffs and the guardian *ad litem* appealed, assigning the rulings covered by their respective exceptions as error.

William Joslin for the plaintiffs.

Martin R. Peterson for Martin R. Peterson, Guardian Ad Litem.

Brassfield & Maupin for the defendants, Louise P. Austin, Isabelle A. Armstrong, and Edward U. Austin.

ERVIN, J. The appeal of the plaintiffs challenges the validity of the declarations of the judgment in respect to the devises to the plaintiff, Lucy P. Elmore, under the third and seventh items of the will.

In construing a will, the court seeks to ascertain and carry into effect the expressed intention of the testator, *i.e.*, the intention which the will itself, either explicitly or implicitly, declares. *Smyth v. McKissick*, 222 N.C. 644, 24 S.E. 2d 621; *Sharpe v. Isley*, 219 N.C. 753, 14 S.E. 2d 814; *Whitley v. Arenson*, 219 N.C. 121, 12 S.E. 2d 906; *Anderson v. Bridgers*, 209 N.C. 456, 184 S.E. 78; *Snow v. Boylston*, 185 N.C. 321, 117 S.E. 14. Where the language employed by the testator is plain and its import is obvious, the judicial chore is light work; for, in such event, the words of the testator must be taken to mean exactly what they say. *Whitfield v. Garris*, 131 N.C. 148, 42 S.E. 568. But where the language in the will does not clearly express the testator's purpose, or when his intention is obscure because of the use of inconsistent clauses or words, the court finds itself confronted by a perplexing task. In such case, the court calls to its aid more or less arbitrary canons or rules of testamentary construction designed by the law to resolve any doubts in the language of the testator in favor of interpretations which the law deems desirable. 57 Am. Jur., Wills, sections 1120, 1124; Am. Law Inst. Restatement, Property, Vol. 3, section 243.

The third item of the will undertakes to set forth the intent of the testator in respect to the devolution of Lot No. 3 of the Bloomsbury Property in twofold fashion. Unfortunately the phraseology used in the first statement is employed in reverse in the second. As a result of this doubleness of expression, the language of the item is more or less inconsistent, and the purpose of the testator in regard to the lot is somewhat obscure. Similar observations apply to the seventh item, which devised to the *feme* plaintiff a share in remainder in the residuary realty of the testator.

These things being true, the court must invoke the canons or rules of testamentary construction germane to its present problems. These are as follows:

1. "When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity." G.S. 31-38; *Kirkman v. Smith,* 174 N.C. 603, 94 S.E. 423.

2. The law favors the construction of a will which gives to the devisee a vested interest at the earliest possible moment that the testator's language will permit. *Priddy & Co. v. Sanderford,* 221 N.C. 422, 20 S.E. 2d 341; *McDonald v. Howe,* 178 N.C. 257, 100 S.E. 427. As an incident of this rule, courts prefer to construe doubtful conditions as subsequent rather than precedent because such construction gives the devisee a vested estate subject to be divested instead of deferring the vesting. *Mountain Park Institute v. Lovill,* 198 N.C. 642, 153 S.E. 114; 69 C. J., Wills, section 1784.

3. "The law favors not only the early vesting, but also the early indefeasible or absolute vesting, of estates." 69 C. J., Wills, section 1682. As a corollary of this rule, such a construction is to be put upon conditional expressions, which render a testamentary gift defeasible, as to confine their operation to as early a period as the words of the will allow, so that it may become an absolute interest as soon as the language of the testator will permit. *Westfeldt v. Reynolds,* 191 N.C. 802, 133 S.E. 168; *Whitfield v. Douglas,* 175 N.C. 46, 94 S.E. 667; *Biddle v. Hoyt,* 54 N.C. 159; *Hilliard v. Kearney,* 45 N.C. 221.

4. "Every contingent limitation in any . . . will, made to depend upon the dying of any person . . . without issue . . . shall be held and interpreted a limitation to take effect when such person dies not having such . . . issue . . . living at the time of his death . . . unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the . . . will creating it." G.S. 41-4; *Willis v. Trust Co.,* 183 N.C. 267, 111 S.E. 163; *Perrett v. Bird,* 152 N.C. 220, 67 S.E. 507; *Dawson v. Ennett,* 151 N.C. 543, 66 S.E. 566; *Wilkinson v. Boyd,* 136

N.C. 46, 48 S.E. 516; *Kornegay v. Morris,* 122 N.C. 199, 29 S.E. 875; *Williams v. Lewis,* 100 N.C. 142, 5 S.E. 435, 6 Am. St. Rep. 574; *Buchanan v. Buchanan,* 99 N.C. 308, 5 S.E. 430.

The judgment under review is necessarily based on the theory that the third item of the will gives the *feme* plaintiff two distinct legal estates in Lot No. 3 of the Bloomsbury Property; that the first is a life estate, which inevitably ends at her death; and that the second is an estate in fee, which remains contingent throughout her life, but will vest in her absolutely at her death in case specified contingencies are satisfied. We by-pass without discussion or decision the intriguing, but somewhat disconcerting, assumption implicit in the judgment that the law will permit an erstwhile devisee, who has departed this life, to become vested of an earthly estate in fee simple absolute at a time when theology testifies that she is only fitted for a home in heaven.

Be that as it may, the trial court has fallen into error in other respects. The third item of the will devises a single estate to the *feme* plaintiff. Since such estate may last forever, it is a fee simple; and since it may end on the happening of a specified event, it is a fee simple defeasible rather than a fee simple absolute. Am. Law. Inst. Restatement, Property, Vol. 1, Chapters 3 and 4. See, also, in this connection: 19 Am. Jur., Estates, sections 13, 28; 31 C.J.S., Estates, sections 8, 10; *Paul v. Willoughby,* 204 N.C. 595, 169 S.E. 226; *Henderson v. Power Co.,* 200 N.C. 443, 157 S.E. 425, 80 A.L.R. 497; *West v. Murphy,* 197 N.C. 488, 149 S.E. 731; *James v. Griffin,* 192 N.C. 285, 134 S.E. 849; *Alexander v. Fleming,* 190 N.C. 815, 130 S.E. 867; *Walker v. Butner,* 187 N.C. 535, 122 S.E. 301; *Love v. Love,* 179 N.C. 115, 101 S.E. 562; *Smith v. Parks,* 176 N.C. 406, 97 S.E. 209; *Williams v. Blizzard,* 176 N.C. 146, 96 S.E. 957; *Albright v. Albright,* 172 N.C. 351, 90 S.E. 303; *Bizzell v. Building Association,* 172 N.C. 158, 90 S.E. 142; *Maynard v. Sears,* 157 N.C. 1, 72 S.E. 609; *Elkins v. Seigler,* 154 N.C. 374, 70 S.E. 636; *Whitfield v. Garris,* 134 N.C. 24, 45 S.E. 904; *Keith v. Scales,* 124 N.C. 497, 32 S.E. 809; *Wright v. Brown,* 116 N.C. 26, 22 S.E. 313; *Hall v. Turner,* 110 N.C. 292, 14 S.E. 791.

An estate in fee simple defeasible may be either (1) an estate in fee simple determinable, or (2) an estate in fee simple subject to a condition subsequent, or (3) an estate in fee simple subject to an executory limitation. Am. Law. Inst. Restatement, Property, Vol. 1, sections 44, 45, 46.

When the sixth item of the will is read in the light of the relevant canons and rules of testamentary construction, it becomes manifest that the testator thereby devised Lot No. 3 of the Bloomsbury Property to the *feme* plaintiff in fee simple determinable. This is true because "an estate in fee simple determinable is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple;

and provides that the estate shall automatically expire upon the occurrence of a stated event." Am. Law. Inst. Restatement, Property, Vol. 1, section 44.

Notwithstanding the qualification annexed to it, a fee simple determinable constitutes the entire estate throughout its continuance. *Landers v. Landers,* 151 Ky. 206, 151 S.W. 386, Ann. Cas. 1915A, 223; *Church in Brattle Square v. Grant,* 3 Gray (Mass.) 142, 63 Am. Dec. 725; *Lyford v. Laconia,* 75 N.H. 220, 72 A. 1085, 22 L.R.A. (N.S.) 1062, 139 Am. St. Rep. 680. It retains its defeasible quality, however, until the happening of the stated event by which it is to be determined, or until it is converted into a fee simple absolute. *Harrell v. Hagan,* 147 N.C. 111, 60 S.E. 909, 125 Am. St. Rep. 539. A fee simple determinable is converted into a fee simple absolute when the stated event on which it is limited becomes impossible of occurrence. *Lide v. Mears,* 231 N.C. 111, 56 S.E. 2d 404; Simes: Law of Future Interests, section 187; 31 C.J.S., Estates, section 10; 69 C.J.S., Wills, section 1559.

When the owner of land in fee simple absolute devises it in fee simple determinable, a possibility of reverter, which is a reversionary interest subject to a condition precedent, springs up. It arises without being created by any specific words in the will, and exists in the eligible heirs of the devisor while the fee simple determinable is outstanding in the devisee or his successors in interest, that is to say, until that estate ends by the happening of the stated event on which it is limited, or until that estate is converted into a fee simple absolute. Am. Law. Inst. Restatement, Property, Vol. 1, sections 44, 58, and Vol. 2, section 154; Simes: Law of Future Interests, sections 177, 187; 19 Am. Jur., Estates, section 31. The term "eligible heirs" does not refer to the heirs of the devisor in general. It embraces only those persons who would answer the description of heirs of the devisor at a particular time if the stated event terminating the fee simple determinable were then to occur. It necessarily follows that where an estate in fee simple determinable created by will is ended by the happening of the stated event limiting it, the property reverts in fee simple absolute to those who are heirs of the testator at the time when the estate terminates, and not to those who were heirs of the testator at any other time. *Burden v. Lipsitz,* 166 N.C. 523, 82 S.E. 863; *Church v. Young,* 130 N.C. 8, 40 S.E. 691.

These things being true, a possibility of reverter arising on the creation of a fee simple determinable is not an estate in land, but is a mere possibility of acquiring an estate in land at a future time upon the happening of a condition precedent, *i.e.,* the occurrence of the stated event on which the fee is limited. Mordecai: Law Lectures (2d Ed.), Vol. 1, page 498; Tiffany: Real Property (3rd Ed.), section 314; Thompson: Real Property (Perm. Ed.), section 2182; 33 Am. Jur., Life Estates,

Remainders, Reversions, sections 204, 205, 206; 31 C.J.S., Estates, section 105.

In the creation of a fee simple determinable, the stated event, which operates to end the fee, may be either the occurrence of all of a combination of contingencies, or the happening of only one of two or more alternative contingencies. *Christopher v. Wilson,* 188 N.C. 757, 125 S.E. 609; *Pilley v. Sullivan,* 182 N.C. 493, 109 S.E. 359; *Bell v. Keesler,* 175 N.C. 525, 95 S.E. 881; *Ham v. Ham,* 168 N.C. 486, 84 S.E. 840; *Dickenson v. Jordan,* 5 N.C. 380; Page on Wills (Lifetime Ed.), section 1278; 69 C.J.S., Wills, section 1552. The doubleness of expression in the third item of the will leaves the meaning of the provisions for defeasance of the fee in Lot No. 3 of the Bloomsbury Property in doubt. A literal perusal of these provisions supports two conflicting conclusions: (1) That the testator intended the fee to be defeated in case the *feme* plaintiff either dies without having improved the lot by the erection of a dwelling house thereon, *or* dies without having issue living at the time of her death; and (2) that the testator intended the fee to suffer defeasance only in case the *feme* plaintiff dies without having improved the lot by the erection of a dwelling house thereon *and also* without having issue living at the time of her death. Consequently, the provisions for defeasance must be read so as to require both of the specified contingencies to occur before the fee of the *feme* plaintiff can be defeated; for this construction confines the operation of the provisions for defeasance to as early a period as the words of the will allow, and enables the estate of the *feme* plaintiff to become absolute as soon as the language of the will permits.

The plaintiff has improved Lot No. 3 of the Bloomsbury Property by the erection of a dwelling house thereon. Hence, both of the required contingencies can never occur. This being true, the stated event terminating her estate cannot happen, and the *feme* plaintiff is now the absolute owner of the lot under the rule that a fee simple determinable is converted into a fee simple absolute when the event on which the determinable fee is limited becomes impossible of happening.

In construing the seventh item of the will, the court below committed an error similar to that which characterized its ruling upon the third item. The *feme* plaintiff took a fee simple determinable in the share of the residuary realty devised to her in the seventh item of her father's will, subject only to the preceding estate of her mother. Since the preceding estate has fallen in, the *feme* plaintiff now owns the share in fee, but such fee is determinable on her dying without having issue living at the time of her death.

We cannot bring our consideration of the seventh item of the will to a close without referring to a contention of the plaintiffs. They say that the *feme* plaintiff is an heir of her father, the testator, and an heir of her

predeceased brother, James Thaddeus Pace; that consequently parts of the possibility of reverter passed to her in these capacities under the laws of intestacy; and that such parts of the possibility of reverter merged with corresponding parts of her fee simple determinable, giving her title in fee simple absolute to a portion of the share devised to her in the seventh item.

This contention is engaging, but not convincing. It runs counter to the words of the will, overlooks the characteristics of the possibility of reverter, and ignores the conditions which call the doctrine of merger of estates in land into play.

The *feme* plaintiff is unquestionably an heir of the testator. But she is clearly not one of his eligible heirs. In the very nature of things, she cannot possibly qualify as an heir of the testator at the happening of the stated event which may cut off her fee simple determinable; for such stated event is her own dying without having issue living at the time of her death. Hence, no part of the possibility of reverter has ever passed to the *feme* plaintiff. This conclusion finds implicit support in the decisions of this Court in *Burden v. Lipsitz, supra,* and *Church v. Young, supra.*

Moreover, the doctrine of merger does not apply in case a fee simple determinable and the possibility of reverter unite in the same person. Merger is the absorption of a lesser estate by a greater estate, and takes place when two distinct estates of greater and lesser rank meet in the same person or class of persons at the same time without any intermediate estate. *Trust Co. v. Watkins,* 215 N.C. 292, 1 S.E. 2d 853. Since the whole estate in the land is in the tenant in fee simple determinable, and since the possibility of reverter is not an estate at all, there can be no merger of a fee simple determinable and the possibility of reverter because an essential prerequisite to merger, *i.e.,* the coincidence of two independent estates presently held by one and the same person or class of persons, is necessarily absent. *Chaplin v. Adams,* 10 S.C. Eq. 263.

This brings us to the appeal of the guardian *ad litem,* which calls in question the correctness of the adjudication of the trial court that the three pieces of realty bought by the executrix with funds derived from the sale of portions of the land mentioned in the fifth item of the will now belong to the *feme* plaintiff and the defendant, Louise P. Austin, in fee simple absolute, share and share alike.

Manifestly, these three pieces of realty are not "real estate not herein disposed of and not sold under the powers hereinbefore granted" within the purview of the seventh item of the will. When the executrix sold and conveyed portions of the Bloomsbury Property to third persons under the discretionary power of sale vested in her by the fifth item of the will, the land so sold and conveyed was actually converted into the money

representing the sale price. *Mills v. Harris,* 104 N.C. 626, 10 S.E. 704; 18 C.J.S., Conversion, section 23. The executrix held this money in trust for investment in Liberty Bonds for the benefit of herself, the *feme* plaintiff, and the defendant, Louise P. Austin, in the manner specified in the fifth item. When the executrix used these fiduciary funds in the purchase of three pieces of realty and took a conveyance in her name as executrix, a resulting trust arose in the three pieces of realty in favor of the persons beneficially entitled to the funds with which they were purchased. *Owen v. Hines,* 227 N.C. 236, 41 S.E. 2d 739; *Jackson v. Thompson,* 214 N.C. 539, 200 S.E. 16; *Miller v. Miller,* 200 N.C. 458, 157 S.E. 604; *Tire Co. v. Lester,* 190 N.C. 411, 130 S.E. 45. These considerations sustain the adjudication under present review.

For the reasons given, the action is remanded to the Superior Court on the appeal of the plaintiffs with directions that it modify the provisions of its judgment relating to the rights of the *feme* plaintiff in the property mentioned in the third and seventh items of the will so that such provisions will conform to this opinion. The judgment is affirmed on the appeal of the Guardian *ad Litem.*

Error on the appeal of the plaintiffs.

Judgment affirmed on the appeal of the Guardian *ad Litem.*

EDNA CROUSE v. O. M. VERNON AND FIRST STATE BANK & TRUST COMPANY OF MOUNT HOLLY, N. C., AND C. B. FALLS, JR., TRUSTEE.

(Filed 3 May, 1950.)

1. Evidence § 22½—

Where defendant, on cross-examination of plaintiff, has elicited matter irrelevant to the issue, but calculated to impeach plaintiff as morally unfit to be believed as a witness, the court has discretionary power to permit plaintiff on re-direct examination to testify in explanation or repair of the matter elicited on cross-examination, and defendant cannot complain if it also incidentally appeals to the sympathy of the jury.

2. Evidence § 22—

The court has discretionary power to limit the cross-examination of a witness for the purpose of impeaching her character in regard to matters irrelevant to the issue and unrelated to her testimony in chief.

3. Evidence § 46d—

In order to testify as to the value of property before and after the damage in suit, it is not required that the witness should have seen the property immediately before and after the injury, reasonable nearness under the circumstances being sufficient. In the present case, testimony

disclosing that the witness saw the house a few days before the fire and its remains two or three days after the fire, *held* to render the witness' testimony of comparative values competent.

4. Trial § 22a—

On motion to nonsuit, plaintiff's evidence is taken as true.

5. Insurance § 16—

Plaintiff's testimony to the effect that the mortgagee promised to insure the house under construction for a definite sum for the protection of both mortgagor and mortgagee, and to deduct the premiums from the mortgagor's account, *is held* sufficient to be submitted to the jury on the issue of the existence of a contract to insure in the amount stated for mortgagor's benefit.

6. Same—

An agreement by the mortgagee to procure insurance for the benefit of mortgagor and mortgagee will not be held void for indefiniteness for its failure to specify a date within which the insurance should become in force, since in such instance the insurance must be placed in a reasonable time, as implied by the nature and purpose of the contract.

7. Same—

In an action for damages for breach of contract to procure insurance where no time is specified in the contract for performance, the failure of the court to instruct the jury on the question of reasonable time for performance will not be held for error in the absence of a special request when it appears that more than two months elapsed between the agreement and the fire causing the damage, especially where defendants defend solely upon the theory that there was no contract to insure.

8. Damages § 13a—

An instruction on the issue of damages will not be held for error in using the terms "cash value" and "market value" as interchangeable terms, and the court is not required to explain the meaning of the rule without a special request.

9. Insurance § 16: Contracts § 22—

Where a defendant categorically admits nonperformance, and bases his defense solely upon the denial of the existence of the contract, he may not complain of the failure of the court to charge that the burden of proving nonperformance was on plaintiff.

DEFENDANT'S appeal from *Gwyn, J.*, January Civil Term, 1950, GASTON Superior Court.

The plaintiff sued to recover damages for breach of contract to insure a building of plaintiff, constructed on a lot in or near Mount Holly, N. C., in which town the corporate defendant was doing a banking business, and, allegedly, conducting an insurance agency, through its president and codefendant, O. M. Vernon. The defendant Falls, Jr., was trustee in a

deed of trust executed by plaintiff to the Bank to secure a note in the sum of $2,500 given by plaintiff for a loan extended to her, to be used in financing, in part, the construction of the building.

The plaintiff alleges that at the time the loan was made to her the defendant bank and its codefendant Vernon contracted with her to secure adequate and timely insurance on the building in the sum of $4,500, and, through gross carelessness and neglect failed to do so; that the structure was destroyed by fire, or greatly damaged in excess of the designated amount of insurance which defendants agreed to procure, and that she was damaged in that amount.

Plaintiff further alleges that at the time of the loss by fire plaintiff had withdrawn from the fund credited to her at defendant bank the sum of $1,535.06, leaving a balance of $964.94, which she endeavored to draw out, but the Bank refused to honor her check. That they still retain and refuse to return to her the note and deed of trust extended by Mrs. Raymond Bagley on her Mecklenburg property, constituting a second lien thereupon, deposit of which had been made as additional security for the $2,500 loan.

The defendants, in separate answers, denied the principal allegations of the complaint respecting the alleged agreement to procure insurance, and set up, each, further defenses: The defendant Vernon alleged that he had "explained to the plaintiff that when she had completed her building for her to come to him and that he would be glad to write Fire Insurance upon it. That the plaintiff agreed to this and knew that she did not have any Fire Insurance and knew that she had not paid for any Fire Insurance. That thereafter this defendant did not see the plaintiff again until in April, 1949, and when she called and stated she had had a fire." The Bank alleged that it was not empowered to write fire insurance and "never authorized its President or anyone else to represent to the plaintiff or anyone else any representations as to securing fire insurance and that any such representations, if made, which this defendant denies, were without the authority of this defendant . . ."

Plaintiff testified substantially as follows:

That she went to see O. M. Vernon and discussed with him a loan on her house; told him what security she had, and that the lot on which she was building had been bought from him. After this information he told her he thought he could let her have the money to finish her house; to bring him the deeds to the lot and the note and deed of trust on the Charlotte property and he would have it checked. This was around the 20th or 22nd of January.

There was a discussion of the insurance policy. Plaintiff went to the Bank three times and the matter of insurance was discussed. The first time Vernon told her she would have to have insurance on the house.

She replied: "Insurance on a block house?" And he said, "Yes Ma'am. You already have some timbers in there and there will be more timbers later on and you will need insurance and will have to have it."

The second time they talked about insurance, "he said he would take the papers over to Charlotte and have them checked to see if they were all right, and he would send the man over to have the house appraised and he would write out the insurance. He asked what the house would cost, and I told him I was hoping to get by with $4,500 with my free labor. The first and second time both he said that I would have to have the insurance to get the loan. I said, 'Well, if I have to have it, I have to have it. Go ahead and write it.' "

"When he asked me what the house was going to cost me, I told him I was hoping to get by with $4,500. He said, 'Well, we want that much insurance for your protection and mine.' "

About February 1, when she signed the note for the loan, "there was a reference to a fire insurance policy, and it was to cover the property described in the deed of trust. The last time I was there he was in a hurry, and I asked him if he had had the house appraised and had wrote the insurance yet. He said, 'No, I have been busy, and I have not got it just yet, but I will do it.' I opened my bag and was going to pay him. He said it would cost me about $15.00 to have the house appraised. I meant to pay the insurance and appraisal of the house. He said, 'You go ahead and finish with your house, and I will write this out and take it out of what you have in the bank.' He said, 'You attend to that part over there and I will attend to this.' That was all that was said, as he was in a hurry to go to Charlotte, and we did not sit down. We just walked out. He gave me a check book and said, 'Here's your check book. Check on your money as you need it.' "

The house was burned down April 9. (Witness described conditions after the fire):

> "On Wednesday after the fire I talked to Mr. Vernon at his home about 8:45. They said he was out of town until that day. I asked him about my insurance. He said he had it, but he didn't know exactly how much he had written out. I said, 'Well, my house has burned to the ground,' and he stood there a minute and said, 'Mrs. Crouse, I don't believe that I have written the insurance.' After that I talked to Mr. Vernon at the bank. Before I told him the house was burned, he said he would look at the bank and see about the insurance. When I went down there, he went in, and that fellow right in the front of the bank and he said a word or two and came back and sat down and said, 'Mrs. Crouse, I am sorry you don't have any insurance.' "

At the time the house had burned plaintiff had expended in its construction $5,200 or $5,300.

On cross-examination plaintiff described the condition of the house when she went to see Mr. Vernon about the loan, stating that most of the building was up. She further testified:

> "Up until that time I didn't have any insurance on the construction of the building. There wasn't anything but the cement block walls up until the week before I went to borrow the money. I didn't have any insurance at the time I got the loan. I had intended insuring the building. I wanted it. I said, 'What, a cement block house.' I didn't mean that a cement block house ought not to be insured. My money was scarce at that time, and I never dreamed of anybody being low-down enough to burn my house down as they did. That is the reason I didn't give it a thought. I didn't think there was anybody living mean enough to burn a widow woman's house down. I know the fire was set. I thought I had insurance. I thought Mr. Vernon would write the insurance as he had promised to do. I hadn't thought of insurance until I went to Mr. Vernon and he told me I would have to have it. I hadn't thought of it until then. I hadn't thought of anything happening to it; if I had, I would have had insurance, and I would have known that I had it."

* * *

> "The only purpose I had when I went to see Mr. Vernon was to borrow $2,500, and had no other purpose whatever and never thought about insurance until he mentioned it, and then I seen that I should have needed it."

On questions asked by the defendants' counsel the plaintiff gave an account of her family, stating the number of her daughters, and ages of the children, and the environment in which she lived in Charlotte, and whether she kept a rough house.

> "I wouldn't say that I had a pretty rough house there. My daughter Loreen was there and my youngest daughter, Joyce, when I lived there. She was 14 years old. I deny that at practically all times of day and night men were coming in and out of my house, drinking and carousing. I do not know that conditions were so rough that neighbors had to call the police time and again. That didn't happen while I was at home. Once in a while drinking was going on there. That was my daughter Loreen. Police weren't there when I was there. I won't swear they were never there. My daughter was the one who called them unless she lied to me."

"Q. I'll ask you if conditions weren't so bad there that the Welfare Department made you take Joyce away from there?"

"I don't think I am responsible for what my married children do in this case. It is not my will for my children to go wrong. Not many mothers can correct children after they are married and leave home."

"Q. You testified for them when Hall was suing Stafford when you were in Stafford's house and your son-in-law was suing Stafford because he had separated your daughter from Hall?"

Objection—sustained—exception.

"I was here at that trial and testified for Stafford in that suit."

"Q. You heard neighbor after neighbor testify that this man Stafford that you have been living with, while your son-in-law was away from home, would go there and spend nearly every morning with your daughter?"

Objection—sustained—exception.

On re-direct examination the following occurred:

"Q. Did you work during the time your husband was living?"

Objection—overruled—exception.

"A. Yes.

"Q. Why did you work?"

Objection—overruled—exception.

"A. He was sick and not able to work. He lacked from January to March being sick for twenty years, and I had to work to make a living for us."

Ethel Stafford testified that she was present on one of these occasions when plaintiff was negotiating the loan and when the subject of insurance was discussed, in corroboration of plaintiff's testimony.

Charles Hoyle, for plaintiff, testified as to work on the house, details of construction, and settlements made with him; identifying the protested check for $762 given him by plaintiff in settlement.

Alphonso Beam, for the plaintiff, testified that he did cement work on the house, from September to the following February. He testified that he had been in the building business for 32 years; had sold two or three houses; had five at present that he had built. He testified that at the time he quit construction in February the house, exclusive of the land, had a reasonable market value of $2,800 to $3,000.

Over defendants' objection he testified that he had seen the house before it was burned and afterward, and that its reasonable market value before burning was $4,500 to $5,000 and after burning from $500 to $600.

Mrs. Crouse told witness that she had insurance with the Mount Holly Bank.

Plaintiff offered several witnesses who testified to her good character.

Plaintiff rested. Defendants demurred to the evidence and moved for judgment of nonsuit, which was declined. Defendants excepted.

The defendant Vernon testified as to details of the security plaintiff offered for the $2,500 loan, and an explanation of the items charged against the proceeds. He testified that no mention of insurance on the house she was constructing was made on Mrs. Crouse's second visit. The insurance discussed with her was on the Charlotte property, to know if there was provision made in the second deed of trust, on the strength of which he was making the loan, for fire insurance. The deed was at the time given him for inspection.

He testified that his security was based on the Charlotte papers, not the Crouse propery; he did not at any time agree to procure fire insurance on the Mount Holly property; but that at her last visit, after procuring the loan, he suggested to her as she was leaving the bank, that when the house was finished he "would be glad to go up, have it appraised, and write you some fire insurance on it." He testified that he had never written a builder's risk insurance policy in his life. The first time he heard of the fire was two or three days after it occurred.

On cross-examination defendant stated that he was qualified to write insurance in half a dozen companies, and would have written insurance on Mrs. Crouse's house if she had had one and requested it. That he had financed 60 or 75 houses on which he required builder's risk insurance. "I have been writing insurance more than 20 years, between 20 and 25 years. My board of directors knows that I customarily write insurance of this sort and that I customarily require insurance on real estate loans."

W. H. Crane, witness for defendant, testified that he made out the deposit slip for the loan and heard Mr. Vernon say when he handed it to her, "Now, Mrs. Crouse, when your house is finished let me know. I will be glad to come out and look at it and write you some fire insurance."

Clyde Davis, witness for defendant, testified to the same effect.

Fred McIntosh testified for defendant, giving an estimate of replacement value.

At the conclusion of all the evidence the defendants renewed their demurrer thereto and moved for judgment of nonsuit, which was declined. Defendants excepted.

Issues were submitted to the jury, and after instructions thereupon by the court, the issues were answered as follows:

> "1. Did the plaintiff and the defendant Vernon at the time the plaintiff obtained the aforesaid $2,500 loan enter into an agreement

by the terms of which the defendant Vernon agreed to procure and have issued to the plaintiff a fire insurance policy in the amount of $4,500 covering the house being built on the plaintiff's property in Vernon's Park during the construction thereof, as alleged in the complaint?

"Answer: Yes.

"2. Did the defendant Vernon fail to procure such insurance coverage and thereby violate the agreement with the plaintiff, as alleged in the complaint?

"Answer: Yes.

"3. What damage, if any, is the plaintiff entitled to recover?"

"Answer: $4,000.00."

The defendants moved to set aside the verdict for errors of law committed on the trial. The motion was declined and defendants excepted.

In the ensuing judgment, after adjudging recovery in accordance with the issues, Judge Gwyn provided:

"It is further ordered, adjudged that any and all amounts due the First State Bank and Trust Company upon the note and deed of trust executed by the plaintiff to C. B. Falls, Trustee for the defendant First State Bank and Trust Company, referred to in the complaint shall constitute an offset to this judgment and shall be credited upon the amount which the plaintiff recovers by this judgment."

From the judgment defendants appealed, assigning errors.

J. Mack Holland, Jr., and James Mullen for plaintiff, appellee.

S. B. Dolley and Garland & Garland for defendant appellants O. M. Vernon and First State Bank & Trust Company of Mount Holly, N. C.

SEAWELL, J. It is often not advisable, and sometimes impossible to set out in detail all the challenges made to the validity of a trial, with accompanying explanatory matter, in the space allotted for statement of the case and the opinion. All these objections have, of course, received due consideration; but we are compelled to confine discussion to those which have been advanced as disclosing more outstanding prejudicial error. Those to which more importance seems to have been given are discussed.

1. *Objection to the admission and exclusion of evidence.*

An exception is directed to the admission of plaintiff's testimony that because of her husband's illness she had been compelled to work, (she had

previously stated at a cotton mill in Charlotte), on the ground that this was irrelevant to the issue and constitued an appeal to the sympathy of the jury, citing *Shepherd v. Lumber Co.,* 166 N.C. 130, 81 S.E. 1064; *Dellinger v. Building Co.,* 187 N.C. 845, 123 S.E. 78; *S. v. Page,* 215 N.C. 333, 1 S.E. 2d 887; *S. v. Warren,* 227 N.C. 380, 42 S.E. 2d 350.

This testimony was let in on direct examination after, on the preceding cross-examination, defendants' counsel had sought to impeach the plaintiff witness, and attack her credibility by questions tending to show that her house, in which there were several daughters, was so disorderly and badly kept as to excite the complaint of neighbors and cause police visitation.

Some of these questions elicited answers apparently unsatisfactory to counsel and these questions persisted after the court sustained objections.

Notwithstanding the liberality extended to cross-examination, counsel asking impeaching questions as to matters he would not be permitted to prove independently is bound by the answers; and sometimes damaging implications often attend the simple asking of questions where no answer is allowed. In the particular case cross-examination was of such a character as to invite the testimony given by the witness on re-direct. These matters generally are within the discretion of the court; *S. v. Warren, supra;* but it would be a strange exercise of discretion which permitted a cross-examination irrelevant to the issue but calculated to impeach the witness as morally unfit to be believed, and deny her the right to explain or repair the attempted damage. *S. v. Warren, supra.* The defendant's counsel opened the door and if the return sally was germane to the attack, counsel cannot complain if it incidentally appealed to sympathy.

Some of the questions of this character asked the plaintiff by counsel for the defendants were excluded and objection was made by the defendants. "(1) Weren't conditions so bad there (in your home in Charlotte) that the Welfare Department made you take Joyce away from there?" (2) "You testified for them when Hall was suing Stafford because he had separated your daughter from Hall?" (3) "You heard neighbor after neighbor testify that Stafford . . . would go there and spend nearly every morning with your daughter?"

The right to cross-examine witnesses on all matters brought out in the examination in chief is absolute. But the cross-examination of the character here disclosed is within the reasonable discretion of the court and we think the trial judge held to the balance fairly within the discretion permitted him. *S. v. Coleman,* 215 N.C. 716, 2 S.E. 2d 865.

An objection has been made to the testimony of witnesses directed to the measure of damages caused by the fire: That they were not qualified to express an opinion because they did not testify that they saw the premises *immediately* before and immediately after the fire.

We are of the opinion that the evidence disclosed to the jury that both views, "before and after," were taken with sufficient nearness to the burning as to make the evidence competent; Beam saw the house a few days before the fire, and what remained of it two or three days after it. "Immediately," in the strict sense, is not essential. It is a question of reasonable nearness. *Grubbs v. Ins. Co.*, 108 N.C. 472, 13 S.E. 236; *Hart v. R. R.*, 144 N.C. 91, 56 S.E. 559; *Newsom v. Cothrane*, 185 N.C. 161, 116 S.E. 415; *Wyatt v. R. R.*, 156 N.C. 307, 72 S.E. 383.

2. *Demurrer to the evidence and motion for nonsuit.*

The theory on which the motion to nonsuit is pressed appears to be that the evidence as to the terms of the purported contract, as testified to by the plaintiff, renders it too vague to constitute a completed contract, breach of which would give rise to a cause of action. The main defect criticized as fatal is that it does not set a definite date for its performance; that Mrs. Crouse had no purpose in mind in obtaining it except in view of the loan for which she applied; that she had paid for no insurance; and if there had been an agreement defendant would have been allowed a reasonable time to write or procure the insurance.

In presenting these views in the brief appellants resort in part to defendants' evidence in support of their position. But looking to the plaintiff's evidence in its most favorable light, there is ample evidence tending to show that defendant Vernon entered into an agreement to write or procure the insurance upon the house in question and in a definite amount; that plaintiff offered to pay for it and he agreed to take it out of the amount of her loan and would not permit her to do so; that she inquired about the insurance with some diligence, and at one time, because of the hurry of Vernon to get away to Charlotte, he told her he had not attended to it but would, with assurance that if she attended to the construction of the house he would attend to the insurance. She was led to believe that the house really was insured both for her own benefit and that of the bank.

The contract to write or procure insurance on plaintiff's building will not be rejected for vagueness because it fixed no date for performance of the time within which the insurance should become in force. We do not understand that this is usual in a contract of this nature. Under plaintiff's evidence, (which on demurrer must be taken as true), the contract was sufficiently definite. Under it the defendant was charged with good faith and due care in its performance. Couch on Insurance, Sec. 1215; Appleman, Insurance Law and Practice, sec. 2261. This *per se* requires that the insurance must be placed in a reasonable time, as implied by the nature and purpose of the contract. Appleman, *supra*, p. 113, sec. 2261; and in an action for its breach this may be a matter for

the jury, or, in some situations where the delay is *per se* unreasonable, a matter of law for the court; but its omission will not vitiate the contract.

On the evidence the defendant is not entitled to limit the purpose of the insurance to the necessities of the loan and thus make its procurement optional with the mortgagee. The mortgagee may, and according to the evidence did, insure for his own benefit and also for the benefit of the mortgagor, Appleman, Insurance, Sec. 2264; and the sum named in the proposed agreement corroborates the plaintiff in this respect since it far exceeded the loan.

Referring again to the evidence, the defendants cannot avail themselves of the defense that plaintiff did not pay the premium on the policy, since she offered to pay it and defendant agreed to deduct it from her account. Strikingly apt in this connection is *Dixon v. Osborne*, 204 N.C. 480, (Loc. cit. 487), 168 S.E. 683, in which it is said:

> "The plaintiff J. W. Dixon had an agreement with defendants Osborne and Newcomb that they would advance the premium. They lulled plaintiffs into security by the promise and did not pay the premium. Then again, when $2,500 was paid directions were specifically made by plaintiffs that out of the amount, the insurance premium was to be paid. The exception in the record as to this question in relation to this matter cannot be sustained."

See cases *supra*.

The demurrer to the evidence was properly overruled.

3. *Instructions to the jury.* The defendants contend that the trial judge should have given the jury an instruction on the matter of reasonable time for the performance of the contract. There was no request for such an instruction. We doubt whether on the record presented the defendants would be entitled to such an instruction at all. They deny the contract *in toto* and tried the case upon that theory; and such instruction would have been hypothetical. The defendant Vernon agreed about February 1st to place the insurance, and the fire did not occur until the following April 9th. Under the evidence we are of the opinion that the court was not required to give the instruction as a matter of legal duty without special request on the part of the defendant. *Penn v. Standard Life Ins. Co.*, 160 N.C. 399, 76 S.E. 262; *Livingston v. Investment Co.*, 219 N.C. 416, 14 S.E. 2d 489.

We find no error in the instruction given the jury on the measure of damages. It was not inconsistent to refer to "cash value" and "market value" as interchangeable terms. Much hammering of this subject has not shaped any better way of arriving at "cash value" of property (such as does not inherently fix its own value) than by applying the rule of market value.

The rule has become so familiar in popular and legal use that it needs no preliminary schooling of a witness to enable him to apply it, any more than it does a jury to enable them to understand it. The court was not required to go into an explanation of the meaning of the rule without special request.

The instruction limiting recovery to the cost of replacement and to the amount of insurance agreed upon was not unfavorable to the defendants and, therefore, they were not prejudiced by it.

It is urged that there is reversible error in the failure of the judge to formally charge the jury that the burden of the second issue rested upon the plaintiff. To give such an instruction the court must ignore the theory upon which the case was tried, and the categorical admissions of the defendant Vernon in the evidence that no insurance had been procured or written by him. This left no evidence in that respect to be weighed or determined by the jury.

In a civil action, issues, in the form of questions, are addressed to the jury to aid them in consideration of the evidence and determination of the truth of the matter with which the issues are concerned. They are framed on both the pleadings and the evidence; *Allison v. Steele,* 220 N.C. 318, 17 S.E. 2d 33; *Brown v. Daniel,* 219 N.C. 349, 13 S.E. 2d 623; and when in the evidence and by his own admission the defendant has given the answer, he cannot complain that his own testimony was not submitted to a jury test.

The jury having found in answer to the first issue that the defendants entered into a valid contract to procure the insurance, and Vernon having admitted its nonperformance,—to ascertain which was the only function of the second issue,—the instruction given the jury was logical and free from error. McIntosh, North Carolina Practice and Procedure, 632; 53 Am. Jur., 267; *Speas v. Merchants Bank & Trust Co.,* 188 N.C. 524, 125 S.E. 398.

Nonperformance of a valid contract is a breach thereof regardless of whether it occurs deliberately or through forgetfulness or neglect, unless the person charged, (in this case the defendant), shows some valid reason which may excuse the nonperformance; and the burden of doing so rests upon him.

All the parties to this action stipulated that any liability of the defendant Vernon was that of the corporate defendant, for whom, it is stipulated, he was acting.

On these considerations we are unable to interfere with the result of the trial. We find

No error.

WILLIAM M. RUSS, TRUSTEE OF THE ESTATE OF MOSES W. WOODARD, SR., PETITIONER, v. MOSES W. WOODARD, MOSES W. WOODARD III, MARY WHITE WOODARD McDONALD, NANCY ELIZABETH WOODARD, ELIZABETH G. WOODARD, AND BESSIE W. CAMPBELL, DEFENDANTS.

(Filed 3 May, 1950.)

1. Trusts § 8—

The order of the clerk of the Superior Court accepting the resignation of a trustee in a special proceeding pursuant to G.S. 36-9, *et seq.*, is an interlocutory order regardless of whether an appeal is taken therefrom or not, since even in the absence of an appeal the statute requires that such order be approved by the judge of the Superior Court before it becomes effective. G.S. 36-12.

2. Judgments § 17a—

A judgment in a special proceeding as well as in a civil action may be either interlocutory or final. G.S. 1-393, G.S. 1-208.

3. Same—

A final judgment is one which decides the case upon its merits without need of further directions of the court; an interlocutory order or judgment is provisional or preliminary, and does not determine the issues but directs some further proceeding preliminary to final decree.

4. Judgments § 20a—

An interlocutory order or judgment is subject to change by the court during the pendency of the action to meet the exigencies of the case.

5. Clerks of Court § 3—

While the clerk of the Superior Court is a court of very limited jurisdiction, within his jurisdiction the clerk has the same power as courts of general jurisdiction to open, vacate, modify, set aside or enter as of a former time, decrees or orders of his court, and to fix time for hearings. G.S. 2-16 (9).

6. Clerks of Court § 5: Trusts § 8—

The clerk of the Superior Court has power to set aside his prior order accepting the resignation of a trustee and appointing a successor when no appeal has been taken and the order has not been approved by the judge of the Superior Court.

7. Trusts § 8—

Where the clerk of the court, in the exercise of his valid discretionary power, has set aside his order accepting the resignation of the trustee, his subsequent valid order accepting the resignation of the trustee and appointing a successor, entered in proceedings consonant with statutory requirements, G.S. 36-9, *et seq.*, and approved by the judge of the Superior Court in the exercise of judgment and discretion, will be affirmed on appeal.

RUSS *v.* WOODARD.

APPEAL by Elizabeth G. Woodard and Bessie W. Campbell from *Williams, J.*, at October Term, 1949, of WAKE.

Special proceeding instituted 30 December, 1948, by petitioner before the Clerk of Superior Court of Wake County for the purpose of resigning as successor trustee of trust created under the will of Moses W. Woodard, Sr., deceased, pursuant to provisions of Articles 3 of Chapter 36 of the General Statutes of North Carolina.

The record on this appeal shows:

(1) That on 16 March, 1949, the Clerk of Superior Court, upon findings set forth, entered an order, in his discretion (1) allowing the petitioner to resign as trustee under and pursuant to the provisions of the last will and testament of Moses W. Woodard, deceased, and (2) appointing Thomas G. Chapman as the successor trustee, etc. (The record of this order does not carry the approval of the Judge of Superior Court.)

(2) That thereafter on 22 March, 1949, the Clerk of Superior Court entered order vacating the said order of 16 March, 1949. (The premises of this order is that "a misunderstanding has arisen for that the attorney representing the defendants Moses W. Woodard, Moses W. Woodard III, Mary White Woodard McDonald and Nancy Elizabeth Woodard seems to have understood that he would be given further time to present the name or names of the proposed trustee or trustees before the entering of an order," and that "the court not desiring to cause any injustice to be done believes it to be for the best interest of the parties concerned that the said order of March 16, 1949, be vacated and the matter placed in its original position as if said order had not been signed, to the end that all parties involved may be further heard." And the record of this order fails to show that any exception thereto, or that any appeal therefrom was taken by anyone.)

(3) That thereafter on 7 April, 1949, the Clerk of Superior Court entered an order allowing the defendants Moses W. Woodard, Moses W. Woodard III, Mary White McDonald Woodard and Nancy Elizabeth Woodard to file a petition or motion in the cause to be considered by the court in connection with the questions involved herein. (This petition details (a) the incidents of a hearing held on 28 February, 1949, at which all parties were present or represented by counsel, and (b) the contention of the parties as to a successor trustee or trustees, and states "that at the conclusion of the hearing the Clerk of the Court advised that he would take the matter under advisement; that he might wish to confer further with counsel, and suggested that counsel make suggestions to him as to persons who should be considered as Trustees"; and that subsequent thereto, and without notice to, or knowledge of them, or their attorneys, an order was inadvertently made, which order when called to

the attention of the Clerk was vacated by the Clerk of the Court on 22 March, 1949, reciting that a misunderstanding had arisen, etc.; and that at another hearing or conference on 28 March, 1949, the parties being represented by counsel, the matter of selecting a trustee or trustees was discussed, but no agreement was reached, and so on.)

(4) That thereafter on 2 May, 1949, the Clerk of Superior Court, after reciting the entry of the order of 16 March, 1949, and the vacation of it on 22 March, 1949, on account of misunderstanding that had arisen between counsel for Moses W. Woodard, and others, and the court as to the time when an order would be signed, and the court thereafter having conducted another hearing on 28 March, 1949, and thereafter on 7 April, 1949, Moses W. Woodard, and others, having filed a petition as allowed by an order of the court on 7 April, 1949, and finding that this proceeding has been duly conducted pursuant to the provisions of G.S. 36-9 through G.S. 36-12, and further finding that the resignation of petitioner, W. M. Russ, Trustee, can be allowed without prejudice to the rights of creditors or *cestuis que trustent,* and concluding that two trustees should be appointed to carry out the terms of the trust as set forth in the said will of Moses W. Woodard, deceased, entered an order, in the exercise of his discretion, allowing W. M. Russ to resign as trustee, and appointing as his successors First-Citizens Bank and Trust Company of Raleigh, North Carolina, and Wm. G. Mordecai, and setting forth requirements as to trustees' bond. (The defendants Elizabeth G. Woodard and Bessie W. Campbell, by notice dated 10 May, 1949, and served 11 May, 1949, excepted to the foregoing order and judgment "upon the grounds that the same is contrary to the evidence and the law and is erroneous," and appealed therefrom "to the Judge of the Superior Court as provided by law.")

(5) That thereafter on 20 October, 1949, defendants Elizabeth G. Woodard and Bessie W. Campbell filed a motion in the cause substantially as follows: That the court:

(a) Hold that the judgment entered by the Clerk on 16 March, 1949, was a final judgment, and since no appeal was taken therefrom, passed beyond and out of the jurisdiction of the Clerk, and was subject to confirmation by the Judge as prescribed by statute;

(b) Approve and affirm the judgment of 16 March, 1949, for that the person therein named as successor trustee was found to be a proper person to serve as such;

(c) Strike out the order of 22 March, 1949, as a nullity, for that the Clerk had no authority to enter said order, and that same was attempted to be entered without notice or hearing; and

(d) Strike out and disregard the order of the Clerk, dated 2 May, 1949, purporting to appoint trustees under the will of Moses W. Woodard,

for that same is "erroneous and done without power or authority, and the same is null and void."

(6) That the cause came on for hearing before the Judge presiding over Wake County Superior Court on the appeal of the defendants Elizabeth G. Woodard and Bessie W. Campbell from the order and judgment entered by the Clerk under date of 2 May, 1949, and, after being heard on 19 October, 1949, the Judge by consent took the matter under advisement, and on 9 November, 1949, ordered and adjudged that the said order of the Clerk of Superior Court of Wake County "be, and the same is hereby approved," except as to a portion not here pertinent.

The court denied the motion of the appealing defendants, dated 20 October, 1949, as to each ground, and they except to each ruling.

Defendants Elizabeth G. Woodard and Bessie W. Campbell appeal to Supreme Court and assign error.

Simms & Simms and Bunn & Arendell for appellants.

Smith, Leach & Anderson for appellees.

WINBORNE, J. Where in a special proceeding instituted by a trustee for the purpose of resigning his trust, pursuant to the provisions of G.S. 36-9 through G.S. 36-12, an order, purporting (1) to accept the resignation of the trustee, and (2) to appoint a successor trustee, has been entered by the clerk of Superior Court, before whom the proceeding is pending, and after a hearing, but through misunderstanding with counsel for some of the parties as to time when the clerk would sign an order in this respect, and such order has not been approved by the judge of Superior Court, and the clerk recognizes such misunderstanding, and is of opinion that it would be to the best interest of all parties concerned that the order so entered be vacated, does the clerk have authority and power to vacate the order? This is the basic question on which decision on this appeal turns. And pertinent statutes in this State, and decisions of this Court afford an affirmative answer.

In this connection, it is appropriate to review the provisions of the statute, Article 3 of Chapter 36 of General Statutes of North Carolina, which vests clerks of Superior Courts with power and jurisdiction to accept the resignation of trustees, and to appoint their successors in the manner provided in this article. G.S. 36-9. Upon the trustee filing his petition in the office of the clerk of Superior Court of the county in which he qualified or in which the instrument under which he claims is registered in compliance with provisions of G.S. 36-10, it is prescribed in G.S. 36-11 that the clerk shall docket the cause as a special proceeding, with the fiduciary as plaintiff and the *cestuis que trustent* as defendants, and that the procedure shall be the same as in other special proceedings. The

cestuis que trustent, creditors and any person interested in the trust estate are given the right to answer the petition or traverse the same and to offer evidence why the prayer of the petition should not be granted. It is provided that the clerk shall then proceed to hear and determine the matter, and if it appears to the court that the best interest of the creditors and the *cestuis que trustent* demand that the resignation of the fiduciary be accepted, or if it appears to the court that sufficient reasons exist for allowing the resignation, and that the resignation can be allowed without prejudice to the rights of creditors or the *cestuis que trustent,* the clerk may, in the exercise of his discretion, allow the applicant to resign, "and in such case the clerk shall proceed to appoint the successor of the petitioner in the manner provided in this article." And it is provided in G.S. 36-12 that if there be no appeal from the decision and order of the clerk within the time prescribed by law, the proceedings shall be submitted to the judge of the Superior Court and approved by him before same becomes effective. Moreover, it is provided in G.S. 36-13 that any party in interest may appeal from the decision of the clerk to the judge at Chambers, and that in such case the procedure shall be the same as in other special proceedings as now provided by law. And it is also provided that if the clerk allows the resignation, and an appeal is taken from his decision, such appeal shall have the effect to stay the judgment and order of the clerk until the cause is heard and determined by the judge upon the appeal taken. And it is further provided in G.S. 36-14 that upon appeal taken from the clerk to the judge, the judge shall have the power to review the facts or to take other evidence, and the facts found by the judge shall be final and conclusive upon any appeal to the Supreme Court. And there are other provisions of the statute pertaining to final accounting by trustee before resignation, G.S. 36-15, as to resignation of trustee becoming effective on settlement by him with his successor, G.S. 36-16, as to court appointing a successor, G.S. 36-17, and as to the rights and duties devolving on the successor, G.S. 36-18, which are not pertinent to questions involved on this appeal.

Thus it appears expressly that a proceeding by a trustee for the purpose of resigning his trust is denominated a special proceeding. The clerk is given jurisdiction of such proceedings. And the order of the clerk, in accepting the resignation of the trustee, if no appeal be taken therefrom, is then subject to approval by the judge of Superior Court. "Approve" implies the exercise of discretion and judgment. *Key v. Board of Education,* 170 N.C. 123, 86 S.E. 1002; *Harris v. Board of Education,* 216 N.C. 147, 4 S.E. 2d 328. Moreover, if an appeal be taken, the judge of Superior Court is given expressly the power to review the findings of fact made by the clerk and to find the facts or to take other evidence, and the

facts found by the judge shall be final and conclusive on any appeal to Supreme Court. It follows, therefore, that in either event,—no appeal therefrom or appeal therefrom,—the order of the clerk of Superior Court is not a final judgment. It is an interlocutory order or judgment.

"A judgment," as declared in the chapter on Civil Procedure, G.S. 1-208, "is either interlocutory or the final determination of the rights of the parties in the action." And the provisions of the chapter on Civil Procedure are applicable to special proceedings. G.S. 1-393.

"A judgment is final which decides the case upon its merits, without any reservation for other and further directions of the court, so that it is not necessary to bring the case again before the court." *Bunker v. Bunker,* 140 N.C. 18, 52 S.E. 237; see also *Flemming v. Roberts,* 84 N.C. 532; *Sanders v. May,* 173 N.C. 47, 91 S.E. 526.

"An interlocutory order or judgment is provisional or preliminary, and does not determine the issues in the action but directs some further proceedings preliminary to final decree." McIntosh, N. C. P. & P., Section 614, page 686. *Johnson v. Roberson,* 171 N.C. 194, 88 S.E. 231.

An interlocutory order or judgment differs from a final judgment in that an interlocutory order or judgment is "subject to change by the court during the pendency of the action to meet the exigencies of the case." McIntosh, N. C. P. & P., Sec. 614, page 686. See also *Shinn v. Smith,* 79 N.C. 310; *Miller v. Justice,* 86 N.C. 26; *Welch v. Kingsland,* 89 N.C. 179.

Indeed, in the case of *Hyman v. Edwards,* 217 N.C. 342, 7 S.E. 2d 700, a special proceeding for the partition of land, it is held that all orders therein, other than decree of confirmation, are interlocutory, and that until the decree of confirmation is entered "the whole matter rests in the judgment of the clerk, subject to review by the judge."

And while the decisions of this Court hold that the clerk of Superior Court is a court of very limited jurisdiction, such clerk does have such jurisdiction as is given by statute. *McCauley v. McCauley,* 122 N.C. 288, 30 S.E. 344; *Dixon v. Osborne,* 201 N.C. 489, 160 S.E. 579; *Beaufort County v. Bishop,* 216 N.C. 211, 4 S.E. 2d 525; *Keen v. Parker,* 217 N.C. 378, 8 S.E. 2d 209; *Perry v. Bassenger,* 219 N.C. 838, 15 S.E. 2d 365; *Moore v. Moore,* 224 N.C. 552, 31 S.E. 2d 690; *McDaniel v. Leggett,* 224 N.C. 806, 32 S.E. 2d 602.

And in G.S. 2-16 it is provided that "every clerk has power . . . (9) to open, vacate, modify, set aside or enter as of a former time, decrees or orders of his court, in the same manner as courts of general jurisdiction."

Moreover, it may be noted that there are no terms or sessions of court for proceedings pending before clerk of Superior Court. Each case has its own return day. *Hartsfield v. Bryan,* 177 N.C. 166, 98 S.E. 379.

And time for hearings may be fixed from time to time as the clerk may direct.

Applying these principles to case in hand, the clerk of Superior Court of Wake County has the power in his discretion to vacate the order of 16 March, 1949, entered through misunderstanding as to the time he would take such action. Hence, the order of 22 March, 1949, vacating the order of 16 March, 1949, was within the power and discretion of the clerk.

And in the light of the decision here on the question first stated, the judgment from which appeal is brought to this Court appears to follow orderly procedure after the order of 16 March, 1949, was vacated.

Finally, it is appropriate to note that hearing was thereafter had before the clerk and a full opportunity afforded all parties to present their respective contentions, and it is not made to appear that in the order of 2 May, 1949, appellants are prejudiced. The judge below, in the exercise of judgment and discretion, approved the order. And the judgment of approval is

Affirmed.

MRS. MOZELLE STEPHENSON, ADMINISTRATRIX OF THE ESTATE OF LEO B. STEPHENSON, v. CITY OF RALEIGH.

(Filed 3 May, 1950.)

1. Pleadings § 15—

Upon demurrer the facts alleged in the complaint, as well as relative inferences of fact necessarily deducible therefrom, are taken as true.

2. Municipal Corporations § 12—

A municipality may be held liable for torts of its officers or employees committed in performance of its corporate or private functions, but in the absence of statutory provision to the contrary it may not be held liable for such torts committed in performance of a public or governmental function.

3. Same—

In collecting and removing shrubbery and tree prunings from the homes of citizens pursuant to authority conferred by law for the public benefit a municipality is exercising a governmental function, and it may not be held liable for the negligence of its servants in the performance of such duties in the absence of statutory liability.

4. Municipal Corporations § 5—

A municipal corporation has only those powers conferred by statute and those necessarily implied by law. G.S. 160-1.

5. Same: Municipal Corporations § 12—

A municipal corporation has no authority to waive its immunity from tort liability in performance of its governmental functions.

6. Municipal Corporations § 12—

A provision in a liability policy obtained by a municipality that insurer would not claim exemption from liability to the named insured because of any legal exemption of insured from liability arising by reason of its being a municipal corporation, is for the protection of the municipality only, and does not purport to create liability on the part of the municipality to anyone who may suffer negligent injury as a result of acts of officers or employees in the performance of a governmental duty.

APPEAL by defendant from *Williams, J.*, at October Civil Term, 1949, of WAKE.

Civil action to recover damages for alleged wrongful death of plaintiff's intestate allegedly resulting from actionable negligence of defendant —heard upon demurrer to complaint and on motion to strike certain portion of the complaint and the amended complaint.

Plaintiff alleges in her complaint, in pertinent aspect, summarily stated: That about 9 o'clock p.m. on 21 April, 1949, Leo B. Stephenson, intestate of plaintiff, came to his death on St. Mary's Street in the city of Raleigh when the motor scooter he was riding collided with the rear end of a truck, owned by defendant, and then being used by employees of defendant and under its supervision and direction in collecting and removing prunings from shrubbery and trees from the homes of citizens and residents of the city,—the obligation of collecting and removing of which being assumed and discharged pursuant to authority of law; that the death of plaintiff's intestate was the proximate result of the negligence of defendant; and (paragraph 11) that even though this action may be directed at defendant for acts of alleged negligence occurring in the discharge of its governmental or police powers, defendant is a party to a contract voluntarily entered into by defendant, and in effect at the time plaintiff's intestate came to his death, providing, among other things, that in the event tort action, such as this, is brought against defendant, it will not plead its immunity.

Defendant demurred to the complaint herein for that it does not state facts sufficient to constitute a cause of action, in that it appears upon the face of the complaint:

1. That plaintiff's intestate was killed when the motorcycle he was riding collided with a garbage truck which at the time was being used by defendant in the discharge of its governmental powers, for which under the laws of North Carolina no recovery can be had.

2. That plaintiff is seeking to recover because of the existence of a contract alleged to have been entered into by defendant to the effect that in a tort action, such as this, defendant will not plead its immunity, and it does not appear whether the alleged contract is written or oral; and there is no reference to the name of the other contracting party, if any,

and there is no allegation from which the court may determine the validity or effect of such alleged contract; and said portions of the complaint contains only pleader's interpretation and conclusions, and does not contain a plain and concise statement of facts tending to constitute a cause of action, as required by law.

3. That such alleged contract with respect to waiver of a right to plead immunity, if valid or binding, contains only the alleged provision with respect to pleading immunity, and could not create a liability which, under the law, does not exist, such liability being contrary to public policy; and the complaint is grounded on the alleged negligence of defendant, and not on contract.

4. That plaintiff's intestate was guilty of contributory negligence as a matter of law in specified respect.

Thereafter plaintiff, filing amended complaint, alleges:

"1. That at the time mentioned in the complaint filed herein the defendant City of Raleigh carried public liability insurance with Glen Falls Indemnity Insurance Company of Glen Falls, N. Y.; that the public liability policy was procured by the City on January 18, 1949, and continues in effect until January 18, 1950, and provides coverage in the amount of $50,000 on each accident and $25,000 on each person; that attached to the policy and a part thereof is a schedule listing by number the motor vehicles owned and operated by the City and covered by the policy; that included in the list of vehicles is City Car #21, a 1½-ton Dodge truck used in the Sanitary Department, which truck, as this plaintiff is informed and believes and on such information and belief alleges, is the truck involved in this action.

"2. That the portion of the policy hereinbefore described providing for public liability coverage was bought by the City of Raleigh at a cost of $2,470.33, which sum is the premium paid for the public liability portion of the policy, and the defendant paid to Glen Falls Indemnity Insurance Company from tax moneys collected from the citizens of Raleigh the said sum of $2,470.33, and received a public liability policy covering certain motor vehicles described in the policy which the defendant owns and operates over and along the streets of the City of Raleigh in the collection of trash and garbage and in the discharge of other services the defendant performs for the citizens of the City of Raleigh.

"3. That among the provisions and agreements set out in the said public liability policy are the following:

" 'INSURING AGREEMENTS

" '1. *Coverage A—Bodily Injury Liability.* To pay in behalf of the insured all sums which the insured shall become obligated to pay as damages because of bodily injury, sickness or disease, including death, at

any time resulting therefrom, sustained by any person, caused by accident or arising out of the ownership, maintenance or use of any automobile.'

"'MUNICIPALITY ENDORSEMENT

"'It is hereby agreed the Companies will not, in case of loss or damage arising under this policy during the term thereof, claim exemption from liability to the named insured because of any statute, ordinance or other legal restrictions, whereby the named assured shall, by reason of its being a municipal corporation, be legally exempt from liability for damage, and that in all cases of loss or damage, settlement shall be made as herein provided the same as though the named assured were a private corporation.'

"4. That this plaintiff is advised and believes and upon such advice and belief alleges that the defendant, when it bought the said public liability policy and paid for the same from public funds, intended to purchase and did purchase indemnity against liability, and the company, Glen Falls Indemnity Insurance Company, intended to really insure and not have the defendant, City of Raleigh, pay a premium out of public funds for nothing.

"5. That this plaintiff is advised and believes and upon such advice and belief alleges that even though the defendant, City of Raleigh, may be immune from liability in actions such as this, the defendant, City of Raleigh, could waive its immunity in the event the defendant, City of Raleigh, procured indemnity from liability which might arise by reason of such waiver, as was done in this instance. That the defendant, City of Raleigh, having purchased for a large consideration indemnity from liability, the defendant, City of Raleigh, defending for the Glen Falls Indemnity Insurance Company, cannot defend upon the grounds that the damage or loss complained of occurred in the discharge of a governmental function."

Defendant, thereupon, moved the court to strike out the amended complaint upon the ground that the allegations contained therein are irrelevant, immaterial, redundant and highly prejudicial to defendant, and to strike out paragraph 11 of the original complaint, etc.

When the cause came on for hearing on the demurrer, and the motion to strike, the court overruled the demurrer, and denied the motion to strike. From order in accordance therewith, defendant appeals to Supreme Court, and assigns error.

T. Lacy Williams for plaintiff, appellee.

Wm. C. Lassiter and Douglass & McMillan for defendant, appellant.

WINBORNE, J. Admitting the truth of the allegations of fact set forth in the complaint, as well as relevant inferences of fact necessarily deducible therefrom, as we do in testing the sufficiency of a complaint, challenged by demurrer, *Parks v. Princeton,* 217 N.C. 361, 8 S.E. 2d 217, and numerous other cases, we are of opinion that the complaint fails to state a cause of action against the defendant, City of Raleigh, a municipal corporation.

Decisions on the subject in this State uniformly hold that, in the absence of some statute which subjects it to liability therefor, a city or town, when acting in its corporate character, or in the exercise of powers for its own advantage, may be liable for the negligent acts of its officers and agents; but when acting in the exercise of police power, or judicial, discretionary, or legislative authority, conferred by its charter or by statute, and when discharging a duty imposed solely for the public benefit, it is not liabile for the tortious acts of its officers and agents. *Parks v. Princeton, supra.* See also *Hill v. Charlotte,* 72 N.C. 55; *McIlhenney v. Wilmington,* 127 N.C. 146, 37 S.E. 187; *Harrington v. Greenville,* 159 N.C. 632, 75 S.E. 849; *Snider v. High Point,* 168 N.C. 608, 85 S.E. 15; *James v. Charlotte,* 183 N.C. 630, 112 S.E. 423; *Cathey v. Charlotte,* 197 N.C. 309, 148 S.E. 426; *Broome v. Charlotte,* 208 N.C. 729, 182 S.E. 325; *Lewis v. Hunter,* 212 N.C. 504, 193 S.E. 814; *Hodges v. Charlotte,* 214 N.C. 737, 200 S.E. 889; *Millar v. Wilson,* 222 N.C. 340, 23 S.E. 2d 42.

Applying these principles to the facts alleged in the complaint, if it be conceded that there are allegations of negligence on the part of defendants, through its agents and employees, proximately causing the injury to and death of plaintiff's intestate, it appears that the acts in which the agents and employees of defendant were using the truck at the time in question,—the collecting and removing prunings from shrubbery and trees from homes of citizens and residents of the city,—were in pursuance of authority conferred by law for the public benefit, and come within the principle that unless a right of action is given by statute a municipality may not be held liable to individuals for failure to perform, or negligence in performing duties which are governmental in their nature. See particularly the cases of *Snider v. High Point, supra; James v. Charlotte, supra,* and *Broome v. Charlotte, supra,* each of which is of kindred nature to the one in hand.

And the appellee cites, and we know of, no statute imposing liability upon municipalities, cities and towns for torts committed by their officers, agents or employees, in connection with the performance of governmental functions.

Now, in respect of the allegations of paragraph 11 of the complaint, appellee contends that defendant, City of Raleigh, has waived its immu-

nity to tort liability. If this be conceded, the question arises as to whether the City of Raleigh has the power and authority to do so. In this connection, it must be borne in mind that the Legislature has declared that "every incorporated city or town is a body politic and corporate, and shall have the powers prescribed by statute, and those necessarily implied by law, and no other." G.S. 160-1. And the decisions of this Court are uniform in applying this statute as it is written. In the recent case of *Nash v. Tarboro,* 227 N.C. 283, 42 S.E. 2d 209, it is said: "A municipal corporation is a political subdivision of the State and 'can exercise only such powers as are granted in express words, or those necessary or fairly implied or incident to the powers expressly conferred, or those essential to the accomplishment of the declared objects and purposes of the corporation.' 37 Am. Jur. 722," citing cases. And we know of no statute, and none is called to our attention that empowers any city, town or other municipality to waive immunity to tort liability, directly or indirectly. In the absence of such a statute a city, or town, or other municipality has no power to abrogate the rule. The cases relied upon by appellee are distinguishable. The case *Taylor v. Knox County Board of Education,* 292 Ky. 767, 167 S.W. 2d 700, upon which appellee most strongly relies, is differentiated from the case in hand, in that the decision there is based upon an act of the General Assembly passed in 1940.

Thus we hold that the demurrer to the complaint is well founded, and should have been sustained.

Moreover, plaintiff, appellee, by amending the complaint, has undertaken to spell out the terms of, and the conditions pertaining to the alleged contract,—of waiver of immunity,—an insurance policy. But reference to the quoted portion clearly reveals that the policy is one of indemnity against loss, and protects only the insured, the City of Raleigh, and does not purport to create liability to anyone who may suffer tortious injury as result of acts of officers, agents or employees of the city in the performance of governmental duties. Thus the amendments are deemed to be immaterial and irrelevant to the cause of action attempted to be alleged in the complaint. Hence the motion to strike has merit,—and should have been allowed.

For causes stated, the judgment from which appeal is taken is

Reversed.

NELLO L. TEER v. DR. H. W. JORDAN, H. G. SHELTON, W. GUY HARGETT, A. WILBUR CLARK, DR. R. E. EARP, JAMES A. BARNWELL, GEORGE S. COBLE, M. OTIS POOLE, MARK GOFORTH, JOSEPH GRAHAM, AND L. DALE THRASH.

(Filed 3 May, 1950.)

1. State § 3—

While an individual may not enjoin governmental agencies in the performance of their official duties merely because he disagrees with the policy or discretion of those in charge, a citizen and taxpayer may maintain an action to restrain the unlawful use of public funds to his injury.

2. Same—

The immunity of the State to suit by an individual, except when consent thereto has been expressly given, does not extend to individual officers of the State, even though they assume to act under the authority of the State.

3. Taxation § 11—

While the proceeds of the bond issue authorized by Chap. 1250, Session Laws of 1949, constitute a separate fund to be used exclusively for the construction of secondary roads, and not for primary roads or maintenance, there is no requirement that the work must be let to contract and the State Highway and Public Works Commission has discretionary power to construct or improve secondary roads by the use of its own materials, equipment and engineering supervision, and may use a part of the equalization fund set up by the Act for the purchase of equipment to this end.

4. Highways § 8b—

The courts will not interfere with the State Highway and Public Works Commission in the exercise of its sound discretion and informed judgment in the discharge of the governmental functions entrusted to it unless there has been some substantial departure from legislative limitations or directives.

5. Taxation § 11—

Where, in the use of part of the equalization fund set up by Chap. 1250, Session Laws of 1949, for the purchase of construction equipment, provision is made for the use of a rental system for the purpose of allocating the funds among the counties as required by the Act, the matter is resolved into a question of bookkeeping, and the possibility of injury to a resident of any particular county by the failure of his county to receive its correct proportion of the funds is too remote to justify the intervention of equity.

6. Injunctions § 3—

It is incumbent upon plaintiff to make out a *prima facie* case of irreparable injury entitling him to equitable relief by injunction.

7. Injunctions § 8—

Where the sole objective of the suit is the issuance of a restraining order, and no material issues of fact arise on the pleadings, the action is properly dismissed when plaintiff is not entitled to injunctive relief upon the facts.

TEER *v.* JORDAN.

APPEAL by plaintiff from *Williams, J.*, October Term, 1949, of WAKE. Affirmed.

This was a suit to restrain the defendants as members of the State Highway and Public Works Commission from using any portion of the proceeds of the bond issue authorized by Chap. 1250, Session Laws 1949, for the purchase of machinery for road building, and more specifically from appropriating for this purpose any part of the equalization fund provided in the Act.

The statute referred to authorized the issuance of the bonds of the State in the sum of $200,000,000 for the construction or improvement of the secondary public roads of the State. The issuance of the bonds was approved on a popular referendum. Pertinent provisions of the statute are as follows:

"The proceeds of said bonds are hereby appropriated to the State Highway and Public Works Commission, which appropriation shall be in addition to all other appropriations heretofore made or which may be made at the present Session of the General Assembly. Said proceeds shall be used by the State Highway and Public Works Commission exclusively for those roads that now or may hereafter make up and constitute the State-maintained county road systems, also referred to herein and being commonly known as secondary roads as distinguished from primary roads, and shall be fairly and equitably divided among the highway divisions of the State by the State Highway and Public Works Commission. . . . the proceeds from said bonds shall be allocated, and expended, for the purposes hereinabove set forth to the several counties of the State in the following proportions: (Here follows the specific amount allocated to each county.)

"Notwithstanding the above provision for the allocation of said fund to various counties of the State, the State Highway and Public Works Commission may retain an amount not exceeding ten per cent (10%) of the total of said fund as an equalization fund to be used by the said Commission for secondary road purposes, such purposes to include any and all streets and extensions thereof in incorporated cities and towns which form important connecting links to the State highway system or the county highway system or farm to market roads, and including roads or streets in that border or fringe section which is neither city nor country."

The plaintiff is a resident and taxpayer of Durham County and operates motor vehicles over and along the roads of the County and State, and is subject to the gallonage tax on motor fuels. He alleges in his complaint that the several defendants acting as chairman and members of the State Highway and Public Works Commission under color of authority conferred by the Act referred to are illegally diverting the

proceeds of the bond issue, which was to be devoted exclusively to the construction or improvement of secondary roads, to the purchase of machinery and equipment in the amount of $5,000,000; and that the defendants propose to use for such purpose the equalization fund authorized in the Act to be set up "to be used by said Commission for secondary road purposes," which plaintiff alleges is contrary to the provisions of the Act and beyond the power and authority of the Commission. He prays that defendants be restrained from so doing.

The defendants deny the right of the plaintiff to maintain this suit, or that suit can be maintained against the defendants acting under authority of law as an agency of the State, and on the merits deny that the purchase of road building equipment in the manner and form proposed and being carried out is unlawful, or constitutes a diversion of the funds from the construction or improvement of secondary roads, and the defendants further allege that under the advice of the Attorney-General the purchase of equipment needed for the purposes of construction or improvement of secondary roads has been arranged by temporary allocation from the equalization fund, so that when and if this equipment is used in a particular county the reasonable cost or rental thereof may be charged against the fund allocated to that county under the Act, such charges to be credited to the advances made from the equalization fund and for the reimbursement thereof. It was also admitted that the Commission had signified its approval of the use at this time "of $5,000,000 of the amount for the purpose of purchasing road building equipment which shall be used on a rental basis for the purpose of stabilization and for other such 'force account work' as the Commission thinks necessary."

On the hearing in the Superior Court before Judge Williams, pursuant to an order to show cause, plaintiff's motion for the issuance of a restraining order as prayed for in his complaint was denied, the court being of opinion, and so finding, that the State Highway and Public Works Commission was authorized by the Act to use the proceeds from the sale of bonds for building or improving the roads referred to as secondary roads, and that under the language of the Act in carrying out its purposes the Commission had authority and power to acquire by purchase road machinery and equipment deemed reasonably necessary to this end. The court further found that the acts and things done and contemplated by the defendants as chairman and members of the State Highway Commission as set out in the answer and affidavits filed were not in violation of Chap. 1250, Session Laws 1949, or other applicable laws, and that the Commission was within the authority granted by law in setting up an equalization fund and using said fund for the purchase of road building machinery and equipment in the manner set forth in the answer.

The court further found that the sole object of the suit was to secure a restraining order, and that no issues of fact were raised by the pleadings, and thereupon dismissed the action.

Plaintiff excepted and appealed.

Ross & Ross, Brooks, McLendon, Brim & Holderness, W. P. Farthing, Jr., and J. C. B. Ehringhaus, Jr., for plaintiff, appellant.

Attorney-General McMullan, John R. Jordan, Jr., Member of Staff; W. T. Joyner and W. T. Joyner, Jr., R. Brookes Peters, General Counsel State Highway and Public Works Commission, and Kenneth F. Wooten, Jr., and E. O. Brogden, Members of Staff, for defendants, appellees.

DEVIN, J. The court below in ruling in favor of the defendants on the ultimate issue of law raised by the pleadings inferentially disposed of two questions which apparently were not pressed on the hearing in the Superior Court, namely, the capacity of the plaintiff to maintain this suit for the purposes declared, and to maintain it against these defendants who compose an agency of the State constituted for governmental purposes. However, we are not disposed to deny the right of an individual who is one of those for whose benefit the law was enacted to be heard on allegations of an illegal diversion of public funds which may in some degree injuriously affect his rights as a citizen, taxpayer, and user of secondary public roads. It is conceivable that, under the allegations contained in plaintiff's complaint, the expenditure from the equalization or stabilization fund for the purchase of machinery for use in constructing or improving secondary roads in other counties might result in the diminution of the amount allocated under the Act to the county of his residence. While the activities of governmental agencies engaged in public service imposed by law ought not to be stayed or hindered merely at the suit of an individual who does not agree with the policy or discretion of those charged with responsibility, the right of a citizen and taxpayer to maintain an action in the courts to restrain the unlawful use of public funds to his injury cannot be denied. *S. v. Scott,* 182 N.C. 865, 109 S.E. 789; *Hinton v. Lacy,* 193 N.C. 496, 137 S.E. 669; *Freeman v. Commissioners,* 217 N.C. 209 (212), 73 S.E. 2d 354; *Shaw v. Liggett & Myers Tobacco Co.,* 226 N.C. 477, 38 S.E. 2d 313. Nor are the doors of the courts closed to suits against the individual members of a Commission which has been by law constituted an agency or arm of the State. Immunity of the State to suit by an individual, except when consent thereto has been expressly given, does not extend to the individuals who in disregard of law invade or threaten to invade the personal or property rights of a citizen even though they assume to act under the authority of the State. *Schloss v. State Highway and Public Works Commission,*

230 N.C. 489, 53 S.E. 2d 517; *Pue v. Hood,* 222 N.C. 310, 22 S.E. 2d 896; *Insurance Co. v. Unemployment Comp. Com.,* 217 N.C. 495, 8 S.E. 2d 619; *Vinson v. O'Berry,* 209 N.C. 287, 183 S.E. 423; *Carpenter v. R. R.,* 184 N.C. 400, 114 S.E. 693; *White Eagle Oil & Refining Co. v. Gunderson,* 205 N.W. 614 (N. Dak.), 43 A.L.R. 397. Counsel for plaintiff in their brief have cited a number of decisions from other jurisdictions in support of this principle.

This brings us to the consideration of the principal question upon which a ruling is sought. Did the action of the defendants in carrying out the resolution adopted by the State Highway and Public Works Commission to use a portion of the funds derived from the issuance of the County Road Bonds for the purpose of purchasing road building machinery and equipment to be used on a rental basis as outlined, constitute such an illegal diversion of specific public funds from the statutory purpose as to warrant the interposition of a court of equity to restrain?

It was not controverted that under the general statutes creating and regulating the activities of the State Highway and Public Works Commission for the ordinary work of paving, improving and maintaining the public roads of the State, the Commission is authorized to purchase machinery, collect materials, employ labor and supervise the work by its own force. It was likewise conceded that under the Act of 1949 the proceeds of the $200,000,000 bond issue constituted a separate fund devoted exclusively to the construction of secondary roads as distinguished from primary roads, and that the funds so devised could not lawfully be used for maintenance.

It was urged by the plaintiff that the purpose of the bond issue was to provide a "State Secondary Road Fund" to defray the cost of construction of secondary roads, and not a fund to be used for the purchase of machinery and equipment, of which presumably the Commission now has an adequate supply; that the use of the words "construction or improvement" in the statute, when considered in connection with the dominant purpose of the Act, manifests the legislative intent that the funds be used exclusively for construction; and that the provision permitting the setting up of an equalization fund out of the proceeds of the bond issue should not be held to authorize the diversion of this fund or its depletion for other purposes than the construction of secondary roads, and that the purpose of the establishment of an equalization fund was to relieve hardship cases as between the several counties and not for an over-all purchase of machinery.

While the law will not justify the use of the proceeds of a State or municipal bond issue for purposes other than those specified in the Act authorizing the issue, as was held in *Waldrop v. Hodges,* 230 N.C. 370, 53 S.E. 2d 263, it does not follow that immaterial or temporary changes

consistent with the general purpose of the legislative act should be interpreted as unlawful diversions of public funds. *Atkins v. McAden,* 229 N.C. 752, 51 S.E. 2d 484; *Worley v. Johnston County,* 231 N.C. 592, 58 S.E. 2d 99.

There is no requirement that the work contemplated by the Act of 1949 must be let to contract. If deemed wise, in the interest of expedition or economy, the Commission lawfully may proceed to the construction or improvement of secondary roads by the use of its own materials, equipment and engineering supervision. The extensive work the General Assembly has authorized and the people have approved has been placed under the control of the State Highway and Public Works Commission for execution. Manifestly many matters of detail must be left to the sound discretion and informed judgment of this Commission, and, unless some substantial departure from the legislative purpose has been shown, a court of equity will not intervene. As said by *Justice Holmes* in *Missouri K. & T. Ry. Co. v. May,* 194 U.S. 267, "Some play must be allowed for the joints of the machine." The good faith of the defendants was conceded.

The court below found that the plan proposed by the defendants for handling the purchase and use of road building machinery in the several counties, as set forth in their answer, was not in violation of Chapter 1250, Session Laws 1949. This apparently resolved the question into a matter of bookkeeping, subject to the supervisory authority conferred by law and applicable to these funds. The possibility of injury to the plaintiff's personal or property rights, which he alleged might be caused by the action of the defendants, seems to have been eliminated or rendered too remote to justify the intervention of equity. We see no compelling reason for the issuance of the restraining order prayed for. It was incumbent upon the plaintiff to make out a *prima facie* case of irreparable injury entitling him to equitable relief by injunction. 30 C.J.S. 362; 28 A.J. 242, 352. This he has failed to do. The court below ruled correctly in declining to issue the restraining order.

Since it appears that the sole remedy sought was the issuance of a restraining order, and that no material issues of fact arise on the pleadings, the judgment of dismissal of plaintiff's case will be upheld. *Cox v. Kinston,* 217 N.C. 391 (398), 8 S.E. 2d 252.

Judgment affirmed.

EVELYN J. WILLIAMSON, EXECUTRIX OF THE ESTATE OF JOHN P. WILLIAMSON, SR., DECEASED, AND EVELYN J. WILLIAMSON, WIDOW, IN HER OWN RIGHT, v. JOHN P. WILLIAMSON, JR., AND WILLIAM J. WILLIAMSON, MINORS, APPEARING HEREIN BY THEIR DULY APPOINTED GUARDIAN AD LITEM, EDWARD F. GRIFFIN.

(Filed 3 May, 1950.)

1. Wills § 41—

Testator had two children, one born before and one after the execution of the will. No testamentary provision was made for either child, but testator, after the birth of the second child, procured a policy of life and accident insurance on his life, making both the children beneficiaries therein. *Held:* The procurement of the policy was not such a provision for the afterborn child as to prevent such child from participating in his father's property as heir and distributee. G.S. 31-45.

2. Same—

While the courts will not inquire into the adequacy of provision made for a child born after the execution of the will within the purport of G.S. 31-45, such provision must be of reasonable substance and value *in praesenti.*

3. Wills § 31—

As a general rule, a will should not be construed phrase by phrase so that a subsequent restrictive phrase be rejected as repugnant to a prior general devise, but the entire instrument should be construed from its four corners to ascertain the intent of testator.

4. Wills § 33g—

The sole dispositive sentence was to testator's wife in fee simple all his property, "she to be entitled to same so long as she lives." *Held:* The will devised only a life estate to the wife, and as to the remainder testator died intestate.

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

PLAINTIFFS' appeal from *Harris, J.,* in Chambers March 18, 1950. From FRANKLIN Superior Court.

This action was instituted by the plaintiff as executrix and in her own right against the minor defendants, under the provisions of Article 26, Chapter 1 of the General Statutes, to procure a judicial construction of the last will and testament of John P. Williamson, Sr., deceased. The complaint and answer thereto are in agreement as to the facts which may be stated as follows:

John P. Williamson, Sr., died August 1, 1949, leaving surviving him his widow, Evelyn J. Williamson, and two minor children, John P. Williamson, Jr., and William J. Williamson, who are represented in this proceeding by E. F. Griffin, guardian *ad litem.*

He left a will in which the single disposing clause consists of one sentence as follows: "ITEM Two: After payment of my burial expenses and my just debts, if there be any owing at the time of my death, I give to my beloved wife, Evelyn J. Williamson, in fee simple, all my property, both real and personal, of every description and kind and wheresoever situate, she to be entitled to same so long as she lives."

Evelyn J. Williamson qualified as executrix under the will August 10, 1949, and is now acting in that capacity.

John P. Williamson, Jr., was born in December, 1943, prior to the execution of the will, and William J. Williamson was born in May, 1947, after its execution and during the life of the testator.

Before his death John P. Williamson, Sr., on or about December 8, 1949, procured a life insurance policy on his own life containing a double indemnity provision in case of death by accident and naming John P. Williamson, Jr., and William J. Williamson as beneficiaries, each in the sum of $2,000.

Williamson, Sr., died as the result of an automobile accident, increasing the benefit to each of the beneficiaries to $4,000 which is now left in trust for them.

The petition of the plaintiff avers that by reason of these facts the policy of insurance taken out by John P. Williamson, Sr., for the benefit of William J. Williamson, whose name does not appear in the will, is a provision for the said child within the meaning of G.S. 31-45, operating to estop him from participating in his father's estate by reason of intestacy as to him. In her petition, Mrs. Evelyn J. Williamson also alleges that, properly interpreted, the effect of the language employed in the second item of the will devises to her a fee simple estate in all the property of the testator without further limitation or qualification.

The answering guardian *ad litem* denies that procuring of insurance on his own life by the testator and making William J. Williamson his beneficiary, although the policy may have matured in his favor, is a compliance with the provisions of the statute, and avers that he is not thereby estopped from participating in the estate as an heir at law on account of intestacy as to him. G.S. 31-45.

The parties to the action joined in the request for construction of the will.

After hearing, under a stipulation between parties that judgment might be rendered out of the County and at chambers, Judge Harris rendered judgment at chambers in the City of Raleigh on the 18th day of March, 1950.

After finding the facts as above, he concluded in construing the will:

(1) That Evelyn J. Williamson did not take a fee simple to testator's property under the devise in the will, but only a life estate therein, the

remainder passing as undevised property under the statute of descent and distribution, with, however, further modifications from the fact that Williamson, Sr., died wholly intestate as to William J. Williamson and as appears *infra*.

(2) That John P. Williamson, Sr., did not make any provision for William J. Williamson, who was born after the execution of his father's will, as contemplated in G.S. 31-45, by the procurement of the life insurance policy above mentioned so as to bar the said minor from sharing in his father's property by inheritance and distribution, because of the intestacy as to him.

The interests of the parties respectively were worked out in detail in accordance with the above construction placed on the will, and embodied in the judgment.

From the judgment rendered the plaintiff appealed, assigning as errors, *inter alia,* the following:

"Exception No. 1: That the Court erred in its conclusion of law that procurement of insurance by John P. Williamson, Sr., for the benefit of his son, William J. Williamson, born after the execution of the will in question, was not a provision" as contemplated and required by Sec. 31-45, General Statutes of North Carolina, and that testator died intestate in so far as said child is concerned.

"Exception No. 2: That the Court erred in its conclusion of law that under the will in question, the plaintiff, Evelyn J. Williamson, did not take a fee simple estate in all of the property of her deceased husband, John P. Williamson, Sr."

Exception No. 3 is to the determination of the several interests of the parties and is considered in its relation to the above exceptions.

Malone & Malone for plaintiff, appellant.

Edward F. Griffin—Guardian ad Litem for John P. Williamson, Jr., and William J. Williamson, Minors, defendant appellees.

SEAWELL, J. This appeal poses three questions: Was the procurement of a life and accident policy on his own life, naming as his beneficiary William J. Williamson, the son born after the execution of the will, such a provision for the latter as is contemplated in G.S. 31-45, barring him from participation in his father's property as heir and distributee?

What estate does Evelyn J. Williamson take under the will; in fee or for life?

What interests in the subject property do the parties respectively have?

1. The first question is answered adversely to appellant's contention in *Sorrell v. Sorrell* (1927), 193 N.C. 439, 137 S.E. 306, on a factual situation on "all fours" with the instant case. The whole opinion is

pointedly applicable and might be quoted; but preferably it should be read with its connection and sequences.

The appellant contends, however, that economic changes have taken place since the rendition of that opinion, especially with regard to the importance of life insurance, and its place in these changing economies in affording family security and stabilizing social conditions. We know that with the passage of time many subjects have graduated into categories theretofore denied them, in the process of "keeping the law alive," *pari passu* with progress. Animation of the "living law" must be found in its reasonable conformity to the *mores* of the people who are its ultimate sponsors,—in the progress which breeds its necessity and accepts its control. Those required to interpret it judicially, *when the initiative is theirs and the duty clear,* should be glad to recognize and promote its currency. But there is no particular emphasis in the trends mentioned that would relieve *Sorrell v. Sorrell* from its obligation to *stare decisis* as establishing a rule of law relating to property rights; and we are persuaded that there are reasons behind the decision that are not affected by the factors pointed out: Such as the inherent unsuitability of life insurance as a substitute for the provision omitted from the will and its indirectness as *ex parentis provisione.*

Neither the trial court nor this Court will be an arbiter of the adequacy of the posited provision; *King v. Davis,* 91 N.C. 142; but in order to be *ex parentis provisione* it must be something of reasonable substance and value *in praesenti* rather than a possibility which must be continually fed to keep it alive, and may never get beyond the control of the insured. The want of directness in such a provision and of the characteristics mentioned would in any event prevent its ready acceptance in that role. It is not necessary to say that these considerations were in the minds of the Court at the time the decision was rendered; but we consider the opinion sound in principle as presently applied.

2. The appellant argues that since the testator first unequivocally devised Evelyn J. Williamson an estate in fee simple to his property and thus "divested himself of the fee, there is nothing further to grant or devise and no further control over the subject of his gift or devise," quoting from *Fellowes v. Durfey,* 163 N.C. 305, 79 S.E. 621; and *Daniel v. Bass,* 193 N.C. 294, 136 S.E. 733; citing also *Barco v. Owens,* 212 N.C. 30, 192 S.E. 862, and numerous cases therein cited.

On the other hand the appellees are equally sure that since the last testamentary expression was to that effect the plaintiff took only a life estate, citing *Rees v. Williams,* 164 N.C. 128, 81 S.E. 286, and *Taylor v. Brown,* 165 N.C. 157, 81 S.E. 137.

We do not think either proposition is of universal application or particularly pertinent to the matter in hand. Modern legal thought rejects

the concept that power goes out of the maker of the instrument step by step as the words are spoken, and holds to the theory that the story is not told until the amen of the signature is uttered.

Space forbids us to go into an extended analysis of the cases cited by the appellant so as to show their factual differences from the case at bar. An example, however, may be found in the more recent case of *Barco v. Owens, supra,* which, carefully noted, eliminates itself from the list of authorities supporting appellant's contention.

But even if there may be found in some former cases expressions more general than required in the particular case, apparently reverting to less liberal rules of construction, this does not alter the rule that in finding the intent we must look to the whole instrument; from "its four corners." *Jarrett v. Green,* 230 N.C. 104; *Hornaday v. Hornaday,* 229 N.C. 164, 47 S.E. 2d 857; *Ward v. Black,* 229 N.C. 221, 49 S.E. 2d 413; *Wheeler v. Wilder,* 229 N.C. 379, 49 S.E. 2d 737.

It is scarcely possible to assume that the will was written by an expert scrivener or a lawyer. The dispository sentence contains in its brief compass two repugnant designations of the estate conveyed: the first "in fee simple," the second for life. The first in terms as technical as can well be conceived, such as we would expect from a professional. The second as vernacular as any English-speaking layman might use. We are inclined to vote for the simpler expression as embracing the intent, with the more technical and perhaps less understood term as expressive of the beneficiary's uninterrupted enjoyment of the premises "as long as she lives." We, therefore, hold that the will conveyed to Evelyn J. Williamson a life estate only in her husband's property.

3. We only need add that the conclusions thus reached are determinative of the several interests of the parties, quantitatively, and the legal implications attached. The schedule adopted in the lower court correctly determines such interests, and we do not understand it to be challenged, assuming that the basic conclusions of law as above outlined prevail.

We have given due care to the rules of construction which counsel for the appellant have called to our attention,—the presumption against partial intestacy, the rule favoring early vesting of the estate, and others; but persuasive as they may be, we have been unable to follow them to conclusion in our present attempt to resolve into testamentary significance these apparently repugnant parts of the sentence without destroying the will.

It follows that the judgment must be affirmed. It is so ordered.

Affirmed.

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

IN THE MATTER OF THE ESTATE OF K. B. JOHNSON, DECEASED.

(Filed 3 May, 1950.)

1. Partnership § 10—

The death of a partner ordinarily dissolves the partnership as of that date. G.S. 59-61 (4).

2. Partnership § 11—

Upon the death of a partner, his interest in the partnership property vests in the surviving partner for administration in winding up the partnership, and the surviving partner stands as a trustee charged with the duty of faithful management and accounting to those entitled to the deceased partner's interest after the settlement of the debts of the partnership.

3. Executors and Administrators § 5—

Upon the death of a partner the administration of the partnership and the administration of the deceased partner's estate are separate and distinct, and only the deceased partner's interest in the surplus after the winding up of the partnership belongs to his estate or his distributees, as the case may be.

4. Executors and Administrators § 3—

The Clerk of the Superior Court has jurisdiction to entertain verified petition for the removal of an administrator. G.S. 28-32.

5. Same—

Where, in proceedings for removal of an administrator, the administrator resigns, a vacancy occurs and the Clerk has authority to appoint a successor.

6. Partnership § 12—

The bond required by G.S. 59-74 of surviving partners is primarily for the protection of those interested in the deceased partner's interest in the surplus after the partnership has been wound up, and such bond had no retroactive effect and does not become liable for any maladministration prior to its filing.

7. Same: Clerks of Court § 3: Courts § 4c—

Upon the failure or refusal of surviving partners to file the bond required by G.S. 59-74 or the inventory required by G.S. 59-76, the Clerk of the Superior Court may not properly issue order requiring the filing of bond and inventory, but does have appropriate remedies within his jurisdiction, and upon appeal from such orders the Superior Court acquires jurisdiction of the entire proceeding, G.S. 1-276, and the appeal is erroneously dismissed in the Superior Court on the ground of want of jurisdiction.

8. Same—

While the Clerk of the Superior Court has no jurisdiction to appoint a receiver for a partnership under G.S. 59-77 when the surviving partners have failed or refused to file the inventory required by G.S. 59-76, the

Superior Court on appeal from an order of the Clerk in the proceeding, does acquire jurisdiction to appoint such receiver.

9. Courts § 4c: Executors and Administrators § 3—

The jurisdiction of the Superior Court on appeal from the order of the Clerk in removing an administrator and appointing a successor is solely derivative.

ADMINISTRATOR'S appeal from *Hatch, Special Judge,* January 1950 Civil Term, WAKE Superior Court.

S. J. Bennett for Administrator, appellant.

Robert A. Cotten and F. T. Dupree, Jr., for appellees.

SEAWELL, J. The controversy with which this review is concerned is over the administration of the estate of K. B. Johnson, now pending before the Clerk of the Superior Court of Wake County, and the matter directly in controversy is the alleged interest of the said K. B. Johnson in the partnership property and assets of K. B. Johnson & Sons, an alleged partnership which the petition hereinafter referred to alleges to remain unadministered by the surviving partners of the said firm and to constitute assets unadministered by the preceding executor and administrator of the estate of the said K. B. Johnson, and still subsisting.

Since the crux of the controversy is directly over the powers and duties of the surviving partners as affecting the present obligation, and liabilities to the estate, the following observations are pertinent by way of clarification.

The death of a partner ordinarily dissolves the partnership as of that date. Article 2, (Uniform Partnership Law), sec. 59-61 (4) of the General Statutes. Expressed in the singular, to avoid awkward grammatical expression, the legal estate of the deceased partner in the partnership property vests in the surviving partner for administration in winding up the partnership and paying the partnership debts. Sugarman on Partnership, Sec. 236; *Sherrod v. Mayo,* 156 N.C. 144, 72 S.E. 216.

The surplus of the deceased partner's property interest in the partnership, after the debts are paid and the partnership is wound up, belongs to his individual estate and goes to his personal representative or distributees, as the case may be; and it is sometimes said that their interest therein is equitable; *In re Lichtblau,* 146 Misc. 278, 261 N.Y.S. 863 (1933).

The surviving partner stands to them in the relation of trustee charged with the duty of faithful management and accounting to those entitled to the surplus of the deceased partner's interest after settling the debts of the partnership and winding up its affairs. *Coppersmith v. Upton,*

228 N.C. 545, 46 S.E. 2d 565; *Walker v. Miller,* 139 N.C. 448, 52 S.E. 125.

At any rate the right of the surviving partner to administer the deceased partner's interest in the partnership is his by virtue of the survivorship and is separate and distinct from the ordinary administration of decedents' estates in the charge and jurisdiction of the Clerk of the Superior Court. Story on Partnership, sec. 344; *Weisel v. Cobb,* 114 N.C. 22, 18 S.E. 943; *Hodgin v. Peoples National Bank,* 124 N.C. 540, 32 S.E. 887. The latter administration has nothing to do with the former except as some statute may empower the Clerk to take action, and then only to the extent, and upon the conditions manifest in such statute. The legal consequences of these principles as they apply to the case at bar will be dealt with in the conclusion. But first let us get clearly before us the factual history of the proceeding under review in brief summary so that it may be followed step by step.

C. P. Dickson, a judgment creditor of the estate of K. B. Johnson, filed on August 31, 1949, a verified petition for the removal of T. Lacy Williams as administrator *c. t. a., d. b. n.,* of the estate of K. B. Johnson, deceased, and for the appointment of a successor, such petition alleging the existence of unadministered assets of the estate, consisting of the unadministered interest of K. B. Johnson & Sons. The Clerk on the same day issued an order to T. Lacy Williams to show cause why he should not be removed as administrator *c. t. a., d. b. n.,* for alleged "default in the due administration of the said estate." The order to show cause was duly served and returned on August 31, 1949. On September 13, 1949, C. P. Dickson filed an amended petition which contains no complaint of default in the administration by T. Lacy Williams.

On September 19, 1949, the Clerk issued an order "that the said T. Lacy Williams be, and he hereby is discharged by this court as administrator *c. t. a., d. b. n.,* of the estate of K. B. Johnson, deceased," and recited as the reason therefor "that the said T. Lacy Williams waived his right to further administer upon the estate of K. B. Johnson, deceased, and agreed that upon his final account heretofore filed he be discharged as administrator *c. t. a., d. b. n.,* on the estate of K. B. Johnson, deceased." On the same day the Clerk issued an order reopening the estate and appointing W. L. Totten, Sr., as administrator, *c. t. a., d. b. n.* And also on the same day, without Totten having been made a party and without his participation, the Clerk issued an order to the purported surviving partners of K. B. Johnson & Sons requiring them to file a bond conditioned on the faithful performance of their duties in the settlement of the partnership affairs pursuant to G.S. 59-74, and also to file with the Clerk a "full and complete inventory to date of all the assets of the partnership, including all real estate owned by said partnership, together

with a schedule of the debts and liabilities existing at the time of the death of K. B. Johnson, the deceased partner; and to furnish the personal representative a copy of said inventory and schedule of debts as required under the statute, G.S. 59-76."

Thereafter, on October 25, 1949, upon motion of H. W. Johnson for himself and the surviving partners, the time for filing the bond and inventory was extended by the Clerk to November 25, 1949. On December 1, 1949, no bond or inventory having been filed, the Clerk issued an order requiring the filing of the bond and inventory on or before December 7, 1949, "under penalty as prescribed by law."

The proceeding reached the court below on appeal by the administrator from the denial by the Clerk of a motion to dismiss the amended petition filed by C. P. Dickson, and to vacate the orders of September 19, 1949, and the supplemental order of December 1, 1949. The court below vacated and set aside the orders of September 19, 1949, and the supplemental order of December 1, 1949, and dismissed the proceeding on the ground that the Clerk of the Court was without jurisdiction.

That the Clerk of the Court had jurisdiction to entertain a complaint on affidavit, in this case the verified petition of Dickson, and to issue an order to the administrator *c. t. a., d. b. n.*, to show cause why he should not be removed, is clear. G.S. 28-32. That the proceeding was obviated by the resignation and discharge of the administrator Williams and that upon such resignation and discharge a vacancy occurred is also clear, and the Clerk very properly appointed a successor.

The order of September 19, 1949, requiring the surviving partners to give bond and file inventory and accounts, and the supplemental order of December 1, 1949, to the same effect commanding that the order theretofore made should be obeyed "under penalty as prescribed by law" were made without regard to the want of any sanction for their enforcement and in disregard of the remedial procedures provided in the statutes upon which the purported authority is based, G.S. 59-74, 59-75, 59-76, 59-77. Such orders also appear to have been executed by the Clerk *ex mero motu*.

G.S. 59-74 provides:

> "Upon the death of any member of a partnership, the surviving partner shall, within thirty days, execute before the clerk of the superior court of the county where the partnership business was conducted, a bond payable to the state of North Carolina, with sufficient surety conditioned upon the faithful performance of his duties in the settlement of the partnership affairs. The amount of such bond shall be fixed by the clerk of the court; and the settlement of the estate and the liability of the bond shall be the same as under the law governing administrators and their bonds."

The bond required by G.S. 59-74 is primarily for the protection of those interested in the surplus of the deceased partner's estate remaining after the affairs of the partnership have been wound up. *Coppersmith v. Upton,* 228 N.C. 545, 46 S.E. 2d 565. Such a bond filed now would have no retroactive effect or become liable for any maladministration theretofore occurring.

G.S. 59-75 provides:

> "Upon the failure of the surviving partner to execute the bond provided for in Sec. 59-74, 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."

But the remedial procedure provided herein has not been invoked.

G.S. 59-76 provides:

> "When a member of any partnership dies the surviving partner, within sixty days after the death of the deceased partner, together with the personal representative of the deceased partner, shall make out a full and complete inventory of the assets of the partnership including real estate, if there be any, together with a schedule of the debts and liabilities thereof, a copy of which inventory and schedule shall be retained by the surviving partner, and a copy thereof shall be furnished to the personal representative of the deceased partner."

G.S. 59-77 provides:

> "If the surviving partner neglect or refuse to have such inventory made, the personal representative of the deceased partner may have the same made in accordance with the provisions of G.S. 59-76. Should any surviving partner fail to take such an inventory or refuse to allow the personal representative of the deceased partner's estate to do so, such personal representative of the deceased partner's estate may forthwith apply to a court of competent jurisdiction for the appointment of a receiver for such partnership, who shall thereupon proceed to wind up the same and dispose of the assets thereof in accordance with law."

The somewhat uncertain reference to a "court of competent jurisdiction" relieves the Clerk from further duties in this particular phase of the proceeding, since the appointment of a receiver involves certain equities which are beyond the statutory jurisdiction of the Clerk.

We are not attempting to chart proceedings in the court below, but it seems to us that the order of September 19, 1949, appointing Totten administrator *c. t. a., d. b. n.,* was within the jurisdiction of the Clerk; and while the two orders following, one of September 19, 1949, and the other of December 1, 1949, requiring the filing of bond and inventory were improperly made, there are some remaining remedies for which the newly appointed administrator might apply, all such remedies not being necessarily limited to the sections of the statute discussed above; and the judgment of the court dismissing the proceedings cannot be sustained.

Attention is here called to the provisions of G.S. 1-276, which provides:

> "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."

We think that the matter is now within the greater jurisdiction of the Superior Court as provided in this statute and such remedies as may be appropriate might be pursued in that court, if conditions warrant. However, since the Superior Court has only derivative jurisdiction as to the removal or appointment of an administrator *d. b. n.,* that matter could not be interfered with in that court. *In re Estate of Fred Styers,* 202 N.C. 715, 164 S.E. 123. As to other appropriate matters within the jurisdiction of the Superior Court, they may be so administered, or in the discretion of that court given by the statute, the whole controversy might be remanded by the Superior Court to the Clerk for such action as he is empowered to make.

As for this Court, the judgment dismissing the proceeding is reversed and the proceeding remanded to the court below for judgment in accordance with this opinion.

Reversed and remanded.

OWEN H. TEAGUE AND HIS WIFE, HELEN TEAGUE, v. SILER CITY OIL COMPANY AND AMERICAN OIL COMPANY.

(Filed 3 May, 1950.)

1. Pleadings § 19b—

Where there is a misjoinder of parties and causes of action, defendants' demurrer on this ground must be sustained, and the court has no authority to direct severance for the purpose of trial, G.S. 1-132.

2. Same—

Where two plaintiffs institute one action against defendants for the recovery of their respective property alleged to have been destroyed by the negligence of defendants, and there is no allegation that each defendant had an interest in the property of the other, there is a misjoinder of parties and causes of action, and the cause is demurrable.

3. Pleadings § 20—

The filing of answer to the original complaint does not waive defendants' right to demur to the amended complaint on the ground of misjoinder of parties and causes of action. G.S. 1-134.

APPEAL by defendants from *Morris, J.*, at January Term, 1950, of CHATHAM.

This is a civil action to recover for loss of property by fire.

The plaintiffs, husband and wife, alleged in their complaint that on 18 April, 1948, by reason of the negligence of the defendants and their agents, in the manner set forth therein, certain properties were destroyed by fire. Each of the defendants filed an answer. Thereafter both defendants "demurred *ore tenus* to the complaint upon the ground that the complaint did not state a cause of action in that the plaintiffs did not allege that they were the owners of the property alleged to have been destroyed by the negligence of the defendants. Thereupon, without waiting for a ruling on the demurrer, the plaintiffs requested the court to grant them permission to file an amended complaint, which request was granted.

It is alleged in the amended complaint that prior to 18 April, 1948, the plaintiff, Owen H. Teague, had purchased certain lands described by metes and bounds, and that the plaintiffs constructed thereon a "combined home and filling station and a road-side grill for the sale and distribution of drinks, sandwiches and other foods sold and served to the general public." It is also alleged "the plaintiffs were living upon the premises, . . . and had installed necessary household and kitchen furniture and had equipped the other parts of said structure with necessary apparatus for carrying on the business heretofore described." It is further alleged that as a result of the negligence of the defendants: (1) The

buildings owned by the plaintiffs were completely destroyed by said fire and explosion and were worth $7,500.00; (2) that the enumerated equipment in the grill, the contents of the house, consisting of certain listed articles and many other items too numerous to mention, together with the plaintiffs' personal effects, including clothing, jewelry, etc., were all destroyed; and, that the value of the said personal property destroyed was worth at least $8,000.00. The amended complaint also contains an allegation to the effect that the plaintiffs have lost $400.00 per month profits from the operation of their business, etc.

The defendants demurred to the amended complaint for that there is a misjoinder of parties and causes of action, in that the plaintiffs allege four distinct causes of action, as follows:

(1) An alleged cause of action for damages for injury to real property owned individually by the plaintiff, Owen H. Teague.

(2) An alleged cause of action for damages for injury to personal property owned individaully by the plaintiff, Owen H. Teague.

(3) An alleged cause of action for damages for injury to personal property owned individually by the plaintiff Helen Teague.

(4) An alleged cause of action for damages for injury to personal property owned jointly by both plaintiffs, Owen H. Teague and his wife Helen Teague.

Whereupon, the court overruled the demurrers and *ex mero motu* ordered each of the plaintiffs to file with the court a bill of particulars "setting forth the property alleged to be owned individually by each of said plaintiffs which is alleged to have been destroyed by negligence of the defendants, said bill of particulars to be considered as a basis for severance of the causes of each plaintiff for trial."

The defendants appeal from the ruling of the court below, and assign error.

Thomas C. Carter, Long & Ross, and Bell & Horton for plaintiffs.

Smith, Wharton, Sapp & Moore for defendant American Oil Co.

J. L. Moody, L. P. Dixon, and Barber & Thompson, for Siler City Oil Co.

DENNY, J. A demurrer should be sustained where there is a misjoinder of parties and causes of action, and the court is not authorized in such cases, to direct a severance of the respective causes of action for trial under the provisions of G.S. 1-132. *Moore County v. Burns,* 224 N.C. 700, 32 S.E. 2d 225; *Southern Mills, Inc., v. Yarn Co.,* 223 N.C. 479, 27 S.E. 2d 289; *Wingler v. Miller,* 221 N.C. 137, 19 S.E. 2d 247; *Bank v. Angelo,* 193 N.C. 576, 137 S.E. 705; *Rose v. Warehouse Co.,* 182 N.C. 107, 108 S.E. 389; *Taylor v. Ins. Co.,* 182 N.C. 120, 108 S.E. 502;

Roberts v. Mfg. Co., 181 N.C. 204, 106 S.E. 664; *Thigpen v. Cotton Mills*, 151 N.C. 97, 65 S.E. 750; McIntosh, N. C. Practice and Procedure, p. 467.

There is no allegation to the effect that while the title to the real estate involved in the action is in Owen H. Teague, the coplaintiff, Helen Teague, has an equity in said real estate and the improvements erected thereon, as was the case in *Walker v. Oil Co.*, 222 N.C. 607, 24 S.E. 2d 254. The same is true with respect to the personalty which is alleged to have been destroyed.

The appellees contend, however, that since the defendants filed answers to the original complaint, it would be necessary for them to withdraw those answers by leave of court, before they would have the right to demur to the amended complaint on the ground that there is a misjoinder of parties and causes of action, citing *Ezzell v. Merritt*, 224 N.C. 602, 31 S.E. 2d 751. We do not concur in this view. When the plaintiffs filed an amended complaint, the defendants had the right to elect whether to answer or demur. In *Ezzell v. Merritt, supra,* the defendant undertook to demur to the original complaint on the ground of a misjoinder of parties and causes of action, after he had filed an answer thereto, without withdrawing his answer by leave of court. A defendant is not permitted, under our practice, to answer and demur at the same time, *Rosenbacher v. Martin*, 170 N.C. 236, 86 S.E. 785, except as to the jurisdiction of the court or to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. G.S. 1-134; *Cherry v. R. R.*, 185 N.C. 90, 116 S.E. 192. However, these defendants have not filed answers to the amended complaint, and we think the interposition of the demurrers was well advised.

For the reasons stated, the order of the court below overruling the demurrers interposed by the defendants, is

Reversed.

LUTHER C. ATKINSON AND WIFE, FRANCES M. ATKINSON, v. CHARLOTTE BUILDERS, INC., AND WILLIAM C. TAYLOR.

(Filed 3 May, 1950.)

Fraud § 4—

A positive representation by the seller's agent, acting within the scope of his employment, that the house, the subject of sale then under negotiation, was brick veneer when in fact it was built of "speed brick" which allowed the seepage of water destructive of plaster and paint on the inside, *held* sufficient to support an action for fraud even in the absence of *scienter*, since a person who is in a position to know the truth may be

held liable for a misrepresentation made in conscious and reckless ignorance of its truth or falsity when such representation is made to induce the sale and is reasonably relied on by the purchaser.

APPEAL by plaintiffs from *Patton, Special Judge*, November Term, 1949, of MECKLENBURG. Reversed.

This was an action for damages for fraud and deceit in the sale of a house. At the close of plaintiffs' evidence, defendants' motion for judgment of nonsuit was allowed, and from judgment dismissing the action plaintiffs appealed.

Jay W. Alexander, Jr., for plaintiffs, appellants.

Lassiter & Moore for defendants, appellees.

DEVIN, J. We think the plaintiffs offered evidence, when considered in the light most favorable for them, sufficient to carry the case to the jury.

The testimony tended to show that the defendants' agent, who admittedly was acting within the scope of his employment, represented to the plaintiffs that the house, the subject of sale then being negotiated, was constructed of brick veneering, and that plaintiffs relied on this representation and were induced thereby to make the purchase, whereas in truth and in fact the house was built of what is called "speed brick"—a hollow brick without air space between brick and plaster—a kind of structure which permits water to pass through, destructive of plaster and paint on the inside.

Defendants argue absence of evidence of *scienter* as ground upon which the nonsuit should be sustained. However, it is well settled that a false representation positively made by one who ought in the discharge of his duty to have known the truth and who is consciously and recklessly ignorant whether it be true or false, may be regarded as fraudulent when made to induce a sale and reasonably relied on by the vendee. *Modlin v. R. R.*, 145 N.C. 218, 58 S.E. 1075; *Whitehurst v. Insurance Co.*, 149 N.C. 273, 62 S.E. 1067; *Bank v. Yelverton*, 185 N.C. 314, 117 S.E. 299; *Stone v. Milling Co.*, 192 N.C. 585, 135 S.E. 449; *Silver v. Skidmore*, 213 N.C. 231, 195 S.E. 775; *Small v. Dorsett*, 223 N.C. 754, 28 S.E. 2d 514. *Harding v. Insurance Co.*, 218 N.C. 129, 10 S.E. 2d 599, is not controlling on the facts here presented.

Without discussing the evidence further, we think it sufficient to survive a motion for nonsuit, and that the judgment below must be

Reversed.

MABEL A. HUNTER, NINA HUNTER THOMSON AND HUSBAND, W. FRANK THOMSON, AND CORA D. HUNTER v. AMERICAN TRUST COMPANY, A CORPORATION, TRUSTEE UNDER THE WILL OF BAXTER ROSS HUNTER; AND CHARLES W. BUNDY, GUARDIAN AD LITEM FOR FRANCES ANNE THOMSON, INFANT DAUGHTER OF NINA HUNTER THOMSON, AND GUARDIAN AD LITEM FOR THE UNBORN CHILD OR CHILDREN OF NINA HUNTER THOMSON.

(Filed 3 May, 1950.)

Executors and Administrators § 24—

A valid contract compromising a family dispute over the validity of a will and providing for the distribution of the estate in a manner other than that specified in the will, is enforcible in equity under the doctrine of family settlements, and when all persons having any interest in the estate are parties to the contract and are *sui juris*, it is a valid contract enforceable at law.

APPEAL by the defendants, Charles W. Bundy, Guardian *ad litem*, and American Trust Company, Trustee under the will of Baxter Ross Hunter, from *Crisp, Special Judge*, at the March Term, 1950, of the Superior Court of Mecklenburg County.

The plaintiffs sued the defendants to enforce a contract made in December, 1949, compromising a family dispute over the validity of the will of the late Baxter Ross Hunter of Mecklenburg County, North Carolina, and providing for the distribution of his estate among all persons having any claim thereto in a manner other than that specified in the will. The parties waived trial by jury. After hearing the evidence, the court made detailed findings of fact and appropriate conclusions of law, and entered judgment thereon approving and enforcing the contract. The defendants, Charles W. Bundy, Guardian *ad litem*, and American Trust Company, Trustee under the will of Baxter Ross Hunter, appealed, assigning errors.

Orr & Hovis for plaintiffs, appellees.

Charles W. Bundy for the defendant, Charles W. Bundy, Guardian ad litem, appellant.

Henry E. Fisher for the defendant, American Trust Company, Trustee under the will of Baxter Ross Hunter, appellant.

ERVIN, J. The trial court rightly ruled that the infant, Frances Anne Thomson, and the unborn child or children of the plaintiff, Nina Hunter Thomson, have no interest whatever in the estate of Baxter Ross Hunter. The judgment finds full support in decisions upholding family settlements. *Bohannon v. Trotman*, 214 N.C. 706, 200 S.E. 852; *Trust Co. v.*

Wade, 211 N.C. 27, 188 S.E. 611; *Reynolds v. Reynolds,* 208 N.C. 578, 182 S.E. 341; *Spencer v. McCleneghan,* 202 N.C. 662, 163 S.E. 753; *Tise v. Hicks,* 191 N.C. 609, 132 S.E. 560; *Bailey v. Wilson,* 21 N.C. 182.

Moreover, it is proper even apart from the doctrine of family settlements; for it appears that the contract was made in good faith to settle a dispute between the parties as to the validity of the will of the testator; that all persons having any interest in the estate are parties to the contract; and that all of such persons are *sui juris.* 57 Am. Jur., Wills, section 995. For these reasons, the judgment is

Affirmed.

EDWIN F. LOCHNER v. SILVER SALES SERVICE, INC., A CORPORATION DOING BUSINESS AS RELIABLE HOME EQUIPMENT COMPANY, A CORPORATION.

(Filed 10 May, 1950.)

1. Trial § 21—

A motion for a compulsory nonsuit challenges the sufficiency of the evidence to take the case to the jury and support a verdict for plaintiff.

2. Principal and Agent § 7c—

Where an agent has authority to hire employees for his principal, he has implied authority to contract with an employee as to his compensation according to the methods usual in such employment, and an employee hired by the agent will not be bound by limitations upon the agent's authority to contract in respect to compensation of which the employee has no knowledge or notice.

3. Same—Whether agent authorized to hire employees had implied authority to agree to salary at annual rate held for jury.

Plaintiff's evidence was to the effect that he was employed by defendant's agent on the basis of a salary at a stipulated annual rate, and that such agent had authority to employ persons on behalf of defendant. Defendant moved for nonsuit for want of evidence that the agent had authority to bind defendant to pay salary at a stipulated annual rate, and offered evidence that the agent was specifically instructed to hire persons solely on a commission basis. Plaintiff testified he had no notice or knowledge of such limitation. *Held:* Nonsuit was properly denied, the question of the agent's implied authority to bind defendant to pay compensation at a stipulated annual rate being for the jury.

4. Master and Servant § 2a—

A contract of employment will not be held void for indefiniteness when it stipulates the nature and extent of service to be performed, the place where and the person to whom it is to be rendered, and the compensation to be paid.

5. Compromise and Settlement § 2—

The acceptance of a lesser sum in full payment of a larger sum constitutes a settlement, but only as to those items of liability embraced in the settlement.

6. Same—Whether claim sued on was included in checks accepted by plaintiff in discharge of liability held for jury.

Plaintiff's allegations and evidence were to the effect that defendant promised to pay him a stipulated amount annually, the remuneration to be paid on the basis of weekly checks for a stipulated commission on sales made by plaintiff, with quarterly payments to make up the proportionate part of the annual salary. *Held:* The acceptance of weekly checks by plaintiff with stipulations above plaintiff's endorsement that the payment released the payer of all claims due to date, with accompanying voucher stipulating that the sums included in the checks covered no items except commissions and travel allowances, raises for the determination of the jury the question as to whether the weekly payments composed one account of liability and the quarterly payments another, and therefore whether the settlement included the claim for quarterly payments.

7. Evidence § 36—

Advertisements are improperly admitted in evidence against a party merely upon identification of the newspaper in which published, it being necessary to show that the party against whom they are sought to be admitted authorized or instigated publication.

8. Evidence § 19—

Printed matter is not competent to contradict or impeach the testimony of a witness when there is no evidence indicating that the witness had any connection whatever with such matter.

APPEAL by defendant from *Patton, Special Judge,* and a jury, at the November Term, 1950, of MECKLENBURG.

Civil action to recover compensation for personal services.

The pleadings and evidence of both parties disclose that the matters stated in the next three paragraphs are not in dispute.

At the times set forth below, the defendant, a domestic corporation, was engaged in retailing household equipment at Charlotte and other places in North Carolina through the agency of traveling solicitors, who made sales to customers residing on routes assigned to them. In September, 1948, Bernard A. Mollen was employed by defendant to manage its retail business at Charlotte, with express authority to hire, supervise, and discharge soliciting agents in the Charlotte area. At that time Mollen hired the plaintiff to serve the defendant as a soliciting agent in the Charlotte territory, and the plaintiff worked in that capacity upon a route assigned to him until on or about 18 January, 1949, when he was discharged.

At the end of each week of the employment, the defendant issued a bank check to the plaintiff bearing this notation: "Endorsement of this check is acknowledgment by payee that he has been compensated in full for all services to date." The plaintiff accepted and endorsed the checks, and collected and used their proceeds. The checks were accompanied by pay vouchers containing the underlying computations, and showing these two things: (1) that the sums included in the checks covered no items except commissions on sales and collections made for defendant by plaintiff, travel allowances for the operation of plaintiff's automobile in the defendant's business, and advancements made to plaintiff by defendant; and (2) that the defendant retained approximately one-tenth of the sum total of the travel allowance and the commissions during each week of plaintiff's employment to protect itself against what it called "reverts," *i.e.*, losses suffered by it on account of commissions paid plaintiff on sales subsequently becoming uncollectible. Each pay voucher was prepared on a printed form stipulating that "this payment releases the payer of all claims which are now due or may accrue in the future," and providing a space below the stipulation for the signature of the payee. The plaintiff signed his name upon such space in several instances.

The last transaction between the parties occurred more than two months after plaintiff's discharge, to wit, on 26 March, 1949. At that time the plaintiff made demand on defendant for payment of the compensation involved in this action, and the defendant repudiated such demand on the ground that there was no contract between the parties obligating defendant to pay any such compensation to plaintiff. The parties thereupon "adjusted the commissions" and settled the reserve account. This they did by crediting the plaintiff with additional commissions omitted from the checks and previous pay vouchers, and by offsetting such additional commissions and the reserve account against "reverts" arising after the termination of the plaintiff's employment and advancements made to plaintiff by defendant during the course of the employment. No check or money passed between the parties at this time, but defendant recorded the adjustment of the commissions and the settlement of the reserve account on an unsigned pay voucher form containing the stipulation quoted above.

This action arose out of differences between the parties respecting the remuneration accruing to the plaintiff for the services rendered by him to defendant. Their testimony with regard to this phase of the case was in sharp conflict.

The evidence for the plaintiff tended to show that the agreement between Mollen, the manager of the defendant's business at Charlotte, and the plaintiff in relation to this matter was as follows: Defendant was to remunerate the plaintiff for his services at the rate of $5,000.00 per

year. A part was to be paid weekly, and a part was to be paid quarterly. The portion due weekly represented commissions of 10 per cent on the amount of current sales and collections made for defendant by plaintiff, and the portion payable quarterly consisted of the excess of compensation for the quarter computed at the stipulated annual rate over the aggregate of the weekly payments of commissions made during the quarter. The defendant was to be permitted to reserve not exceeding one-tenth of the weekly commissions to safeguard itself against "reverts," but any adjustment in the recompense of the plaintiff necessitated by the withholding of such reserve was to be made by defendant at the time of subsequent weekly payments. The defendant was to grant the plaintiff a travel allowance of $10.00 per week in addition to the agreed compensation to aid plaintiff in operating an automobile in carrying on his work for defendant.

The evidence for plaintiff further tended to show that the stipulated compensation accruing to plaintiff upon the agreement during his employment by defendant totaled $1,515.71; that the commissions on the sales and collections made by him for defendant in that period aggregated $659.59; that the defendant paid the full amount of the commissions and automobile allowances amounting to an additional $150.00 to the plaintiff in the transactions evidenced by the checks and pay vouchers; that the defendant has refused to pay the plaintiff any part of the excess of the stipulated compensation over the commissions, leaving $856.12 unpaid on that item; and that the checks and pay vouchers did not include or refer to this item in any way.

The testimony for the defendant tended to establish that the defendant had expressly instructed Mollen to hire soliciting agents in the Charlotte area on a commission basis only and to set their compensation "at ten per cent on their sales, ten per cent on their collections, and $2.00 a day car allowance"; that Mollen obeyed these instructions implicitly when he hired plaintiff, and the agreement in controversy limited the plaintiff's compensation to the specified commissions and allowance; that these items totaled $848.08 during the period of plaintiff's employment, and the defendant paid this amount in full to plaintiff, leaving nothing due the plaintiff by it; and that, on the contrary, the plaintiff is indebted to defendant in the sum of $58.81 on account of unrepaid advancements made to plaintiff by defendant during the course of employment.

The jury returned this verdict:

1. Did the plaintiff and the defendant enter into a contract of employment under the terms of which the plaintiff was to receive payment for his services at the rate of $5,000.00 per year?

Answer: Yes.

2. If so, did the plaintiff accept payment from the defendant in full settlement for his services?

Answer: No.

3. If not, in what amount, if any, is the defendant indebted to the plaintiff?

Answer: $856.12.

4. Did the plaintiff and the defendant enter into a contract of employment under the terms of which the plaintiff was to receive compensation for his services on a commission basis without a guarantee?

Answer:

5. If so, in what amount, if any, is the plaintiff indebted to the defendant?

Answer:

The court entered judgment on the verdict, and the defendant appealed, assigning the denial of its motion for a compulsory nonsuit and the admission of certain evidence as error.

Charles Truett Myers for plaintiff, appellee.

Frank H. Kennedy and P. Dalton Kennedy, Jr., for defendant, appellant.

ERVIN, J. The motion of the defendant for a compulsory nonsuit challenges the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. *Graham v. Gas Co.*, 231 N.C. 680, 58 S.E. 2d 757.

The defendant insists initially that the action ought to have been nonsuited for lack of evidence that Bernard A. Mollen, the manager of its business at Charlotte, had any authority to bind it to pay the plaintiff "for his services at the rate of $5,000.00 per year."

The sole evidence at the trial relating to the power conferred directly upon Mollen by defendant to fix the compensation of the plaintiff came from wtinesses for the defense whose testimony indicated that the defendant had specifically instructed Mollen to employ soliciting agents on a commission basis only and to set their compensation "at ten per cent on their sales, ten per cent on their collections, and $2.00 a day car allowance." Hence, the evidence was insufficient to show that the defendant expressly empowered Mollen to make an agreement obligating it to pay the plaintiff "for his services at the rate of $5,000.00 per year."

But the testimony was ample to warrant the conclusion that Mollen had implied authority from the defendant to enter into such contract with plaintiff. The defendant expressly conferred upon Mollen the power to employ soliciting agents to work for it. Express authority in an agent to hire an employee for his principal necessarily implies power in the

agent to contract with the employee as to his compensation according to the methods usual in matters of the kind for which the employment is effected. *Strickland v. Kress,* 183 N.C. 534, 112 S.E. 30; *In re Opinion of Justices,* 72 N.H. 601, 54 A. 950. The authority of the agent in such respect is not impaired by private instructions of the principal limiting the matter of compensation, when the person hired has no knowledge or notice of such instructions. 2 C.J.S., Agency, section 105.

There is nothing in the record disclosing as a matter of law that the provisions respecting compensation as claimed by the plaintiff were out of the usual course in matters of the kind for which he was employed. Besides, he testified that he had no knowledge or notice of any limitation on Mollen's authority as to the matter of compensation. These things being true, the court did not err in submitting to the jury under the first issue the question of whether Mollen had implied authority to bind the defendant to pay the plaintiff the compensation in controversy.

Moreover, the court rightly rejected the contention of defendant that the contract depicted in the plaintiff's evidence was void for indefiniteness and uncertainty. An agreement for personal services is binding in law if it is certain and definite as to the nature and extent of service to be performed, the place where and the person to whom it is to be rendered, and the compensation to be paid. *Croom v. Lumber Co.,* 182 N.C. 217, 108 S.E. 735; 12 Am. Jur., Contracts, section 64.

The defendant maintains secondarily, however, that the refusal of the court to dismiss the action on a compulsory nonsuit must be held for error, even if the testimony of the plaintiff at the trial was sufficient to establish the proposition that Mollen had implied authority from defendant to make the contract in controversy. This contention is based on the theory that when the plaintiff accepted and used the checks, he necessarily became bound by the recitals of the checks and the accompanying pay vouchers to the effect that he had been compensated in full for all services. The defendant cites *Durant v. Powell,* 215 N.C. 628, 2 S.E. 2d 884; *Harris v. Kennedy,* 202 N.C. 487, 163 S.E. 458; *Walston v. Coppersmith,* 197 N.C. 407, 149 S.E. 381; *Dredging Co. v. State,* 191 N.C. 243, 131 S.E. 665; *DeLoache v. DeLoache,* 189 N.C. 394, 127 S.E. 419, and other decisions on this phase of the litigation.

It is undoubtedly true that the acceptance of a lesser sum in full payment of a larger sum is valid under G.S. 1-540, but the payment of one account is not the settlement of another. *Garland v. Improvement Co.,* 184 N.C. 551, 115 S.E. 164. What was said in *Aydlett v. Brown,* 153 N.C. 334, 69 S.E. 243, is apropos here. "We adhere to our former decisions that where a check is sent in full payment of an account, the creditor cannot accept and appropriate the check and afterwards recover the amount of any item which was a part of the account. Having elected

to take a part in satisfaction of the whole, he will be held to his agreement, but the principle of course does not apply to a transaction not embraced by the account. Whether it is or not may often be a question of law upon admitted facts, but sometimes the evidence, as in this case, may be such as to make it a question for the jury."

There was evidence in behalf of the plaintiff that commissions on sales and collections were payable weekly and composed one account or item of liability, and that the indebtedness in suit was payable quarterly and constituted another account or item of liability; and that the checks and pay vouchers covered the commissions only, and did not embrace the indebtedness in suit or any part of it. In consequence, the trial court did not err in leaving it to the jury to determine whether the indebtedness in suit was included in the alleged accord and satisfaction. *Youngblood v. Taylor,* 198 N.C. 6, 150 S.E. 614; *Standard Oil Co. v. Moore,* 195 N.C. 305, 141 S.E. 926; *Refining Corporation v. Sanders,* 190 N.C. 203, 129 S.E. 607; *Bogert v. Manufacturing Co.,* 172 N.C. 248, 90 S.E. 208.

Notwithstanding the conclusion that the plaintiff made out a case for the jury, the defendant is entitled to a new trial on account of the ruling of the trial judge in permitting the plaintiff to introduce in evidence over the objection of defendant advertisements published in the *Charlotte Observer* on 23 and 26 May, 1949, purporting to emanate from the defendant and offering to employ salesmen at a beginning compensation of $100.00 per week.

The advertisements appeared eight months after Mollen had hired plaintiff to work for defendant, seven months after Mollen had relinquished his post as manager of the defendant's business at Charlotte, and four months after the plaintiff had been discharged by the defendant. Manifestly, they had no relevancy whatever to the question of whether Mollen had agreed that the defendant was to pay plaintiff "for his services at the rate of $5,000.00 per year," or to the question of whether Mollen had been authorized by defendant to make any such agreement if he did in fact undertake to do so. *Brown v. Featherstone,* 202 N.C. 569, 163 S.E. 558.

Furthermore, no sufficient foundation was laid for the introduction of the advertisements. It is a basic principle of the law of evidence that "before any writing will be admitted in evidence, it must be authenticated in some manner—*i.e.,* its genuineness or execution must be proved." Stansbury: North Carolina Evidence, section 195. This rule applies to advertisements in newspapers. 22 C. J., Evidence, section 1138.

There was nothing at the trial to show that the defendant authorized the advertisements, or had anything to do with their appearance in the newspapers. The testimony identifying the newspapers, which contained the advertisements, as issues of the *Charlotte Observer* proved nothing

whatever except the naked fact that they were printed in that newspaper. It had no tendency to fix the defendant with responsibility for their preparation or publication. The advertisements were not properly receivable in evidence on account of the lack of preliminary proof that they emanated from the defendant even if they had been relevant to the issue. *Lindsey v. Commercial Discount Company,* 12 Cal. App. 2d 345, 55 P. 2d 896; *Mann v. Russell,* 11 Ill., 586; *Saenger Amusement Company v. Murray,* 128 Miss. 782, 91 So. 459; *Schaff v. Bourland* (Tex. Civ. App.), 266 S.W. 843; *State v. Low,* 192 Wash. 631, 74 P. 2d 458. The suggestion of plaintiff that the newspaper advertisements were admissible to contradict witnesses for the defendant is without validity; for there was no evidence indicating that any of these witnesses had any connection whatever with them.

These observations of Dean Wigmore are germane: "Printed matter in general bears upon itself no marks of authorship other than contents. But there is ordinarily no necessity for resting upon such evidence, since the responsibility for printed matter, under the substantive law, usually arises from the act of causing publication, and merely of writing, and hence there is usually available as much evidence of the act of printing or handing to a printer as there would be of any other act, such as chopping a tree or building a fence. There is therefore no judicial sanction for considering the *contents alone* as sufficient evidence." Wigmore on Evidence (3rd Ed.), section 2150.

For the reasons given, the verdict and judgment are vacated, and the defendant is granted a

New trial.

STATE v. LAWRENCE WELCH.

(Filed 10 May, 1950.)

1. Intoxicating Liquor § 3—

The term "intoxicating liquors," G.S. 18-1, includes the more restrictive term "alcoholic beverages," G.S. 18-60, and the terms are not synonymous.

2. Intoxicating Liquor § 2—

The Turlington Act is in full force in those counties which have not elected to come under the Alcoholic Beverage Control Act except to the extent which the former statute is modified by the later.

3. Same—

G.S. 18-2 prohibiting the transportation of intoxicating liquor has been modified by G.S. 18-49 and G.S. 18-58 so that it is not unlawful to transport through a county which has not elected to come under the provisions of

the Alcoholic Beverage Control Act, alcoholic beverages in actual course of delivery to any Alcoholic Beverage Control Board, or for a person to transport into such county not in excess of one gallon of alcoholic beverages lawfully purchased outside the State or from A.B.C. stores in counties of the State which have elected to come under the Alcoholic Beverage Control Act, provided the liquor is for personal use and the seals of the containers have not been broken.

4. Same—

The statutes relating to alcoholic liquors must be interpreted in the light of the common law principle that guilty knowledge is an essential element of crime, and therefore a person cannot be held guilty of illegally transporting intoxicating liquors if he has no knowledge of the nature of the goods transported.

5. Intoxicating Liquor § 3—

The word "transport" means to carry or convey from one place to another, and therefore a person transports intoxicating liquor if he carries it on his person or conveys it in a vehicle under his control or in any other manner, regardless of whether the liquor belongs to him or is in his custody.

6. Intoxicating Liquor § 9d—

Evidence which, considered in the light most favorable to the State, is sufficient to warrant findings that the automobile owned and driven by defendant in a county which had not elected to come under the Alcoholic Beverage Control Act contained, to defendant's knowledge, two gallons of alcoholic beverage, *is held* sufficient to overrule nonsuit in a prosecution for unlawful transportation, even though one of the gallons of liquor belonged to a passenger in the automobile, and both defendant and the passenger had purchased the liquor at an ABC store for personal consumption, and the seals of the containers had not been broken.

7. Courts § 1—

It is the province of the courts to declare the law, not to make it.

8. Criminal Law § 62a—

A punishment which is within the limits authorized by statute cannot be held cruel or unusual in the constitutional sense. Constitution of N. C., Art. I, sec. 14.

APPEAL by defendant from *Gwyn, J.*, and a jury, at the October Term, 1949, of UNION.

The defendant was charged with unlawfully transporting intoxicating liquor in a quantity in excess of one gallon contrary to the provisions of the Turlington Act as modified by the Alcoholic Beverage Control Act of 1937.

The testimony for the prosecution and that for the defense harmonized in respect to the particulars stated in this paragraph. Mecklenburg County operates county liquor stores under the Alcoholic Beverage Control Act of 1937; but Union County does not come under the provisions

of that statute. On 17 September, 1949, the defendant and his wife, Geneva Welch, were traveling eastward in Union County along a public highway, which led from Charlotte in Mecklenburg County to Monroe in Union County, in a two-seated automobile owned by the defendant. He was driving the automobile, and his wife was sitting to his right on the front seat. They were accosted and stopped by State highway patrolmen, who discovered two packages in the automobile, one of them being in the manual custody of the defendant's wife and the other resting on the floor between the front and rear seats. The patrolmen opened the packages, and thereby ascertained that each of them held one gallon of tax-paid alcoholic beverages in various containers, whose caps or seals had not been opened or broken.

The State introduced additional circumstances tending to show that when the packages were first observed by the patrolmen, the defendant admitted that they contained "whiskey"; and that after they had been opened and their contents revealed, he conceded that "he had brought two gallons . . . to save expenses in driving back to Charlotte."

The defendant presented further testimony to the effect that he and his wife resided at different places in Monroe; that the package resting on the floor of the automobile belonged to him, and contained one gallon of tax-paid alcoholic beverages, which he had bought at a county liquor store in Charlotte for his personal consumption; that the package in his wife's manual custody was her property, and held one gallon of tax-paid alcoholic beverages, which she had purchased at a county liquor store in Charlotte for her own use; and that he had no knowledge whatever that his wife's package contained alcoholic beverages until it was opened by the patrolmen.

The jury found defendant "guilty of transporting intoxicating liquor as charged," and the court entered judgment on the verdict. The defendant appealed, assigning as errors the refusal of the court to dismiss the action upon a compulsory nonsuit, certain excerpts from the charge, and the sentence pronounced.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

Coble Funderburk for defendant, appellant.

ERVIN, J. The defendant puts his chief reliance on the appeal upon his claims that the trial court erred in refusing to dismiss the action upon a compulsory nonsuit, and in giving the jury certain instructions in which it directed the jury in specific detail to convict the defendant in case it found beyond a reasonable doubt from the testimony that the

defendant knowingly transported two gallons of alcoholic beverages, even though one gallon of such beverages may have belonged to his wife.

The solution of these problems is to be found in the statutes relating to the transportation of intoxicating liquors and alcoholic beverages. These terms are not synonymous; but the broader term "intoxicating liquors," as defined in G.S. 18-1, includes the more restricted term "alcoholic beverages," as delimited in G.S. 18-60.

Since Union County has not elected to establish county liquor stores, the Turlington Act of 1923 is in full force in Union County except to the extent of its modification by the Alcoholic Beverage Control Act of 1937. *S. v. Wilson,* 227 N.C. 43, 40 S.E. 2d 449.

Section 2 of the Turlington Act specifies that "no person shall . . . transport . . . any intoxicating liquor." G.S. 18-2. This provision of the Turlington Act has been modified by sections 14 and 22 of the Alcoholic Beverage Control Act of 1937, which are now codified respectively as G.S. 18-49 and G.S. 18-58.

G.S. 18-49 is as follows: "It shall not be unlawful for any person to transport a quantity of alcoholic beverages not in excess of one gallon from a county in North Carolina coming under the provisions of this article to or through another county in North Carolina not coming under the provisions of this article: Provided, said alcoholic beverages are not being transported for the purposes of sale, and provided further that the cap or seal on the container or containers of said alcoholic beverages has not been opened or broken. Nothing contained in this article shall be construed to prevent the transportation through any county not coming under the provisions of this article, of alcoholic beverages in actual course of delivery to any alcoholic beverage control board established in any county coming under the provisions of this article."

G.S. 18-58 provides that a person may bring into this State for his own personal use not more than one gallon of alcoholic beverage which he has purchased legally outside the State.

It is axiomatic at common law that a crime is not committed if the mind of the person doing the act is innocent. The statutes relating to the unlawful transportation of intoxicating liquor are to be construed in the light of this common law principle, and the existence of guilty knowledge on the part of the accused is to be regarded as essential to criminality, even though it is not required by the statutes in express terms. *S. v. McLean,* 121 N.C. 589, 28 S.E. 140, 42 L.R.A. 721. In consequence, a person transporting liquor is not criminally responsible for so doing under these statutes when he has no knowledge of the nature of the goods transported. *Parker v. Commonwealth,* 135 Va. 625, 115 S.E. 566; *State v. Fishback,* 122 Wash. 246, 210 P. 375.

A person violates section 2 of the Turlington Act, i.e., G.S. 18-2, as modified by sections 14 and 22 of the Alcoholic Beverage Control Act of 1937, *i.e.*, G.S. 18-49 and G.S. 18-58, and is guilty of unlawfully transporting intoxicating liquor by reason thereof if he knowingly transports intoxicating liquor for any purpose other than those specified in the Alcoholic Beverage Control Act, or in a quantity in excess of one gallon, unless such liquor is in actual course of delivery to an alcoholic beverage control board established in a county coming under the provisions of the Alcoholic Beverage Control Act. *S. v. Davis,* 214 N.C. 787, 1 S.E. 2d 104.

The word "transport" means to carry or convey from one place to another. *Alexander v. R. R.,* 144 N.C. 93, 56 S.E. 697; *Cunard Steamship Co. v. Mellon,* 262 U.S. 100, 43 S. Ct. 504, 67 L. Ed. 894. Hence, a person transports liquor when he carries or conveys it from one place to another on his person, or in some vehicle under his control, or in any other manner. *Asher v. State,* 194 Ind. 553, 142 N.E. 407, *West v. State,* 93 Tex. Cr. 370, 248 S.W. 371; 48 C.J.S., Intoxicating Liquors, section 234; Annotation: 65 A.L.R. 983. This is so even though the liquor belongs to the person who carries or conveys it, and is intended for his personal use. *S. v. Winston,* 194 N.C. 243, 139 S.E. 240. But it is not an essential element of the crime of unlawfully transporting intoxicating liquor that the accused own the liquor, *Simpson v. State,* 195 Ind. 633, 146 N.E. 747; or that he have any pecuniary interest in it, *Szymanski v. State,* 93 Tex. Cr. 631, 248 S.W. 380; or that he have the custody of it. *Lomis v. U. S.,* 61 F. 2d 653; 48 C.J.S., Intoxicating Liquors, section 234. This being true, an automobile driver who knowingly carries in his automobile intoxicating liquor belonging to and in the custody of a passenger is guilty of transporting such liquor. *Green v. Commonwealth,* 195 Ky. 698, 243 S.W. 917; *People v. Ninehouse,* 227 Mich. 480, 198 N.W. 973; *Maloney v. State,* 119 Tex. Cr. 273, 45 S.W. 2d 216.

The task of applying these legal principles to this case must now be performed. When the evidence is considered in the light most favorable to the State, it is sufficient to warrant these findings by a jury: That an automobile, which the defendant owned and controlled, contained two gallons of alcoholic beverages; that the defendant knew that such quantity of alcoholic beverages was in his automobile; and that with such knowledge the defendant carried or conveyed such quantity of alcoholic beverages from one place to another in his automobile for some purpose other than that of delivering the same to an alcoholic beverage control board in a county coming under the provisions of the Alcoholic Beverage Control Act. This being the case, the testimony is ample to support the conviction of the defendant upon the charge preferred against him, *i.e.*, unlawfully transporting intoxicating liquor in a quantity in excess of one gallon.

This conclusion is inescapable even though it be taken for granted that one of the two gallons of alcoholic beverages involved in this action was owned by the defendant's wife. Our decision in this respect conforms to the view expressed by the trial court in the instructions in which it directed the jury to convict the defendant in case it found beyond a reasonable doubt from the testimony that the defendant knowingly transported two gallons of alcoholic beverages, even though one gallon of such beverages may have belonged to his wife.

To prevent misunderstanding on that score, we note here that no special significance is to be attributed to the fact that the possible owner of one gallon of the alcoholic beverages was the defendant's wife rather than a third person. The trial court did not make the guilt of the defendant to turn in any degree upon any supposition that his wife was acting upon his coercion. We emulate its example, and ignore the presumption which provoked Mr. Bumble's exclamation: "If the law supposes that, the law is an ass."

The defendant insists primarily on this phase of the case that his carriage of the gallon of alcoholic beverages claimed by his wife did not constitute a transportation of such beverages by him within the purview of the relevant statutes, and that in consequence he did not transport in excess of one gallon of alcoholic beverages in a legal sense. We cannot accept this contention without giving to the statutory phraseology a distorted meaning at complete variance with the language used. This we are not permitted to do.

The defendant asserts secondarily on this aspect of the controversy that the statutes permit the driver of an automobile to carry or convey more than one gallon of alcoholic beverages in his automobile if he is accompanied by others, and if the maximum quantity of alcoholic beverages owned or possessed by any one occupant of the automobile does not exceed one gallon. We cannot put any such construction on the pertinent statutes without reading into them a purpose quite foreign to that expressed by the Legislature. This we cannot do. It is our province to declare the law, but not to make it.

When all is said, the statutes under review express in clear and unambiguous language the definite legislative intent to prohibit the transportation of more than one gallon of alcoholic beverages under any circumstances by any person other than one engaged in carrying or conveying such beverages to an alcoholic beverage control board in a county coming under the provisions of the Alcoholic Beverage Control Act.

It necessarily follows that the court rightly refused to nonsuit the action, and that its instructions to the jury were correct.

The punishment imposed upon the defendant by the judgment of the court is within the limits authorized by the statute. G.S. 18-29. This

being true, it does not offend Article I, Section 14, of the Constitution, forbidding the infliction of "cruel or unusual punishments." Moreover, the circumstances do not show that the court abused its statutory discretion in pronouncing the sentence. *S. v. Stansbury,* 230 N.C. 589, 95 S.E. 2d 185.

The trial and judgment will be upheld; for there is in law

No error.

STATE v. ETHAN CHAVIS.

(Filed 10 May, 1950.)

1. Intoxicating Liquor § 9g—

Upon a general verdict of guilty to an indictment charging separately unlawful possession of intoxicating liquor and unlawful transportation of intoxicating liquor, the court is empowered to assign separate punishment for each count, notwithstanding that the possession was physically necessary to the act of transporting.

2. Criminal Law §§ 1c, 60a—

Where the definition and prohibition of a specified transaction is within the legislative power, the Legislature may prescribe that each step leading to the commission of such act shall constitute a separate offense.

DEFENDANT'S appeal from *Gwyn, J.,* November Term, 1949, SCOTLAND Superior Court.

In the early morning of June 18, 1949, a patrol officer of the Town of Laurinburg and other officers accompanying him, observed the defendant Ethan Chavis, accompanied by Julius Liles, driving an Oldsmobile car in the colored section of the town, near the town limits. Suspecting Chavis of carrying contraband intoxicating liquors the officers gave chase, and Chavis, accepting the role of the pursued, endeavored to escape. In all, four official cars joined in the chase.

As the Chavis car approached Highway 15, an improved road, the pursuing car of the patrol, or police officer, then being some distance behind, Julius Liles opened the door of the Chavis car, jumped out, put a case of whiskey in some bushes close to the road, and jumped back into the car. The police car overtook the Chavis car during this maneuver, but was unable to stop it, because Chavis had jockeyed his car so that it was impossible to get around him, or block his progress, and Chavis rapidly drove away. His speed finally increased until, when one of the pursuing cars succeeded in getting alongside, he was exceeding 85 m.p.h., as checked by the speedometer of the officers' car. Finally the pursuing posse shot

down all four tires of the Chavis car and brought it to a stop. Chavis, after some resistance, was put under arrest.

Thereupon, within five minutes after Liles had been observed to put the case in the bushes beside the road, the police officer went to the point where he had observed it placed, and retrieved a case of nontax-paid whiskey, which was retained for evidence.

For these activities Chavis was charged in three several bills of indictment as follows:

> "(1) In case no. 491, the indictment contained two accounts alleging:
>
> "(a) That on June 18, 1949, the defendant unlawfully had in his possession a quantity of non-tax-paid intoxicating liquors;
>
> "(b) That on June 18, 1949, the defendant unlawfully transported a quantity of non-tax-paid intoxicating liquors.
>
> "(2) The indictment in Case No. 492 charged the defendant with speeding and reckless driving in separate counts, alleging:
>
> "(a) That on June 18, 1949, the defendant operated a motor vehicle upon a highway carelessly and heedlessly in willful and wanton disregard of the rights and safety of others and withoue due caution and circumspection and at a speed and in a manner so as to endanger and be likely to endanger divers persons and property; and
>
> "(b) That on June 18, 1949, the defendant operated a motor vehicle on a highway at a speed greater than was reasonable and prudent under the conditions then existing and in excess of the limits allowed by law.
>
> "(3) The indictment in case No. 493 charged the defendant with failing to stop for a police siren. The indictment was not written in the language of the statute, but was apparently intended to charge a violation of G.S. 20-157."

The bills of indictment were consolidated and treated as one indictment with several counts. Chavis entered a plea of not guilty.

On the hearing the evidence for the State pertinent to this decision was substantially as above set out.

There was a general verdict of guilty.

Over objection and exception by defendant the following judgment was rendered:

> "Verdict of guilty to the charge of unlawful possession and unlawful transportation of intoxicating liquors in #491 and in #492 guilty to the charge of reckless driving.
>
> "Upon the count of unlawful possession of intoxicating liquors let the defendant be confined in the common jail in Scotland County

for a term of twelve (12) months, to be assigned to work under the supervision of the State Highway and Public Works Commission.

"Upon the count of unlawful transportation of intoxicating liquor let the defendant be confined in the common jail of Scotland County, for a term of two years to be assigned to work under the supervision of the State Highway and Public Works Commission.

"The latter sentence of two years is suspended for a period of five years upon the following conditions: That the defendant be of good behavior and violate none of the laws of the State; that he apply himself regularly to legitimate, gainful occupation, that, he support and maintain his wife and minor children according to his reasonable ability; that he do not operate a motor vehicle upon the public highways of the State for a period of three (3) years immediately, following his release from active service of sentence.

"492—The prayer for judgment is continued for a period of five years upon condition that the defendant be of good behavior and violate none of the laws of the State and abide the conditions of the suspension as set forth in No. 491 above, the Court retaining leave to enter judgment against the defendant at any time during the said period of five years upon motion of the Solicitor."

Motion to set aside the verdict for errors of law committed on the trial was declined, and defendant excepted; and from the judgment ensuing, appealed.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Walter F. Brinkley, Member of Staff, for the State.

Gilbert Medlin and Jennings G. King for defendant, appellant.

SEAWELL, J. We can see but one arguable point involved in appellant's challenge to the trial in the court below. The objection to the judgment brings up for consideration the question whether the judge, upon a general verdict applying to all counts of the case, can assign separate punishment for the count of possession of intoxicating liquor and that of transportation of the same liquor. The theory upon which the exception is based is that it is not competent to find the defendant guilty of two offenses and fix separate punishments therefor when the facts constituting the two purported crimes are identical, the possession being physically necessary to the act of transportation.

But neither the logic nor the law is as simple as that.

Two things will help us in our thinking: we are not dealing with common law crimes but with statutory offenses; and not with a single *act* with two criminal labels but with *component transactions* violative of

distinct statutory provisions denouncing them as crimes. Neither in fact nor law are they the same. *S. v. Midgett,* 214 N.C. 107, 198 S.E. 613. They are not related as different degrees or major and minor parts of the same crime and the doctrine of merger does not apply. The incidental fact that possession goes with the transportation is not significant in law as defeating the legislative right to ban both or either. When the distinction between the offenses is considered in the light of their purpose, vastly different social implications are involved and the impact of the crime of greater magnitude on the attempted suppression of the liquor traffic is sufficient to preserve the legislative distinction and intent in denouncing each as a separate punishable offense.

No doubt many authorities can be arrayed on either side of the question under consideration—many of them, however, wanting in persuasive authority because of the difference in local laws. However, the decided weight of authority supports the view that in cases of factual similarity with the one under review the power of the Legislature, when it so intends, to make punishable as a distinct violation of statute law each offense denounced by the statute, although occurring in the same transaction, must be given effect. 22 C.J.S., Criminal Law, sec. 9, and authorities assembled in notes 39, 40, and 42; 15 A. J., Criminal Law, sec. 389; *Ebelling v. Morgan,* 237 U.S. 625, 59 L. Ed. 1151; *Ruark v. U. S.,* 17 Fed. 2d 570 (C.C.A. 8); 51 A.L.R. 87; *Albrecht v. U. S.,* 273 U.S. 1, 71 L. Ed. 511; *S. v. Midgett, supra.*

The case involves violations of G.S. 18-2 which came into our law through the Turlington Act *in ipsissimis verbis* from the National Prohibition Act, and the interpretation we have placed upon the law here is that given it by many of the Federal courts.

In *Massy v. U. S.,* 281 Fed. 293 (C.C.A. 8), the defendant transported liquor in his car and had carried it into his house when arrested. On appeal from a conviction of illegal transportation and illegal possession, the Court said:

"The National Prohibition Act penalizes the illegal possession of liquor, as well as the illegal transportation of such liquor. Transportation involves the elements of carriage and removal that are not involved in mere possession. Separate acts though parts of a continuous transaction may be made separate crimes by the legislative power."

In *Bell v. U. S.,* 285 Fed. 145 (C.C.A. 5), Cert. den. 262 U.S. 744, the defendant drove up in his car and Federal agents searched and found liquor in the car. In holding invalid the defendant's contention that he could not be convicted for illegal transportation and possession in that the transportation included possession, the Court held:

A person may be in unlawful possession of liquor and never transport it. If he also transports it, that is a separate offense and each is a

violation of the National Prohibition Act, and the court could properly impose punishment on each count.

In *Earl v. U. S.*, 4 Fed. 2d 532 (C.C.A. 9), upon the same facts a similar decision was rendered in which the *Bell* and *Massy cases* were cited. In *Loomis v. U. S.*, 61 Fed. 2d 653 (C.C.A. 9), and *Aldridge v. U. S.*, 67 Fed. 2d 956 (C.C.A. 10), it was held that transportation and possession are separate and distinct offenses even though they grow out of the same transaction, and sentence could be imposed on both counts. See also, *State v. Melerine*, 158 La. 511, 104 So. 308; *Haarman v. State*, 111 Neb. 790, 197 N.W. 947; *State v. Mooers*, 129 Me. 364, 152 A. 265; *Allen v. State*, 24 Ohio App. 85, 155 N.E. 811; *People v. Grabiec*, 210 Mich. 559, 178 N.W. 55.

In *Albrecht v. U. S., supra, Justice Brandeis,* writing the opinion of the Court, says:

"The contention is that there is double punishment because the liquor which the defendants were convicted for having sold is the same that they were convicted for having possessed. But possessing and selling are distinct offenses. One may obviously possess without selling; and one may sell and cause to be delivered a thing of which he has never had possession; or one may have possession and later sell, as appears to have been done in this case. The fact that the person sells the liquor which he possessed does not render the possession and the sale necessarily a single offense. There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction. The precise question does not appear to have been discussed in either this or a lower Federal court in connection with the National Prohibition Act; but the general principle is well established. Compare *Burton v. United States*, 202 U.S. 344, 377, 50 L. Ed. 1057, 1069, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362; *Gavieres v. United States*, 220 U. S. 338, 55 L. Ed. 489, 31 Sup. Ct. Rep. 421; *Morgan v. Devine*, 237 U.S. 632, 59 L. Ed. 1153, 35 Sup. Ct. Rep. 712." See *S. v. Welch, ante*, 77.

The case of *S. v. Midgett, supra,* deals with the question before us in considering the matter of double jeopardy or *autrefois acquit* in a way which is an adequate test of double punishment in this case. It is analytical and thorough and we refer to the text and copious citations of authority.

We regard *S. v. Gordon*, 224 N.C. 304, 30 S.E. 2d 43, as a precedent, although similar objection to the judgment was not made. In this case the defendant was charged with violating the prohibition laws by a warrant containing the same three counts as here: unlawful transportation, unlawful possession, and unlawful possession for the purpose of

sale. The only evidence of possession was during the course of transportation; but the judgment upon the verdict of guilty was a 12-months' sentence in each of the three counts.

We find no error in the record.

No error.

CLAUDE R. WILLIAMS, EMPLOYEE, v. ORNAMENTAL STONE COMPANY, EMPLOYER, AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CARRIER.

(Filed 10 May, 1950.)

1. Master and Servant § 42b—

Where a policy of insurance covering liability for injuries to employees under the Workmen's Compensation Act is ambiguous as to the employees covered, such ambiguity will be resolved against the insurer.

2. Same—Policy held to cover employees engaged in operations incident to employer's business, though performed at separate place.

The employer was engaged in a single business and secured insurance covering its employees engaged in business operations at its principal place of business and all operations incident or appurtenant thereto "whether conducted at the places . . . described in said Declarations or elsewhere in connection with or in relation to such work places." *Held:* The policy covered employees at a stone quarry some forty miles distant from the employer's main business office which was operated in connection with the employer's business and controlled from its main office, and a further provision in the policy that the employer conducted no other business operations at other locations not disclosed "except: Other locations not covered hereunder" does not preclude liability for employees at the stone quarry, since the term "other locations" is ambiguous and will be construed to mean locations other than those designated or included in the policy.

3. Same—

The fact that insurer fails to collect premiums based on the wages of some of the employees covered by the policy does not preclude liability for injuries to such employees.

4. Master and Servant § 55d—

The findings of fact made by the Industrial Commission are conclusive on appeal when supported by competent evidence.

APPEAL by plaintiff and defendant Stone Company from *Armstrong, J.*, October Term, 1949, of ROWAN. Reversed.

The plaintiff claimed compensation under the Workmen's Compensation Act for disablement by silicosis while employed by defendant Stone Company at its quarry.

Upon the evidence introduced the Industrial Commission found that defendant Stone Company was bound by the provisions of the Workmen's Compensation Act, and that claimant's disability was due to silicosis, and that the last injurious exposure was with defendant Stone Company during the time the policy of defendant's insurance carrier, the American Mutual Liability Insurance Company, was in force. On the facts found by it, the Commission concluded that claimant's employment at the time and place of injury was covered by the policy issued by defendant Insurance Company, and thereupon awarded compensation to claimant in accord with the statute against the Stone Company and its insurance carrier.

The defendant Insurance Company appealed to the Superior Court, where the award as it affected the Stone Company was affirmed, but the conclusion and award of the Industrial Commission as to the defendant Insurance Company was reversed, on the ground that there was no evidence to support it.

The plaintiff and the defendant Stone Company excepted and appealed to this Court, assigning error in the failure of the court to affirm the decision and award of the Commission as to the Insurance Company.

Pierce & Blakeney and Nelson Woodson for plaintiff, appellant.

Ralph V. Kidd for defendant Ornamental Stone Company, appellant.

Helms & Mulliss and James B. McMillan for American Mutual Liability Insurance Company, appellee.

DEVIN, J. It was not controverted that the claimant's last exposure to the occupational disease of silicosis occurred while he was in the employ of defendant Stone Company, and that as against his employer compensation therefor was properly awarded. G.S. 97-58; *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E. 2d 797.

The only question presented by the appeal is whether from the testimony introduced there was any evidence to support the finding of the Industrial Commission that the disease which caused the disablement of the claimant while in the employ of defendant Stone Company was within the coverage of the policy issued by the defendant Insurance Company.

The policy designated the operations of the insured as "concrete products mfg.—shop or yard work only," and the location as 2336 South Boulevard, Charlotte, North Carolina, and contained the following pertinent provisions:

"This agreement shall apply to such injuries so sustained by reason of the business operations described in said declarations which for the purpose of this insurance shall include all operations necessary, incident

or appurtenant thereto or connected therewith, whether such operations are conducted at the work places defined and described in said Declarations or elsewhere in connection with or in relation to such work places.

"The premium is based upon the entire remuneration earned during the policy period of all employees of—this employer engaged in the business operations described in said declarations together with all operations necessary, incident or appurtenant thereto or connected therewith, whether conducted at such work places or elsewhere in connection therewith, or in relation thereto . . .

"4. The foregoing enumeration and description of employees includes all persons employed in the service of this Employer in connection with the business operations above described to whom remuneration of any nature in consideration of service is paid, allowed or due together with an estimate for the Policy Period of all such remuneration. . . . .

"5. This employer is conducting no other business operations at this or any other location not herein disclosed except: Other locations not covered hereunder."

From the findings of the Industrial Commission and the evidence offered as shown by the record, it appears that during the time this policy was in force and the claimant as employee of the insured was exposed to silicosis, the defendant Stone Company was engaged in "concrete products and dimension quarry," including processing stone for building, monumental and ornamental purposes, with its office in Charlotte. The quarry, belonging to defendant Stone Company, and from which the stone was obtained and where the stone was fabricated, is located at Faith, North Carolina, 40 miles from Charlotte. There fifteen or twenty workmen were employed, including claimant Williams, under a foreman, and the operations were controlled by orders from the Charlotte office where payrolls were kept and from which checks for wages were sent. Claimant was engaged in cutting and polishing stone. This place was referred to by one of the witnesses as "one of the work places of the company."

It is apparent that the work at the quarry was necessary and appurtenant to the business of the Stone Company and was controlled and directed from the office in Charlotte, and that the employees working there were covered by the policy, and by proper interpretation were included in its terms (*Miller v. Caudle,* 220 N.C. 308, 17 S.E. 2d 487), unless excluded by the words added at the end of paragraph 5 above quoted, "other locations not covered hereunder." This addenda presents some difficulty. It is not clear whether it was intended by these words to exclude all employees of defendant Stone Company except those in the Charlotte office, or whether "other locations" meant locations other than those designated or included in the policy. However, in *Miller v.*

Caudle, supra, where on similar facts the liability of this same Insurance Company, under an identical policy, was considered by this Court, it was said, "If the language of the policy is not clear but ambiguous, and there is uncertainty as to its right interpretation, the doubt is resolved against the Insurance Company." We are inclined to adopt that view. It was conceded that the policy was intended to cover the operations of the Stone Company in Charlotte, and we think its terms included operations "conducted elsewhere in connection therewith." Nor is it to be supposed that the parties intended to insure only a portion of the employees of a single business. We think the Industrial Commission has ruled correctly and its award should be upheld.

It was urged by appellee that no premiums were collected on the employees at the quarry. But this fact would not preclude recovery by the claimant if the policy covered his employment. Payrolls were open to inspection of Insurance Company, and the Industrial Commission has authorized the Insurance Company, in case the award is upheld, to collect the premiums based on the number of employees at the quarry.

Counsel have called our attention to decisions in other jurisdictions, some tending to support the claimant's position here, and others indicating a different view. Without attempting to analyze or distinguish these cases, we are content to rest our decision upon a proper interpretation of the terms of the policy in the light of the findings of fact made by the Industrial Commission on the evidence offered. It is well settled that these findings if supported by competent evidence are conclusive on appeal. *Kenan v. Motor Co.,* 203 N.C. 108, 164 S.E. 729; *Fox v. Mills,* 225 N.C. 580, 35 S.E. 2d 869; *Rewis v. Insurance Company,* 226 N.C. 325, 38 S.E. 2d 97.

We conclude that the court below correctly upheld the award of compensation to claimant, but that there was error in holding on the facts found by the Commission that the defendant Insurance Company was not liable under the terms of the policy therefor.

The cause is remanded for judgment in accordance with this opinion.

Reversed.

HELEN STEED PERKINS v. SIDNEY E. PERKINS, ALIAS DISNEY HARTE.

(Filed 10 May, 1950.)

1. Process § 4—

A summons issued after an amendment constituting a new cause of action is ineffectual as an *alias* summons, and endorsement of the word "*alias*" thereon does not make it in law an *alias* summons.

2. Process § 6—

Where the summons issued with the filing of the complaint is returned "defendant not to be found in the county," and thereafter purported *alias* summons is stricken as ineffectual, plaintiff is still entitled to attachment of defendant's property and the service of summons and notice of attachment by publication upon affidavit sufficient in form that defendant had left the State and was a nonresident, there being no discontinuance, and the attachment and service by publication in the prescribed manner obviating the necessity of issuance of summons.

3. Judgments § 30—

An order of the Superior Court may not be extended beyond the particular question raised and ruled upon.

4. Divorce and Alimony § 12—

A proper order for reasonable subsistence and counsel fees *pendente lite* may be enforced against a nonresident or absconding husband by attachment against his property without notice, and in such case the court may also appoint a receiver to collect the income from the husband's property. G.S. 50-16.

APPEAL by defendant from *Crisp, Special Judge,* February-March Civil Term, 1950, of MECKLENBURG. Affirmed.

Suit for alimony without divorce under G.S. 50-16, and for allowance for subsistence and counsel fees *pendente lite.*

The facts briefly stated were these:

The plaintiff instituted her action 14 October, 1949, by issuance of summons and filing complaint, setting out a cause of action for alimony without divorce, alleging in detail cruel treatment, failure to support and final abandonment, and praying for an allowance for subsistence and counsel fees *pendente lite.* The summons was returned by the sheriff "defendant not to be found in Mecklenburg County." On 29 October, 1949, plaintiff filed an amendment to her complaint alleging that defendant had left the State to avoid service of process and was now a nonresident; that he owned a house and lot in Charlotte from which he was collecting rent, and that he was attempting to transfer the title to this property to a fictitious person. Notice of *lis pendens* was also filed on this date. Pursuant to an order for an *alias* summons, another summons was issued 29 October, 1949, on which was endorsed the word *"alias,"* and this was returned by the sheriff as having been executed by leaving copies of summons and other papers at the last known address of defendant in Charlotte.

On 29 October, 1949, on plaintiff's affidavit that defendant had abandoned her, was a nonresident and owned real property subject to attachment, warrant of attachment was issued, of which on 1 November, 1949, the sheriff made return showing levy on described house and lot.

On 3 November, 1949, plaintiff filed two affidavits restating the facts upon which her action was based, the nonresidence of defendant and issuance of warrant of attachment, and praying that summons and warrant of attachment be served by publication.

Based upon plaintiff's affidavits and verified complaint, and the court's findings thereon, Judge Crisp on 3 November, 1949, entered an order that defendant pay for plaintiff's subsistence $150 per month pending the action, and that a receiver be appointed to rent the house and lot and pay the proceeds into court for the purposes set out in the order.

On 8 November, 1949, upon the plaintiff's affidavits, the sheriff's return, the order of court, and plaintiff's motion for service by publication, the clerk entered an order that notice of summons and attachment be published once a week for four successive weeks in the *Mecklenburg Times*. Publication was duly made as ordered for four weeks, 10, 17, 24 November, 1 December.

On 18 November, 1949, defendant through counsel entered special appearance and moved to dismiss plaintiff's action based on the purported *alias* summons of 29 October, on the ground that this was not an *alias*, but an original or new action, and that the purported *alias* summons did not show any relation to the original process. And on 9 December, 1949, Judge Patton, presiding, being of opinion that the issuance of summons 29 October had the force and effect of instituting a new action, ordered that "the cause of action based on summons issued October 29, 1949, be and the same is hereby dismissed."

On 29 December, 1949, defendant again through counsel entered special appearance and moved to dismiss the entire proceedings, including the order of Judge Crisp 3 November, 1949, and the order of the clerk directing service by publication, on the ground that the effect of the order of Judge Patton was to dismiss all proceedings ancillary and subsequent to 29 October, and that the action based on the summons of 14 October should be dismissed as no valid *alias* had been issued and the court was without jurisdiction to appoint a receiver.

Plaintiff answered defendant's motion to dismiss, admitting the ineffectiveness of the purported *alias* summons but alleging that all the proceedings which defendant seeks to have dismissed relate to the action instituted 14 October, 1949; that these proceedings were regular, based on summons and complaint filed, sheriff's return, affidavits and amendment to complaint, order of Judge Crisp, attachment, and publication of summons and attachment, beginning 10 November and ending 1 December.

When the defendant's motion came on for hearing, the court, Judge Crisp again presiding, was of opinion that the proceedings in attachment, referred to in the motion and answer, related to the action instituted

14 October, 1949, and ordered that defendant's motion to dismiss be denied, defendant to have 30 days from date of order to plead.

Defendant excepted and appealed.

Henry L. Strickland for plaintiff, appellee.
Elbert E. Foster for defendant, appellant.

DEVIN, J. On 14 October, 1949, plaintiff instituted action for alimony without divorce, and for an allowance for subsistence and counsel fees *pendente lite*, under G.S. 50-16. The summons was returned by the sheriff with the notation "defendant not to be found in Mecklenburg County." On 29 October, following, the plaintiff had another summons issued labeled *"alias* summons," but subsequently this was dismissed by order of court as ineffective. However, by amendment to her complaint and affidavits setting forth that the defendant had abandoned her and left the State, and that he owned real property in the State, warrant of attachment was issued and service of summons and notice of attachment by publication was ordered. Upon the showing before him Judge Crisp, presiding, entered order 3 November, 1949, requiring defendant to make certain payments to plaintiff for subsistence and counsel fees. The notice of summons and attachment were duly published, publication being completed 1 December, 1949.

The defendant appearing specially on 29 December, 1949, moved to dismiss all proceedings subsequent to 29 October, 1949, including order of the court of 3 November, and the service by publication, on the ground that these were based upon an invalid attempt to continue the original action by a so-called *alias* summons, and were embraced in Judge Patton's order of dismissal. This motion was denied by Judge Crisp who was again presiding in the court, and the defendant's exception thereto presents the question for review.

We think the defendant's motion was properly overruled. While Judge Patton correctly held that the mere endorsement of the word *"alias"* on the summons issued 29 October did not make it in law an *alias* summons (*Mintz v. Frink*, 217 N.C. 101, 6 S.E. 2d 804; *Ryan v. Batdorf*, 225 N.C. 228, 34 S.E. 2d 81), and accordingly dismissed the cause of action based on that summons, this did not necessarily sever the connection between the subsequent proceedings and the summons of 14 October, or render the proceedings void. Upon affidavits sufficient in form that defendant had left the State and was a nonresident warrant of attachment was levied on defendant's real property, and the summons and notice of attachment were duly served by publication under order of Court. *Scott & Co. v. Jones*, 230 N.C. 74, 52 S.E. 2d 219; G.S. 1-98; G.S. 1-444. No discontinuance is apparent. It seems well settled that where service

is had by attachment of property based upon affidavits sufficient in law and followed by publication in prescribed manner, the necessity of issuance of summons is obviated. *Grocery Co. v. Bag Co.,* 142 N.C. 174, 55 S.E. 90; *White v. White,* 179 N.C. 592, 103 S.E. 216; *Jenette v. Hovey,* 182 N.C. 30, 108 S.E. 301; *Voehringer v. Pollock,* 224 N.C. 409, 30 S.E. 2d 374. Cases cited by defendant, *Green v. Chrismon,* 223 N.C. 724, 28 S.E. 2d 215; *McGuire v. Lumber Co.,* 190 N.C. 806, 131 S.E. 274, and *Hatch v. R. R.,* 183 N.C. 617, 112 S.E. 529, are not in point.

The effect of the order of Judge Patton may not be extended beyond the particular question ruled upon by him, and is not determinative of the question here presented.

By adequate statutes and the decisions of this Court it has been established in this jurisdiction that in an action for alimony without divorce, upon issuance of summons and the filing of a verified complaint setting forth facts sufficient to entitle the complainant to the relief sought, the Judge of the Superior Court has power to require the payment by the husband of a reasonable amount for the wife's subsistence and counsel fees *pendente lite,* and the court may enforce its order by attachment against the property of a nonresident or absconding husband without notice (G.S. 50-16), and in such case may also appoint a receiver to collect the income from the husband's property. *Bailey v. Bailey,* 127 N.C. 474, 37 S.E. 502; *White v. White,* 179 N.C. 592, 103 S.E. 216; *Holloway v. Holloway,* 214 N.C. 662, 200 S.E. 436; *Peele v. Peele,* 216 N.C. 298, 4 S.E. 2d 616; *Wright v. Wright,* 216 N.C. 693, 6 S.E. 2d 555; *McFetters v. McFetters,* 219 N.C. 731, 14 S.E. 2d 833.

Judgment affirmed.

MARGARET NANCE REECE v. DAVIS J. REECE.

(Filed 10 May, 1950.)

Divorce and Alimony § 12—

The right to subsistence pending trial in a wife's action under G.S. 50-16, does not exist in favor of a wife who has abandoned her husband without just cause.

APPEAL by plaintiff from *Burney, J.,* at Chambers, 21 January, 1950, in action pending in the Superior Court of NEW HANOVER County.

Independent action for subsistence without divorce under G.S. 50-16.

It is alleged by plaintiff and admitted by defendant that the parties are husband and wife, and that they have been living in a state of separation since 3 September, 1947. The complaint states a good cause of

action for subsistence without divorce under the provision of G.S. 50-16 authorizing such relief for a wife whose husband has separated himself from her and failed to provide her with necessary subsistence according to his means and conditions in life. *Reece v. Reece,* 231 N.C. 321, 56 S.E. 2d 641. The answer denies all misconduct on the part of the defendant, and alleges affirmatively that the separation of the parties was caused by the act of the plaintiff in abandoning the defendant without just cause. The plaintiff applied to the court for an allowance for subsistence from the estate or earnings of the defendant pending the trial, and the defendant appeared in opposition to the application. The court heard the pleadings, affidavits, and oral testimony of the parties, and made full findings of fact thereon, including the specific finding "that the defendant, Davis J. Reece, did not abandon the plaintiff, Margaret Nance Reece, as alleged in the plaintiff's complaint; but, on the contrary, the plaintiff . . . voluntarily of her own free will and accord, without any fault on the part of the defendant, abandoned the defendant on September 3, 1947." The court thereupon entered an order denying the application of the plaintiff for an allowance of subsistence pending the trial, and the plaintiff appealed, assigning such ruling as error.

Walton Peter Burkhimer for plaintiff, appellant.
Allen & Henderson and Aaron Goldberg for defendant, appellee.

ERVIN, J. The statute now codified as G.S. 50-16 was enacted to establish an efficient procedure for enforcement of the marital right of the wife to support by the husband. Such right does not exist, however, in favor of a wife who has abandoned her husband without just cause. This being true, the court rightly refused the application of the plaintiff for an allowance for subsistence from the estate or earnings of the defendant pending the trial. *Byerly v. Byerly,* 194 N.C. 532, 140 S.E. 158; *McManus v. McManus,* 191 N.C. 740, 133 S.E. 9. See, also: *Pollard v. Pollard,* 221 N.C. 46, 19 S.E. 2d 1; and *Byrum v. Byrum,* 207 N.C. 655, 178 S.E. 97. In consequence, the order in question is

Affirmed.

MORTON G. THALHIMER, INC., v. AARON ABRAMS.

(Filed 10 May, 1950.)

Pleadings § 31—

A "further defense" which contains averments of fraud but which is insufficient to state a cause of action against plaintiff for actionable fraud is properly stricken upon motion when the averments are irrelevant to the issue between plaintiff and defendant.

APPEAL by defendant from *Stevens, J.*, at December Civil Term, 1949, of NEW HANOVER.

Civil action to recover on written contract commissions on rentals as compensation for negotiating a lease. Defendant denies all allegations of complaint. While action was pending, the leased premises burned. Thereafter plaintiff, by leave of court, filed an amendment to its complaint so as to include in its claim commissions on rents up to date of the fire. Defendant, answering, also denies the allegations of the amendment, and sets up what he terms "a further defense." Plaintiff moved to strike the allegations of the further defense for that they are "irrelevant, immaterial and impertinent, for even taken as true the said allegations of the further defense would neither work a defense for the defendant nor give him a cause of action nor counterclaim against the plaintiff." The motion was allowed, and from order in accordance therewith, defendant appeals to the Supreme Court and assigns error.

Harriss Newman and Rountree & Rountree for plaintiff, appellee.
Emmett H. Bellamy and Isaac C. Wright for defendant, appellant.

PER CURIAM. While it appears from careful reading and consideration of the matters set up in defendant's further defense that there are averments of fraud, it is manifest that these averments are insufficient to state a cause of action against plaintiff for actionable fraud. And what the effect of the averments is in respect of the lessees and their assignee is a matter foreign to the issue between plaintiff and defendant. Hence in the order striking the further defense, no error is made to appear.

Affirmed.

VERNELL JORDAN, MINOR, BNF, R. F. JORDAN, v. HERBERT SASSER AND LUTHER PRICE.

ANNIE MAE JORDAN, MINOR, BNF, R. F. JORDAN, v. HERBERT SASSER AND LUTHER PRICE.

R. F. JORDAN v. HERBERT SASSER AND LUTHER PRICE.

(Filed 10 May, 1950.)

APPEAL by defendant Price from *Halstead, Special Judge,* January Term, 1950, of COLUMBUS. No error.

Powell, Lee & Lee for plaintiffs, appellees.
Wm. F. Jones for Luther Price, appellant.

PER CURIAM. The three plaintiffs above named instituted action to recover damages for injury to person and property alleged to have been caused by the negligent operation of a motor truck belonging to defendant Price and driven by defendant Sasser. By consent the cases were consolidated for trial, and there was verdict for plaintiffs. From judgment on the verdict defendant Price appealed.

The only assignment of error brought forward by the appellant is the denial of his motion for judgment of nonsuit. He contends there was no evidence that the operation of the truck on this occasion was authorized by him or in his behalf. However, an examination of the evidence as shown by the record leads us to the conclusion that there was some evidence which when considered in the light most favorable for the plaintiffs (*Nash v. Royster,* 189 N.C. 408, 127 S.E. 356) was sufficient to carry the case to the jury. *Gallop v. Clark,* 188 N.C. 186, 124 S.E. 145.

No error.

NATIONAL SURETY CORPORATION v. VAN B. SHARPE AND LOUISE R. SHARPE, TRADING AND DOING BUSINESS AS CARTHAGE WEAVING COMPANY.

(Filed 24 May, 1950.)

1. Receivers § 8—

Any judge of the Superior Court has jurisdiction to appoint a receiver for an insolvent. G.S. 1-501.

2. Same—

In receiverships of insolvents under G.S. 1-501, G.S. Chap. 55, Art. 13, will be applied as far as possible, G.S. 1-502.

3. Receivers § 12d—

All claims against an insolvent must be settled in the original action in which the receiver is appointed except in the infrequent instances where the appointing court, for cause shown, may grant leave to a plaintiff to bring an independent action against the receiver.

4. Receivers § 12a—

All claims against an insolvent must be presented to the receiver in writing. G.S. 55-152.

5. Same—

The court should fix a time, giving appropriate notice thereof to creditors, within which claims against an insolvent must be presented or be barred. G. S. 55-152.

6. Receivers § 12d—

An order for the distribution of the assets of an insolvent should not be made until after the validity of all claims has been determined and their order of priority fixed. G.S. 55-152.

7. Same—

The receiver must pass upon the validity and priority of all claims presented, and to this end has plenary power to examine claimants and witnesses and to require the production of relevant books and papers, G.S. 55-152, and must notify claimants of his determination of their claims and report his findings to the next ensuing term of Superior Court. G.S. 55-153.

8. Same—

Any claimant may except to the receiver's determination of his claim or to the granting of priority to the claim of any other creditor which will exhaust the funds available for the payment of his claim, at any time within ten days after notice of the finding of the receiver and not later than three days after the beginning of the term to which the report is made, with discretionary power in the court to extend the time. G.S. 55-153.

9. Same—

If claimant does not demand a jury trial in his exceptions to the report of the receiver, he waives his right thereto. G.S. 55-153.

10. Same—

The general rules of evidence apply to the trial of exceptions to the report of a receiver upon an appropriate issue to be submitted by the court.

11. Same: Constitutional Law § 21—

An order of the Superior Court adjudging that the claim of a particular creditor constituted a preferred claim and ordering the receiver to pay such claim, made without notice, either actual or constructive, to other claimants, is contrary to the established rules of practice and procedure in receivership proceedings, G.S. 55-153, and is in contravention of due process of law in failing to give other claimants notice and an opportunity to be heard, Constitution of N. C., Art. I, Sec. 17, and must be held for error on appeal.

APPEAL by movent, York Mills, Inc., from *Phillips, J.*, in chambers at Rockingham, North Carolina, 4 February, 1950, in action in the Superior Court of MOORE County.

Motion in the cause made by York Mills, Inc., to set aside so much of a previous order of the court as adjudged the priority of a claim filed with receiver by plaintiff.

The facts essential to a decision of the appeal are set forth below. Unless otherwise indicated, they are gleaned from the record proper and the findings of the trial court.

On 20 July, 1949, a receiver was appointed in this cause to administer the assets of an insolvent partnership composed of the defendants, Van B. Sharpe and Louise R. Sharpe, trading as the Carthage Weaving Company, who had numerous creditors, including the plaintiff, National Surety Corporation, a surety corporation, and the York Mills, Inc., a

manufacturing corporation. No order was ever made or published limiting the time for creditors to file claims with the receiver.

On 15 August, 1949, the plaintiff presented to the receiver a claim in writing, asserting that the defendants were indebted to it in the sum of $29,194.88 on contracts antedating the receivership, and that such debt constituted a preferred claim or lien on the assets in the custody of the receiver. This claim has never been passed upon by the receiver.

The York Mills, Inc., alleged on the hearing of its motion in the court below that the defendants owed it $8,166.56 for goods, which it sold and delivered to the defendants immediately before the appointment of the receiver; and that it "filed a claim for this with the receiver in October, 1949," but "the receiver failed to pass on this claim." The court below found as a fact at that time that the York Mills was a simple contract creditor of the insolvent partnership in the amount stated, but made no finding either affirming or disaffirming the averment respecting the presentation of the claim of the York Mills to the receiver, and his inaction thereon. But the case on appeal as settled by the court recites that "the movent filed claim for preference with the receiver in October, 1949, but the receiver failed to pass on the same."

On 14 January, 1950, his Honor, F. Donald Phillips, Resident Judge of the judicial district which embraces Moore County, acting upon application of the plaintiff and without notice, either actual or constructive, to the York Mills, entered an order at chambers in Rockingham, North Carolina, adjudging that the plaintiff had a valid claim against the receiver for $29,194.88; declaring that such claim constituted a preferred claim and lien on the property in the custody of the receiver; and ordering the receiver to pay such claim out of such property.

The assets in the hands of the receiver fall far short of the amount necessary to pay off both the claim of the plaintiff and that of York Mills.

The order of Judge Phillips was filed in the office of the Clerk of the Superior Court of Moore County on 16 January, 1950, and two days later the York Mills acquired knowledge of its entry. The York Mills forthwith filed a verified motion in the cause, alleging that it "had no notice whatsoever that there would be a hearing on preferred claims on January 14, 1950" and that it "had no notice that any hearing had been held or order entered until January 18, 1950," and praying that "the order of January 14, 1950, be set aside and revoked in so far as it allows" the claim of the plaintiffs as a preferred claim, or that "the claim of the movent be allowed as a preferred claim."

The motion of the York Mills was heard by Judge Phillips at chambers in Rockingham on 4 February, 1950. The movent asserted at that time on the basis of evidence alleged to have been adduced on the previous

hearing that the contracts between plaintiff and the defendants antedating the receivership were chattel mortgages or conditional sales contracts, which had never been recorded; and that by reason thereof there was no legal foundation for the contention of plaintiff that its claim constituted a preferred claim or lien on the assets held by the receiver. The trial judge made no findings as to this, but he did find that the York Mills was a simple contract creditor of the insolvent partnership in the sum of $8,166.56 and that the York Mills "had no notice of the said order of January 14, 1950, or the hearing on which it was based until January 18, 1950." Notwithstanding these findings, Judge Phillips entered an order refusing to vacate the order of 14 January, 1950. The York Mills thereupon excepted and appealed, assigning errors.

Gavin, Jackson & Gavin for plaintiff, appellee.

John M. Spratt and Carroll & Steele for the York Mills, Inc., appellant.

ERVIN, J. This appeal necessitates an examination of the rules of practice and procedure in the presentation, proof, and payment of claims in receiverships. They may be summarized as follows:

1. Under the Code of Civil Procedure, "any judge of the Superior Court with authority to grant restraining orders and injunctions has jurisdiction" in proper cases to appoint a receiver to collect and preserve the assets of an insolvent debtor, to ascertain who are his creditors, and to administer his assets for the benefit of his creditors and all others concerned. G.S. 1-501; McIntosh: North Carolina Practice and Procedure in Civil Cases, section 891. The statute now codified as G.S. 1-502 stipulates that "the article Receivers, in the chapter entitled Corporations," *i.e.*, Article 13 of Chapter 55 of the General Statutes, "is applicable, as near as may be," to receivers appointed under the Code of Civil Procedure.

2. The law contemplates the settlement of all claims against the insolvent debtor in the original action in which the receiver is appointed, except in the infrequent instances where the appointing court, for good cause shown, grants leave to a claimant to bring an independent action against the receiver. *Black v. Power Co.*, 158 N.C. 468, 74 S.E. 468.

3. For this reason, all persons, who have claims against the insolvent debtor and desire to participate in the distribution of his estate, must present their claims to the receiver in writing. G.S. 55-152.

4. The court in control of the receivership should fix the time in which any and all claims against the estate of the insolvent debtor are to be presented to the receiver, give appropriate notice to creditors of such limitation of time by publication or otherwise, and postpone any order

of distribution until an opportunity has been afforded for the determination of the status of all claims and their order of priority. G.S. 55-152; *Schneider v. Schneider,* 347 Mo. 102, 146 S.W. 2d 548; *Naslund v. Moon Motor Car Co.,* 345 Mo. 465, 134 S.W. 2d 102; 45 Am. Jur., Receivers, section 246. The pertinent statute expressly provides that the court may bar all creditors and claimants failing to present their respective claims to the receiver within the time limited from participating in the distribution of the assets of the estate in receivership. G.S. 55-152.

5. The receiver must pass upon the validity and priority of the claims presented to him, and allow or disallow them or any part thereof, and notify the claimants of his determination. To enable the receiver to decide whether the claims are just, the law confers upon him plenary power to examine claimants and witnesses touching the claims, and to require the production of relevant books and papers. G.S. 55-152.

6. The receiver is required to report his finding as to any claim to the next ensuing term of the Superior Court in which the receivership was granted. G.S. 55-153.

7. When this is done, "any interested person" may except to the reported finding of the receiver as to the claim, and contest such finding in the original receivership action without any leave from the court provided he files his exception in apt time. The statute specifies that the exception may be filed "within ten days after notice of the finding by the receiver, and not later than within the first three days of the term" to which the report is made. The judge has the discretionary power, however, to extend the time for filing such exceptions. G.S. 55-153; *Benson v. Roberson,* 226 N.C. 103, 36 S.E. 2d 729. The term "any person interested" undoubtedly includes a claimant who wishes to resist a finding by the receiver adjudging his claim to be invalid, or of less dignity than that alleged by him. Moreover, a creditor, who has a valid claim, is certainly a "person interested" for the purpose of opposing a report of the receiver allowing the validity or priority of other asserted claims, whose payment will exhaust or reduce the receivership assets otherwise available for the satisfaction of his claim. *Wigginton v. Auburn Wagon Co.,* 33 F. 2d 496; *Farmers' Loan & Trust Co. v. San Diego St. Car Co.,* 45 F. 518; *Franklin Nat. Bank v. Whitehead,* 149 Ind. 560, 49 N.E. 592, 63 Am. St. Rep. 302, 39 L.R.A. 725; *In re Field Body Corp.,* 240 Mich. 28, 215 N.W. 6.

8. If the person, who excepts to the report of the receiver to the Superior Court, demands a jury trial on his exception, it is the duty of the court to prepare a proper issue and submit it to a jury; but if the demand for a jury trial is not made in the exceptions to the report, the right to a jury trial is waived. G.S. 55-153.

9. The general rules as to evidence in civil actions and proceedings apply on the trial of exceptions to reported findings of a receiver in respect to the validity and priority of claims against the estate of an insolvent debtor. *Hassall v. Wilcox,* 130 U.S. 493, 9 S. Ct. 590, 32 L. Ed. 1001; *Central Savings Bank v. Newton,* 59 Colo. 150, 147 P. 690; *In re Field Body Corp.,* 240 Mich. 28, 215 N.W. 6; *Lincoln Trust Co. v. Missouri Water, Light & Traction Co.,* 151 Mo. A. 322, 131 S.W. 889; *Westinghouse Electric Mfg. Co. v. Barre & Montpelier T. & P. Co.,* 98 Vt. 130, 126 A. 594.

10. Property in receivership is distributed in payment of the claims of creditors only upon order of the court. Manifestly, such an order should not be made until there has been a proper determination of the status of claims, and the order of their priority, and the assets available for their satisfaction. 45 Am. Jur., Receivers, section 335; 53 C.J., Receivers, section 513. See, also: *Strauss v. Building & Loan Association,* 117 N.C. 308, 23 S.E. 450, 30 L.R.A. 693, 53 Am. St. Rep. 585.

11. Even in the absence of an express statutory requirement to that effect, the giving of appropriate notice to creditors is an essential prerequisite to the entry of an order for the payment of claims by a receiver, for one whose rights will be affected by a proceeding in court should be notified in order that he may appear and protect his interests. *Naslund v. Moon Motor Car Co.,* 345 Mo. 465, 134 S.W. 2d 102. It is provided by statute in this State "that no court shall issue any order of distribution or order of discharge of a receiver until said receiver has proved to the satisfaction of the court that written notice has been mailed to the last known address of every claimant who has properly filed claim with the receiver, to the effect that such orders will be applied for at a certain time and place therein set forth and by producing a receipt issued by the United States Post Office, showing that such notice has been mailed to each of such claimants' last known address at least twenty days prior to the time set for hearing and passing upon such application to the court for said orders of distribution and/or discharge." G.S. 55-153 as amended by Chapter 219 of the 1945 Session Laws of North Carolina.

Article I, Section 17, of the North Carolina Constitution was copied in substance from Magna Charta by the framers of the Constitution of 1776, and prescribes that "no person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land." The term "law of the land" is synonymous with "due process of law," a phrase appearing in the Federal Constitution and the organic law of many states. *S. v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731, 7 A.L.R. 2d 407.

A text writer has laid open the meaning of due process of law in its procedural aspect with accuracy in these words: "In its procedural aspect the constitutional guaranty of due process of law assures to every person his day in court, and means that there can be no proceeding against life, liberty, or property without observance of those general rules established in our system of jurisprudence for the security of private rights. It guarantees a course of legal procedure which has been established in our jurisprudence for the protection and enforcement of private rights. Its essential elements are notice and opportunity to be heard or defend, before a competent tribunal, in an orderly proceeding adapted to the nature of the case, which is uniform and regular, and in accord with established rules which do not violate fundamental rights." 16 C.J.S., Constitutional Law, section 569.

The established rules of practice and procedure in the presentation, proof, and payment of claims in receivership are aptly designed to secure to each claimant his constitutional right to due process of law in its procedural aspect.

It affirmatively appears upon the face of the record that these established rules were not observed in the proceeding under review; that the order of 14 January, 1950, was entered contrary to the course and practice of the court, and without notice, either actual or constructive, to the York Mills; and that the order of 4 February, 1950, deprived the York Mills of its legal right to contest the claim of the plaintiff in the mode appointed by law. Moreover, the case on appeal reveals that there is a substantial question as to the asserted right of the plaintiff to a preferred claim or lien on the assets in receivership. See: *Manufacturing Co. v. Price,* 195 N.C. 602, 143 S.E. 208.

For these reasons, the orders of 14 January, 1950, and 4 February, 1950, are hereby annulled and vacated in so far as they find and decree that the plaintiff has a valid preferred claim constituting a lien on assets of the receivership, and in so far as they order the receiver to pay such alleged claim out of such assets. The cause is remanded to the Superior Court of Moore County with directions that the question of the validity and priority of the claim asserted by plaintiff be determined in accordance with the rules of practice and procedure regulating the presentation, proof, and payment of claims in receivership. We observe, in closing, that there is no valid basis for the contention of the York Mills that its claim is a preferred one.

Error.

L. A. BUFFALOE AND PEARL W. BUFFALOE, HIS WIFE, v. L. W. BLALOCK, JR.

(Filed 24 May, 1950.)

1. Wills § 31—

The intent of testator as gathered from the four corners of his will must be given effect unless contrary to some rule of law or at variance with public policy.

2. Wills § 33c—

A devise to testator's four sons, but if any one of them should "fail to become a father of a living child by lawful wedlock" his share should revert to the estate, *is held* to devise a fee simple to each son, defeasible upon his death without having had a living child born in wedlock, but which becomes a fee simple absolute as to each son upon the birth to him of a living child in wedlock.

3. Same: Wills § 38—Possibility of reverter held to have passed to residuary legatees and their deed estops them and their heirs.

By residuary clause, testator devised the remainder of his estate to his four sons, his sole heirs at law, each to take a defeasible fee to become absolute as to each upon the birth of a living child in wedlock. *Held:* Testator intended to dispose of all the residue of his estate in the residuary clause, including any reversion, and therefore if the fee of any one of the sons should be defeated, the reversion would go to the estate and pass under the residuary clause to the other sons or their heirs, who would not take as purchasers under the will but by descent from the devisee, and therefore deed executed by the four sons conveys the fee simple absolute, since the deed of each would estop him or his heirs from claiming any reversionary interest if such interest should thereafter arise.

APPEAL by defendant from *Harris, J.*, at Chambers in Raleigh, N. C., 7 January, 1950. From WAKE.

Controversy without action submitted on an agreed statement of facts.

The plaintiffs and the defendant entered into a written contract, on 19 October, 1949, by the terms of which the defendant agreed to purchase from the plaintiffs a certain lot, described in the agreement, for the sum of $1,000.00, and the plaintiffs agreed to sell and convey the property to the defendant by deed conveying a good and indefeasible fee simple title thereto.

The land in question is a part of the estate of George R. Parker, who died testate in 1929. His will was duly admitted to probate on 16 January, 1929.

The residuary devise under which the property in question passed, reads as follows:

"Ninth: After the above bequests have been properly provided for all the property belonging to my estate shall be apportioned equally among

my children: Alan Phares, Joseph Yates, Harry Oliver and William Carey. If any one of my children fail to become the father of a living child by lawful wedlock then in that event the property of that son or those sons who fail to become parents as above set out shall revert to my estate at the death of any son who shall fail to become the father of a living child born of lawful wedlock."

On 10 October, 1949, the four sons of George R. Parker (with the spouses of those who were married), executed a deed in fee simple for the said George R. Parker Farm to the plaintiffs, L. A. Buffaloe and wife, Pearl W. Buffaloe, said deed containing full covenants of warranty and containing in the granting clause and in the *habendum* the specific language, "together with and including all interests and rights of the parties of the first part, both vested and contingent, present and prospective, and including remainders, reversions and any other rights and interest which the parties of the first part may now have or may hereafter acquire in said George R. Parker Farm."

At the time of the execution of the above mentioned deed to L. A. Buffaloe and Pearl W. Buffaloe, dated 10 October, 1949, Alan Phares Parker, Joseph Yates Parker and Harry Oliver Parker each had "become the father of a living child by lawful wedlock," but no issue has yet been born to William Carey Parker.

The four sons of George R. Parker, namely, Alan Phares Parker, Joseph Yates Parker, Harry Oliver Parker and William Carey Parker, were at the time of the death of George R. Parker, and are now the sole heirs at law of George R. Parker.

Subsequent to the execution and recordation of the deed dated 10 October, 1949, to L. A. Buffaloe and Pearl W. Buffaloe, the said plaintiffs executed and tendered to L. W. Blalock, Jr., a deed for a portion of said George R. Parker Farm, pursuant to the contract of purchase and sale therefor, but said deed was refused by L. W. Blalock, Jr., on the ground that it did not convey the full fee.

The defendant admits the deed tendered would convey a good title to the three-fourths undivided interest in said property, but he contends that Alan Phares Parker, Joseph Yates Parker, Harry Oliver Parker and William Carey Parker (together with the spouses of those that are married) had no power or authority to convey to the plaintiffs an indefeasible title to the remaining one-fourth undivided interest in said property, and that therefore the deed tendered by the plaintiffs to the defendant does not convey an indefeasible fee simple title.

His Honor held the plaintiffs are vested with a good and indefeasible fee simple title to the lands described, and that the deed tendered by plaintiffs to the defendant will convey to and vest in the defendant a good

and indefeasible fee simple title to said premises, and entered judgment accordingly.

The defendant appeals and assigns error.

A. L. Purrington, Jr., and Weathers & Young for plaintiffs.

C. C. Cunningham for defendant.

DENNY, J. The intent of the testator is the polar star that must guide the courts in the interpretation of a will. *Elmore v. Austin, ante,* 13; *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17; *Holland v. Smith,* 224 N.C. 255, 29 S.E. 2d 888. This intent is to be gathered from a consideration of the will from its four corners, and such intent should be given effect, unless contrary to some rule of law or at variance with public policy. *House v. House,* 231 N.C. 218, 56 S.E. 2d 695; *Williams v. Rand,* 223 N.C. 734, 28 S.E. 2d 247; *Culbreth v. Caison,* 220 N.C. 717, 18 S.E. 2d 136; *Smith v. Mears,* 218 N.C. 193, 10 S.E. 2d 659; *Heyer v. Bulluck,* 210 N.C. 321, 196 S.E. 356.

A brief review of the provisions of the last will and testament of George R. Parker, deceased, will be helpful in arriving at his intent, as set forth in the Ninth Item thereof, which Item contains the provision upon which the validity or invalidity of the tendered deed must be determined.

The testator made provision for the education of his children, being the four sons named in the residuary clause of his will, "to the extent of an A.B. graduate course of Wake Forest College or some other college of equal standing." He also expressed the wish that his estate remain as an undivided whole until all of his children shall have been educated as provided therein. He directed that the income from the estate should be used in defraying the expenses of his wife and such of his children as might not have finished their college education as provided for in the will, as far as might be necessary, the remainder to accumulate for the benefit of his estate. The will then contains the following provisions:

"SIXTH: After my children shall have been educated as above set out, then the remainder of my estate shall be divided as follows:

"SEVENTH: To my wife I give and bequeath a one fifth interest in all my personal property and a life estate of a one third interest in all my real estate.

"EIGHTH: To my sister Annie I bequeath the house now owned by me, situated on the South side of and known as number 307 West South Street, Raleigh, N. C., for the term of her natural life. At her death this property shall revert to my estate."

It seems clear to us that the testator intended to dispose of all the residue of his estate, under the provisions contained in the residuary

clause, including any part of his estate that might revert thereto under the terms of the will.

It is conceded that William Carey Parker was the only son and heir of the testator who had not become the father of a living child in lawful wedlock, when the deed was executed on 10 October, 1949, purporting to convey the George R. Parker Farm to the plaintiffs. Consequently, at the time of the execution of this deed, Alan Phares Parker, Joseph Yates Parker and Harry Oliver Parker, were seized and possessed of a three-fourths undivided interest in the property conveyed, in fee simple. And William Carey Parker was seized and possessed of a one-fourth undivided interest in said property in fee simple, subject to be divested at his death, if during his lifetime he should "fail to become the father of a living child by lawful wedlock." It follows then that each of the other sons having become the father of a living child born in lawful wedlock, held his interest in fee simple and also a contingent interest in the one-fourth undivided interest of William Carey Parker.

It is quite clear that the real question for determination is whether or not the holders of the contingent interest could convey such interest to these plaintiffs, and by their deed estop themselves and their heirs from claiming any interest therein, should William Carey Parker die without having become the father of a living child born in lawful wedlock.

The appellant takes the position that the heirs of the grantor who may be eligible to take, at the death of William Carey Parker, should he die without having become a father, as contemplated in the will, cannot be ascertained until the death of William Carey Parker, the first taker, citing *Burden v. Lipsitz,* 166 N.C. 523, 82 S.E. 863, and *Daly v. Pate,* 210 N.C. 222, 186 S.E. 348.

In *Burden v. Lipsitz, supra,* the devise was in the following language: "I give to my son, John Henry Burden, a fee-simple title to the tract of land on which I live, it being all the land I own, provided he has a child or children; but if he has no child, then I give him the said land during his life, and to his widow if he leaves one surviving, during her widowhood, and then the said land shall go in equal portions to my heirs at law as if I had made no will." The court very properly held that upon the nonhappening of the contingency named, the heirs of the grantor took directly from the testator as his heirs at law and that the contingent event by which the estate was determined must be referred, not to the death of the devisor, but to the death of the first taker. Revisal, sec. 1581, now G.S. 41-4. And in *Daly v. Pate, supra,* the testator devised to his daughter and her heirs certain lands, in fee simple absolute should she leave any child or children surviving her, but should she not leave any child or children surviving her, "then it is my will and desire that said lands shall revert to my estate and be equally divided as best it may

be between my then living nephews and nieces." Clearly the "then living nephews and nieces" could not be ascertained until the death of the first taker.

The above cases are not controlling on the facts presented on this appeal. The reversion of the interest of William Carey Parker, if and when it occurs, will not revert to the estate of the testator to be divided among his heirs at law, as if he had made no will, neither will it revert to his estate to be divided among his then living heirs at law. On the contrary, it will revert to the estate of the testator and pass under the residuary clause of his will. And his four sons being the sole residuary legatees and devisees under the will, the one-fourth undivided interest will pass to the other three sons of the testator, or through them by descent to their heirs, if any of them predecease William Carey Parker. *Whitesides v. Cooper,* 115 N.C. 570, 20 S.E. 295. And since such heirs must take by descent from the devisees and not directly from the devisor as purchasers, the holders of the contingent estate did have the right to convey such estate to the plaintiff. *Bodenhamer v. Welch,* 89 N.C. 78; *Kornegay v. Miller,* 137 N.C. 659, 50 S.E. 315; *Hobgood v. Hobgood,* 169 N.C. 485, 86 S.E. 189; *Williams v. Biggs,* 176 N.C. 48, 96 S.E. 643; *Grace v. Johnson,* 192 N.C. 734, 135 S.E. 849; *Croom v. Cornelius,* 219 N.C. 761, 14 S.E. 2d 799.

In *Williams v. Biggs, supra,* the lands were devised to the four sons of the testator, but with a provision to the effect that if either one of the sons should die without a lawful heir, then his share should descend to the surviving sons and their heirs forever. One of the sons died without issue and the survivors undertook to convey the property in fee simple. This Court held that the three surviving brothers could convey a good title to the property. *Walker, J.,* speaking for the Court, said: "In any view of the case, the estate was vested absolutely either in all the surviving brothers, or ultimately will so vest in some one or more of them. If any one of them should die, leaving heirs, his share would descend to such heirs, who, though, would be bound by his deed as the warranty in the deed of the ancestor will conclude and estop or rebut the heir who takes by descent. Of course, where the heirs, issue or children, are so designated as to take by purchase, under the terms of the will, there is no estoppel or rebutter as they do not take from their ancestor by descent, but directly from the devisor as purchasers. *Whitesides v. Cooper, supra.* But whether all the sons die without leaving issue, and others die leaving issue, all parties have joined in the deed who have or will have the title to the land. We are of opinion that the plaintiff has derived his title from parties who, if not owners of the land at the time they conveyed it to him, will eventually become the owners in fee simple absolute, and therefore that all interest therein has passed to him. It follows that the

deed tendered to the defendant will convey to him a good and indefeasible title."

To the same effect is *Hobgood v. Hobgood, supra,* where this Court, speaking through *Hoke, J.,* said: "When the holders of a contingent estate are specified and known, they may assign and convey it, and, in the absence of fraud or imposition, when such a deed is made, it will conclude all who must claim under the grantors, even though the conveyance is without warranty or any valuable consideration moving between the parties."

In the case of *Croom v. Cornelius, supra,* the testator devised his property in these words: "I wish my estate of whatever nature equally divided among the aforesaid four . . . if there are no surviving children to go not to any inlaws or other outsiders, but revert to my other children or grandchildren." The plaintiff, one of the devisees, obtained a deed for the devised lands, duly executed by all the other devisees under the will. This Court held the plaintiff had a good title to the property, since he held a deed from all the other devisees under the will, to whom in the event of the happening of the contingency the land would descend; and that they and their heirs would be estopped by their deed.

The case before us is not like *Burden v. Lipsitz, supra,* and *Daly v. Pate, supra,* where the ultimate takers were not known and could not be ascertained until the preceding estate terminated. It makes no difference when the reversion takes place, the ultimate takers are known and since their heirs will take by descent, if any one or more, or all of them, are dead when the property reverts, if it ever does, such heirs will be estopped by the deed of the ancestor or ancestors. Moreover, if William Carey Parker becomes the father of a living child born in lawful wedlock, he and those who may claim under him will be bound by his warranty in the deed to these plaintiffs.

Furthermore, it so happens that if the property involved herein reverts to the estate of the testator, it will descend in the same channel and by the same line of descent as it would if there were no defeasance clause in the will and William Carey Parker should die intestate. *Croom v. Cornelius, supra; Hales v. Renfrow,* 229 N.C. 239, 49 S.E. 2d 406.

In our opinion, the deed tendered by the plaintiffs will convey a good title to defendant. Hence, the judgment of the court below is

Affirmed.

JIMMY EVANS, EMPLOYEE, v. TABOR CITY LUMBER COMPANY AND/OR WACCAMAW LUMBER CORPORATION, INSURED BY EMPLOYERS' MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, AND/OR G. J. MARTIN, NON-INSURER, ALLEGED EMPLOYERS.

(Filed 24 May, 1950.)

1. Master and Servant § 55d—

While findings of fact of the Industrial Commission are conclusive on appeal when supported by evidence, G.S. 97-86, the courts must review the reasonableness of the inferences of fact deduced from the basic facts found, and the conclusions of law predicated upon them.

2. Master and Servant § 38c—

A lumber company which purchases timber on the basis of a stipulated price per thousand feet when processed into lumber by it, and which is given the privilege of going upon the land and cutting and logging the timber to its site, cannot be held a contractor of the owners of the timber in the performance of the logging operations, and therefore a person employed by it to conduct logging operations cannot be a sub-contractor within the meaning of G.S. 97-19, and the statute has no application in determining the liability for injury to one of the workmen employed in the logging operations.

3. Same: Master and Servant § 39b—

Where a lumber company, pursuant to its contract for the purchase of timber, engages in logging operations, and a workman is injured in the course of his employment relating thereto, the Industrial Commission should find from the evidence whether the person employed by the lumber company to perform the logging operations was an employee or an independent contractor in order to determine the respective liabilities of the parties for compensation for injury to the workman.

4. Master and Servant § 55g—

Where the award of the Industrial Commission is erroneous, the courts may not on appeal make an award *pro* or *con* from the evidence, but will remand the cause to the Industrial Commission for proper findings of fact and conclusions of law.

DEFENDANTS' Waccamaw Lumber Company, Tabor City Lumber Company and Employers' Mutual Liability Insurance Company of Wisconsin appeal from *Crisp, Special Judge,* November 1949 Term, COLUMBUS Superior Court.

J. B. Eure for plaintiff, appellee.

David M. Britt for defendants, appellants.

SEAWELL, J. Our review concerns a claim of the plaintiff claimant filed with the Industrial Commission against the defendant lumber com-

pany for whom its codefendant insurance company is insurance carrier, and defendant Martin, non-insurer, as employers, seeking an award for an injury for which it is contended they are liable under the Workmen's Compensation Law.

The hearings before the Industrial Commission resulted in an award of compensation to the claimant, and from this award an appeal was taken to the Superior Court where the award was affirmed; and the defendants or respondents appealed to this Court.

The claimant contends that at the time of his injury he was in the employment of the defendant Martin in logging timber from a tract of land in Columbus County, and that Martin was sub-contractor of the logging operations under his codefendant, the Waccamaw Lumber Company, which because of its relationship to the owners of the timber, Holliday Brothers, was the original contractor in such logging operation, and that both the defendant Martin and his codefendant, the Waccamaw Lumber Company and the insurance carrier are all liable under the Workmen's Compensation Act, G.S. 97-19, which reads as follows:

> "Any principal contractor, intermediate contractor, or sub-contractor who shall sublet any contract for the performance of any work without requiring from such sub-contractor or obtaining from the Industrial Commission a certificate, issued by the Industrial Commission, stating that such sub-contractor has complied with 97-93 hereof, shall be liable, irrespective of whether such sub-contractor has regularly in service less than five employees in the same business within this State to the same extent as such sub-contractor would be if he had accepted the provisions of this Article for the payment of compensation and other benefits under this Article on account of the injury or death of any employee of such sub-contractor, due to an accident arising out of and in the course of the performance of the work covered by such sub-contract. If the principal contractor, intermediate contractor, or sub-contractor shall obtain such certificate at the time of subletting such contract to sub-contractor, they shall not thereafter be held liable to any employee of such sub-contractor for compensation or other benefits under this Article. The Industrial Commission, upon demand, shall furnish such certificate, and may charge therefor the cost thereof, not to exceed twenty-five (25) cents. Any principal contractor paying compensation or other benefits under this Article, under the foregoing provisions of this section, may recover the amount so paid from any person, persons, or corporation who, independently of such provision, would have been liable for the payment thereof. Every claim filed with the Industrial Commission under this section shall be insti-

tuted against all parties liable for payment, and said Commission, in its award, shall fix the order in which said parties shall be exhausted, beginning with the immediate employer."

Inasmuch as it is admitted, or at least the evidence clearly shows, that the injury was by accident arising out of the employment and in course thereof, and that at that time the combined number of employees of Martin and the Waccamaw Lumber Corporation exceeded the number required for application of the Act, and other facts necessary to sustain the award, the controversy narrows down to the determination of the relationship existing between the Waccamaw Lumber Corporation and Holliday Brothers, of South Carolina, respecting the ownership of the timber which Martin was cutting and carrying to the mill site of the Lumber Company and for which the latter company was paying Holliday Brothers a stipulated price per thousand feet as and when the timber was cut and delivered to the mill.

The evidence on that particular point, mostly advanced by the defendant Lumber Company or its officers and codefendant Martin, is substantially as follows:

W. F. Maurer, secretary of the Waccamaw Lumber Corporation, testified repeatedly that the lumber company did not purchase the timber on the tract and that it belonged to Holliday Brothers:

"Q. So that the Waccamaw Lumber Co. did own the timber?

"A. Waccamaw Lumber Company did do what?

"Q. Did own the timber?

"A. No, I said we just paid for it as it was cut.

"Q. My understanding, Mr. Maurer, that you said the Waccamaw Lumber Company bought the timber and Mr. Martin cut it?

"A. I said that the timber belonged to the Holliday Brothers which is, I imagine, the P. D. Farms, Inc., Gallavant's Ferry, S. C.

"Q. Well now, did Mr. Martin buy the timber?

"A. No sir, he did not buy it.

"Q. Who bought it?

"A. Nobody bought it. We paid for it as it was cut.

"Q. Well, didn't you all buy it?

"A. We didn't buy it until we had it. Then we bought it.

"Q. Mr. Maurer, I think we're just splitting hairs here a little bit.

"A. Can I tell you this, where we buy the timber, that tract, that timber we consider ours. We can cut it when we want to.

"Q. Well, as I understand it, the officials of the Waccamaw Lumber Company made a trade with the owner of this timber by which the Waccamaw Lumber Company after having the timber cut and

hauled to the mill to pay the original owner of the timber so much a thousand for what they had cut and hauled to the mill, is that correct?

"A. Yes, sir."

The defendant Martin testified: "Mr. Maurer has testified correctly as to my relationship with the company." Pursuant to questions by the court, he further testified:

"I know the arrangements Waccamaw Lumber Company had with the owners of the land where claimant was hurt. The Hollidays wanted to sell the timber and they couldn't agree on a lump price, therefore, Waccamaw Lumber Company agreed to deliver them $20.00 per thousand feet for what they cut. After it was delivered to the mill they were to give them $20.00 a thousand for the logs. The timber was to be cut clean, ten inches up. They couldn't agree on the stumpage so agreed by the thousand and were to be paid after the logs were delivered to the mill.

"This is the usual agreement on a tract of timber where they can't agree on a lump sum. Sometimes they go out in the woods, look at the timber and when they can't agree on the footage they get down and agree per thousand."

Upon this evidence the commission found as facts:

"That the defendant, the Waccamaw Lumber Company, sometime prior to the date the plaintiff was injured, entered into an agreement or contract with the owners of the tract of timber where the plaintiff was working at the time he was injured to cut said timber, transport it to the mill and to pay the said owners of the timber, namely, the Holliday Brothers, the sum of $20.00 per thousand after the logs were delivered to the mill for the amount which was cut by said Waccamaw Lumber Company. The agreement, which was oral, further provided that the timber which was cut was to be cut clean and not more than ten inches from the ground; that the defendant, the Waccamaw Lumber Company, was therefore the principal contractor in connection with the cutting of the timber on the tract of land on which the plaintiff was injured."

* * *

"The Commission specifically finds as a fact that the defendant, G. J. Martin, at the time the plaintiff was injured was a sub-contractor of the defendant, the Waccamaw Lumber Company, said Waccamaw Lumber Company having originally contracted with the owners to cut and transport the timber to said defendants, Waccamaw Lumber Company's mill, and pay said owners for the timber when it

was transported to the mill; that the plaintiff employee, Jimmy Evans, at the time he suffered his injury by accident was an employee of G. J. Martin, sub-contractor of the principal contractor, the Waccamaw Lumber Company; that the principal contractor, the Waccamaw Lumber Company, at the time it contracted with the said G. J. Martin to cut and haul some of the timber on the tract owned by the Holliday Brothers did not require said sub-contractor to obtain workmen's compensation insurance nor require said sub-contractor to obtain a certificate from the Industrial Commission that he had complied with G.S., Paragraph 97-93."

And concluded as a matter of law:

"(1) The Waccamaw Lumber Company was the principal contractor in connection with the logging and transporting of the timber on the tract of land owned by the Holliday Brothers. The defendants contend that the Waccamaw Lumber Company was not a contractor but the owner of the timber. If said Waccamaw Lumber Company had purchased the timber for a lump sum amount or had acquired a timber deed for said timber, the Commission is of the opinion that they would be the owners thereof but instead they simply contracted with the owners to cut and deliver some of the merchantable timber to their mill and after it was delivered, to pay said owners so much per thousand for the timber which they cut and transported. This was just as much a contract as was the contract between the Waccamaw Lumber Company and the defendant, G. J. Martin, to cut and deliver some of the merchantable timber from the tract of land owned by the Holliday Brothers to the mill and receive so much per thousand for doing said work.

"(2) The word 'sub-contractor' is generally understood. The prefix 'sub' in the sense it is used here means subordinate, secondary, inferior, lower in position, grade or rank. Therefore, from all the evidence the Commission concludes as a matter of law that the defendant, G. J. Martin, was a sub-contractor for the principal contractor, the Waccamaw Lumber Company, in connection with the cutting of the timber on the tract of land on which the plaintiff was injured."

The Commission further found that the defendant G. J. Martin is primarily and first liable to the plaintiff for the compensation award; and concluded as a matter of law that if plaintiff was not able to obtain the compensation from the defendant Martin after having exhausted his legal remedies, that defendants Waccamaw Lumber Company and its insurance carrier were liable for the payment of compensation to the

plaintiff for temporary total disability, making specific schedules and terms of payment, and made a corresponding award.

Other matters of detail not fully set out above have not been considered important to the record in view of our decision. Nevertheless, it may be said that they were of a character to sustain the award both as to evidence and conclusions of law, except in the respects herein noted.

We are unable to sustain the findings of fact or the conclusions of law made by the Industrial Commission and affirmed by the lower court with respect to the liability of the Waccamaw Lumber Co. The defendant Martin has elected not to come under the provisions of the Workmen's Compensation Act. If the Waccamaw Lumber Company had been in fact and in law an original contractor within the provisions of such Act, G.S. 97-19, he would be liable with the codefendant; but not as we view it in the present proceeding.

The appellee calls attention to the rule that this Court is bound by the Commission's finding of fact when there is any evidence to support it. This is true, of course. G.S. 97-86, and annotations. But the principle must be applied with discrimination. A "fact found" upon supporting evidence may be posited as an evidentiary fact purporting to establish the existence of another, or other facts or factual situations necessary to the final result; or leading to a question of fact and law, or a conclusion of law upon which the decision or award is necessarily predicated. It is still the office of this Court to determine whether a reasonable inference may be drawn from the basic fact, or facts, found by the Commission tending to establish the other facts in sequence, or the conclusions predicated upon them. The question primarily is one of probative value in the several sequences.

The Commission has found several facts in connection with the contract between the lumber company and Holliday Brothers as follows: That the lumber company did not buy the entire tract of timber at a bulk price but did purchase such timber as was logged by the Lumber Company, carried to the mill and converted into lumber, at so much per thousand feet; that it did agree to cut the timber upon the site of its operation clean, in accordance with the specifications given. The Commission is of the opinion that this is evidence pointing to its conclusion as to facts and law that the lumber company thereby undertook, *for and in behalf of* the owners of the timber, to do the logging for them, transport the timber to the mill site, where the duties to be performed by the owners then ended and the timber, when converted, became that of the lumber company, to be paid for according to the ascertained footage.

We cannot see how for the purpose of this case it makes any difference whether the lumber company had bought the entire tract at an upset price upon an estimated footage, or whether they bought the timber piece-

meal in the manner contended for by the defendants and adopted by the Industrial Commission in making the award. The principle is the same.

In analyzing any bilateral contract in order to see the several duties imposed upon either of the parties thereby, there is the prime necessity of determining upon which of the parties rests consideration and duty; and no matter which way we consider terms of the contract under consideration, it is not susceptible to the interpretation that the logging operation performed by the lumber company became a duty to be performed by the Holliday Brothers or that any consideration moved from them to the lumber company for its performance for them by the lumber company. Entrance upon the premises by the lumber company or its agents, or those clothed with the authority to do so, cutting or logging the timber and transporting it to the site where it was to be cut into lumber, was clearly a privilege granted by the owners in the contract to facilitate an operation which the lumber company carried on in its own behalf.

The logic of the Industrial Commission in concluding that there can be no sub-contractor without an original contractor is unimpeachable; and by "original contractor" is meant one who has undertaken for another to do something, the performance of which he has in whole or in part sublet to another. It would be unreasonable to assume that a person could contract with himself to do something for his own benefit so as to answer the definition of original contractor if he should contract the performance of that operation to another person or concern.

We are, therefore, of the opinion, and so find, that Martin was not a sub-contractor within the meaning of the statute, G.S. 97-19, and that this statute has no application.

However, neither this Court nor the Superior Court has the right to make an award *pro* or *con* upon the evidence which was submitted or which may be submitted before the Industrial Commission. *Reed v. Lavender Brothers,* 206 N.C. 898, 172 S.E. 877; *Walker v. Wilkins,* 212 N.C. 627, 194 S.E. 89.

Referring to the rationale of the decision in making its award, it appears that the Industrial Commission, basing its decision entirely on the application of the cited statute, did not pass upon the question whether Martin was an independent contractor, whether there was evidence in that respect, or want of evidence, either *pro* or *con.* We cannot, as we have said, make an award for them. The case is therefore remanded to the Superior Court, which in turn will remand the proceeding to the Industrial Commission to make its findings of fact and conclusions of law in that respect upon such evidence as may be before it.

Error and remanded.

STATE v. JOSEPH C. FULK.

(Filed 24 May, 1950.)

1. Criminal Law § 52a (1)—

On motion to nonsuit the evidence must be taken in the light most favorable to the State. G.S. 15-183.

2. Criminal Law § 52a (3)—

In order for circumstantial evidence to be sufficient to sustain conviction of a felony the circumstances 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.

3. Homicide § 25—Circumstantial evidence held sufficient to sustain conviction of first degree murder.

Evidence tending to show that deceased was shot and killed by a rifle bullet which was fired from the direction of defendant's trailer, some 110 feet away, that immediately thereafter there was a great deal of noise from persons screaming and hollering and from sirens of an ambulance and of an officer's car coming to the scene, that an officer went to defendant's trailer and found defendant therein, that defendant denied knowing that a man had been shot, and without the name of the victim having been mentioned, inquired whether the officer was accusing him of shooting the deceased, calling his name, that a .22 calibre rifle and an empty shell were found in the trailer, smelling of powder, together with evidence that the bullet taken from deceased's head was of the same weight as a .22 long rifle bullet, *is held* sufficient to support defendant's conviction of murder in the first degree.

APPEAL by defendant from *Moore, J.*, at January Term, 1950, of STOKES.

Criminal prosecution upon a bill of indictment charging that defendant, Joseph C. Fulk, with force and arms, at and in Stokes County, feloniously, willfully and of his malice aforethought, did kill and murder W. A. Wall contrary to the form of the statute, etc.

Upon arraignment, defendant pleaded not guilty.

And upon the trial in Superior Court, the State offered evidence tending to show that W. A. Wall came to his death on 8 October, 1949, at about 12:45 o'clock p.m., while sitting on a bench in front of, or on the south side of his place of business, a grocery store and service station combined, in King, North Carolina, as the result of a wound inflicted by a bullet of .22 rifle calibre. The bullet, as testified by a doctor, entered "right back behind the left ear about half-way from there to the middle of the head and ranged toward the upper part of the right eye, through the lower part, slightly upward." The witness, Billy Burge, testified that, while his automobile was being serviced at the Wall Service Station,

he was sitting on a bench to the left of, and with W. A. Wall, facing same way; that no one else was out there; that he heard a rifle shot,—sounded like a .22; that about the time he heard the shot Wall fell off in front of him, face forward; and that he, Wall, did not say anything after he fell.

The State, in support of the charge against defendant, relies upon incriminating circumstances. And in this connection, the evidence offered by the State tends to show the following to be the factual situation at and surrounding the scene of the homicide:

King, North Carolina, is situated on Highway No. 52 between Winston-Salem on the south and Mt. Airy on the north. The store and service station of W. A. Wall is located in King on the east side, that is the right-hand side of the highway going from Winston-Salem to Mt. Airy. The store faces, and is on level with the highway, but the service station, or grease pit, is built on back of the store building, and on a lower level. South of the Wall store, and also facing the highway is the garage of Ike Lawson. It has two floors, the front and upper one faces, and is on level with the highway, and the lower and rear one is a garage. There are windows, but no doors on the side of the Lawson garage next to the Wall store. The witnesses variously estimate the distance between the Wall store and the Lawson garage as between 150 and 300 feet,—more accurately about 150 feet. And the evidence tends to show that a street runs east from the highway immediately south of the Wall store and service station,—the latter opening on the side of this street.

The evidence offered by the State also tends to show the location of other buildings referred to hereinafter. The Clyde Hauser house is right behind the Wall service station, probably 30 or 40 feet from the rear of it. The Jim Dodson house is just across the street from the Hauser house. It is the first house on that side of the street. But there is an unoccupied telephone booth, six feet by six feet, located on the same side of, and near the edge of the street, between the Dodson house and the highway, and across the street from the Wall service station.

And the evidence offered by the State also tends to show that defendant, at the time of the homicide, lived in a trailer which was "located down behind a wall" between the Wall store and service station and the Lawson garage, about 30 feet from the highway, and 25 or 30 feet from Lawson's garage, and on level with the Wall service station and the lower floor of the Lawson garage. The door of the trailer was 109 or 110 feet from the bench on which W. A. Wall was sitting when he was shot. The trailer was 50 to 75 feet from the Dodson house, and between it and the highway. The trailer was also between the telephone booth and the Lawson garage. It is twelve feet long and seven and a half feet wide, and at the time stood 18 inches above the ground. The door of the trailer is six feet high and

twenty-five inches wide. It opened outside on the right. The bottom of the door is three feet eight inches from the bottom of the glass in the door. There was no obstruction between the door of the trailer and the bench on which W. A. Wall was sitting when shot. Sheriff Helsabeck testified that he took position inside the trailer to the right of the door, and sighted with a rifle in direction of the bench, and there was room for both, that is, to take the position and to sight with the rifle.

The State also offered several witnesses who testified about hearing the shot. Billy Burge, after testifying that defendant had a trailer right below, and right behind us, said that the shot sounded like it came from behind . . . sounded close by.

J. T. Wall, son of deceased, testified that he was in the grease pit greasing Burge's car, with his back to the trailer; that he heard the shot, that it sounded like a rifle; and that it came from behind him.

Mrs. Dodson testified that she was at home alone, lying on the couch, dozing, in living room away from trailer, with radio on, and the front door open, and the shot waked her up; that it sounded like a rifle; that she couldn't tell what general direction it came from; and that "it sounded loud enough as if it had been in my living room."

Mrs. Hauser testified that she heard the shot; that it sounded like a rifle; that she was on her back porch, watering flowers; and that the shot sounded like it came from the front of the house in that general direction,—like it was pretty close.

Joe Lawson testified that he was standing on the third step from the top floor of the Lawson garage; that he heard the shot; that it didn't sound too loud; that he couldn't say if it was a shotgun or a rifle shot; and that it didn't impress him so that he observed the direction of it.

Robert Rierson testified that he was in basement greasing Billy Burge's auto when he heard the shot; that it was close; that the sound came in the wash pit very strong from behind him—the direction of Mr. Fulk's trailer; that it was a rifle shot,—seemed like a dead sound; that he could tell it was different; and that it struck his attention when he heard it.

And Roberta Wall, daughter of deceased, testified that she was in the Wall store when she heard the shot; that "the shot came from between those two buildings,"—Lawson's garage and her father's store; that she could tell the direction from which it came; and that "the sound was different . . . sounded dead."

The State's witness, Virginia Meeks, testified that as she, with a four year old child, came up the side street by the Wall service station going to her father's home, a ten minutes walk, about 12:30 o'clock, she saw Mr. Fulk, the defendant, sitting in a chair in front of the trailer, but that she saw no one else in the area between street and the garage and Mrs. Dodson's and the highway; that about fifteen minutes later she

heard somebody screaming down in the direction of Mr. Wall's and that she later learned that Mr. Wall had been shot.

And the witness Billy Burge testified that after the shot was fired, he did not see anybody around there, down about the trailer or anywhere in there.

To like effect is the testimony of J. T. Wall, Mrs. Dodson, Mrs. Hauser and Roberta Wall.

The evidence offered tends to show that there was a lot of noise around there after W. A. Wall was shot,—such as persons screaming and hollering, and the sirens of an ambulance and of officer's car coming to the scene. J. T. Wall, Mrs. Dodson, Ike Lawson, and Robert Rierson each testified that immediately after the shot was heard, the screaming of Roberta Wall was heard, and there is testimony that others screamed and hollered; that ambulance came in 15 or 20 minutes after the shot, and that several officers soon arrived.

The State further offered testimony of three State Highway patrolmen, and of Sheriff Helsabeck as to what they found, and what transpired when they went to the trailer of defendant. In this connection, Patrolman Gwaltney testified substantially as follows: That he heard of the shooting when he was in the vicinity of Pilot Mountain, 10 or 12 miles away; that he immediately came to the scene of the shooting; that quite a few people were there, 100 or 150; that approximately 10 minutes later, after he had looked around, he and Patrolmen Williams and Lavely went directly from the bench to the trailer; that he knocked on the trailer door, and no one answered; that as he stepped up a couple of small steps and looked in the glass, defendant Fulk unlocked the trailer door; that on the left, inside, there was a ".22 rifle setting propped against the door facing"; that he picked up the rifle and handed it to Patrolman Williams, and (quoting Gwaltney), "I asked Mr. Fulk if he knew a man had been shot. He says, 'No, I haven't, I don't,' and I says 'Fellow, you mean to tell me with all this screaming and hollering going on you don't know anything has happened here,' and he says 'You are not trying to accuse me of shooting Mr. Wall, are you?' Says 'Me and him good friends, I buy groceries from him.' Up to that time no one there told him who had been shot, or suggested Mr. Wall had been shot . . . an empty cartridge was found in behind the bed on the trailer floor . . . the cartridge and also the gun had an odor of powder . . . the type of cartridge was .22 calibre long . . . When the defendant came to the door he was only dressed in riding boots and riding pants, and I won't say what kind of shirt he had on, . . . he said he had been asleep. The weather that day was very warm. The door and windows of this trailer were closed . . . He was dressed. The covers of the bed had not been disturbed, but it

did look like somebody had been sitting on them or maybe laying on them . . ."

And there was expert testimony tending to show that the empty shell had been shot in the rifle found in defendant's trailer, and that while the bullet taken from the wound in Wall's head was too battered to admit of comparison and identification with bullets shot from this rifle, the bullet corresponded in weight with a .22 long rifle bullet.

There was testimony that the window in the trailer door was partially covered with a curtain,—there being approximately a two or three inch space in the center; that while the screen was fully in place, at the end next to the latch on which the door opened, the pins were completely out of the trailer door, but still holding into the screen frame; that the rear pegs were partially put into the trailer door, but could be removed by hand; that four of them were all loose,—the two near the latch were just stuck into the window frame; that other window screens in the trailer were fastened in the same way, but the pegs in the other screens were tight; that the windowpane itself was closed at that time, but that it has an adjustable handle.

Sheriff Helsabeck testified that defendant made these statements to him: "It wouldn't have been possible for anybody to get my gun after I went to sleep at 12:00 o'clock before I woke up, unless they had a key; the door to my trailer was locked; nobody else had a key; nobody been in the trailer all morning except me." And that, in answer to question if he were a pretty good shot with a rifle, he said, "Well, I have killed a few squirrels." And, again, in reply to question if he shot Mr. Wall, defendant "always said if he shot him, he didn't know anything about it."

The State also offered testimony of Roberta Wall tending to show that her father, the deceased, had operated the store for about three and a half years; that defendant Fulk lived in the trailer around two years, and had been a customer at the store ever since he had had his trailer there, and was in and out of the store every few minutes; but that on 16 September, approximately three weeks before the shooting, she told defendant that her father had told her not to let him have any more groceries if he didn't pay the money; and that defendant never came in or close to the store any more; but would go to Lawson's station and up the steps and around, out of his way, to go to King.

Verdict: Guilty of murder in the first degree with recommendation of life imprisonment.

Judgment: Confinement in the State's Prison at hard labor for life.

Defendant appeals therefrom to Supreme Court, and assigns error.

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

Leonard H. van Noppen and Dallas C. Kirby for defendant, appellant.

WINBORNE, J. The assignment of error, other than formal ones, presented by defendant for consideration on this appeal brings into question only the correctness of the ruling of the trial court in denying motion for judgment as in case of nonsuit made by defendant at the close of the evidence. G.S. 15-183.

In passing upon motion for judgment as of nonsuit in a criminal prosecution under G.S. 15-183, the evidence is to be taken in the light most favorable to the State.

And in passing upon the legal sufficiency of the evidence, so taken, when the State relies upon circumstantial evidence for a conviction of a felony, as in the present 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 to exclude any other reasonable hypothesis." *S. v. Stiwinter,* 211 N.C. 278, 189 S.E. 868; *S. v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472; *S. v. Coffey,* 228 N.C. 119, 44 S.E. 2d 886; *S. v. Minton,* 228 N.C. 518, 46 S.E. 2d 296; *S. v. Frye,* 229 N.C. 581, 50 S.E. 2d 895.

Applying these principles to the present case, we are of opinion and hold that the evidence, shown in the record on this appeal, as hereinbefore stated, taken in the light most favorable to the State, is legally sufficient to take the case to the jury, and to support a verdict of guilty on the charge under which defendant stands indicted. The factual situations and circumstances here are different from those in the cases of *S. v. Jones,* 215 N.C. 660, 2 S.E. 2d 867, and *S. v. Cromer,* 222 N.C. 35, 21 S.E. 2d 811, on which defendant relies, as well as in the *Harvey* and *Coffey* and *Minton cases, supra.*

Hence, after careful consideration, we find in the judgment from which appeal is taken

No error.

J. C. LANGSTON, JR., AND WIFE, MARY ELIZABETH LANGSTON, *v.* ELMER S. WOOTEN, MELVIN JONES, EARL KINSEY, A. F. WALLER AND PRESTON HARPER, MEMBERS OF AND COMPOSING THE BOARD OF EDUCATION OF LENOIR COUNTY; AND THE BOARD OF EDUCATION OF LENOIR COUNTY, A BODY CORPORATE.

(Filed 24 May, 1950.)

1. Wills § 33a—

A devise of land with provision that the rents should be used by testator's wife and children until they should become of age, and that the lands should be divided among them all upon the children coming of age or upon the prior death of the widow, with further provision that they should have no right to sell the lands except to each other, *is held*, upon the death of the widow, to vest the fee simple in the children.

2. Partition § 4f—

Where one of the tenants in common is a minor, represented by a next friend, and after his coming of age, he ratifies and confirms the division of the property as made in the partition proceeding, such tenant is estopped from challenging the validity of the proceeding, and it is conclusive, there being no contingent interests involved.

3. Wills § 46—

Where the same persons take certain lands either as devisees under the will, or, if the devise of the lands is insufficient to convey the fee, take same by inheritance from testator, they are perforce seized and possessed of the fee simple title to the premises.

4. Wills § 33i—

Where the will directs that the devisees of the fee should not have the right to convey the property except among themselves, the attempted restraint on alienation is void as repugnant to the fee.

APPEAL by defendants from *Stevens, J.*, at Chambers in Warsaw, N. C., 7 April, 1950. From LENOIR.

Controversy without action submitted on an agreed statement of facts.

J. C. Langston, Jr., and wife, Mary Elizabeth Langston, contracted to convey to the Board of Education of Lenoir County, approximately 20 acres of the 71 acres allotted to J. C. Langston, Jr., pursuant to the terms of his father's will, for the purpose of erecting thereon a consolidated school building and such other structures and for such other uses as may be proper for public school purposes in the operation of the public school system of Lenoir County. The Board of Education of said County offered to pay the sum of $4,000.00 for the 20 acres of land, and the plaintiffs accepted said offer and tendered their fee simple warranty deed therefor.

It is agreed between the parties that the deed tendered is sufficient in form to convey a good and indefeasible title in fee simple to the tract

of land described therein, provided the plaintiffs are able to convey a good and indefeasible title thereto, and that the said deed has been properly executed; but the defendants have refused and declined to pay the said purchase price and accept the deed upon the ground that the plaintiffs are unable to convey a fee simple title to the land in question, by reason of the terms of the holograph will of J. C. Langston, Sr., which are as follows:

"To all that it concerns:

"That this is the last will and testament of the late J. C. Langston, that I bequest my insurance to be taken and go to Kinston and buy a home for my wife and children to live in, and the farm to be rented out to the best advantage of them all, and that my wife and children shall have the proceeds to live on until they become of age, and the land shall then be divided among them all to the best advantage, and they will have no right to sell it, except to each other, and that my personal property, such as stocks and farming utensils shall be sold to the best advantage and applied with my insurance to the house and lot in Kinston, and that my wife shall have the control of handling it, with Y. T. Ormond as Attorney, without bond, and that my wife shall use rents to educate my children, to the best advantage, as long as she lives, and if she dies before the children become of age, it is to be equally divided between them all alike.

"This the 11th day of October, 1917.

"(Signed) J. C. LANGSTON

"To pass without witness. Written by me at Hot Springs, Ark."

J. C. Langston, Sr., died on 22 September, 1926, and his will was duly probated on 27 September, 1926. Y. T. Ormond predeceased the testator. Minnie Langston, widow of the testator, qualified as executrix of the will, and his estate was duly and fully administered by her. The land in question is a part of a 231.7 acre tract of land in Contentnea Neck Township, Lenoir County, N. C., owned in fee simple and possessed by the testator at the time of his death. He left surviving him, his widow, Minnie Langston, and four children, to wit: B. Cameron Langston, Wilbur Langston, J. C. Langston, Jr., and Jessie Langston Rogers, as his sole heirs at law, devisees and distributees.

It is stipulated that Jessie Langston Rogers and her husband conveyed all their right, title and interest in and to the estate of J. C. Langston, Sr., to her three brothers, B. Cameron Langston, Wilbur Langston and J. C. Langston, Jr., as tenants in common, share and share alike, subject to any rights their mother, Mrs. Minnie Langston, might have therein, by a fee simple warranty deed dated 27 April, 1928. It is further admitted

that the tract of land was divided among the three brothers named as devisees in the will of J. C. Langston, Sr., in accordance with the order of the court entered in a special proceeding instituted in the Superior Court of Lenoir County in 1932, entitled, "In the matter of Cameron Langston and wife, Lena Langston, Wilbur Langston and wife, Ruth Langston, Mrs. Minnie Langston, widow of J. C. Langston, Sr., and J. C. Langston, Jr., a minor, by his next friend, F. T. White," and that in said proceeding J. C. Langston, Jr., was regularly assigned and duly allotted the 71 acre tract referred to herein.

J. C. Langston, Jr., the youngest of the children of J. C. Langston, Sr., became 21 years of age on 30 October, 1937.

Minnie Langston, widow of J. C. Langston, Sr., died on 26 May, 1949.

The parties agree that if, in the opinion of the court, under the facts submitted, the deed tendered by the plaintiffs is sufficient to convey a good and indefeasible fee simple title to the land in question, judgment should be rendered in favor of plaintiffs, otherwise for the defendants.

The court being of the opinion that the deed tendered was sufficient to convey a fee simple title to the 20 acre tract of land, rendered judgment in favor of the plaintiffs, and the defendants appeal and assign error.

George B. Greene for plaintiffs.

Thomas J. White for defendants.

DENNY, J. The appellants raise the following questions: (1) Is the language of the will under which the plaintiff, J. C. Langston, Jr., claims title, sufficient to devise to said plaintiff the fee simple title to a portion of testator's land? (2) If so, does the provision that the devisees shall "have no right to sell it, except to each other" constitute a valid limitation upon the right of alienation?

The first question, when considered in light of the provisions of G.S. 31-38, in our opinion, must be answered in the affirmative. The statute provides: "When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity." *Taylor v. Taylor,* 228 N.C. 275, 45 S.E. 2d 368; *Elder v. Johnston,* 227 N.C. 592, 42 S.E. 2d 904; *Williams v. McPherson,* 216 N.C. 565, 5 S.E. 2d 830; *Henderson v. Power Co.,* 200 N.C. 443, 157 S.E. 425; *Barbee v. Thompson,* 194 N.C. 411, 139 S.E. 838.

We find nothing in the testator's will to indicate an intent to limit the estate his children would take. It is true the will is inaptly drawn. However, there is not only an expressed intent that his children should

have the land, but that they should keep it among themselves. If he had not intended to devise the property to them, his attempt to restrain its alienation would be illogical. Moreover, he contemplated and directed a division of the farm land when his children became of age, or earlier, in the event his wife should die before the children became of age.

There seems to be some doubt on the part of the appellants as to the validity of the partition proceeding, since it took place before the plaintiff, J. C. Langston, Jr., became 21 years of age.

We are mindful of what was said in *Greene v. Stadiem,* 198 N.C. 445, 152 S.E. 398, with respect to the proper time for instituting partition proceedings, where the devisor fixes the time for a division. In *Greene v. Stadiem,* however, contingent remaindermen were involved. But no contingent interest was involved in the special proceeding referred to herein, and all parties who could possibly have been interested in the partition of the land were parties thereto, and all were *sui juris* except the plaintiff, J. C. Langston, Jr., who was represented by his next friend. Furthermore, J. C. Langston, Jr., became 21 years of age on 30 October, 1937, and ratified and confirmed the division of the property as made, by entering into the possession and occupancy of the 71 acre tract of land allotted to him in such proceeding. He would now be estopped from challenging the validity of the proceeding.

On the other hand, conceding, but not deciding, the will to be insufficient to devise the lands in fee to the children of the testator, then they would have taken the fee by inheritance, subject only to the dower interest of the widow. Consequently, the widow now being dead and the daughter of the testator and her husband having conveyed all their right, title and interest in and to the testator's estate to her three brothers, these brothers would be seized and possessed of the fee simple title to the premises. *Hales v. Renfrow,* 229 N.C. 239, 49 S.E. 2d 406.

The second question must be answered in the negative. The right of alienation is regarded as an inseparable incident to an estate in fee; and it has been uniformly held by this Court that an absolute restraint upon the free and unlimited power of alienation, annexed to a grant or devise in fee, is void. *Johnson v. Gaines,* 230 N.C. 653, 55 S.E. 2d 191; *Buckner v. Hawkins,* 230 N.C. 99, 52 S.E. 2d 16; *Beam v. Gilkey,* 225 N.C. 520, 35 S.E. 2d 641; *Douglass v. Stevens,* 214 N.C. 688, 200 S.E. 366; *Norwood v. Crowder,* 177 N.C. 469, 99 S.E. 345. Neither is the rule changed in this respect when the right of alienation is permitted among but limited to the heirs or devisees of the testator. *Early v. Tayloe,* 219 N.C. 363, 13 S.E. 2d 609; *Williams v. McPherson, supra; Brooks v. Griffin,* 177 N.C. 7, 97 S.E. 730.

The judgment of the court below is

Affirmed.

J. P. RUSS v. THE BOARD OF EDUCATION OF BRUNSWICK COUNTY.

(Filed 24 May, 1950.)

1. Schools § 4c—

A school committeeman for a district, although appointed by the county board of education, holds for a definite term of two years and is not removable at the will or caprice of the county board of education, but may be removed only for cause after notice and an opportunity to be heard. G.S. 115-74, G.S. 115-354.

2. Courts § 4c—

Certiorari is the appropriate process to review the proceedings of boards and officers exercising judicial or *quasi*-judicial functions in cases where no appeal is provided by law. G.S. 1-269.

3. Same: Schools § 4c—

A proceeding for the removal of a school district committeeman under G.S. 115-74 is judicial or *quasi*-judicial in character, and, there being no statutory provision for appeal, the procedure to obtain a review of the board's proceedings is by *certiorari*.

4. Same—

Where a verified petition of a district school committeeman alleges that the county board of education made an order purporting to remove petitioner from his office without notice and an opportunity to be heard, and contains a general prayer for relief in addition to specific prayers, it will not be held inadequate as a petition for *certiorari* because of its failure to specifically pray that the writ be issued.

APPEAL by defendant from *Stevens, J.*, at September Term, 1949, of BRUNSWICK.

Application for writ of *certiorari* to review action of defendant in removing petitioner from his office as member of a district school committee.

The verified application of the petitioner alleges the following things in specific detail: On 4 May, 1949, the defendant, Board of Education of Brunswick County, elected the petitioner a member of the school committee for Shallotte School District in Brunswick County for a term of two years, and the petitioner forthwith qualified for the office and entered upon the discharge of its duties. On 18 May, 1949, the defendant made an order purporting to remove petitioner from his office. In making such order, the defendant acted in excess of its jurisdiction; for the petitioner was capable of performing the duties of his office, and was actually discharging them in conformity to law, and had not been guilty of any immoral or disreputable conduct. Moreover, the defendant proceeded illegally in making the order of removal. The petitioner was given no notice of any charges or proceeding against him, and was

afforded no opportunity to be heard or to produce evidence in his defense. In fact, no charge of any kind was preferred against him, no investigation was conducted relative to his removal, and no cause or ground was assigned as a reason for the action of the defendant.

The prayer of the application is as follows: That the Superior Court review the action of the defendant in removing the petitioner from his office, and declare such action to be invalid; that the Superior Court adjudge that the petitioner is still a member of the school committee for the Shallotte District; and that the Superior Court grant the petitioner "such other and further relief in the premises as the nature and equity of this case may require and to this honorable court may seem meet and proper."

The defendant demurred to the application and moved to dismiss it upon the ground that it "does not state facts sufficient to constitute a cause of action," and upon the further ground that the Superior Court is without jurisdiction to review the action of a county board of education in removing a school committeeman from his office.

Judgment was rendered overruling the demurrer and denying the motion to dismiss, and the defendant appealed, assigning such ruling as error.

John D. Bellamy & Sons and Robert E. Calder for plaintiff, appellee.

E. J. Prevatte, Frink & Herring, and Stevens, Burgwin & Mintz for defendant, appellant.

ERVIN, J. Although his office is filled by appointment of the county board of education, a school committeeman does not hold at the pleasure of the board, and is not removable at the will or caprice of that body. He holds for a definite term of two years. G.S. 115-354. Moreover, he can be removed only for cause in a proceeding conforming to G.S. 115-74.

This statute provides that "in case the county superintendent or any member of the county board of education shall have sufficient evidence at any time that any member of any school committee is not capable of discharging, or is not discharging, the duties of his office, or is guilty of immoral or disreputable conduct, he shall bring the matter to the attention of the county board of education, which shall thoroughly investigate the charges, and shall remove such committeeman and appoint his successor if sufficient evidence shall be produced to warrant his removal and the best interests of the schools demand it."

The law clearly contemplates that any school committeeman against whom the statutory proceeding for removal is brought shall be given notice of the proceeding, and of the charges against him, and afforded an opportunity to be heard and to produce testimony in his defense, and

that the county board of education shall not remove him from his office unless it determines after a full and fair hearing on the merits that one or more of the specified causes for removal has been established by the evidence. This being true, the statutory proceeding for the amotion of a school committeeman is judicial or *quasi*-judicial in character, and for that reason an ousted committeeman is entitled to have the action of the county board of education reviewed in the Superior Court. It is noted, in passing, that the board is required by law to keep minutes of its meetings. G.S. 115-44.

The question arises as to how an ousted school committeeman is to obtain the court review of the action of the county board of education in removing him from office. Although this court refrained from expressing any opinion on the point in *Board of Education v. Anderson,* 200 N.C. 57, 156 S.E. 153, there is nothing in the statutory laws relating to schools and school districts providing that an appeal may be taken to the court from the decision of the county board of education ousting a school committeeman. Besides, these laws do not expressly or impliedly authorize the committeeman to seek a review of such proceeding by an independent action against the board under the provisions of G.S. 115-45.

G.S. 1-269 expressly stipulates that "writs of *certiorari* . . . are authorized as heretofore in use." It is well settled in this jurisdiction that *certiorari* is the appropriate process to review the proceedings of inferior courts and of bodies and officers exercising judicial or *quasi*-judicial functions in cases where no appeal is provided by law. *Warren v. Maxwell,* 223 N.C. 604, 27 S.E. 2d 721; *Belk's Department Store, Inc., v. Guilford County,* 222 N.C. 441, 23 S.E. 2d 897; *Drug Co. v. R. R.,* 173 N.C. 87, 91 S.E. 606; *Hillsboro v. Smith,* 110 N.C. 417, 14 S.E. 972; *Thompson v. Floyd,* 47 N.C. 313; *Commissioners v. Kane,* 47 N.C. 288; *Brooks v. Morgan,* 27 N.C. 481; *Collins v. Haughton,* 26 N.C. 420; *Matthews v. Matthews,* 26 N.C. 155; *Dougan v. Arnold,* 15 N.C. 99; *Allen v. Williams,* 2 N.C. 17. Hence, we conclude that the Superior Court, which is the highest court of original jurisdiction in this State, has the power to review by *certiorari* the action of a county board of education in removing a school committeeman from his office.

This decision finds full support in well considered cases in other states holding that when a governmental agency has power to remove a public officer only for cause after a hearing, the ouster proceeding is judicial or *quasi*-judicial in its nature, and may be reviewed by *certiorari. McCain v. Collins,* 204 Ark. 521, 164 S.W. 2d 448; *Warren v. McRae,* 165 Ark. 436, 264 S.W. 940; *Hall v. Bledsoe,* 126 Ark. 125, 189 S.W. 1041; *Sweetnam v. Board of Public Com'rs,* 56 Cal. App. 644, 206 P. 102; *Denver v. Darrow,* 13 Colo. 460, 22 P. 784, 16 Am. St. Rep. 215; *State v. Williams,* 149 Fla. 48, 5 So. 2d 269; *Blake v. Lindblom,* 225 Ill.

555, 80 N.E. 252; *Chicago v. Gillen,* 222 Ill. 112, 78 N.E. 13; *Kammann v. Chicago,* 222 Ill. 63, 78 N.E. 16; *Powell v. Bullis,* 221 Ill. 379, 77 N.E. 575; *People v. Allman,* 314 Ill. App. 194, 40 N.E. 2d 812, affirmed in 382 Ill. 156, 46 N.E. 2d 974; *People v. Burdett,* 195 Ill. App. 255; *People v. Bullis,* 124 Ill. App. 7; *Merrick v. Arbela Tp. Bd.,* 41 Mich. 630, 2 N.W. 922; *McGregor v. Gladwin County,* 37 Mich. 388; *State v. Board of Education,* 213 Minn. 550, 7 N.W. 2d 544; *In re Mason,* 147 Minn. 383, 181 N.W. 570; *State v. Eberhart,* 116 Minn. 313, 133 N.W. 857, 39 L.R.A. (N.S.) 788, Ann. Cas. 1913B, 785; *State v. Duluth,* 53 Minn. 238, 55 N.W. 118, 39 Am. St. Rep. 595; *State v. Davidson,* 310 Mo. 397, 276 S.W. 631; *State v. Morehead,* 256 Mo. 683, 165 S.W. 746; *State v. Knott,* 207 Mo. 167, 105 S.W. 1040; *La Bonte v. Berlin,* 85 N.H. 89, 154 A. 89; *Loughran v. Jersey City,* 86 N.J.L. 442, 92 A. 55; *Daily v. Essex County,* 58 N.J.L. 319, 33 A. 739; *State, Fitzgerald, Prosecutor, v. New Brunswick,* 47 N.J.L. 479, 1 A. 496, 54 Am. Rep. 182, affirmed in 48 N.J.L. 457, 8 A. 729; *Bryan v. Town Board of Brighton,* 133 Misc. 315, 232 N.Y.S. 18; *State v. Welford,* 65 N.D. 522, 260 N.W. 593; *State v. Fargo,* 63 N.D. 33, 245 N.W. 887; *State v. Frazier,* 47 N.D. 314, 182 N.W. 545; *Garvin v. McCarthy,* 39 R. I. 365, 97 A. 881; *McCarthy v. Central Falls,* 38 R.I. 385, 95 A. 921; *McKee v. Board of Elections,* 173 Tenn. 276, 116 S.W. 2d 1033, rehearing denied in 173 Tenn. 276, 117 S.W. 2d 755; *Gilbert v. Salt Lake City Bd. of Police,* 11 Utah 378, 40 P. 264; *Browne v. Gear,* 21 Wash. 147, 57 P. 359; *State v. Martin,* 112 W. Va. 174, 163 S.E. 850; *Helmick v. Tucker County Court,* 65 W. Va. 231, 64 S.E. 17; *State v. Goodland,* 159 Wis. 393, 150 N.W. 488; *Loomis v. Dahlem,* 37 Wyo. 498, 263 P. 708.

The verified application alleges facts sufficient to establish the right of the petitioner to have the Superior Court review on *certiorari* the action of the county board of education in ousting him from his office as school committeeman, and contains a general prayer for such remedy as the court shall deem meet and proper. Consequently, its validity as a pleading is not impaired by the fact that the petitioner does not specifically pray that the court issue a writ of *certiorari* commanding the county board of education to certify and return to it the record in the removal proceedings. *City of Nashville v. Mason,* 11 Tenn. App. 344; *Woodstock v. Gallup,* 28 Vt. 587.

The ouster proceeding established by the statute codified as G.S. 155-74 calls to mind words spoken by the Supreme Court of Minnesota in *State v. Board of Education* (213 Minn. 550, 7 N.W. 2d 544), *supra:* "Criticisms have often been made of the phenomenon which permits an administrative body to serve in the triple capacity of complainant, prosecutor, and judge . . . As a result of this combination of roles, its final adjudication often lacks that stamp of impartiality and of disinterested justice

which alone can give it weight and authority. This anomaly in procedure makes it vitally necessary that in reviewing administrative decisions courts zealously examine the record with a view to protecting the fundamental rights of the parties, lest the rule against arbitrariness and oppressiveness become a mere shibboleth. An appeal being denied, a review by *certiorari* or other prerogative writ must not be permitted to degenerate into a mock ceremony. The least that the courts can do is to hold high the torch of 'fair play' which the highest court of our land has made the guiding light to administrative justice. *Morgan v. United States*, 304 U.S. 1, 58 S. Ct. 999, 82 L. Ed. 1129."

For the reasons given, the judgment is

Affirmed.

DENNIS R. HEWETT v. THE BOARD OF EDUCATION OF BRUNSWICK COUNTY.

(Filed 24 May, 1950.)

APPEAL by defendant from *Sterens, J.*, at September Term, 1949, of BRUNSWICK.

The petitioner applied to the Superior Court of Brunswick County for a writ of *certiorari* to review the action of the defendant, the Board of Education of Brunswick County, in removing him from his office as a member of the school committee for the Shallotte School District. The defendant demurred to the application, and moved to dismiss it. Judgment was entered overruling the demurrer, and denying the motion to dismiss, and the defendant appealed, assigning errors.

John D. Bellamy & Sons and Robert E. Calder for plaintiff, appellee.

E. J. Prevatte, Frink & Herring, and Stevens, Burgwin & Mintz for defendant, appellant.

ERVIN, J. The questions in this case are identical with those decided this day in *J. P. Russ versus the Board of Education of Brunswick County*. Hence, the judgment is

Affirmed.

L. C. WILLIAMS AND MRS. L. C. WILLIAMS v. MRS. LYDIA R. GIBSON.

(Filed 24 May, 1950.)

1. Federal Rent Control § 2: Criminal Law § 3—

The Federal Housing and Rent Act of 1947 is a penal law. 50 U.S.C.A. 1895.

2. Courts § 13—

When Congress expressly vests the State courts with power to enforce valid Federal penal laws, State courts, which have jurisdiction adequate and appropriate for the purpose under established local law, are required by the supremacy clause of the Federal Constitution to enforce claims arising under such Federal penal laws.

3. Courts § 2—

In this State actions for civil penalties are assimilated to actions founded on contracts for jurisdictional purposes.

4. Same—

The jurisdiction of a court is determined by the amount demanded in good faith by the plaintiff, or by the character of the relief sought by him.

5. Federal Rent Control § 2: Courts § 8—

The Municipal-County Court of the City of Greensboro has jurisdiction of a suit to recover a penalty of $90.00 and the costs of the action under the provisions of the Federal Housing and Rent Act of 1947, Chap. 651, Public Laws of 1909, as amended, there being no demand for attorneys' fees, even if it be conceded that such court has no jurisdiction to award attorneys' fees, since the item of attorneys' fees is severable from that of liquidated damages under the Federal Rent Act, and recovery of the penalty would preclude a subsequent action for attorneys' fees.

6. Courts § 2—

A party may confer jurisdiction on a court by waiving the amount of his claim in excess of such court's jurisdiction provided he does not split a single cause of action into several actions for this purpose.

APPEAL by defendant from *Patton, Special Judge,* at the February Term, 1950, of GUILFORD.

Civil action by tenants against landlord for recovery of liquidated damages under the Federal Housing and Rent Act of 1947 for overcharge in excess of the prescribed maximum rent in a defense-rental area in Guilford County, North Carolina.

The plaintiffs brought this action in the Municipal-County Court of the City of Greensboro. They seek to recover liquidated damages totaling $90.00, but do not demand attorney's fees. The defendant demurred on the ground that the Municipal-County Court has no jurisdiction of the subject of the action. G.S. 1-127. The demurrer specifically asserts

that the Municipal-County Court is a court of limited or special jurisdiction; that no existing State statute authorizes the Municipal-County Court to fix and award attorney's fees in any case; and that the Municipal-County Court has no power to try and determine the action because of its legal incapacity to fix and award attorney's fees as provided by the Federal Housing and Rent Act of 1947.

The Municipal-County Court overruled the demurrer, and the defendant appealed to the Superior Court of Guilford County, which entered judgment sustaining the ruling. The defendant thereupon appealed to the Supreme Court, assigning the decision of the Superior Court on the demurrer as error.

Horace R. Kornegay and E. M. Stanley for plaintiff, appellees.
Robert Cohn and Elton Edwards for defendant, appellant.

ERVIN, J. The only question on the appeal is whether the Municipal-County Court of the City of Greensboro has jurisdiction to try and determine the action.

The Federal Housing and Rent Act of 1947 has been adjudged to be constitutional by the Supreme Court of the United States. *Woods v. Miller,* 333 U.S. 138, 68 S. Ct. 421, 92 L. Ed. 596. The Act provides, in part, that any landlord who demands or receives as rent any sum in excess of the prescribed maximum rent in a defense-rental area shall be liable to the tenant for liquidated damages of $50.00 or three times the amount of the overcharge, whichever is greater, plus reasonable attorney's fees and costs as determined by the court. 50 U.S.C.A., section 1895.

The Act is clearly a Federal penal law; for "the term 'penalty' involves the idea of punishment for the infraction of the law, and is commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered." *O'Sullivan v. Felix,* 233 U.S. 318, 34 S. Ct. 596, 58 L. Ed. 980.

When Congress expressly vests the State courts with power to enforce valid Federal penal laws, State courts, which have jurisdiction adequate and appropriate for the purpose under established local law, are required by the supremacy clause of the Federal Constitution to enforce claims arising under such Federal penal laws. *Testa v. Katt,* 330 U.S. 386, 67 S. Ct. 810, 91 L. Ed. 967, 172 A.L.R. 225. This principle is applied in these recent North Carolina decisions: *Taylor v. Motor Co.,* 227 N.C. 365, 42 S.E. 2d 460; *Hilgreen v. Cleaners & Tailors, Inc.,* 225 N.C. 656, 36 S.E. 2d 252; and *Hopkins v. Barnhardt,* 223 N.C. 617, 27 S.E. 2d 644.

It is held in the *Hopkins case* that a justice of the peace does not have jurisdiction adequate and appropriate under local law to enforce a claim for a penalty under a Federal penal statute regardless of the amount of the penalty demanded, if in addition thereto the plaintiff seeks an award of reasonable attorney's fees under the Federal statute. The holding is predicated upon the legal incapacity of the justice of the peace as a court of limited jurisdiction to fix and award attorney's fees in any instance. It is adjudged in the *Hilgreen case,* however, that the Superior Court has adequate and appropriate jurisdiction under local law to try and determine an action for a penalty under a Federal penal statute irrespective of the amount of the penalty demanded, if in addition thereto the plaintiff undertakes to recover reasonable attorney's fees under the Federal statute. The decision is based upon the authority of the Superior Court as a court of general jurisdiction to fix and award attorney's fees in any proceeding where the allowance of such fees is sanctioned by law.

The Federal Housing and Rent Act of 1947 explicitly stipulates that a suit to enforce the civil penalty imposed by the Act upon an offending landlord "may be brought in any Federal, State, or Territorial court of competent jurisdiction." 50 U.S.C.A., section 1895.

The determination of the question raised by the appeal necessitates a consideration of the power conferred upon the Municipal-County Court of the City of Greensboro by North Carolina law to try and determine actions for penalties.

Actions for civil penalties are assimilated to actions founded on contracts for jurisdictional purposes in this State. *Hopkins v. Barnhardt, supra; Templeton v. Beard,* 159 N.C. 63, 74 S.E. 735; *Katzenstein v. Railroad Co.,* 84 N.C. 688; *Doughty v. R. R.,* 78 N.C. 22. The jurisdiction of a court is determined by the amount demanded in good faith by the plaintiff, or by the character of the relief sought by him. *Hilgreen v. Cleaners & Tailors, Inc., supra; Hopkins v. Barnhardt, supra; Drainage Comrs. v. Sparks,* 179 N.C. 581, 103 S.E. 112; *Petree v. Savage,* 171 N.C. 437, 88 S.E. 725; *Wooten v. Drug Co.,* 169 N.C. 64, 85 S.E. 140; McIntosh: North Carolina Practice and Procedure in Civil Cases, section 57. "In actions arising out of contract, if the sum demanded exceeds two hundred dollars, the jurisdiction is in the Superior Court, and for an amount not exceeding that sum the jurisdiction is in a court of a justice of the peace." McIntosh: North Carolina Practice and Procedure in Civil Cases, section 56.

Under Chapter 651 of the Public Laws of 1909 and the acts amendatory thereof, the Municipal-County Court of the City of Greensboro has "concurrent jurisdiction with justices of the peace in all civil matters, actions and proceedings within the jurisdiction of justices of the peace," and "concurrent jurisdiction with the Superior Court of civil actions . . .

founded on contract where the sum demanded (exclusive of interest) . . . does not exceed one thousand dollars."

These things being true, the Municipal-County Court of the City of Greensboro appears to have plenary power under North Carolina law to entertain a suit in which the plaintiffs demand nothing except a penalty of $90.00 and the costs of the action.

The defendant maintains, however, that such is not the case. She asserts that the Municipal-County Court has no jurisdiction in this action, notwithstanding that the sum demanded by plaintiffs falls far below the maximum amount of which the court may take jurisdiction, and notwithstanding that plaintiffs do not seek to recover any attorney's fees whatever. To sustain this position, the defendant advances these arguments: (1) That the Municipal-County Court is a court of limited jurisdiction, having no power to fix or award attorney's fees in any proceeding; (2) that the Federal Housing and Rent Act of 1947 compels a trial court to award attorney's fees to a plaintiff who recovers a penalty under the Act, even though such plaintiff neither demands nor desires such fees; and (3) that consequently the Municipal-County Court has no jurisdiction of a claim arising under the Act because of its legal incapacity to fix and award attorney's fees in any instance.

It is conceded that the Municipal-County Court is not given express authority by any State statute to fix and award attorney's fees in any action. Nevertheless, it does not necessarily follow that the first premise of the defendant is sound. Since the Municipal-County Court has "concurrent jurisdiction with the Superior Court of civil action . . . founded on contract where the sum demanded . . . does not exceed one thousand dollars," and since the Superior Court has undoubted authority to fix and award attorney's fees in any proceeding where their allowance is sanctioned by law, it may be asserted with much show of reason that the Municipal-County Court has power to fix and award attorney's fees in cases arising under the Federal Housing and Rent Act of 1947 in case the amount of the attorney's fees demanded plus the amount of the liquidated damages sought to be recovered do not exceed one thousand dollars. We express no opinion on this question, however, for the plaintiffs do not demand any allowance of attorney's fees in this suit.

The second premise of the defendant and her resultant deduction that the Municipal-County Court has no jurisdiction of this action are unsound even if it be taken for granted that such court has no power to fix and award attorney's fees in any instance. It may be conceded that the trial court is required to award both liquidated damages and attorney's fees to a tenant who sues his landlord under the Federal Housing and Rent Act of 1947, if the tenant seeks an allowance of such attorney's fees and is successful in his suit. But the Act does not impose upon the

Court a judicial obligation to compel a prevailing tenant to accept attorney's fees in addition to liquidated damages if the tenant neither demands nor desires such fees.

When all is said, the Federal Housing and Rent Act of 1947 vests in the tenant of an offending landlord the right to recover by suit two items in addition to court costs, to wit: (1) Liquidated damages; and (2) reasonable attorney's fees. The item of attorney's fees is severable from that of liquidated damages at the option of the tenant, who may validly abandon the item of attorney's fees in its entirety, and sue the offending landlord for the liquidated damages only. In such case, the jurisdiction of the court in which the suit is brought is to be tested by the amount of the liquidated damages demanded.

Such is the course which the plaintiffs have elected to pursue in the case at bar. It necessarily follows that the Municipal-County Court of the City of Greensboro has jurisdiction of the subject of the action, even though it be assumed that the tribunal is wholly without legal capacity to fix and award attorney's fees. This conclusion finds full support in the authorities holding that a party "who desires to sue in a court whose jurisdiction does not extend to the full amount of his claim may confer jurisdiction upon such court by waiving or remitting a portion of his claim, so that what remains is within the jurisdiction of the court." 21 C.J.S., Courts, section 68. See, also, in this connection: *Knight v. Taylor,* 131 N.C. 84, 42 S.E. 537; *Cromer v. Marsha,* 122 N.C. 563, 29 S.E. 836; *Heyser v. Gunter,* 118 N.C. 964, 24 S.E. 712; *Brantley v. Finch,* 97 N.C. 91, 1 S.E. 535.

There is no basis for any contention that the plaintiffs have unjustifiably split a single cause of action into several actions to give the court jurisdiction. The Act itself expressly states that "a judgment in an action under this section shall be a bar to a recovery under this section in any other action against the same defendant on account of any violation with respect to the same person prior to the institution of the action in which such judgment was rendered." 50 U.S.C.A., section 1895.

The judgment of the Superior Court overruling the demurrer is

Affirmed.

VICTORY CAB CO., INC., A CORPORATION; BEATY SERVICE CO., INC., A CORPORATION; CLAYTON MOSER; JOHN HELMS; JAMES P. ALLISON; CARL W. HINSON; H. L. JOHNSON; M. B. SMITH; WILLIAM BUFORD SEAGRAVES; KERMIT W. HOWARD; ERNEST E. SMITH; JAMES G. HARMON; L. E. CRUMP; E. D. RICE; EARL HUBBARD; FRANK E. SAUL; WARREN H. BENTLEY; OTTO GOODWIN; T. E. HOLCOMB; TROY L. BROWN; C. M. ALLISON; FRED KING, JR.; HOWARD ANGLE; LLOYD L. FRANTZ; J. B. CRUMP; JESSIE J. HARGETT; FRED ALLEN; R. R. WINGATE; JACK REYNOLDS; F. O. KING; WILLIAM JOE KING; REECE M. HARTSELL; I. L. BAKER; D. D. WHITWORTH; A. L. STACEY; EARL SHEAFF; GEO. FESPERMAN; V. A. AUSTIN; C. D. WORLEY; WILLIAM J. JOHNSON, SR.; H. S. HASSEN; A. HENDERSON; JAMES Q. DUNCAN; H. M. ALLMAN; W. R. HUGHES; M. C. SMITH; H. P. WENTZ; J. N. KIZIAH; E. H. AUGHTRY; J. W. PATE; A. W. QUICK; H. O. ROSS; J. P. AUGHTRY; N. A. WARREN; JOHN P. BEATY; WILLIAM C. HARGETT; H. A. MANUS; H. G. THORNTON; E. L. GIBSON; WILLIAM NORKETT; M. C. STARNES; H. L. ROWLAND; CHARLES BRADSHAW; R. C. BROWN; EDGAR R. BAKER; J. R. TODD; F. A. HUNSUCKER; D. M. GEER; W. W. BUFF; MARVIN N. WARD; W. J. TRULL; F. R. ALLEN; R. H. REICHARD, AND OTHERS IN LIKE POSITION, PLAINTIFFS, v. VICTOR SHAW, MAYOR; FRANK N. LITTLEJOHN, CHIEF OF POLICE; H. G. CLEVELAND, CAB INSPECTOR; HENRY A. YANCEY, CITY MANAGER; G. DOUGLASS AITKEN, COUNCILMAN; CLAUDE L. ALBEA, COUNCILMAN; BASIL M. BOYD, COUNCILMAN; WILLIAM I. CODDINGTON, COUNCILMAN; JAMES H. DAUGHTRY, COUNCILMAN; S. R. JORDAN, COUNCILMAN; EMMETT M. WILKINSON, COUNCILMAN; AND THE CITY OF CHARLOTTE, DEFENDANTS.

(Filed 24 May, 1950.)

1. Municipal Corporations § 40—

A municipal ordinance promulgated in the exercise of the police power will not be declared unconstitutional unless clearly so, and every reasonable intendment will be made to sustain it.

2. Municipal Corporations § 36—

Obligations of contracts and vested rights must yield to the proper exercise of the police power, which, nevertheless, must not be exercised arbitrarily or oppressively, and must be reasonably related to the accomplishment of a public purpose.

3. Municipal Corporations § 39—

A municipal corporation has the power in regulating the privilege of using its streets for the operation of taxicabs, to prohibit franchise holders from leasing or renting its vehicles for such purpose to independent contractors, even though they are duly licensed and qualified taxicab drivers. G.S. 160-200.

PLAINTIFFS' appeal from *Bobbitt, J.*, December 3, 1949, MECKLENBURG Superior Court.

The corporate plaintiffs and certain of the individual plaintiffs are owners of motor taxicabs and holders of franchises (termed certificates of public convenience and necessity by the City Code), granted by the City of Charlotte to privilege the operation of such vehicles for hire in and around the municipality. The corporate plaintiffs rent such vehicles to others of the individual plaintiffs, at a fixed daily rental, for operation of the vehicles for hire, and have done so for a number of years. The corporate plaintiffs furnish the taxicabs with their own respective trade names painted thereon, with all lights, fixtures and appliances required by ordinance being attached thereto; keep the vehicles in mechanical order, service them except for gasoline, and insure them against property damage and personal injury. The drivers, as independent contractors, are supervised by personnel of the owner corporation in order to assure the observance of the city ordinances pertaining to the operation of taxicabs. The taxicabs have been inspected and approved and all regulations with respect to taxes and fees have been complied with by the plaintiffs.

On June 11, 1946, the Council of the City of Charlotte adopted an ordinance, (brought forward in the City Code of Charlotte, Chapter 3, Article VI, Sec. 6,) and it was later amended to become effective midnight October 31, 1949. The ordinance provides:

> "OPERATOR TO BE OWNER OR EMPLOYEE THEREOF. (a) No taxicab shall be operated except by the owner thereof or by a duly authorized agent and employee of the owner, to whom such owner pays a fixed and definite wage or a fixed commission or percentage of the gross amount received from the operation of such taxicab or a combination wage and commission.
>
> "(b) No owner of any taxicab shall enter into any contract, agreement, or understanding with any driver by the terms of which such driver pays to such owner a fixed or determinable sum per day for the use of such taxicab and is entitled to all, or a portion of the proceeds of operation over and above the fixed or determinable sum. Nothing herein contained shall prevent an owner from paying a fixed fee or other compensation to another owner for furnishing insurance required by this Chapter, for use of terminal facilities and/or for the privilege of operating under the name of such other owner."

Prior to the effective time of the ordinance, plaintiffs brought action to perpetually enjoin and restrain defendants from the enforcement of the quoted ordinance.

The hearing of the order to show cause was upon the complaint and answer, affidavits and stipulation of counsel, from which the foregoing facts emerge as determinative of the controversy and are in accord with

and substantially included *inter alia* in the findings of fact. After finding the facts Judge Bobbitt made the following conclusions of Law:

"1. That those individual plaintiffs who own franchises in their own right are permitted by the terms of Article VI, Sec. 33 (b) to pay 'a fixed fee or other compensation to another owner for furnishing insurance required by this Chapter, for use of terminal facilities and/or for the privilege of operating under the name of such other owner.'

"2. That the City of Charlotte, through its City Council, has authority to grant franchises covering the operation of taxicabs on such terms as it deems advisable; that Article VI, Section 33, of said Ordinance, is a valid exercise of such authority.

"3. That the challenged provisions of said Ordinance, so far as the evidence discloses, do not affect adversely those individual plaintiffs who own franchises.

"4. That the corporate plaintiffs, as owners and holders of franchises, are attempting to exercise their rights thereunder, not through operators who are their agents and employees while in charge of and while operating their taxicabs, but through operators who lease the equipment of the corporate plaintiffs and pay therefor and for prescribed services and benefits a flat sum per diem as rental, irrespective of the extent of operation and of total fares collected and who operate as their individual enterprises without disclosure or accounting for their aggregate receipts from the public, and in doing so are violating Art. VI, Section 33, of said ordinance.

"5. That it is within the authority and discretion of the City Council of the City of Charlotte to determine that it is reasonable and necessary in the public interest, and for the proper supervision and regulation of the taxicab business in the City of Charlotte, that the owners and holders of taxicab franchises conduct their business, in so far as the operation of the taxicabs is concerned, solely through persons who occupy unequivocally and without question the status of agents and employees.

"6. That the aforesaid practices of the corporate plaintiffs constitute in effect a 'farming out' or leasing of their franchise privileges to those who, in their own right, own no franchise evidenced by certificate of public convenience and necessity.

"7. That the validity of the ordinance requirement as to the methods by which a franchise holder may compensate its agents and employees is not before the Court, since it does not appear that any of the individual plaintiffs under present practices are agents and employees of the corporate plaintiffs.

"8. That the City of Charlotte, through its City Council, incident to the exercise of its power to establish taxicab rates, has the authority to provide by ordinance that the holders of taxicab franchises shall maintain such practices and keep such records as will disclose from their records the total fares collected from the operations of their several cabs.

"9. That the provisions of Article VI, Section 33, of the Ordinance, as applied to the plaintiffs, are not unreasonable, arbitrary, or oppressive.

"10. That while it appears that the City Council has determined that the provisions of Art. VI, Sec. 33, should be enforced commencing Nov. 1, 1949, it does not appear from the evidence how or to what extent, if any, the enforcement of Article VI, Sec. 33, will be attempted in relation to the status of each of the several plaintiffs herein."

Thereupon he entered the following judgment:

"1. That Article VI, Section 33, of the Ordinance, as applied to the plaintiffs herein, is valid.

"2. That the plaintiffs' alleged threatened injuries and damages are speculative and not irreparable; and that under the facts the plaintiffs are not entitled to injunctive relief.

"3. That the temporary restraining order signed by his Honor, A. R. Crisp, bearing date of October 31, 1949, be, and is dissolved.

"4. That in view of the fact that the corporate plaintiffs, in order to comply with the provisions of Article VI, Section 33, will be required to make adjustments in their practices of operation, and in order to insure uninterrupted taxicab service to the public, this order dissolving as aforesaid the temporary restraining order of October 31, 1949, shall be deemed effective as of midnight, December 31, 1949."

From the ruling of the court below the plaintiffs appealed and contend that the Council of the City of Charlotte is without legal authority to enact the disputed ordinance and that the General Assembly is without authority to confer any such power on the City of Charlotte; that the purpose of the ordinance is not in any proper manner in the interest of the health, convenience and welfare of the public, but seeks to impose an unnecessary and arbitrary rule on the terms of employment, and means of payment and accounting in the business of the plaintiffs; that such ordinance is in violation and impairment of existing contracts between the plaintiffs, in direct violation of the 5th and 14th Amendments to the

Constitution of the United States and Article I, Sections 1 and 17, of the Constitution of the State.

Henry L. Strickland, J. F. Flowers, and W. M. Nicholson for plaintiffs, appellants.

John D. Shaw for defendants, appellees.

SEAWELL, J. The exhaustive opinion of *Barnhill, J.*, in *Suddreth v. Charlotte*, 223 N.C. 630, 27 S.E. 2d 650, obviates a recapitulation of the delegation by the General Assembly to the City of Charlotte of the authority with respect to the regulation of taxicabs. Since that opinion was rendered G.S. 160-200 has been amended to provide, *inter alia*, that a municipality "may grant franchises to taxicab operators upon such terms as it deems advisable."

In the case of *S. v. Stallings*, 230 N.C. 252, *Denny, J.*, speaking for the Court, said: "In the exercise of this delegated power it is the duty of the municipal authorities in their sound discretion, to determine what ordinances or regulations are reasonably necessary for the protection of the public or the better government of the town; and when such ordinance is adopted, it is presumed to be valid; and, the courts will not declare it invalid unless it is clearly shown to be so." *Motley v. State Board of Examiners*, 228 N.C. 337, 45 S.E. 2d 550, 175 A.L.R. 253; *Brumley v. Baxter*, 225 N.C. 691, 36 S.E. 2d 281, 162 A.L.R. 930; *Chimney Rock Co. v. Town of Lake Lure*, 200 N.C. 171, 156 S.E 542 This is true when the constitutionality of an ordinance is attacked, and no law or ordinance will be declared unconstitutional unless clearly so and every reasonable intendment will be made to sustain it *Glenn v. Board of Education*, 210 N.C. 525, 187 S.E. 781; *Jewel Tea Company v. Troy*, 80 F. 2d 366.

It is well settled that, although the obligations of contract must yield to a proper exercise of the police power and vested rights cannot inhibit proper exertion of the power, it must be exercised for an end which is in fact public, and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary and oppressive. *Triegle v. Acme Homestead Association*, 297 U.S. 189, 80 L. Ed. 575; *State v. Finney*, 65 Idaho 630, 150 P. 2d 130, 132; *S. v. Harris*, 216 N.C. 746, 6 S.E. 2d 854.

As was stated by *Barnhill, J.*, speaking for the Court in *Suddreth v. Charlotte, supra*, quoting 37 Am. Jur. 535, "No person has an absolute right to use the streets of a municipality in the operation of power-driven vehicles for hire. Such operation is a privilege which the municipality under proper legislative authority may grant or withhold." *Commonwealth v. Rice*, 158 N.E. 797, 55 A.L.R. 1128; *Bunn v. City of Atlanta*, 19 S.E. 2d 553; *S. v. Carter*, 205 N.C. 761, 172 S.E. 415; Blashfield Cyc.

Auto. L. & P. 67; 7 McQuillin, Municipal Corporations, Sec. 24.661, and cases cited thereunder.

"The fundamental rule that a municipal corporation cannot surrender in any part or in any respect the police power delegated to it by the State is applicable to the regulation of taxicabs. It follows that the grant of a franchise to a taxicab does not and cannot, despite any terms of the franchise, diminish in any respect in the least, the police power of the municipal corporation to regulate taxicabs or the particular company enjoying such franchise." 7 McQuillin, Municipal Corporations, Sec. 24.662; *Northern Pac. Ry. Co. v. Duluth,* 208 U.S. 583, 52 L. Ed. 630; *Carolina & N. W. Ry. Co. v. Town of Lincolnton,* 33 F. 2d 719.

The municipality now seeks by ordinance to restrict the operation of taxicabs to the holders of franchises. It is not logical to assume that a franchise holder is operating a taxicab when such vehicle is rented to an independent contractor. The lessor is engaged in the business of renting vehicles to be operated as taxicabs by others who, not being franchise holders, are not extended the privilege of operation, even though they are duly licensed and qualified drivers of taxicabs; "operation" being used here to denote the business engaged in and not the manual operation of a vehicle. The corporate plaintiffs are in effect "farming out" their franchises. The ordinance does not interfere with the right of a duly licensed and qualified driver to be employed as such. It simply requires the proper exercise of the franchise by those to whom the privilege has been extended.

By whatever designation given, be it franchise, certificate of public convenience and necessity, permit or license, the privilege of operating vehicles for hire on the streets of a municipality is not a common, fundamental or natural right, and must give way to reasonable regulation bottomed on a *bona fide* promotion of the public safety, security and welfare.

In this instance the power to create carries with it the power to control. The constitutionality of the legislative delegation to the municipality to grant and regulate motor vehicles franchises carries with it *ex vi terminis* the power to apply such measures and means of regulation as are reasonably necessary to the public interest to secure the result. *Suddreth v. City of Charlotte, supra; Rio Bus Lines Co. v. Southern Bus Line Co.,* 272 S.W. 18.

The municipality may name such terms and conditions as it sees fit to impose for the privilege of transacting such business, and the courts cannot hold such terms unreasonable, except for discrimination between persons in a like situation. The wisdom and expediency of the regulation rests alone with the lawmaking power. *Lawrence v. Nissen,* 173

N.C. 359, 91 S.E. 1036; *Turner v. New Bern,* 187 N.C. 541, 122 S.E. 469; *Suddreth v. Charlotte, supra.*

Applying these principles to the case in hand the Court is of the opinion, and so holds, that the judgment of the Superior Court should be affirmed. It is so ordered.

Affirmed.

W. B. BENNETT v. ATLANTIC COAST LINE RAILROAD COMPANY, INC.

(Filed 24 May, 1950.)

1. Trial § 23b—

A *prima facie* showing takes the case to the jury for its determination as to whether or not the necessary facts have been established.

2. Carriers § 10—

Evidence tending to show that two mules and nineteen horses were delivered to initial carrier in good condition, that upon arrival at destination some of the animals were dead and the rest of the animals were in a bad and weakened condition with cuts and bruises, is sufficient to raise a *prima facie* case of negligence in the shipper's action against the terminal carrier to recover the damage, and the carrier's motion for nonsuit should have been denied.

APPEAL by plaintiff from *Crisp, Special Judge,* at November Term, 1949, of COLUMBUS.

Civil action to recover of defendant, as delivering carrier, damages for injuries to shipment of horses and mules in interstate shipment from Winchester, Indiana, to Whiteville, North Carolina, resulting from actionable negligence of carriers.

Plaintiff alleges in his complaint substantially these pertinent facts: That on 28 January, 1947, Willard Lennox delivered to the New York Central Railroad at Winchester, Indiana, two mules and nineteen horses, the property of Lennox and Bennett, in good condition, and consigned them to Lennox and Bennett at Whiteville, North Carolina, and received therefor a receipt; that the mules and horses were transported from Winchester, Indiana, by said initial carrier, New York Central Railroad, and the connecting carriers Louisville & Nashville Railroad and Georgia Railroad and the defendant's railroad,—the latter being the terminal or delivery carrier which delivered them to Lennox and Bennett at Whiteville, North Carolina, on 3 February, 1947; that upon the arrival and such delivery, the mules and horses "were suffering from bruises, cuts, muddy condition, wounds, lack of food and water, diseases, sickness, and other injuries such as are not the ordinary and usual results of transporta-

tion to such extent that one mule and four horses were dead upon arrival, or died almost immediately thereafter, and four horses were in such condition that their market value was greatly reduced"; that the death of and damage to said mules and horses were "caused by the carelessness and negligence of the defendant through its agents, servants, and employees, in that it did negligently, carelessly, and recklessly delay the transportation of the same, expose the same to the weather, jarred, jammed and bruised the same, and loaded the same in a defective and inadequate car, and failed to properly feed and water the shipment, all of which negligent acts proximately resulted (in) and caused the aforesaid death, sickness and injury to the aforesaid livestock" to the damage of Lennox and Bennett in the sum of $2,120.00; that "Lennox and Bennett gave due notice of the aforesaid claim, and made due demand upon the defendant, and defendant has failed and wrongfully refused to make good any of the . . . damages"; and that Lennox has assigned to plaintiff all of his interest in the partnership of Lennox and Bennett, including his right of action against defendant for the damages aforesaid.

Defendant, answering the complaint of plaintiff, denies the material allegations, and avers, substantially the following facts: That on 28 January, 1947, Willard Lennox delivered to the New York Central Railroad at Winchester, Indiana, two mules and 19 horses loaded in a car for shipment and received a bill of lading or livestock contract for said shipment, and said shipment was made in accordance with said livestock contract; that the contract was in writing and each and every part thereof is pleaded as fully as if incorporated herein; that in said contract Willard Lennox, from Winchester, Indiana, was named as consignor, and Lennox and Bennett, of Whiteville, North Carolina, were named as consignees; that the shipment moved in accordance with the provisions of said livestock contract by the route and over the lines of the carriers named therein and was delivered at Whiteville and unloaded on 3 February, 1947, and charges for said transportation were paid; and that if said animals were injured, and some of them thereafter died, that said injuries were not caused by the negligence of the carrier or its employees but were occasioned by overloading or crowding one upon another, kicking or otherwise injuring themselves or each other, suffocation, heat or cold, changes in weather or other causes beyond the carrier's control, and Section 1 (a) and (b) of said livestock contract, reading as follows are pleaded in bar of plaintiff's claim in this action:

"Sec. 1 (a) Except in the case of its negligence proximately contributing thereto, no carrier of all or any of the livestock herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, the inherent vice, weakness, or natural propensity of the animal, or the act

or default of the shipper or owner, or the agent of either, or by riots, strikes, stoppage of labor or threatened violence.

"(b) Unless caused by the negligence of the carrier or its employees, no carrier shall be liable for or on account of any injury or death sustained by said livestock occasioned by any of the following causes: Overloading, crowding one upon another, escaping from cars, pens, or vessels, kicking or goring or otherwise injuring themselves or each other, suffocation, fright or fire caused by the shipper or the shipper's agent, heat or cold, changes in weather or delay caused by stress of weather or damage to or obstruction of track or other causes beyond the carrier's control."

And, defendant, further answering, says that said mules were accepted at destination without exception and were unloaded by consignee, and the defendant pleads subsection (c) of Section 4 of the livestock contract under which said livestock was transported, which reads as follows, in bar of plaintiff's right to recover in this action:

"Sec. 4 (c) Before the livestock is removed from the possession of the carrier or mingled with other livestock the shipper, owner, consignee or agent thereof shall inform in writing the delivering carrier of any visible or manifest injury to the livestock."

The statement of case on appeal, shown in the record on appeal, discloses that upon the trial in Superior Court the parties stipulated that the shipment referred to in the complaint moved in interstate commerce, and that the complaint states facts sufficient to cause the action to be tried in Superior Court of Columbus County, and that, in the trial, the parties shall be entitled to all the rights and privileges and subject to all obligations and regulations included in the Federal Law.

And it is stated that in defendant's answer, "The defendant says that notice of claim was filed with the railroad on March 7, 1947."

The record further shows that on the trial plaintiff introduced in evidence contract or bill of lading which was admitted by defendant as the contract or bill of lading, which, among other things, reads as follows: "Now, therefore, this agreement witnesseth, that the carrier has received from the shipper, subject to the classifications and tariffs in effect on the date of issue of this agreement, the livestock described below, in apparent good condition, except as noted."

Also on the trial plaintiff, as witness for himself, testified: That on 28 January, 1947, he was doing business under the name of Lennox and Bennett, a partnership; that the partnership was dissolved about the middle of March; and that in the dissolution of the partnership assets, including this action against the Atlantic Coast Line, were assigned to him.

And plaintiff further testified substantially as follows: That on 3 February, 1947, he received a shipment of 19 horses and 2 mules from

the Atlantic Coast Line Railroad; that the shipment arrived around 12:30 at night; that he was there when the train arrived; that one of the shipment was dead and twenty in about as bad condition as he had ever seen a carload of stock—the worst he had ever seen; that he spoke to the conductor of the freight train and went to the telephone and called Mr. Benton, the railroad agent, to come down there; that the agent did not come down, but ordered him, the plaintiff, to go ahead and unload, and carry the stock over and put it in the barn, and that is what he did, and notified the agent early the next morning as to the condition of the stock; that the railroad sent its doctor and he gave them medicine; that five of them died after they arrived—one being dead when they arrived—and the last one died in about a week. And the plaintiff continued: "The car, on arrival in Whiteville, had the door next to the chute from the middle down was broke out. About half the door was patched with . . . three-quarters by four ceiling strips or flooring stuff. That was below the door . . . half-way of it, and it was at the bottom of it, looked like a horse had been chunked through it. Up . . . on the end of the car—on the other side of the window—there was a place broke out . . . it looked like one had been through the end of it . . . There was one mule that had his head busted open up here,—pretty bad. One was scarred up. They were muddy . . . looked as if they had been unloaded in an out-of-door stock pen . . . the breakage in the back of the car could not have been caused by kicking . . . When the horses were unloaded . . . clean up to their stomachs and a little way up their sides, they were covered and stuck in some kind of stiff clay or mud, more like a putty . . . They were in terrible condition, just as bad as if you had unloaded them at a stock pen along the road that never had had a shelter over it. And they were weak, undernourished . . . The reasonable market value of these horses and mules on their arrival in Whiteville under the condition that they were in, I would say $250 was a big price for the whole outfit . . . If they had been in good condition upon arrival the reasonable market value would have been $2500, first cost."

Plaintiff offered in evidence five freight bills: (1) The freight charges at Winchester, Indiana, on 19 horses and 2 mules in car "NYC 22436"; (2) for advances on same at Corbin, Ky., (3) for feeding same at Howell Stock Yard, Ga., (4) for "21 horses and mules unloaded and reloaded at Augusta, Ga., account animal down in car—service charge $2.50, Re-bedding car—1.38-3.88" at Augusta, Ga., and (5) for "unloading, reloading and F&W car above horses 8.55" at Florence, S. C. And plaintiff testified that he could not read, and that these are all the receipts turned over to him on payment.

Plaintiff also offered testimony of others as to the condition of the car in which the livestock were received, and as to the condition of the livestock.

The record shows that "At the close of plaintiff's evidence, the defendant moves for judgment as of nonsuit and that the case be dismissed. Motion overruled."

And, thereupon, defendant offered evidence tending to support the averments set out in its answer.

At the close of all the evidence defendant renewed its motion for judgment as of nonsuit. The motion was allowed. And, from judgment in accordance therewith, plaintiff appeals to Supreme Court, and assigns error.

Irvin B. Tucker, Jr., for plaintiff, appellant.

Poisson, Campbell & Marshall, V. E. Phelps, and E. K. Proctor for defendant, appellee.

WINBORNE, J. Plaintiff, in this action, has the burden of proving the carrier's negligence as one of the facts essential to recovery, and, when he introduced evidence tending to show delivery of the shipment of horses and mules to the carrier in good condition and its delivery to the consignee in damaged condition, such evidence made out a *prima facie* case of negligence. *Chesapeake & O. R. Co. v. Thompson Mfg. Co.*, 270 U.S. 416, 70 L. Ed. 659; *Davis Livestock Co. v. Davis*, 188 N.C. 220, 124 S.E. 157; *Farming Co. v. R. R.*, 189 N.C. 63, 126 S.E. 167; *Fuller v. R. R.*, 214 N.C. 648, 200 S.E. 403; see also *Precythe v. R. R.*, 230 N.C. 195, 52 S.E. 2d 360.

In the *Davis case, supra*, it is stated: "The defendant admitted the contract of carriage, the receipt of the stock, and the death of one of the mules while in its possession. In these circumstances the loss is presumed to have been attributable to defendant's negligence."

And our decisions are to the effect that a *prima facie* showing may take the case to the jury, and it is for the jury to determine whether or not the necessary facts have been established. *Speas v. Bank*, 188 N.C. 524, 125 S.E. 398; *Jeffrey v. Mfg. Co.*, 197 N.C. 724, 150 S.E. 503; *Hutchins v. Taylor-Buick Co.*, 198 N.C. 777, 153 S.E. 397; *Oil Co. v. Iron Works*, 211 N.C. 668, 191 S.E. 508; *Falls v. Goforth*, 216 N.C. 501, 5 S.E. 2d 554.

In *Speas v. Bank, supra*, the rule is tersely stated in this manner: "A *prima facie* case, or *prima facie* evidence, does not change the burden of proof. It only stands until its weight is met by evidence to the contrary. The opposing party, however, is not required as a matter of law to offer evidence in reply. He only takes the risk of an adverse verdict if he fails to do so. The case is carried to the jury on a *prima facie* showing, and it is for them to say whether or not the crucial and necessary facts have been established."

And in *Hutchins v. Taylor-Buick Co., supra,* it is said that "In the absence of some fatal admission or confession, as against a demurrer to the evidence, or motion to nonsuit, a *prima facie* showing carries the case to the jury."

Applying these principles to the case in hand, we are of opinion and hold that the evidence offered by plaintiff makes out a *prima facie* case, and that the evidence offered by defendant fails to show any fatal admission or confession which would take the case out of the rule in cases of *prima facie* showing, as hereinabove stated.

Hence the judgment below, sustaining the motion for judgment as of nonsuit, is

Reversed.

BOYD SAMUELS v. D. W. BOWERS, T/A D. W. BOWERS LUMBER COMPANY.

(Filed 24 May, 1950.)

1. Negligence § 19c—

Nonsuit on the ground of contributory negligence of plaintiff may be allowed only when the plaintiff's evidence, considered in the light most favorable for him, establishes his own negligence as a proximate contributing cause of the injury so clearly that no other conclusion reasonably can be drawn therefrom.

2. Automobiles § 20a—Gratuitous passenger held not contributorily negligent as matter of law in failing to refuse to continue trip.

The evidence tended to show that plaintiff was a guest in a truck being driven by defendant, that it was misting rain and the road was wet, that defendant was driving at an excessive speed of 60 to 65 miles per hour, G.S. 20-141, but that defendant was sober and was an experienced and competent driver, and that plaintiff remonstrated several times as to speed and was reassured by defendant that he had been driving for twenty-five years without an accident. *Held:* In plaintiff's suit to recover for injuries sustained when the car skidded and turned over on the highway, plaintiff is not guilty of contributory negligence as a matter of law in failing to request that defendant stop the car and permit him to get out, but the issue of contributory negligence should have been submitted to the jury.

3. Same—

Where the driver of a car persistently operates it at a dangerous and excessive speed, the duty devolves upon a gratuitous passenger, in the exercise of that degree of care for his own safety which a reasonably prudent person would employ under similar circumstances, to caution the driver, and if his warning is disregarded, to request that the automobile be stopped and that he be permitted to leave the car, but his failure to do so will not be held contributory negligence as a matter of law if conflicting

inferences can be drawn from the circumstances, the question being, ordinarily, for the jury to determine.

APPEAL by plaintiff from *Sink, J.*, February Term, 1950, of DAVIDSON. Reversed.

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 a motor vehicle. The plaintiff at the request of the defendant was a passenger in a pick-up truck driven by the defendant when, due to defendant's negligent driving, the truck turned over and the plaintiff was injured.

At the close of plaintiff's evidence, defendant's motion for judgment of nonsuit was allowed and plaintiff excepted and appealed.

Hubert E. Olive and W. H. Steed for plaintiff, appellant.

Don A. Walser for defendant, appellee.

DEVIN, J. That there was evidence of negligence on the part of the defendant proximately causing plaintiff's injury was not controverted, but the defendant contends that the nonsuit should be sustained on the ground of contributory negligence on the part of the plaintiff, for that the plaintiff failed to exercise due care and to take proper precaution for his own safety by adequately warning the defendant of the dangerous manner in which he was driving, or making effort to stop or leave the car.

The rule is well settled that involuntary nonsuit on the ground of the contributory negligence of the plaintiff may be allowed only when the plaintiff's evidence, considered in the light most favorable for him, establishes his own negligence as a proximate contributing cause of the injury so clearly that no other conclusion reasonably can be drawn therefrom. *Collingwood v. R. R., post,* 192; *Winfield v. Smith,* 230 N.C. 392, 53 S.E. 2d 251; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307; *Hobbs v. Drewer,* 226 N.C. 146, 37 S.E. 2d 121; *Cole v. Koonce,* 214 N.C. 188, 198 S.E. 637.

Plaintiff's evidence tended to show that plaintiff accompanied defendant in defendant's half-ton pick-up truck on a business trip of defendant from Thomasville to Rockingham, a distance of some 80 miles. On the return trip it was misting rain and the road was wet, and the defendant was driving around 60 to 65 miles per hour. Half a mile beyond an intersection of highways the truck skidded when going around a curve and turned over, injuring plaintiff. Plaintiff testified he cautioned the defendant several times to reduce his speed, twice shortly before the accident, but defendant replied he had been driving 25 years and "never hit anybody yet." Plaintiff had known defendant 15 years and been on trips

with him before. On this trip defendant drove "pretty fast" all the way back, except when driving through towns or at intersections. Plaintiff cautioned him to reduce his speed on account of the condition of the road about 10 miles before the accident happened, and cautioned him "at the crossroads beyond Troy"—told him he was driving too fast. Plaintiff says he also cautioned him at the intersection of highways 49 and 109. Plaintiff did not try to take over control or get out of the truck as it was defendant's truck, and that was plaintiff's only way of getting back home. They stopped only once and that was at the Uwharrie River bridge, a considerable distance from plaintiff's home. Neither plaintiff nor defendant had taken any intoxicating liquor. Plaintiff was an employed person, 53 years old, 5 feet 8 inches tall, and weighing 270 pounds.

There was no evidence that defendant was an inexperienced or incompetent driver, or that his driving on this occasion was reckless, or that he had been drinking. The speed limit fixed by statute in force at the time applicable to defendant's half-ton truck was 55 miles per hour, though weather conditions might require a lower speed. G.S. 20-141.

The question of the contributory negligence of a guest passenger in an automobile has been considered by this Court in a number of cases. In all of them except one it was held the question was one for the jury if there was sufficient evidence offered to require submission of an issue thereon.

In *Nettles v. Rea,* 200 N.C. 44, 156 S.E. 159, where the driver of an automobile was making 70 miles an hour on a mountain road and around curves in spite of passenger's protest, motion to nonsuit was denied, and no error was found in the judgment on verdict for plaintiff on issues of negligence and contributory negligence. In *King v. Pope,* 202 N.C. 554, 163 S.E. 447, where plaintiff was a guest passenger in an automobile driven by defendant in reckless manner after protest, it was held the question of contributory negligence was one for the jury. There the court used this language: "The defendant contends 'the court should have held plaintiff negligent as a matter of law in not demanding and insisting that the defendant stop the automobile and permit him, the plaintiff, to get out of the same.' We cannot so hold. Under the facts and circumstances of the case, we think it was a question of fact for the jury to determine." In that case the Court quoted with approval from *Krause v. Hall,* 195 Wis. 565, the following. "Should the host persist in his reckless driving, the guest may ask to be let out of the car, but that he should do so under all circumstances has never been held his duty as a matter of law, so far as we are advised."

In *Norfleet v. Hall,* 204 N.C. 573, 169 S.E. 143, the defendant was driving at excessive speed without protest from the passenger. No issue of contributory negligence was submitted, doubtless due to the circum-

stances of that case showing sudden acceleration of speed by the driver, and the judgment for plaintiff was affirmed, though two Justices dissented.

In *Taylor v. Caudle,* 210 N.C. 60, 185 S.E. 446, it was held the question of contributory negligence based on evidence that plaintiff's intestate entered the car knowing the reputation of the driver as an unsafe and reckless driver, was for the jury.

In *York v. York,* 212 N.C. 695, 194 S.E. 486, the evidence disclosed that the defendant drove at a high and dangerous speed in face of a fast approaching storm and rain and into a curve with resultant injury to plaintiff passenger who had made no protest. The trial court refused to submit an issue of contributory negligence, and this Court found no error. Three Justices dissented on the ground that the issue of contributory negligence should have been submitted to the jury.

In *Mason v. Johnston,* 215 N.C. 95, 1 S.E. 2d 379, the plaintiff was a guest passenger on a motorcycle driven at a high rate of speed without protest. This Court held the question of contributory negligence of the passenger was a question for the jury, and could not be so declared as a matter of law.

In *Groome v. Davis,* 215 N.C. 510, 2 S.E. 2d 771, it was held the failure of a guest passenger in an automobile driven 65 to 70 miles per hour to remonstrate would not constitute contributory negligence as a matter of law but was a question for the jury.

The latest case considered by this Court on this subject is *Hill v. Lopez,* 228 N.C. 433, 45 S.E. 2d 539. There the plaintiff was a guest passenger in an automobile which was being driven at a speed of 35 miles per hour into an intersection where it was struck from the right by defendant's truck. The plaintiff did not see defendant's truck until an instant before the collision when he said, "Look out! We are hit." In an opinion written by *Justice Denny* it was said the evidence as disclosed on this record "would not justify holding that the plaintiff was guilty of contributory negligence as a matter of law. The ruling of his Honor in this respect will be upheld."

However in *Bogen v. Bogen,* 220 N.C. 648, 18 S.E. 2d 162, in a well considered opinion written for the Court by Justice Barnhill, it was held nonsuit on the ground of the contributory negligence of plaintiff, a passenger in an automobile driven by her husband, should have been allowed. This decision was based on the following facts stated in the opinion: "Here plaintiff became a guest upon the automobile knowing at the time that he habitually drove in a reckless manner at high rate of speed without keeping proper lookout, and that he would ignore any protest or remonstrance she might make, and then failed to abandon the journey

and return home on any one of the numerous occasions she had opportunity so to do after his continued recklessness became apparent."

In the case at bar the facts were materially different. Here, considering plaintiff's evidence in the light most favorable for him, the inference is permissible that defendant was an experienced and competent driver, sober, and reasonably careful of traffic regulations though driving "pretty fast," and in excess of the limit fixed by law, and that in response to plaintiff's remonstrance that he was driving too fast defendant reassured him by saying in effect he had never had an accident. *Thorstad v. Doyle,* 199 Minn. 543.

The principle is generally recognized that when a gratuitous passenger becomes aware that the automobile in which he is riding is being persistently driven at an excessive and dangerous speed, the duty devolves upon him in the exercise of due care for his own safety to caution the driver, and, if his warning is disregarded and speed unaltered, to request that the automobile be stopped and he be permitted to leave the car. *Bogen v. Bogen, supra;* 4 Blashfield Cyc. Auto Law, sec. 2415; 5 Am. Jur. 772. He may not acquiesce in a continued course of negligent conduct on the part of the driver and then claim damages from him for injury proximately resulting therefrom. But this duty is not absolute and is dependent on circumstances. 4 Blashfield, pg. 568; *O'Neal v. Caffarello,* 303 Ill. App. 574. Where conflicting inferences may be drawn from the circumstances, whether the failure of the passenger to avail himself of opportunity for affirmative action for his own safety should constitute contributory negligence is a matter for the jury.

In 4 Blashfield, pg. 578, the law on this point is stated as follows: "Even so, however, it is not the duty of a guest, under all circumstances of negligent or reckless driving, to ask to be let out, nor is it necessarily contributory negligence as a matter of law for a passenger not to insist upon being permitted to leave an automobile driven at excessive speed. . . . A guest who feels himself endangered by the excessive speed of the vehicle cannot ordinarily be expected to leap from the car while it is still in rapid motion. . . . And even if there is a reasonable opportunity to leave the car, failure to leave is not negligence unless a person in the exercise of ordinary care would have done so under the circumstances."

The passenger is required to use that care for his own safety that a reasonably prudent person would employ under same or similar circumstances. Whether he has measured up to this standard is ordinarily a question for the jury. Contributory negligence when interposed as a defense to an action for damages for personal injury involves the element of proximate cause, and the determination of the proximate cause of an injury from conflicting inferences is a matter for the jury. In *Conley v. Pearce-Young-Angel Co.,* 224 N.C. 211, 29 S.E. 2d 740, in an opinion

by *Justice Barnhill,* it was said: "It is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury or not. But that is rarely the case. Hence, what is the proximate cause of an injury is ordinarily a question for the jury."

While we think there was evidence sufficient to require submission of the issue of contributory negligence, it was not of that conclusive character which would justify the court in declaring as a matter of law that plaintiff was barred of recovery on this ground.

The judgment of nonsuit is

Reversed.

STATE OF NORTH CAROLINA AND THE CITY OF GREENSBORO v. EARL BLACK.

(Filed 24 May, 1950.)

1. Appeal and Error § 6c (2)—

A sole assignment of error to the signing of the judgment presents only whether the facts found support the judgment and whether error of law appears on the face of the record.

2. Appeal and Error § 6c (3)—

The want of exception to the findings of fact renders them conclusive, but the court's characterization of a subpoena, made a part of the record, as "process lawfully issued" is a question of law presented by exception to the signing of the judgment.

3. Courts § 11—

A municipal-county court is a creature of the General Assembly, and has only such jurisdiction and powers as are given it by statute, which cannot be enlarged by implication, and the Greensboro Municipal-County Court has power to issue process outside the county only when attested by the seal of said court, and such process without seal, served outside the county, is a nullity. Public Laws 1909, Ch. 651, Public Laws 1939, Ch. 300.

4. Process § 14—

Where a subpoena issued by a municipal-county court and running outside the county is a nullity because not attested by the seal of the court, neither service of the process nor voluntary appearance thereunder, can waive the defect or vitalize the process.

5. Contempt of Court § 2b—

Willful disobedience of process cannot be made the basis for contempt proceedings when the process is a nullity because beyond the powers of the issuing court. G.S. 5-1 (4).

GREENSBORO *v.* BLACK.

APPEAL by defendant from *Crisp, Special Judge,* at 31 October, 1949, Three Weeks Term of GUILFORD—Greensboro Division.

Contempt proceeding under Chapter 5 of the General Statutes of North Carolina,—arising out of the failure of appellant Earl Black to appear on 13 July, 1949, as a witness for the State in the case of State of North Carolina, *et al., v.* Francis Duval Smith *alias* George Smith, *et al.,* then pending in the Municipal-County Court of the City of Greensboro—heard in Superior Court of Guilford County, Greensboro Division, on appeal thereto by Earl Black from judgment of said Municipal-County Court of the City of Greensboro, adjudging him, the said Earl Black, in contempt of court under the provisions of G.S. 5-1 (4) for willful disobedience of lawful process, to wit, a subpoena.

The "subpoena" is shown in the record, and it is attached to and made a part of the record in the case. It purports to be addressed "To the Sheriff, Chief of Police of an Incorporated Town or Other Lawful Officer of New Hanover County," reading in pertinent part as follows: "You are commanded to subpoena as witness for the State in the case of State *vs.* George Smith . . . Mr. and Mrs. Earl Black, Wilmington, N. C. . . . to be and appear before His Honor the Judge of the Municipal-County Court of the city of Greensboro, on the 13th day of July, 1949, at 9:30 A. M., and not depart the court without leave." It purports to be dated 8 July, 1949, and to be signed "P. T. Melton, City of Greensboro Police Officer." And it purports to have been "Served on This the 9th day of July, 1949." The return purports to be signed "M. M. Jefford. Bureau—Wilmington, N. C." But it is not under the Seal of the Municipal-County Court of the City of Greensboro.

The findings of fact made by the presiding judge of the Municipal-County Court of the City of Greensboro upon which the adjudication of contempt against Earl Black is based, are predicated upon this "subpoena," and are incorporated in the judgment entered under date 30 September, 1949.

These are pertinent portions of the findings of fact:

"That defendant was duly served with a subpoena on the 9th day of July, 1949, by M. M. Jefford, police officer of the city of Wilmington, to appear as a witness for the State in the Municipal-County Court of Greensboro on the 13th day of July, 1949, at 10:00 A. M., in the case of State of North Carolina and the City of Greensboro against Francis Duval Smith, *alias* George Smith, *et al.,* said subpoena being attached to and made a part of the record in this case"; "that the defendant willfully failed and refused to answer to and comply with the process lawfully issued by this court by failing to appear on the date of the trial of the aforesaid entitled action"; "that the defendant in a telephone conversation with the prosecuting attorney of this court . . . stated . . . that

the subpoena had been duly served on him . . ."; "that the case of State . . . against Francis Duval Smith . . . was called for trial at 10:00 A. M. on the 13th day of July, 1949"; that defendant Earl Black was called out, and "the presiding judge . . . ordered the defendant to show cause why he should not be cited for contempt of court," and "an order for defendant's arrest was then and there issued by the court"; that "on the 1st day of September, 1949, the defendant voluntarily surrendered himself to a police officer of the city of Greensboro; whereupon the defendant executed a $5000 bond for his appearance in court on the 20th day of September, 1949; that the case of the State . . . against Francis Duval Smith . . . was continued in open court from time to time until called on the 23rd day of September, 1949, at which time . . . Francis Duval Smith . . . entered plea and the facts were stated to the court by the solicitor, without the offering of any witnesses, Now, therefore, the court finds as a fact that the defendant willfully disobeyed the process lawfully ordered by this court by willfully failing and refusing to appear as a witness to a subpoena lawfully issued by this court and that said willful disobedience of the lawful order of this court constitutes the offense of contempt of court as provided under subsection 4, Section 1, Chapter V of the General Statutes of North Carolina, from which the defendant has the right to appeal."

And on the appeal the findings of fact made by the judge of Superior Court, substantially the same as those made by the judge of the Municipal-County Court of the City of Greensboro, upon which like adjudication of contempt is based, are also predicated upon the said subpoena.

Defendant appeals to the Supreme Court, assigning error.

Attorney-General McMullan, Assistant Attorney-General Bruton, John R. Jordan, Jr., and Walter F. Brinkley, Members of Staff, for the State.

Stoner & Wilson and Hubert E. Olive for defendant, appellant.

WINBORNE, J. The only assignment of error presented on this appeal is that the court erred in signing the judgment set out in the record. Such assignment of error raises only the questions as to (1) whether the facts found by the judge of the Greensboro Municipal-County Court, and reiterated by the judge of Superior Court on appeal, support the judgment, and (2) whether error in matters of law appear upon the face of the record. *Culbreth v. Britt Corp.*, 231 N.C. 76, 56 S.E. 2d 15, and cases there cited.

In this connection, the appellant here challenges, and we think properly so, the validity of the judgment holding him for contempt, on the ground, among others, that the subpoena, not being under the seal of the Greensboro Municipal-County Court, was not a process lawfully issued

by that court for service in New Hanover County,—outside of Guilford County in which the City of Greensboro is situated.

Moreover, there being no specific exception to any finding of fact made by the trial court, the facts so found are binding on appeal. *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351.

Nevertheless, the subpoena, which is characterized in the judgment below as "process lawfully issued" is made a part of the record, and the question as to its validity is one of law appearing upon the face of the record.

In this State any person guilty of "willful disobedience of any process or order lawfully issued by any court," may be punished for contempt. G.S. 5-1 (4). *Nobles v. Roberson,* 212 N.C. 334, 193 S.E. 420; *Elder v. Barnes,* 219 N.C. 411, 14 S.E. 2d 249; *Mfg. Co. v. Arnold,* 228 N.C. 375, 45 S.E. 2d 577; *Patterson v. Patterson,* 230 N.C. 481, 53 S.E. 2d 658.

But a process or order not "lawfully issued" may not be the basis on which to found a proceeding for contempt. *In re Foreclosure,* 205 N.C. 488, 171 S.E., 788; *Patterson v. Patterson, supra.*

Here, therefore, the question is whether the subpoena under consideration was a process lawfully issued by the court.

In this connection, it is appropriate to advert to provisions of the statutes pertaining to the jurisdiction and powers of the Greensboro Municipal-County Court. This court (now designated the Greensboro Municipal-County Court, P.L. 1939, Chapter 300), is the creature of the General Assembly of North Carolina, Public Laws 1909, Chapter 651. (See *Miles Co. v. Powell,* 205 N.C. 30, 169 S.E. 828, and *Electric Co. v. Motor Lines,* 229 N.C. 86, 47 S.E. 2d 848). It has only such jurisdiction and powers as are given to it by the General Assembly. It was originally given jurisdiction of misdemeanors committed within the corporate limits of the City of Greensboro. And in Section 14 of this act, P.L. 1909, Chapter 651, the General Assembly declared that said court shall have a seal "which shall be used in attestation of writs, warrants or other proceedings, acts, judgments or decrees of said court in the same manner and to the same effect as the seal of other courts in the State of North Carolina." And in Section 15 of this act, it is further declared that "The judge of said court may issue his process to the chief of police or to the city police of the city of Greensboro, or to the sheriff, constable or other lawful officers of the county of Guilford or of any other county in the State of North Carolina, and such process, when attested by the seal of said court, shall run anywhere in the State of North Carolina and shall be executed by all officers and returns made according to law: *Provided,* no seal shall be required upon any process issued by or from said court to any officer of the city of Greensboro or the county of Guilford."

Thus from the provisions of Section 15, it is clear that the General Assembly has given the court the power to issue its process, to run beyond the limits of Guilford County, only "when attested by the seal of said court." And it is held by this Court that the powers of a court of limited jurisdiction cannot be enlarged by implication. *Thompson v. Cox,* 53 N.C. 311; *Evans v. Singletary,* 63 N.C. 205. Nor may the recognition of the subpoena, and the service of it by an officer of the City of Wilmington in New Hanover County, give character to it which it did not possess at the time of its issuing. *Shepherd v. Lane,* 13 N.C. 148; *Gardner v. Lane,* 14 N.C. 53; *Seawell v. Bank,* 14 N.C. 279.

Hence, the issuance of the subpoena in question, for service in New Hanover County, not being attested by the seal of the court, exceeded the power given to the court by the General Assembly. The subpoena so issued lacked the force of a lawful process, and service of it by an officer in New Hanover County was a nullity.

Moreover, the finding of fact that defendant stated that the subpoena had been duly served upon him is not sufficient to constitute a waiver of the fatal deficiency of the subpoena. Nor does the voluntary surrender of defendant, after the court had ordered him to be arrested, and the execution of a bond for his appearance at a future date, vitalize the subpoena as a lawful process, applicable to his previous contemptuous conduct.

And while the facts found by the court below show defendant in contemptuous attitude in respect of his appearance as a witness in the court, he may not be held in contempt therefor except in the manner provided by law.

In view of the decision here, it is not necessary to consider and treat other contentions of defendant.

For reasons stated hereinabove, the judgment from which appeal is taken is

Reversed.

EUGENE S. LEVY, SR., v. CAROLINA ALUMINUM COMPANY, A CORPORATION.

(Filed 24 May, 1950.)

1. Negligence § 19c—

Nonsuit on the ground of contributory negligence should not be granted unless there is no conflict in the evidence as to the pertinent facts and plaintiff's evidence, taken in the light most favorable to him, so clearly establishes contributory negligence that no other reasonable inference can be drawn therefrom.

2. Trial § 22a—

On motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff.

3. Automobiles § 8i—

A private driveway is not an intersecting highway within the meaning of G.S. 20-150 (c). G.S. 20-6.

4. Automobiles §§ 14, 18h (3)—Overtaking and passing vehicle on its right held not contributory negligence as matter of law under circumstances.

The evidence tended to show that plaintiff's vehicle was following that of defendant, that defendant's truck slowed down and pulled to its left of the highway, that a person in the rear of the truck motioned plaintiff's driver to go ahead, and that as plaintiff's vehicle started to pass defendant's vehicle on its right, the driver of defendant's truck turned right to enter a private driveway, and the two vehicles collided. *Held:* Nonsuit on the ground of contributory negligence was erroneously entered, since, whether defendant's driver was guilty of contributory negligence in attempting to pass defendant's vehicle on the right is a question for the determination of the jury under the circumstances. G.S. 20-149 (a).

APPEAL by plaintiff from *Phillips, J.*, at February Term, 1950, of STANLY.

Civil action instituted by the plaintiff to recover damages for injuries to his person and property resulting from alleged negligence in the operation of the defendant's motor vehicle by its servant and agent.

According to plaintiff's evidence the driver of plaintiff's Chevrolet pick-up truck and the plaintiff were proceeding in said truck along a paved highway 18 feet in width, leading from Badin to Norwood, around 11:30 a.m., on 24 June, 1948. The plaintiff's truck had been trailing the defendant's truck for about a mile, when the driver of the defendant's truck pulled it to the left side of the highway, both left wheels of the defendant's truck "got about eighteen inches to two feet off the hard surfaced portion of the road. No signal at all was given for left-hand turn or right-hand turn." The defendant's truck slowed down to about ten miles per hour, but did not stop completely. Someone on the back of defendant's truck motioned to the plaintiff's driver to come on. When the plaintiff's driver attempted to pass, the defendant's driver cut to his right and the defendant's truck struck the left side of the plaintiff's truck, causing it to turn over and resulting in considerable damage to the truck and inflicting serious personal injuries to the plaintiff.

The plaintiff's driver testified: "There was no side highway intersecting with the highway I was traveling on. Only a side road going up to some houses. There were no signs indicating an intersection with the highway. . . . The road was straight and level where the collision occurred. . . . When the defendant's truck ran into me it was pulled from

the left-hand side to the right. After I had just about stopped, I increased my speed a little after they motioned me to pass. The left door of my truck was first struck by the defendant's truck. . . . I saw the electric signal lights on the back of the truck, but they weren't working. . . . I am positive I looked for a signal light and didn't see any. In spite of the fact that I didn't know what the truck was going to do, I tried to pass it on the right after they motioned me to come on around."

At the close of plaintiff's evidence, the defendant moved for judgment as of nonsuit. The motion was denied and the defendant excepted.

The defendant's driver testified that he put his "light signal on about 150 feet back. . . . I knew Mr. Levy's truck was following me, I saw it from the rear view mirror. I assumed it would stay behind me until I made my turn. . . . When I said I gave a signal, it was one indicating a turn to my right. I turned to the left to bear to the right, and crossed the center of the highway on a right turn. I gave no hand signal, if I had given one it couldn't have been seen on account of the way the truck was constructed. I knew this man was behind me. . . . I had the signal for a right turn on when turning to the left; I did not turn to the right in accordance with the indication of the signaling device, because I could not get into the road, it was too narrow. . . . I last saw plaintiff's vehicle when I started to make the turn. It was about 20 to 25 feet away on its right-hand side of the highway."

Charles Bowers, who was standing in the rear of the defendant's truck with several other employees of the defendant, testified for the defendant as follows: "I signaled for him to stay back. . . . When I started to waving my hand he slowed down at first; . . . and then went on around when I gave the signal. . . . I did not hold my hand out to the right, indicating that the driver of the vehicle in which I was riding was going to turn to the right, I gave him a signal to stay back."

The defendant's evidence further tends to show that its driver intended to enter the private driveway leading to the homes of W. C. Burris and a Mrs. Armstrong, in order to reach one of the defendant's transformers which was located on a pole near by.

At the close of all the evidence, the defendant renewed its motion for the plaintiff was guilty of contributory negligence as a matter of law. Judgment was entered accordingly and the plaintiff excepted and appealed, assigning error.

Morton & Williams for plaintiff.

R. L. Smith & Son for defendant.

DENNY, J. The question posed for our determination, on this appeal, is whether or not upon the evidence adduced in the trial below, the plaintiff was guilty of contributory negligence as a matter of law.

A nonsuit on the ground of contributory negligence should not be granted unless the plaintiff's evidence, taken in the light most favorable to him, so clearly establishes such negligence that no other reasonable inference or conclusion can be drawn therefrom. *Dawson v. Transportation Co.*, 230 N.C. 36, 51 S.E. 2d 921; *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307; *Hobbs v. Drewer*, 226 N.C. 146, 37 S.E. 2d 121; *Atkins v. Transportation Co.*, 224 N.C. 688, 32 S.E. 2d 209; *Hampton v. Hawkins*, 219 N.C. 205, 13 S.E. 2d 227; *Manheim v. Taxi Corp.*, 214 N.C. 689, 200 S.E. 382. Neither should a motion for judgment as of nonsuit be allowed, on the ground of contributory negligence, when there is a conflict in the evidence as to the pertinent facts. *Bundy v. Powell, supra; Hayes v. Telegraph Co.*, 211 N.C. 192, 189 S.E. 499.

The evidence in this case when considered in the light most favorable to plaintiff, as it must be on motion for judgment as of nonsuit, is sufficient to require its submission to the jury on issues of negligence, contributory negligence and damages. *Stevens v. Rostan*, 196 N.C. 314, 145 S.E. 555; *Killough v. Williams*, 224 N.C. 254, 29 S.E. 2d 697; *Hughes v. Thayer*, 229 N.C. 773, 51 S.E. 2d 488.

The appellee is relying on *Cole v. Lumber Co.*, 230 N.C. 616, 55 S.E. 2d 86, and similar cases. This case, however, is not controlled by the rule laid down in that case with respect to passing a vehicle at an intersection in violation of G.S. 20-150 (c). The private driveway which the driver of the defendant's truck was attempting to enter was not an intersecting highway within the meaning of the above statute. A highway is defined in G.S. 20-6, as follows: " 'Highway' shall include any trunk line highway, state aid road or other public highway, road, street, avenue, alley, driveway, parkway, or place, under the control of the state or any political subdivision thereof, dedicated, appropriated or opened to public travel or other use." *S. v. Gross*, 119 N.C. 868, 26 S.E. 91.

The appellee further relies upon G.S. 20-149 (a), which requires the driver of a vehicle in overtaking another vehicle proceeding in the same direction, if he desires to pass such vehicle, to pass at least two feet to the left thereof, etc. It is true the plaintiff's driver attempted to pass the defendant's truck on its right, but it is for the jury to say whether or not, under all the facts and circumstances disclosed by the evidence, he was or was not guilty of contributory negligence in doing so. This identical question was presented in the case of *Stevens v. Rostan, supra*, where a nonsuit had been granted in the court below. This Court held the case should have been submitted to the jury. When the conduct of the driver of an overtaken vehicle, as well as the conduct of another employee of the

defendant riding on such vehicle, is such as might be construed or inferred as an invitation or instruction to the driver of the overtaking vehicle to go ahead and pass to the right, an attempt to pass on the right of such vehicle, under such circumstances, will not be held to be contributory negligence as a matter of law. *Stevens v. Rostan, supra.*

The judgment of the court below is

Reversed.

MRS. JOE SCOTT, MOTHER; JOE SCOTT, FATHER; CALVIN SCOTT, DECEASED (EMPLOYEE), v. WACCAMAW LUMBER COMPANY AND/OR TABOR CITY LUMBER COMPANY (EMPLOYER), INSURED BY EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN (CARRIER), AND/OR CROSS MILLIGAN, NON-INSURER (EMPLOYER).

(Filed 24 May, 1950.)

1. Master and Servant § 39b—

Compensation is recoverable only against the employer of the injured workman, and therefore if the workman is an employee of an independent contractor, the employer of the independent contractor cannot be held liable for compensation. G.S. 97-2.

2. Same—

Whether a person is an independent contractor or an employee within the meaning of the Workmen's Compensation Act is to be determined in accordance with the common law.

3. Master and Servant § 4a—

Where the employer has the right to control the manner and method of doing the work, irrespective of whether such control is exercised or not, the relation is that of employer and employee, but if the employer has the right merely to require certain definite results in conformity to the contract, the relation is that of employer and independent contractor.

4. Master and Servant § 39b—

Evidence tending to show, *inter alia*, that defendant lumber company operated a sawmill as a part of its general business, that it owned the sawmill, controlled the premises where the work was performed, determined the amount of work to be done thereat, gave directions on occasion as to dimensions of the lumber to be sawed, and that the person directing the sawmill operations worked exclusively for the lumber company, which had the power to discharge him at any time with or without cause, *is held* sufficient to support a finding that the director of the sawmill operations was a supervisory employee and not an independent contractor.

5. Master and Servant § 55d—

Findings of fact of the Industrial Commission that the superior of the injured workman was a supervisory employee and not an independent contractor is conclusive on appeal when supported by competent evidence.

APPEAL by defendants, Waccamaw Lumber Company, and Employers Mutual Liability Insurance Company of Wisconsin, from *Stevens, J.*, at the February Term, 1950, of the Superior Court of Robeson County.

Proceeding under the North Carolina Workmen's Compensation Act.

The Waccamaw Lumber Company was engaged in manufacturing and selling lumber. In carrying on its business, it bought standing timber; cut such timber into logs of convenient size; and transported such logs from the woods to its place of business in Tabor City, North Carolina, where the logs were sawed into lumber at its sawmill, and the lumber was stacked on its yard preliminary to sale.

The sawing of the logs and the removal of the resulting lumber from the sawmill to the yard was done by Calvin Scott and some ten fellow workmen, whose activities in these respects were directed by one Cross Milligan. Milligan performed his work in the premises pursuant to an oral contract between him and the Waccamaw Lumber Company.

Calvin Scott met his death on 3 September, 1948, as the result of an injury by accident arising out of and in the course of his employment at the sawmill of the Waccamaw Lumber Company.

The plaintiffs, as next of kin, applied to the Industrial Commission for an award of compensation against the Waccamaw Lumber Company and its insurance carrier, Employers Mutual Liability Insurance Company of Wisconsin, under G.S. 97-40 and other relevant provisions of the Workmen's Compensation Act on the theory that Calvin Scott was an employee of the Waccamaw Lumber Company at the time of his accident and death. The Waccamaw Lumber Company and its insurance carrier denied liability to the plaintiffs. They specifically asserted that Milligan operated the sawmill in the character of an independent contractor, and that for this reason the decedent was an employee of Milligan, and not of the Waccamaw Lumber Company, at the time of the tragedy. The plaintiffs countered these assertions with the contention that Milligan acted as a mere supervisory employee of the Waccamaw Lumber Company in his management of the sawmill.

All parties to the proceeding offered evidence before the Hearing Commissioner for the avowed purpose of sustaining their respective contentions. Some of the testimony presented by the Waccamaw Lumber Company and its insurance carrier indicated that Milligan was an independent contractor at the time in controversy. But when the proceeding reached it on appeal from the Hearing Commissioner, the Full Commission found as facts from evidence adduced before the Hearing Commissioner and set out in the opinion which follows that Milligan operated the sawmill as a supervisory employee of the Waccamaw Lumber Company rather than as an independent contractor, and that the deceased was an employee of

the Waccamaw Lumber Company rather than an employee of Milligan at the time of his injury and death.

On the basis of these findings and the resultant conclusions of law, the Full Commission made an award in favor of plaintiffs, and the Waccamaw Lumber Company and its insurance carrier appealed to the Superior Court of Robeson County, which rendered judgment affirming the award. The Waccamaw Lumber Company and its insurance carrier excepted to the judgment of the Superior Court, and appealed to the Supreme Court, assigning errors.

L. J. Britt and McLean & Stacy for plaintiffs, appellees.

David M. Britt for defendants, Waccamaw Lumber Company and Employers Mutual Liability Insurance Company of Wisconsin, appellants.

ERVIN, J. An injured person, or his dependent or next of kin, is entitled to compensation under the North Carolina Workmen's Compensation Act only if he is an employee of the party from whom compensation is claimed at the time of his injury or death. G.S. 97-2. For this reason, the injured employee of an independent contractor, or his dependent or next of kin, cannot recover compensation from the employer of the independent contractor. *Beach v. McLean,* 219 N.C. 521, 14 S.E. 2d 515.

The deceased was working under the direction of Milligan at the time of his fatal injury. This being true, this proceeding turns on whether Milligan was then acting as an independent contractor or as a mere supervisory employee of the Waccamaw Lumber Company. The Industrial Commission resolved this crucial question of fact in favor of the plaintiffs, and the appellants challenge the validity of the ensuing award by assignments of error asserting that there was no competent evidence before the Industrial Commission to support its essential findings that Milligan operated the sawmill as a supervisory employee of the Waccamaw Lumber Company rather than as an independent contractor, and that the deceased was an employee of the Waccamaw Lumber Company rather than an employee of Milligan at the time of his injury and death.

The question whether one employed to perform specified work for another is to be regarded as an independent contractor, or as an employee within the operation of the Workmen's Compensation Act is determined by the application of the ordinary common-law tests. 58 Am. Jur., Workmen's Compensation, section 138.

An independent contractor is one who exercises an independent employment, and contracts to do specified work for another by his own methods without subjection to the control of his employer, except as to the result of his work. His one indispensable characteristic is that he contracts to do certain work, and has the right to control the manner or method

of doing it. The test to be applied in determining whether the relationship of the parties under a contract for the performance of work is that of employer and employee, or that of employer and independent contractor is whether the party for whom the work is being done has the right to control the worker with respect to the manner or method of doing the work, as distinguished from the right merely to require certain definite results conforming to the contract. If the employer has the right of control, it is immaterial whether he actually exercises it. *Brown v. Truck Lines*, 227 N.C. 299, 42 S.E. 2d 71; *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137; *Lassiter v. Cline*, 222 N.C. 271, 22 S.E. 2d 558; *Graham v. Wall*, 220 N.C. 84, 16 S.E. 2d 691; *Beach v. McLean, supra; Construction Co. v. Holding Corporation*, 207 N.C. 1, 175 S.E. 843; *Bryson v. Lumber Co.*, 204 N.C. 664, 169 S.E. 276; *Inman v. Refining Co.*, 194 N.C. 566, 140 S.E. 289; *Aderholt v. Condon*, 189 N.C. 748, 128 S.E. 337; *Cole v. Durham*, 176 N.C. 289, 97 S.E. 33; *Gadsden v. Craft*, 173 N.C. 418, 92 S.E. 174; *Patrick v. Lumber Co.*, 164 N.C. 208, 80 S.E. 153; *Johnson v. R. R.*, 157 N.C. 382, 72 S.E. 1057; *Beal v. Fiber Co.*, 154 N.C. 147, 69 S.E. 834.

There was no evidence of any express agreement giving the Waccamaw Lumber Company the right to control the manner or method of performing the work at the sawmill.

But the testimony of all the parties disclosed these facts indicative of an employer-employee relationship between the Waccamaw Lumber Company and Milligan: That the work in question was not an independent undertaking, but constituted a part of the general business of the Waccamaw Lumber Company; that the Waccamaw Lumber Company owned and furnished the sawmill used in the work; that the Waccamaw Lumber Company controlled the premises where the work was performed; that the Waccamaw Lumber Company determined the amount of work to be done at the sawmill by the quantity of logs it delivered; that Milligan devoted all his energy and time to the service of the Waccamaw Lumber Company; that the Waccamaw Lumber Company gave Milligan specific directions at its pleasure as to the dimensions of the lumber to be sawed; that the Waccamaw Lumber Company had the right to discharge Milligan with or without cause at any time; that Milligan made no effort to procure compensation insurance covering the sawmill hands or to satisfy the Industrial Commission of his financial responsibility as a self-insurer; and that the Waccamaw Lumber Company extended credit to the sawmill hands at the commissary which it operated for the benefit of its employees.

The plaintiffs introduced additional testimony, which was in sharp conflict with evidence presented by the appellants, tending to show that the Waccamaw Lumber Company did these things through the agency of its

yard superintendent, Gordon Fowler: That it hired the deceased to work for it; that it caused the deceased to labor at times in its lumber yard under the supervision of Fowler, and to work at other times at its sawmill under the direction of Milligan; and that it paid the wages of the deceased and his fellow workmen for the labor which they performed at the sawmill. Moreover, Milligan, who was a witness in the proceeding, conceded on his cross-examination by counsel for the plaintiffs that he "worked for the Waccamaw Lumber Company, the Company that was running the sawmill."

These things being true, there was sufficient competent evidence before the Industrial Commission to warrant the inference that the Waccamaw Lumber Company had the right to control Milligan and his subordinates in respect to the manner or method of doing their work, and to support the findings challenged by the assignments of error of the appellants. This necessitates an affirmance. *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760.

Affirmed.

STEELE H. RATLIFF, DOING BUSINESS AS RATLIFF & RATLIFF, v. VIRGINIA SURETY COMPANY, INC.

(Filed 24 May, 1950.)

1. Insurance § 43c—

A vehicle covered by a policy of liability insurance may be identified as between the parties not only by the motor and serial numbers entered on the policy but also by descriptive insignia resorted to in the policy, or, in case of an ambiguous description, by evidence *aliunde*, and this without resort to the equitable doctrine of reformation for mutual mistake or fraud.

2. Same—

The complaint alleged in effect that insured owned but two White Tractors, one of which had been scrapped for junk at the time the policy was issued, and that the other was involved in the collision in suit, but that through mistake the motor and serial numbers of the scrapped vehicle were entered in the policy instead of those of the vehicle in use, and that the vehicle in use was the one actually insured. *Held:* Demurrer to the complaint was improperly sustained, since, as between the parties, insured is entitled under the allegations of the complaint, admitted by the demurrer, to attempt to identify the property insured by other descriptive insignia contained in the policy and by evidence *aliunde*. G.S. 58-30.

DEFENDANT'S appeal from *Phillips, J.*, heard on demurrer in Rockingham, N. C., January 28, 1950, from ANSON Superior Court.

In the court below the defendant filed a written demurrer to the complaint as not stating a cause of action. The demurrer was overruled; and

the correctness of this ruling was the only question raised on appeal. This statement is addressed to that question.

Omitting reference to more formal parts of the complaint and summarizing it where critical points are involved, plaintiff's grievance is thus summarized:

He complains that he owns several trucks, which he was using in his trucking business, all of which he insured with the defendant, paying him therefor a premium in the sum of $3,812.64; that among these trucks was a 1937 model White truck for which, along with the other trucks mentioned, he had applied for and received a public liability insurance policy issued by the defendant, insuring against liability arising out of collision or other source of injury from use of any of said trucks; that on 27 June 1947, the aforesaid White truck was in collision with the car of another person, causing liability on the part of plaintiff; that plaintiff notified the surety company of the facts of the said collision and was instructed by it to immediately notify certain agents of the said defendant in Columbia, South Carolina, which he did; and through said agents defendant took in charge the adjustment or settlement of the claim and the further handling of the matter; and that upon the advice of the said agents of the defendant, plaintiff paid the sum of $2,000 to the claimants and was compelled to pay court costs; storage charges on the truck; the sum of $250 for attorney's fees, and $200 for local counsel, for all of which he contends, the defendant was liable on its insurance contract; that after the settlement of aforesaid claims and the payments made by the plaintiff thereon, the defendant on October 7, 1947, refused to pay anything on the policy, basing its denial of liability on the contention that the White truck of the plaintiff involved in the collision of June 27 did not bear the serial numbers listed in the policy of insurance.

The plaintiff then instituted the present action.

With respect to the serial numbers and motor numbers on the White truck alleged to have been insured by the defendant the complaint contains the following:

"4. That the first among several units listed for coverage was described as follows:

"Year-Model — 1 - 1937
Trade Name — White Tractor
Motor No. — 30A 77
Serial No. — 199335
B. I. — 324.88
P. D. — 96.8

"That the plaintiff had owned a unit which had the identical description as the above described unit which was covered by the

insurance of the defendant in its original endorsement, but that the unit which answered the above description was completely demolished, in an accident in the vicinity of Hyattsville, Md., on or about the 6th day of June 1947, so that it was necessary to haul it back to Wadesboro, North Carolina, on a trailer and to put it with other junk equipment on the yard of the plaintiff, and was never again operated after June 6, 1947, but was stripped of its parts, and such parts used as could be salvaged. That the plaintiff had never owned but two units of a year model and trade name "1937 White Tractor," that one was the 1937 White tractor involved in the wreck on June 6, 1947, and referred to above, And the other had the motor No. 20 A 442, Serial No. S-211678-750-TC, which said 1937 White Tractor the plaintiff operated on June 27, 1947, and was the only 1937 White Tractor then being operated by the plaintiff, or which he had ever owned and operated other than the one involved in the wreck of June 6, 1947."

"That it was by inadvertence on the part of the plaintiff that the serial number and motor number of the wrecked 1937 White Tractor was furnished to the defendant and that the plaintiff intended to give the serial number and motor number of the 1937 White Tractor, which he was operating at the time the aforesaid insurance policy was issued, the motor and serial number of which was listed in the above referred to insurance policy, and that the plaintiff did not at the time nor any time after intend that the wrecked 1937 White Tractor be insured. That the plaintiff, in fact, insured the 1937 White Tractor which he was operating on June 27, 1947, and only inadvertently gave the serial number and motor number of the 1937 White Tractor which was demolished on June 6, 1947."

The defendant filed a written demurrer to the complaint, as not stating a cause of action, upon the ground that the truck alleged to have been involved in the wreck of June 27, 1947, was not embraced in the policy of insurance; basing this upon the reason that it appears upon the complaint that the motor and serial numbers of the truck were not correct and were not those listed on the policy in the description of the truck with respect to which the plaintiff brought this action; and that the information respecting the said serial numbers had been given by the plaintiff and the mistake, if any, was his own, and not that of the defendant.

The trial judge overruled the demurrer, and defendant appealed.

Taylor, Kitchin & Taylor for plaintiff, appellee.

Bynum & Bynum for defendant, appellant.

SEAWELL, J. The crux of appellant's defense lies in the assumption that the motor and serial numbers endorsed on the policy in the description of the White truck which was the subject of the insurance constitutes the whole and only description in the policy and that the truck is therefore unidentifiable. Obviously the defendant could not succeed in avoiding the policy if the subject of the insurance was identifiable, as *between the insured and the insurer,* by other descriptive insignia that may be resorted to in the policy of insurance, or which might in the case of an ambiguous description be shown by evidence *aliunde.* In that event it seems clear upon the face of this record that there is no necessity of resort to the equitable proceeding of alleging and proving a mutual mistake; because the defective description does not extend to any matter fundamental to the scope of the liability or the rate of premium which the plaintiff paid for and defendant received under the policy.

The ambiguity here consists in the fact that the motor and serial numbers endorsed upon the policy were those of a truck formerly owned by the insured but which at the time of the insurance was a dismantled wreckage incapable of use of any sort upon which risk or liability could attach under the policy,—a wreck from which the usable parts had been taken away. We think this makes it clear that if the incorrect numbers had not been those of another car theretofore owned by plaintiff, it might readily be conceded that the partial misdescription would not be such a defect as to defeat recovery. G.S. 58-30, cited *infra.*

The defendant cannot argue that the ambiguity thus raised will subject it to danger from liability from the use of a car bearing the listed numbers, and at the same time argue that no ambiguity exists which might be explained by evidence *aliunde,* as in any other sort of contract.

The demurrer admits the truth of all the allegations of the complaint; and among them the truth of all the allegations of other identifying marks of description or insignia by which the truck, the subject of the insurance, could be identified; and with this acknowledges whatever right the plaintiff may have to use extraneous evidence in identification should it become necessary. There is little doubt about the effectiveness of this principle *inter partes.*

With technicalities stricken out for the moment, we find the gist of plaintiff's cause of action lies in the fact that he and the defendant Casualty Company joined in a mutual contract for liability insurance on a live and usable car, then owned by plaintiff, a 1937 Model White Truck, with the immediate expectation that it would be used in service, and by such use might become a source of liability,—a risk which the insurer assumed, and for which the insured paid. There is no possibility of a unilateral mistake so far. The defendant could not commend itself to a sense of common fairness or add much credit to the business practices

of the company by denying this, and contending that it was the mutual intent of the parties to contract for liability insurance on a piece of junk or wreckage which had been at the time of the insurance stripped of all usable parts, and demand for such service the payment of a substantial premium.

The demurrer admits that there were only two White trucks concerned in this controversy: The one above described as a 1937 model White truck then owned by the plaintiff, and a former truck of that description which had become defunct. The live terms used in the insurance policy, the ownership of the car, its make and other correct descriptions in the policy, and all the circumstances surrounding the making of the contract, become vital and distinctive as identifying parts of the description,—and those most nearly connected with the liability and risk undertaken and the security purchased by the payment of the premium.

Appellant, therefore, cannot proceed on the assumption that the serial numbers mentioned constitute the entire description of the truck insured in the policy. If this were true the description might be so material as to be vital; because the truck would then be unidentifiable except for the figures. That is not the case. The parties did not agree on an abstraction,—a floating insurance, to hover over and descend upon any car having these numbers; or, to put it as the plaintiff does in his brief, the defendant did not insure a number. The insurance was on a concrete, tangible, existing thing, identifiable by the other description; and as we have said, it does not call for equitable correction, since it does not call into question any fundamental consideration affecting either risk or coverage such as was considered in *Coppersmith v. Ins. Co.*, 222 N.C. 14, 21 S.E. 2d 838. (This case related to a deductible clause for $1,000 alleged to have been put in the insurance by fraud of defendant and by mutual mistake.) See provisions of G.S. 58-30 (Chapter 58, Insurance): "All statements or descriptions in any application for a policy of insurance *or in the policy itself* shall be deemed representations and not warranties; and a representation, unless material or fraudulent, will not prevent a recovery on the policy."

Rudd v. Casualty Company, 202 N.C. 779, 164 S.E. 345, supports the position of the plaintiff; and under the facts of this case evidence *aliunde* may be admitted to clarify the ambiguity produced by the use of wrong motor and serial numbers used in the description. We think that justice lies with the plaintiff and thus far is not inconsistent with law.

The case of *Kostecki v. Zaffina*, 384 Ill. 192, 51 N.E. 2d 152, is pertinent, and we think correctly reasoned. In that case there was a similar contention of the conclusiveness of the motor and serial numbers as fixing the identity of the trucks concerned; and the holding in that case merits

our approval. See also *Fucaloro v. Standard Surety and Casualty Co.*, 225 Iowa 437, 280 N.W. 605, and other cases therein cited.

We are not at this moment concerned as to what may be revealed when the case is tried. The complaint is sufficient to survive the demurrer. The judgment overruling the demurrer is

Affirmed.

ELOISE BOYD, BY HER NEXT FRIEND, WILLIE BOYD, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 24 May, 1950.)

Railroads § 4—

Evidence *held* to show contributory negligence as a matter of law barring recovery for injuries received by plaintiff when she rode her bicycle onto the tracks of defendant railroad company at a grade crossing, and was struck by defendant's train.

APPEAL by plaintiff from *Stevens, J.*, at September-October Term, 1949, of COLUMBUS.

Civil action to recover damages for personal injury allegedly resulting from actionable negligence of defendant,—nonsuit granted at close of plaintiff's evidence.

Plaintiff alleges in her complaint, and on the trial in Superior Court offered evidence tending to show substantially these facts:

(1) That on 25 October, 1947, a railroad track of defendant passed north and south through the main business district of Tabor City between two parallel main thoroughfares or streets, and crossed three east-west streets, which connected the said thoroughfares at intervals of about 75 yards,—all of the cross streets then being south of railroad depot or station.

(2) That on Saturday afternoon, 25 October, 1947, as plaintiff was riding her bicycle from east to west along the southernmost of the said three cross streets over the track of defendant, her bicycle was stricken by defendant's train operated over said track and traveling north from the direction of Myrtle Beach,—hurling her to the pavement and causing her painful, serious and permanent personal injury;

(3) That the streets of the town at the time were heavily congested with motor vehicular traffic, and motor vehicles were closely parked on the east side of the railroad, and close to the track, south of the crossing at which plaintiff was attempting to cross—the evidence in particular is that an automobile was next to the crossing, then a truck with high

sides, then a refrigerator truck, and other vehicles for a distance of fifty to one hundred yards;

(4) That the lights at the crossing were not working, and that no blowing of whistle or ringing of bell was heard as the train approached—and that the train was running at speed of 30 to 40 miles per hour.

The complaint of plaintiff alleges these acts of defendant as negligence causing the injuries of which plaintiff complains: (a) Negligent failure to ring a bell or sound a whistle; (b) train approaching "at a rapid, dangerous, excessive and unlawful rate of speed on Saturday afternoon when the city of Tabor City was congested with pedestrians and motor vehicles and traffic across the three crossings as aforesaid was unusually heavy and the noise from the large crowd was loud enough to drown out the sound of an approaching train, particularly when no bell was rung and no whistle sounded"; (c) permitting automobiles and trucks to be parked along its right of way immediately south and north of the crossing so as to obstruct the view of plaintiff as she was attempting to use the crossing; (d) running of train ahead of schedule without warning of its approach; (e) negligent failure to keep a proper lookout ahead so as to observe the crowded and congested condition on both sides of its track and at the three crossings as it was entering the business district of Tabor City; (f) failure to use due care to have the train equipped with proper brakes for controlling speed of train and stopping same when confronted with a sudden emergency; and (g) failure to have and maintain proper signals and lights at the said three crossings so as to warn plaintiff and others of the approach of train, when attempting to use said crossings.

Defendant, answering, denied that it was negligent as alleged in the complaint, and pleaded that, if plaintiff were injured as alleged in the complaint, her injury resulted from her own negligence which contributed thereto as a proximate cause, and pleaded same in bar of her right to recover in this action.

Plaintiff, as witness for herself, testified in part as follows: "On the evening of October 25, 1947, I left home about 2:30 o'clock with my mother and daddy. After we got to Tabor City we got up with three girls and one of them borrowed a bicycle and she rode it around Tabor a while and then me and her sister took it and rode it around town . . . We started off riding the bicycle at a point on the west side of the track right near the station. I had with me at that time on the bicycle Charity Grainger. It was a boy's bicycle and she was sitting on the cross-bar in front . . . with her feet hanging off . . . to my right and she was facing to my right . . . We crossed over the track going east by the railroad station . . . out this side of Tabor . . . We turned around and went back to town . . . We came back to the street that is parallel with the railroad track and on the east side of the track . . . We turned in front

of the theatre and went across there . . . I crossed the crossing where I got hurt . . . and turned north toward the railroad station down Main Street and crossed the track at the railroad station and then we turned south going . . . toward the theatre. We passed the theatre and as we were going across the railroad and got to the end of the cars which were parked on the side of the railroad I stopped and put my foot down and looked and I could not see anything or hear anything but I went on across and we never made it. I got part of the way across and everything blacked out."

Plaintiff had previously testified: "There are rails extending alongside of the railroad track up to the crossing . . . not very far from . . . the end of the ties. There were trucks and cars parked on both sides of the railroad track . . . I was crossing from the east side to the west side. I approached the crossing from the north and I could see down the railroad track. I stopped the bicycle and looked and I could see outside the trucks and cars about as far down the track as from here to the back end of the court house (about 30 to 35 yards) . . . There was some kind of lights there up on the side of the railroad. I looked for them and, if they were burning, I solid didn't see them . . . The time I was injured was about 4 o'clock or a few minutes afterwards. The automobiles in the town . . . were just riding one behind another just as close as they could get together."

And on cross-examination, plaintiff further testified in pertinent part: "I was almost 18 in October, 1947. I didn't quite get through the eighth grade. I quit during the year. I had made my grades every year except . . . the fifth . . . I could not count the time I had crossed this crossing before. I was pretty familiar with the crossing at the time of the accident and I knew about the position of the railings out from the end of the cross-ties. I knew about the signal lights on each side of the crossing. I knew that there were stop signs on the side of the crossing. I knew that the train passed there . . . I knew that there was a train due shortly after 4 o'clock coming from Loris. It was due at 4:30. . . . We crossed the crossing at the railroad station twice and we crossed the other crossing one time and the second time we did not get across . . . I stopped at the railroad cross sign on my right . . . I rode the bicycle from the point where I stopped and looked and listened about twenty feet from the track . . . I knew the lights belonged to work but that evening they were not working and I didn't think there was a train and started across the track. I did not look again just before I got to the railroad track. We did not look but one time. The lights were not working and I did not think it was time for the train . . . There were a lot of trucks and things that probably kept my view off the railroad . . . I just don't know why I didn't look the second time . . . There were no buildings

between the street and the railroad track except such structures as the railroad has put there and all I saw was the signal box and the sand and the warning signal. I do not know what prevented me from seeing the train unless it was those cars and big trucks that were parked there right side of the railroad; those same trucks and cars were there the first time I crossed the track. I never noticed how far you can see down the track towards Loris. You can see from this crossing certainly more than a mile and past the State line."

Motion of defendant for judgment as of nonsuit made at the close of plaintiff's evidence was allowed, and, from judgment in accordance therewith, plaintiff appeals to Supreme Court and assigns error.

Powell & Powell for plaintiff, appellant.

Poisson, Campbell & Marshall and E. K. Proctor for defendant, appellee.

WINBORNE, J. If it be conceded that there is evidence tending to show that defendant was negligent as alleged in the complaint, it is clear from the testimony of plaintiff herself that she failed to exercise due care at the time and under the circumstances of her injury, and that such failure to exercise due care contributed to and was a proximate cause of her injury. The case comes within and is controlled by the principles enunciated in *Godwin v. R. R.*, 220 N.C. 281, 17 S.E. 2d 137; *Bailey v. R. R.*, 223 N.C. 244, 25 S.E. 2d 833; *Penland v. R. R.*, 228 N.C. 528, 46 S.E. 2d 303; and *Carruthers v. R. R., post,* 183.

Hence, further elaboration on the subject would be only repetitious.

The judgment below is

Affirmed.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION v. FREDRICKSON MOTOR EXPRESS, MRS. MABEL D. BURTON D/B/A HELMS MOTOR EXPRESS, AND MILLER MOTOR EXPRESS.

(Filed 24 May, 1950.)

1. Carriers § 5—Verified petition and exhibits attached may be considered as evidence in passing upon application under G.S. 62-121.11.

While the burden of proof is upon applicant under G.S. 62-121.11, its verified petition and exhibits attached thereto showing that applicant was a common carrier of property by motor vehicle in intrastate commerce on 1 January, 1947, with map outlining territory, list of motor vehicles owned by it, financial statement, and report of operations for typical months prior to 1 January, 1947, and showing continuous operations since

that date, may be considered by the Utilities Commission as evidence, and there being no evidence *contra*, and no evidence that applicant was unfit or otherwise disqualified, is sufficient to support the Commission's findings that applicant had operated continuously and with reasonable frequency during the period in question, and sustained the issuance of franchise under the statute, irrespective of the question of public convenience and necessity.

2. Same—

The phrase "in *bona fide* service as a common carrier" as used in G.S. 62-121.11 means one who was rendering substantial service as a common carrier in good faith, actively, openly, and honestly.

APPEAL by defendants from *Phillips, J.*, October Term, 1949, of GUILFORD. Affirmed.

This was a proceeding before the North Carolina Utilities Commission initiated by the application of Winslow Truckers, Inc., for a certificate under the North Carolina Truck Act of 1947 (Chap. 1008, sec. 7, now G.S. 62-121.11), to which the above named defendants filed protest.

Under this Act on July 12, 1947, Winslow Truckers, Inc., filed verified application for authority to transport property by motor vehicle for compensation, alleging that applicant proposed to operate over irregular routes, and setting out, in support of application and as showing qualification to perform proposed service, the scope of its operations with map outlining territory, list of motor vehicles, financial statement, and report of past operations in the months of June and December 1946 and March 1947. On August 31, 1948, the Utilities Commission issued temporary authority with conditions and limitations therein set out.

February 26, 1949, the Fredrickson Motor Express, the Helms Motor Express and Miller Motor Express, herein called defendants, filed joint protest setting out that they were holders of franchises authorizing transportation of property by truck on regular routes, and that applicant was seeking authority to perform transportation within the territory in which protestants were rendering adequate service, and further that applicant had not, within the meaning of the Act, shown reasonably frequent and continuous service, or that it was in *bona fide* operation January 1, 1947; or that the service rendered was that of a common carrier over irregular routes for the entire period.

At the hearing before the Commission the applicant offered in evidence the application with supporting exhibits showing scope of operations, list of equipment, financial standing and detailed report of operations for the months selected. No evidence was offered *contra*. The Commission found the application was filed under the provisions of the Act within the time limited; that applicant was in *bona fide* operation as a common carrier of property by motor vehicle in intrastate commerce on January

1, 1947, and has continued to so operate since that time; that as shown by the report of applicant operations were reasonably frequent and continuous and transportation service rendered as set out therein. Thereupon it was ordered that applicant be authorized to operate as a common carrier of property by motor vehicle in intrastate commerce.

To this order protestants filed exceptions, and applied for rehearing under Chap. 989, Session Laws 1949. On re-hearing the Commission, pursuant to what it regarded as a statutory declaration of public policy that all motor transportation in service January 1, 1947, be continued without interruption, and in compliance with the provisions of the Act, held that the Commission could issue certificate applied for on the facts set out in the petition without additional or supporting evidence, the verity of the facts stated not being questioned or want of *bona fides* suggested. The Commission further found that the operations were reasonably frequent and continuous within the meaning of the Act, and that there was no evidence the applicant was unfit or otherwise disqualified. Re-hearing was accordingly denied, and protestants appealed to the Superior Court. In the Superior Court the order of the Utilities Commission was affirmed and the protestants excepted and appealed to this Court.

Attorney-General McMullan and Assistant Attorney-General Paylor, for State of North Carolina ex rel. Utilities Commission, appellee.

Harry Rockwell, Harrell Pope, Smith, Wharton, Sapp & Moore, and W. Henry Hunter for Winslow Truckers, Inc., applicant, appellee.

Bailey & Holding for Fredrickson Motor Express, and Mrs. Mabel D. Burton, d/b/a Helms Motor Express, and Miller Motor Express, appellants.

DEVIN, J. The appellants challenge the propriety of the judgment below in affirming the issuance by the Utilities Commission of a temporary certificate or franchise to the applicant Winslow Truckers under the provisions of Chapter 1008, sec. 7, Session Laws 1947 (now G.S. 62-121.11), on the ground that the action of the Commission was taken without adequate proof of the facts found.

This statute was enacted in 1947 pursuant to the policy declared in a resolution previously adopted by the General Assembly that motor carrier service theretofore rendered be continued and preserved under the regulation of the Utilities Commission. Section 7 thereof contains these pertinent provisions: "If any carrier or predecessor in interest was in *bona fide* operation as a common carrier by motor vehicle on January 1st, 1947, over the route or routes or within the territory for which application is made under this section, and has so operated since that time, . . . the commission shall issue a certificate to such carrier without requiring

further proof that public convenience and necessity will be served by such operation, if such carrier qualifies itself in the following manner." The qualifications enumerated, briefly stated, were these: In order to obtain this certificate the carrier was required by the Act to show report of its operations for one or more full calendar months of 1946, chosen as typical or representative of the nature, extent and frequency of its continuous operation from January 1, 1947, to date of application; description of highways and territory covered; description of vehicles, and statement of financial standing. Thereupon it was the duty of the Commission to issue certificate authorizing the route operations applied for, if the Commission should find from the application that the operations were reasonably frequent and continuous throughout the period covered by the report of operations filed and made a part of the application, and to that end the application so filed was to be received in evidence by the Commission. It is further provided in the Act that the Commission may require additional or supporting evidence as to the verity of the facts stated in the application, and the Commission was authorized to deny certificate upon a finding from competent evidence that applicant is unfit or disqualified to perform the service for which application is made.

Appellants in their brief state that the issue here presented is whether the applicant makes out a case under this Act by introducing only the application and exhibits filed with it. It would seem that the answer to this question is to be found in the Act itself which provides in subsection 3 of section 7 that "the application so filed shall be received in evidence by the Commission." We see no reason why the Commission should not be held empowered to act upon the applicant's verified petition and the exhibits attached thereto showing substantial compliance with sub-section 2 of section 7 of the Act, particularly when no evidence *contra* is offered. Furthermore, the applicant is required, pending decision on his application (G.S. 62-121.14), to conform to all provisions of the Act and the regulations of the Commission from the time of filing his application. The Commission as an administrative agent of the state is charged with supervision and inspection of the operations of motor carriers, and the extent and character of applicant's operations after that time came within the scope of its power. Applicant offered detailed statement of its operations during the month of March 1947 as typical and representative of its operations for the entire period, and truth of this statement was not questioned.

While the burden of proof was undoubtedly on the applicant, upon the showing made, we think the record sufficient to support the findings and order of the Utilities Commission and the judgment of the Superior Court in affirmance thereof. The verity of the facts set out in the application was unchallenged by opposing evidence or suggestion of unfitness or other

disqualification of the applicant. The phrase "in *bona fide* service as a common carrier" as used in the statute would seem to carry the implication that applicant was one who was rendering substantial service as such in good faith, actively, openly, honestly. *McDonald v. Thompson,* 305 U.S. 263; *U. S. v. Carolina F. Carriers,* 315 U.S. 475 (480).

It is not contended the applicant had abandoned or discontinued operations. Indeed appellants' right to maintain their position here is grounded on the allegation that applicant is seeking to perform transportation service within the territory covered by their franchises.

We conclude that the judgment below should be affirmed, and it is so ordered.

Affirmed.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, v. FREDRICKSON MOTOR EXPRESS, MRS. MABEL D. BURTON D/B/A HELMS MOTOR EXPRESS, AND MILLER MOTOR EXPRESS.

(Filed 24 May, 1950.)

Carriers § 5—

The fact that an applicant under G.S. 62-121.11, which had been conducting trucking operations extending over a radius of 150 miles, held a previously issued franchise certificate authorizing transportation within a radius of seven miles only, does not preclude a finding that its operations were *bona fide* within the meaning of the act, there having been no effort made by the State to exclude or curtail its operations and there being no evasion, deceit, or defiance of authority.

APPEAL by defendants from *Phillips, J.,* October Term, 1949, of GUILFORD. Affirmed.

This was a proceeding before the North Carolina Utilities Commission in the matter of the application of Wilder Transfer Company for certificate under the North Carolina Truck Act of 1947 (Ch. 1008, sec. 7, now G.S. 62-121.11), to which the above named defendants filed protest.

Certificate as applied for was issued under section 7 of the Act, and defendants' exceptions to the order, after re-hearing, were denied. Defendants appealed to the Superior Court, where the ruling of the Utilities Commission was affirmed. Defendants excepted and appealed to this Court.

Attorney-General McMullan and Assistant Attorney-General Paylor for State of North Carolina ex rel. North Carolina Utilities Commission, appellee.

York & Boyd for J. W. Wilder Transfer Co., appellee.

Bailey & Holding for Fredrickson Motor Express, Mrs. Mabel D. Burton, d/b/a Helms Motor Express and Miller Motor Express, appellants.

DEVIN, J. The proceeding before the Utilities Commission, which is the subject of this appeal, was similar in form and similar in result to that considered in the previous case under the same title, *ante,* 174, but a different question is here presented. The appellants in the instant case assign error in the judgment in that it affirms the finding of the Utilities Commission that the applicant, the Wilder Transfer Company, "was in *bona fide* operation as a common carrier of property by motor vehicle in intrastate commerce during the year 1946 and was so operating on January 1, 1947." Appellants take the position that since the applicant held a previously issued franchise certificate authorizing only transportation within a radius of 7 miles of Greensboro, and nevertheless conducted trucking operations extending over 150 miles from that center, it could not properly be found that the previous operations of applicant were *bona fide* within the meaning of the Act. It is urged that by the statute then in force (G.S. 62-104) operations other than as authorized by the former certificate were unlawful and hence could not be *bona fide.*

In view of the declaration of policy expressed in the Truck Act of 1947 "to preserve and continue all motor carrier transportation services now afforded this state" it is manifest that the purpose of the Act was to bring all truck operators serving the public as common carriers, whether non-franchise operators or those holding limited franchises, within the provisions of the so-called "grandfather clause" in the manner and to the extent set out in the Act, entitling them to new certificate if proper application was made before October 1, 1947.

On the record in this case and the evidence heard by the Utilities Commission, we do not think the fact that applicant in this case conducted operations in 1946 beyond the distance limited in his former certificate should be held determinative of the question whether applicant was in *bona fide* operation as a common carrier during the critical period. Applicant filed with its application detailed statement of trucking operations during the months of 1946, together with showing of routes and facilities employed. If applicant had operated without franchise certificate it was entitled to come in under the Act, and if its operations were different from those authorized in its certificate it could still come in under the Act upon proper showing. G.S. 62-121.10. It could rely on actual operations as a common carrier as a basis for a certificate in order to preserve the position which it had obtained in transportation service unless it be held that the operations described indicated operations not *bona fide.*

Reference was made in *State ex rel. Utilities Commission v. Motor Express, ante,* 174, to the meaning of the phrase "in *bona fide* operation." In *McDonald v. Thompson,* 305 U.S. 263, where the applicant in that case had continued to operate motor trucks over the highways of Texas in defiance of the denial of his application for authority so to do, the Court said the expression "in *bona fide* operation" meant something more than mere ability to serve as a common carrier, and that it did not "extend to one operating as a common carrier on public highways of a state in defiance of its laws." But this is not the case here. Applicant operated under its former certificate, and also as a common carrier by truck in other territory. The Utilities Commission found from the evidence presented that applicant was in *bona fide* operation during and at the times made determinative. It was to preserve and continue motor carrier transportation services that the Act of 1947 was passed. In our case there was no evasion, deceit or defiance. No effort had been made by the State to exclude or curtail its operations, but rather to continue them in the interest of public service. *Alton R. Co. v. U. S.,* 315 U.S. 15; *U. S. v. Carolina F. Carriers,* 315 U.S. 475.

Appellants' exception that the application and the certificate issued thereon differ from the statement contained in applicant's letter to the Chairman of the Commission does not afford sufficient grounds to warrant overruling the findings and conclusion of the Utilities Commission or the judgment of the Superior Court in affirmance thereof.

Judgment affirmed.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, v. FREDRICKSON MOTOR EXPRESS, MRS. MABEL D. BURTON D/B/A HELMS MOTOR EXPRESS, AND MILLER MOTOR EXPRESS.

(Filed 24 May, 1950.)

1. Carriers § 5—

Where application is filed within the time allowed under G.S. 62-121.11, and in the report of operations for a month prior to 1 January, 1947, selected by applicant as typical, applicant asks opportunity, if necessary, to offer proof of operations for other months, the Commission has power to permit an amendment to show operations for other months and to consider the addenda thus filed in passing upon the application.

2. Same—

In an application under G.S. 62-121.11, the Utilities Commission must act within the authority conferred by the statute, yet the findings from the evidence and the exercise of judgment thereon within the scope of its powers are matters for the Commission, and its order will not be disturbed

when sustained by its findings upon competent, material and substantial evidence. G.S. 62-26.10.

APPEAL by defendants from *Phillips, J.,* October Term, 1949, of GUILFORD. Affirmed.

This was a proceeding before the North Carolina Utilities Commission in the matter of the application of S. & S. Trucking Company for certificate under the North Carolina Truck Act of 1947 (Chap. 1008, sec. 7, now G.S. 62-121.11) to which the above named defendants filed protest.

Certificate as applied for was issued under sec. 7 of the Act, and defendants' exceptions to the order, after re-hearing, were denied. Defendants appealed to the Superior Court, where the ruling of the Utilities Commission was affirmed. Defendants excepted and appealed to this Court.

Attorney-General McMullan and Assistant Attorney-General Paylor for State of North Carolina ex rel. North Carolina Utilities Commission, appellee.

Brooks, McLendon, Brim & Holderness for Louise J. Sharpe, d/b/a S. & S. Trucking Company, appellee.

Bailey & Holding for Fredrickson Motor Express, Mrs. Mabel D. Burton, d/b/a Helms Motor Express and Miller Motor Express, appellants.

DEVIN, J. The proceeding before the Utilities Commission, which is the subject of this appeal, was in form similar to that which we have heretofore considered in two other cases under the same title, *ante,* 174 and 178. Here the appellants assign error in the judgment below for that it affirmed the ruling of the Utilities Commission in permitting the filing of an additional and later report of operations in support of its application for franchise certificate under the North Carolina Truck Act of 1947, and also on the ground that the grant of authority to applicant as a common carrier was not supported by competent, material and substantial evidence.

On the first question thus presented, we note that in the original report of operations for the month of July 1946, chosen as typical or representative of the nature, extent and frequency of previous operations, the applicant had asked opportunity, if necessary, to offer proof of operations for other months, and later in response to inquiry from the Commission's Director of Traffic based on this request did subsequently file report of additional shipments transported in 1946. True, the application in manner and form specified by the Act was required to be filed on or before October 1, 1947, but we think the Commission had the power to permit an amendment in the particular matter which had been re-

quested at the time of filing the application. The motion to dismiss the application on this ground was properly denied. Nor was the Commission precluded from considering the addenda thus filed.

The Utilities Commission, after considering the application filed and the additional evidence offered by applicant, found that the application was filed in compliance with the provisions of section 7 of the Act; that applicant was in bona fide operation as a common carrier of property by motor vehicle in intrastate commerce during 1946, and was so operating January 1, 1947, and has continued so to operate since that time; that the operations were reasonably frequent and continuous throughout the period covered by the report. Thereupon the Commission issued order authorizing applicant to operate as a common carrier of general commodities over the regular routes set out in the application.

The appellants excepted on the ground that the evidence does not support a finding that applicant engaged in transportation of general commodities, or show reasonably frequent and continuous operations as a common carrier over the regular routes described in the application.

However, from an examination of the record and the report of the testimony introduced before the Commission and upon which its findings were based, we are unable to hold that the findings and conclusions of the Commission were without substantial support in the evidence. While in the administration of the Truck Act of 1947, the decisions of the Utilities Commission must be within the authority conferred by the Act, yet the weighing of the evidence and the exercise of judgment thereon as to transportation problems within the scope of its powers are matters for the Commission. *U. S. v. Carolina F. Carriers,* 315 U.S. 475; *Utilities Com. v. Trucking Co.,* 223 N.C. 687, 28 S.E. 2d 201; *Utilities Com. v. Coach Co.,* 218 N.C. 233, 10 S.E. 2d 824.

Viewing the entire record in the light of appellants' exceptions, we are unable to discover that any substantial rights of the appellants have been prejudiced because of the Commission's findings or decisions, or that they are unsupported by competent, material and substantial evidence. G.S. 62-26.10.

We conclude that the judgment below in affirmance of the order of the Utilities Commission in the instant case should be affirmed.

Judgment affirmed.

JOSEPH T. CARRUTHERS, JR., ADMINISTRATOR OF THE ESTATE OF DINSON A. CALDWELL, DECEASED, AND MANUFACTURERS CASUALTY COMPANY, v. SOUTHERN RAILWAY COMPANY.

(Filed 24 May, 1950.)

1. Negligence § 19c—

Nonsuit on the ground of contributory negligence should not be granted unless plaintiff's evidence tends to show contributory negligence so clearly that no other conclusion reasonably can be drawn therefrom.

2. Railroads § 4—Evidence held to show contributory negligence as a matter of law on part of driver in failing to look before driving upon crossing.

Evidence tending to show that intestate, driving his employer's truck at a rate of ten to fifteen miles per hour, drove upon a crossing of a spur track without slackening speed or turning, and was struck by defendant railroad company's engine, that his view was unobstructed in the direction from which the engine approached for a distance of several hundred feet when he was within 24 feet 8 inches of the nearest rail, together with evidence that intestate was familiar with the crossing and was aware of the fact that trains passed over the spur track almost daily and usually at the time of the accident, *is held* to show contributory negligence barring recovery as a matter of law irrespective of evidence that the engine was traveling twenty miles per hour or the fact that on the occasion in question there were no crew members on the front and back of the train as was customary.

3. Automobiles § 18g (2)—

Estimate of witnesses as to the speed of a locomotive, based upon the result of the impact, is properly excluded when it appears that the witnesses had not observed the train and had formed no opinion as to its speed.

4. Appeal and Error § 39c—

The exclusion of testimony cannot be held prejudicial when the record does not show what the answer of the witness would have been.

APPEAL by plaintiff from *Sink, J.*, January Term, 1950, of GUILFORD. Affirmed.

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.

At the close of plaintiff's evidence defendant's motion for judgment of nonsuit was allowed, and the plaintiff excepted and appealed.

Falk, Carruthers & Roth, Smith, Wharton, Sapp & Moore, and Harrell Pope for plaintiff, appellant.

W. T. Joyner and R. M. Robinson for defendant, appellee.

DEVIN, J. It was not controverted that there was evidence of negligence on the part of the defendant Railway Company. Therefore, the propriety of the nonsuit depends upon whether the plaintiff's evidence establishes such contributory negligence on the part of the intestate as bars recovery. The rule is well settled that in order to sustain a nonsuit on this ground the evidence tending to show contributory negligence must be so clear that no other conclusion reasonably can be drawn therefrom. *Collingwood v. R. R., post,* 192; *Penland v. R. R.,* 228 N.C. 528, 46 S.E. 2d 303; *Bailey v. R. R.,* 223 N.C. 244, 25 S.E. 2d 833; *McCrimmon v. Powell,* 221 N.C. 216, 19 S.E. 2d 880; *Jeffries v. Powell,* 221 N.C. 415, 20 S.E. 2d 561; *Godwin v. R. R.,* 220 N.C. 281, 17 S.E. 2d 137; *Hampton v. Hawkins,* 219 N.C. 205, 13 S.E. 2d 227; *Cole v. Koonce,* 214 N.C. 188, 198 S.E. 637.

The fatal injury occurred on the grounds of the Pomona Terra Cotta Company at a point where a road used for vehicular traffic by employees of the Terra Cotta Company crosses a spur track which leads from the main line of the defendant Railway Company into the plant of the Terra Cotta Company for use in handling freight and delivering coal. The track extends north and south and the road east and west. The road was much used by vehicles. Engines and cars pass over the track almost daily and usually in the afternoon. September 10, 1947, between 3:00 and 4:00 o'clock p.m. the plaintiff's intestate, who had been employed by the Terra Cotta Company for two years as truck driver, was driving an empty truck along this road, moving west toward the crossing over the spur track at a speed of 10 to 15 miles per hour. A slight rain was falling. The intestate was alone in the cab of the truck, but two other employees were sitting on the side of the flat truck body facing north. On the right of the road as one approached the crossing was a line of brick kilns extending north parallel with and east of the railroad track. These kilns obstructed the view of one traveling west toward the crossing until he was 24 feet 8 inches of the east rail of the track from which point he could see to his right up the track north more than 700 feet. Due to the fact the kilns were circular in form with rounded tops, at a point 28 or 30 feet from the crossing the view to the north was unobstructed for several hundred feet.

At the time the intestate approached the crossing the defendant's engine and cars were moving south on the spur track, without signal or warning, and the engine struck the truck at the right cab door and inflicted injuries on the plaintiff's intestate from which he shortly thereafter died. The two fellow employees of intestate, who were on the truck, jumped in time to avoid injury. They testified the intestate drove on the track without slackening speed, or turning. There was no evidence he applied brakes. The intestate, who had been driving trucks in and about the plant for

several years, was familiar with the road, the spur track, and the kilns, and was aware of the fact that trains passed over this track almost daily and usually about this time of the afternoon. It is apparent that the intestate did not see the train until the moment of impact. Approaching at the rate of 10 to 15 miles per hour, if he had looked when he passed the line of kilns he could and would have seen the train in time to have stopped or turned aside. Instead, without changing his course or speed, he drove on the track. The conclusion is inescapable that he failed to look as he approached the crossing and drove on the track at a time when by looking he could have seen the train and avoided injury. *Harrison v. R. R.*, 194 N.C. 656, 140 S.E. 598; *Bailey v. R. R.*, 223 N.C. 244, 25 S.E. 2d 833. The plaintiff's evidence points unmistakably to failure on the part of the intestate to exercise due care for his own safety with fatal consequences. That he was negligent and that his negligence was a proximate contributory cause of his injury and death seems to have been established by the evidence the plaintiff has offered. We think the defendant was entitled to the allowance of his motion for judgment of nonsuit.

Plaintiff, however, contends that material evidence was excluded and not considered by the court below. He assigns error in the ruling of the court in sustaining objection to testimony tending to show the speed of the train. However, from an examination of the record it appears that neither of the witnesses had observed the train and had formed no opinion as to its speed, but offered an estimate of 20 miles per hour based on the result of the impact. Hence, we think the ruling of the court was correct. *Hicks v. Love,* 201 N.C. 773, 161 S.E. 394. But if we accept as a fact that the train was moving at the rate of 20 miles per hour, we do not see that it helps plaintiff on the question of contributory negligence.

Plaintiff offered testimony tending to show it was the custom of the defendant in operating trains through this yard to have a man on the front and one on the back. The disposition of the train crew on the occasion of the collision does not definitely appear. But we do not regard this evidence, if admitted, as sufficiently material to affect the question here considered. Plaintiff, also, excepted to the ruling of the court in sustaining objection to a question propounded to a witness as to the comparative noise of Diesel engine, but the record does not show what the answer would have been.

Giving due consideration to the evidence offered, as well as that excluded to which exception was noted, we conclude that the court below has ruled correctly and that the judgment of nonsuit must be upheld.

Affirmed.

LOCKE COTTON MILLS COMPANY, A CORPORATION, v. PATE COTTON COMPANY, A CORPORATION.

(Filed 24 May, 1950.)

1. Bills and Notes § 18—

In order for the transferee of warehouse receipts to be a *bona fide* holder within the meaning of G.S. 27-51 it is necessary not only that he acquire same before maturity for value and without notice of fraud but also that he take same in good faith, which means honestly and without knowledge of facts which would negative good faith, particularly where he knows his transferer occupied a relationship of trust. G.S. 27-2.

2. Bills and Notes § 35—

An instruction to the effect that the burden is upon the transferee to show that he took the warehouse receipts in controversy for value and without notice of any defect, must be held for reversible error for omitting the element of good faith, notwithstanding a prior correct instruction, when the question of good faith is the focal point of the controversy upon plaintiff's evidence that the transferer was its agent and transferred the receipts in discharge of his personal liability to the transferee on an unpaid check.

APPEAL by plaintiff from *Gwyn, J.*, October Term, 1949, of SCOTLAND. New trial.

Suit to recover warehouse receipts for 100 bales of cotton alleged to have been fraudulently obtained from the plaintiff, and now held by the defendant.

Issues were submitted to the jury and answered as follows:

"1. Were the warehouse receipts in controversy in this action owned by the plaintiff prior to the time that they came into the possession of the defendant? Answer: Yes.

"2. If so, were said warehouse receipts wrongfully and fraudulently converted to their own use by Dillon Cotton Company or P. G. Wright? Answer: Yes.

"3. If so, did the defendant Pate Cotton Company acquire said warehouse receipts in due course for a valuable consideration and without notice of any defect in the title of the Dillon Cotton Company or P. G. Wright? Answer: Yes."

From judgment on the verdict plaintiff appealed.

Brooks, McLendon, Brim & Holderness and Hartsell & Hartsell for plaintiff, appellant.

Varser, McIntyre & Henry for defendant, appellee.

DEVIN, J. The first two issues, which were not seriously controverted, established the fact that warehouse receipts belonging to the plaintiff and

representing some $15,000 worth of cotton had been fraudulently converted by plaintiff's agent, and thereafter transferred to the defendant in discharge of the agent's personal liability to the defendant on an unpaid check. The controversy was fought out on the third issue whether the defendant acquired the warehouse receipts for value in good faith without notice of the defective title of the transferer, as claimed by defendant.

The warehouse receipts, the subject of this litigation, were negotiable (G.S. 27-10), and the rights of a *bona fide* holder were protected by the following statute, G.S. 27-51: "The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was deprived of the possession of the same by loss, theft, fraud, accident, mistake, duress, or conversion, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, in good faith without notice of the breach of duty, or loss, theft, fraud, accident, mistake, or duress or conversion."

In charging the jury on the third issue the court used this language: "So the plaintiff says and contends that you should find with the plaintiff upon this issue and that you should not be satisfied from the evidence and by its greater weight that the defendant took the receipts for value, in good faith, without knowledge of its defect or infirmity or without knowledge of such facts and circumstances under which the taking would be in good faith, and that you should answer the issue No. It is a matter for you to say what the truth is. Gentlemen, upon that third issue you are instructed that if the defendant has satisfied you from the evidence and by the greater weight thereof that it took the warehouse receipts for value, as that term has been explained, and without notice of any defect in the title of Dillon Cotton Company or P. G. Wright, then it would be your duty to answer that issue, the third issue, Yes."

Plaintiff noted exception to the portion of the charge above quoted, for that after properly stating the plaintiff's contention that the burden was on the defendant to show that it took the warehouse receipts for value, in good faith, without knowledge of the defective title of the person from whom acquired, or of such facts and circumstances as would negative good faith, the court immediately followed this by a positive direction to the jury that they should answer the issue in favor of the defendant if they found it took the warehouse receipts "for value and without notice of any defect in the title" of the person from whom acquired.

The ground of plaintiff's exception is that the court thus relieved the defendant of the burden prescribed by the statute of showing that it acted in good faith as well as without notice of the fraud.

The statute (G.S. 27-2) declares that a thing is done in good faith within the meaning of the Uniform Warehouse Receipts Act "when it is in fact done honestly, whether it be done negligently or not." And in 8 American Jurisprudence, 118, we find the rule stated as follows: "To be a holder in due course under the Uniform Act, or its equivalent under the law merchant, it is necessary not only that a holder give value for an instrument before its maturity, but also that he take it in good faith, without notice of any infirmity in the instrument or defect in the title of the person negotiating it at the time of such taking or knowledge of such facts that his action in taking the instrument amounts to bad faith. This means that at the time he takes it, he acts honestly and fairly under the facts and circumstances within his knowledge with respect to the rights of all prior parties, particularly those with whom he knows his transferer occupied a relationship of trust, and in a manner free from the taint of any illegality." See also *Fehr v. Campbell,* 288 Pa. 549, 52 A.L.R. 506, where the meaning of "in good faith" in this connection is discussed. It may be noted that while these words do not appear in the original Act, Public Laws 1917, C. 317 (C.S. 4087), they were inserted in the recodification of the statute in General Statutes, sec. 27-51, in defining what was essential to bring the holder of a warehouse receipt negotiated in fraud within the protection afforded a *bona fide* holder.

In the light of the circumstances attending the acquisition of the warehouse receipts by the defendant in this case, and the plaintiff's contention thereon that the defendant had knowledge of such facts that its taking them in settlement for the transferrer's unpaid check was not in good faith, we think the omission by the court in his instructions to the jury of the words contained in the statute was error. Here was the focal point of the controversy. The decision turned upon the factors of the defendant's knowledge and good faith in taking and holding warehouse receipts bearing plaintiff's name and of which the plaintiff had been wrongfully deprived. Ordinarily immaterial and inconsequential omissions in an otherwise properly stated charge to the jury will not warrant a new trial. And it is true the court in the first part of his charge in stating generally the principles of law applicable to the transfer of fraudulently acquired instruments, used the words "in good faith," and charged that the holder would not be protected if he took the instrument with knowledge of such facts and circumstances that his taking would amount to bad faith. But later after stating the evidence and contentions of the parties on the third issue at some length, in his final instruction on this vital issue, the court omitted this statutory phrase which tended to lessen the burden which the law imposed upon the defendant's affirmative defense. We think this may have influenced the verdict, and that there should be another hearing. We observe also that when the jury later in the course

of their deliberations requested that the court recapitulate his instructions on the third issue, the charge above quoted was repeated *in totidem verbis*.

For the error pointed out there must be a

New trial.

J. C. McINTYRE, TRADING AS TEXTILE MOTOR FREIGHT, v. MRS. JAMES H. AUSTIN.

(Filed 24 May, 1950.)

1. Process § 4: Actions § 10—

Plaintiff has the duty to sue out *alias* and *pluries* summons when necessary, and upon his failure to maintain the chain of process there is a discontinuance. G.S. 1-95.

2. Process § 4—

Plaintiff may "sue out" an *alias* or *pluries* summons either by oral or written application to the clerk, and no order of court is necessary to the issuance of such process, although an order or memorandum by the clerk showing the relation to the preceding writ or writs will not render the writ invalid if in proper form otherwise.

3. Same—

The mere endorsement of the words "*alias*" or "*pluries*" upon a summons is ineffective, but the *alias* or *pluries* summons must contain sufficient information in the body thereof to show its relation to the original summons.

4. Same—

Legal service of an *alias* or *pluries* summons is effective from the date of the original process.

5. Abatement and Revival § 7—

Where the original process is kept alive by the proper issuance of *alias* and *pluries* summonses, a plea in abatement in a second action instituted subsequent to the issuance of the original process in the first is properly denied notwithstanding that process in the subsequent action is actually served prior to the service of *pluries* summons in the first.

APPEAL by defendant from *Phillips, J.*, at Chambers in Rockingham, N. C., 28 January, 1950. From SCOTLAND.

This is a civil action to recover damages to the plaintiff's truck, alleged to have been caused by the negligence of the defendant.

The plaintiff is a citizen and resident of Scotland County, N. C. The defendant is a citizen and resident of Mecklenburg County, N. C. The

collision complained of occurred between the plaintiff's truck and the defendant's automobile on 16 August, 1949, on a public highway near the town of Polkton, N. C., in Anson County, N. C.

The plaintiff instituted this action on 3 September, 1949. The original summons, with a copy of the complaint, was directed to the Sheriff of Mecklenburg County. The Sheriff of Mecklenburg County received the summons, according to his return, on 6 September, 1949, and returned it unserved, on 15 September, 1949, because of the illness of the defendant.

Thereafter, on 11 October, 1949, the Clerk of the Superior Court of Scotland County issued an *alias* summons, directed to the Sheriff of Mecklenburg County, the pertinent part thereof being in the following language: "You have heretofore been commanded to summons the defendant hereinafter named, said summons having been returned not served, and this being an *alias* summons; you are hereby commanded to summons Mrs. James H. Austin, the defendant above named, . . ."

The Sheriff of Mecklenburg County received the *alias* summons, according to his return, on 12 October, 1949, and returned it unserved on 25 October, 1949, for the same reason assigned in his return of the original summons.

On 14 November, 1949, the Clerk of the Superior Court of Scotland County issued a *pluries* summons, directed to the Sheriff of Mecklenburg County, the pertinent part thereof being in the following language: "You having been heretofore commanded to summons the defendant hereinafter named; said summons having been returned not served, and an *alias* summons having been issued and likewise returned unserved, and this being a *pluries* summons; now, you are hereby commanded to summons the defendant, Mrs. James H. Austin, . . ." The *pluries* summons was duly served on 18 November, 1949.

In the meantime, on 9 November, 1949, this defendant instituted an action in Mecklenburg County against J. C. McIntyre, the plaintiff herein, involving the same matters set out in the complaint filed in this action. The summons and copy of complaint in the action, instituted in Mecklenburg County, were served on J. C. McIntyre on 10 November, 1949.

The defendant in this action entered a special appearance before the Clerk of the Superior Court in Scotland County, and moved to dismiss the action, on the ground that the Superior Court of Mecklenburg County obtained jurisdiction of J. C. McIntyre prior to the time of the service of summons in this action on defendant movent. The Clerk held the summons, *alias* summons and *pluries* summons had been legally issued, and the *pluries* summons properly served, and denied the motion.

The defendant appealed to his Honor, the Judge presiding and holding the courts of the Thirteenth Judicial District, before whom the matter

was heard on the record. The plea in abatement was denied, and judgment entered accordingly.

The defendant appeals and assigns error.

James W. Mason and Smathers & Carpenter for plaintiff.

Varser, McIntyre & Henry for defendant.

DENNY, J. The appellant contends a plaintiff cannot obtain a valid *alias* or *pluries* summons without first applying for and obtaining an order directing the issuance of such writ.

Chapter 66, Public Laws of 1927, required the Clerk of the Superior Court to issue an *alias* or *pluries* summons within three days after the "return of a summons unserved for want of time to make service, as to any defendant or defendants not served." The imposition of this duty on the Clerks of our Superior Courts was eliminated by the repeal of this provision in the statute by the enactment of Chapter 237 of the Public Laws of 1929.

The pertinent part of the present statute which authorizes the issuance of these writs, reads as follows: "When the defendant in a civil action or special proceeding is not served with summons within ten days, the plaintiff may sue out an *alias* or *pluries* summons, returnable in the same manner as original process. An *alias* or *pluries* summons may be sued out at any time within ninety (90) days after the date of issue of the next preceding summons in the chain of summonses." G.S. 1-95.

The duty is now imposed upon the plaintiff to sue out an *alias* summons if the original writ failed of its purpose or proved ineffectual; and likewise to sue out a *pluries* summons when the preceding writs have proved ineffectual, or there will be a discontinuance of the action. 50 C.J., Process, Sec. 49, p. 464; McIntosh's N. C. Practice and Procedure, Sec. 317; *Green v. Chrismon,* 223 N.C. 724, 28 S.E. 2d 215; *Gower v. Clayton,* 214 N.C. 309, 199 S.E. 77; *Neely v. Minus,* 196 N.C. 345, 145 S.E. 771; *McGuire v. Lumber Co.,* 190 N.C. 806, 131 S.E. 274.

What is meant by the words "sue out," as used in G.S. 1-95? According to Black's Law Dictionary, 3rd Ed., p. 1675, to "sue out" means "to obtain by application; to petition for and take out."

We hold that a plaintiff may apply orally or in writing to the Clerk of the Superior Court for an *alias* or *pluries* summons, 50 C.J., Process, Sec. 50, p. 465, and upon such application it is the duty of the Clerk of the Superior Court to issue the writ. And since the writs are returnable before the Clerk of the Superior Court and not to the Superior Court in term time, as was the former practice, Revisal 430; *Battle v. Baird,* 118 N.C. 854, 24 S.E. 668, no order of court is necessary to authorize the Clerk to issue an *alias* or *pluries* summons. 50 C.J., Process, Sec. 50,

p. 465. Neither do we think the present statute requires the Clerk to issue an order directing himself to perform a duty imposed on him by statute. However, if he elects to draw an order or memorandum, containing the facts necessary to show the relation of the writ to the preceding writ or writs, and copies the same on the process, the writ, if in proper form otherwise, will be valid. *Ryan v. Batdorf,* 225 N.C. 228, 34 S.E. 2d 81; *Hatch v. R. R.,* 183 N.C. 617, 112 S.E. 529.

It is well settled that an ordinary summons cannot be effective as an *alias* or *pluries* summons by the mere endorsement of the words *"alias"* or *"pluries"* thereon. *Mintz v. Frink,* 217 N.C. 101, 6 S.E. 2d 804. But if the *alias* or *pluries* summons contains sufficient information in the body thereof to show its relation to the original summons, the legal service of such writ will be effective from the date of the original process. *Mintz v. Frink, supra; Hatch v. R. R., supra;* 50 C.J., Process, Sec. 49, p. 464.

We think the *alias* and *pluries* summonses issued in this cause contained sufficient information to make them referable to the original process, and were valid writs.

The ruling of the court below in denying the plea in abatement, on the ground of a prior action pending, which involved the same cause of action is

Affirmed.

HARRY COLLINGWOOD v. WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY.

(Filed 24 May, 1950.)

1. Negligence § 19c—

Nonsuit on the ground of contributory negligence is proper only when plaintiff's own evidence establishes this defense so clearly that no other conclusion reasonably can be drawn therefrom.

2. Railroads § 4—

Plaintiff's evidence to the effect that he had already turned on the lights of his car, that it was almost dark, that defendant's engine was moving noiselessly down grade, and that just as defendant drove upon the grade crossing light flashed up from the oncoming locomotive and its whistle was blown, but that it approached the crossing without light and without warning signal of any kind, *is held* not to establish contributory negligence as a matter of law.

3. Trial § 31b—

While the trial court's instructions as to the law should be confined to that arising upon the evidence adduced at the trial, an examination of the entire charge in this case *is held* not to disclose prejudicial error in stating

principles of law based on facts having no relation to those in evidence in the case.

4. Appeal and Error § 38—

The burden is on appellant not only to show error but also that the error complained of was material with resulting harm to its cause.

APPEAL by defendant from *Phillips, J.*, February Term, 1950, of STANLY. No error.

This was an action to recover damages for a personal injury sustained by plaintiff when his automobile was struck by defendant's locomotive at a grade crossing.

It was alleged that this occurred at 5:40 p.m. 17 December, 1948, when it was almost dark, and that defendant's locomotive approached the crossing without lights or signal. Defendant denied negligence and pleaded the contributory negligence of the plaintiff.

Issues were submitted to the jury and answered in favor of the plaintiff, and from judgment on the verdict the defendant appealed.

H. C. Turner for plaintiff, appellee.

R. L. Smith & Son and Craige & Craige for defendant, appellant.

DEVIN, J. The plaintiff's evidence was sufficient to carry the case to the jury on the issue of defendant's negligence, but it is contended that defendant's motion for judgment of nonsuit should have been sustained for the reason that the contributory negligence of the plaintiff conclusively appears.

However, we think the issue of contributory negligence was also one for the jury. *Coltrain v. R. R.*, 216 N.C. 263, 4 S.E. 2d 853; *Caldwell v. R. R.*, 218 N.C. 63, 10 S.E. 2d 680. The court properly could not sustain the motion to nonsuit on this ground unless the testimony tending to prove contributory negligence was so clear that no other conclusion reasonably could be drawn therefrom. *Winfield v. Smith*, 230 N.C. 392, 53 S.E. 2d 251; *Dawson v. Transportation Co.*, 230 N.C. 36, 4 S.E. 2d 921; *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307; *Atkins v. Transportation Co.*, 224 N.C. 688, 32 S.E. 2d 209; *Hampton v. Hawkins*, 219 N.C. 205, 13 S.E. 2d 227; *Cole v. Koonce*, 214 N.C. 188, 198 S.E. 637.

Plaintiff testified that at the time he approached the crossing it was almost dark, 5:40 p.m. December 17, and he had already turned on the lights on his automobile; that as he came to the crossing he slowed down almost to a complete stop and looked and listened for a train, and did not see or hear anything; that just as he drove on the track suddenly light flashed up from the on-coming locomotive, which, connected only with a tender, was moving noiselessly down grade, and a blast from the whistle

was blown as he was struck; that while he was familiar with the crossing and the view in daylight was unobstructed, darkness at the time obscured the view of an approaching unlighted locomotive, and no warning signal of any kind was given. Considering his evidence in the light most favorable for him, we think the motion for judgment of nonsuit properly denied.

Defendant assigns error in the charge of the court in that in stating generally the law as to the correlative duties of drivers of automobiles and railroad engines on approaching a grade crossing, the court stated principles of law based on facts which had no relation to those in evidence in this case. It is urged that this tended to suggest consideration by the jury of matters not in evidence, all to the prejudice of the defendant.

While it was the duty of the court to confine his instructions to the law arising on the evidence in the case on trial (G.S. 1-180), an examination of the entire charge of the court in the light of the evidence and the contentions of the litigants leaves us with the impression that no prejudicial effect from the instructions complaind of is apparent, and that the verdict was not improperly influenced thereby. The burden is on the appellant not only to show error, but also to make it appear that the error complained of was material with resultant harm to its cause. *Collins v. Lamb*, 215 N.C. 719, 2 S.E. 2d 863.

We have examined the other exceptions noted by defendant and brought forward in its assignments of error, but do not find them of sufficient moment to justify setting aside the verdict and judgment. The result will not be disturbed.

In the trial we find

No error.

GILMER F. SEAWELL AND WIFE, ELVA SEAWELL, WILEY PURVIS, HUSBAND OF ORA SEAWELL PURVIS, DECEASED, FRANKLIN PURVIS AND WIFE, RUBY PURVIS, AND ARTHUR PURVIS, SINGLE, v. VIRGINIA PURVIS, MINOR DAUGHTER OF ORA SEAWELL PURVIS; LESTER PURVIS, MINOR SON OF ORA PURVIS, OLIVER SEAWELL AND WIFE, MITTIE SEAWELL; HOMER SEAWELL AND WIFE, ETHEL SEAWELL.

(Filed 24 May, 1950.)

1. Abatement and Revival § 6—

Where the pendency of a prior separate proceeding is pleaded in bar, the trial judge must first determine the plea in bar before considering other matters in issue, since if there be a prior separate proceeding pending between the same parties on substantially the same subject matter in which all material questions and rights may be determined, the second proceeding must be dismissed.

2. Same—

A special proceeding, as well as a civil action, is deemed to be pending from the time it is commenced, G.S. 1-88, until its final determination, G.S. 1-208. G.S. 1-393.

APPEAL by respondents Oliver Seawell and wife, Mittie Seawell, from *Phillips, J.*, at February Term, 1950.

Special proceeding instituted 7 February, 1949, for the partition of certain specifically described land in Moore County, North Carolina, of which Catherine A. Seawell died seized, in accordance with petitioner's interpretation of the provisions of the will of Catherine A. Seawell, deceased.

The respondent Oliver Seawell, *in propria persona*, filed answer 23 February, 1949, objecting to the sale of the timber and equal division of land, and prayed that the petition be ignored for that all the heirs have accepted their part of the money according to the will and are now trying to settle the land otherwise than as the will specifies.

On 28 February, 1949, Homer Seawell, through his attorney, E. J. Burns, filed answer to the petition denying in material aspects the allegations of the petition, and pleading in bar of this proceeding specifically the pendency of a prior special proceeding in Superior Court of Moore County between the same parties for partition of the same land,—the judgment roll in that prior special proceeding being set out as a part of the answer.

Subsequently, the judge of Superior Court, without passing upon the plea of the pendency of a prior special proceeding between the same parties and on the same subject matter, entered an order interpreting the will of the said Catherine A. Seawell, and directing a partition of the land in accordance with such interpretation.

Respondents Oliver Seawell and wife, Mittie Seawell, appeal therefrom and assign error.

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

Garin, Jackson & Garin for defendants, appellants.

WINBORNE, J. An inspection of the record on this appeal reveals error in law upon the face of the record. The pendency of a prior special proceeding, being pleaded in bar of this special proceeding, as shown by answer appearing in the record, it was the duty of the trial judge to have passed upon the plea before proceeding to give further consideration to other matters at issue. And if there were a prior special proceeding pending between the same parties on substantially the same subject matter, and all the material questions and rights can be determined

therein, this special proceeding should be dismissed. See *Dwiggins v. Bus Co.*, 230 N.C. 234, 52 S.E. 2d 892, and cases there cited, where the subject has been recently treated. See also *Grady v. Parker*, 230 N.C. 166, 52 S.E. 2d 273.

In this State a civil action is deemed to be pending from the time it is commenced, G.S. 1-88, until its final determination. G.S. 1-208, *McFetters v. McFetters*, 219 N.C. 731, 14 S.E. 2d 833; *Moore v. Moore*, 224 N.C. 552, 31 S.E. 2d 690; *Dwiggins v. Bus Co., supra*. See also *Henderson v. Henderson, ante*, 1. And the provisions of the statutes on civil procedure are applicable to special proceedings except as otherwise provided. G.S. 1-393.

In the light of the decision in the *Dwiggins* and *Grady cases, supra*, the judgment from which appeal is taken will be set aside, and further proceeding had on the plea of the pendency of another action in accordance with this opinion.

Error and remanded.

STATE v. BENNIE DANIELS AND LLOYD RAY DANIELS.

(Filed 24 May, 1950.)

1. Criminal Law § 57d—

The writ of error *coram nobis* obtains in this State only by virtue of the common law and is attended with its common law limitations.

2. Same—

The writ of error *coram nobis* is not a substitute for appeal and will lie only for matters extraneous to the record.

PETITION for Writ of Error *Coram Nobis*.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

Herman L. Taylor for defendants, petitioners.

PER CURIAM. The petitioners, Bennie Daniels and Lloyd Ray Daniels, were tried at May Term, 1949, of Pitt County Superior Court on an indictment charging them with the murder of William Benjamin O'Neal, and were convicted of murder in the first degree, without recommendation of mercy, and were sentenced to death. From this judgment they gave notice of appeal to the Supreme Court of North Carolina, and an order was made permitting them to appeal *in forma pauperis*. Not having per-

fected that appeal by serving case on appeal within the time allowed, they petitioned this Court for a writ of *certiorari* to bring up the case on appeal, which writ was denied for want of merit. *S. v. Daniels,* 231 N.C. 17.

They then filed in this Court a petition for permission to file in the court of trial, to wit, the Superior Court of Pitt County, a writ of error *coram nobis.* This petition was denied for want of substantial merit, and because it failed to bring the application within the purview of such a writ. *S. v. Daniels,* 231 N.C. 341.

On motion of the Attorney-General the appeal of defendants was dismissed by this Court in decision filed 1 March, 1950. *S. v. Daniels,* 231 N.C. 509.

The present petitioners thereupon filed in the Supreme Court of the United States a petition for *certiorari* to have the matter reviewed in that Court, and proceedings here were stayed by order of *Chief Justice Stacy,* pending action upon said petition.

On 8 May, 1950, the Supreme Court of the United States denied the petition without opinion, and this denial has been duly certified to this Court.

The petitioners now again petition this Court for leave to file a petition in the Superior Court of Pitt County for a writ of error *coram nobis;* and incorporate in that petition substantially matters that were presented to the Supreme Court of the United States in their petition to that Court for *certiorari.* On the face of the petition it appears that these are matters fully presented to the Court upon their trial and there passed upon.

The function and limitations of the writ of error *coram nobis* were called to the attention of counsel for the petitioners when the petition for *certiorari* to bring up the case on appeal was dismissed in this Court. *S. v. Daniels,* 231 N.C. 17, *supra;* and again in the subsequent decision dismissing the petition for leave to file a petition for such writ in the trial court.

The writ of error *coram nobis* obtains in this Court only by virtue of adoption of the common law; *In re Taylor,* 229 N.C. 297; *In re Taylor,* 230 N.C. 566, *supra; S. v. Daniels,* 231 N.C. 17, *supra;* and is attended with its common law limitations.

The writ of error *coram nobis* is not a substitute for appeal. Under our practice permission to petition the Superior Court in which the petitioning defendant was tried is given only when the matter on which the petition is based is "extraneous to the record." *S. v. Taylor,* 229 N.C. 297, 49 S.E. 2d 749; *In re Taylor,* 230 N.C. 566; 63 Am. Jur., p. 766, Sec. 1276; 4 C.J.S., Sec. 9.

We understand that the petition for *certiorari* presented to the Supreme Court of the United States comprehended all matters which might be pleaded in that Court in the premises, and upon which the petitioners may now rely.

The petition is denied.

Petition denied.

STATE v. FRANK SCRIVEN.

(Filed 24 May, 1950.)

1. Criminal Law § 74—

Transcript of record on appeal is required to be filed fourteen days before the call of the district to which the case belongs. Rule of Practice in the Supreme Court, No. 5.

2. Criminal Law § 80b (4)—

Where appellant does not docket the appeal or file transcript of the record on appeal within the time allowed, and fails to comply with mandatory rules of practice in the Supreme Court (Rules 5, 22, 21, 19 (3)) motion of the Attorney-General to docket and dismiss will be allowed, but in a capital case this will be done only after a careful examination of the whole record fails to disclose error.

DEFENDANT'S appeal from *Burgwyn, Special Judge*, December Term, 1949, WILSON Superior Court.

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

A. O. Dickens and R. F. Mintz for defendant, appellant.

PER CURIAM. The defendant was tried under an indictment charging him with first-degree murder; and from a verdict of guilty as charged, without recommendation of mercy, and sentence of death thereupon, he appealed to this Court.

The record discloses that the defendant was tried at the term of Superior Court held in Wilson County beginning 5 December, 1949; and that verdict of guilty and judgment thereon was rendered 9 December, 1949.

Under Rule Five of the Practice of the Supreme Court, transcript of the record on appeal is required to be filed 14 days before the call of this, the Second District.

The defendant did not docket the appeal or file such transcript of the record in this Court until 6 April, 1950, after the time had expired; at which time one typewritten copy of the case on appeal, along with the

brief was filed. In its assignments of error the brief makes broadside exceptions to the instructions to the jury without specific reference to exceptions thereto.

The Attorney-General moves to dismiss the appeal for noncompliance with the mandatory Rules of Practice in this Court. Rule 5, Rule 22, 21, 19 (3), and other pertinent requirements as to appeal. Counsel for the defendant have been supplied with copies of the motion to dismiss. The Clerk of this Court at the request of the Court communicated with said counsel, and reply thereto does not indicate that any further steps will be taken in prosecution of the appeal.

As this is a capital case, the Court, as is its practice, has carefully examined the whole record and does not find therein any error. *S. v. West*, 229 N.C. 416, 50 S.E. 2d 3; *Pruitt v. Wood*, 199 N.C. 788, 156 S.E. 126; *S. v. Butner*, 185 N.C. 731, 117 S.E. 163; *S. v. Watson*, 208 N.C. 70, 179 S.E. 455; *S. v. Goldston*, 201 N.C. 89, 158 S.E. 926.

The judgment of the court below is, therefore, affirmed, and the appeal is dismissed.

Judgment affirmed.

Appeal dismissed.

CHESTER R. BULLARD v. MARY BULLARD.

(Filed 24 May, 1950.)

APPEAL by defendant from *Stevens, J.*, at September Term, 1949, of COLUMBUS.

The marriage of plaintiff and defendant, which occurred 1 October, 1944, was dissolved by a decree of absolute divorce entered in this action at the June Term, 1948, of the Superior Court of Columbus County. The defendant applied to the court at the September Term, 1949, by a motion in the cause for the vacation of the divorce decree on the ground that the plaintiff had practiced fraud upon the court in obtaining the decree. The plaintiff denied this allegation of the defendant. Both parties offered testimony at the hearing of the motion for the avowed purpose of sustaining their respective contentions in the premises. The Court rendered judgment denying the motion to vacate the divorce decree, and the defendant excepted and appealed, assigning errors.

Frink & Herring for plaintiff, appellee.
Powell & Powell for defendant, appellant.

PER CURIAM. A careful consideration of the record convinces us that the testimony supports the conclusion reached by the court below, and

that its ruling on the motion to vacate the divorce decree ought not to be disturbed. In consequence, the judgment is

Affirmed.

MARY ESSICK, ADMINISTRATRIX OF HARVEY ESSICK, PLAINTIFF, v. CITY OF LEXINGTON AND LEXINGTON UTILITY COMMISSION, DEFENDANTS, AND DIXIE FURNITURE COMPANY, H. T. LINK AND A. F. TAYLOR, ADDITIONAL DEFENDANTS.

(Filed 9 June, 1950.)

1. Master and Servant § 37—

The Workmen's Compensation Act is a radical and systematic change in the common law, and the Act must be liberally construed to accomplish its purposes, its provisions being superior to the common law in all respects where it deals with the liabilities arising out of the relationship of employer and employee.

2. Electricity § 10—

The complaint alleged that intestate was engaged in laying metal roofing on a catwalk across a street, and was killed when a piece of roofing he was handling in the performance of the work struck a high tension wire, which was without insulation at many places and which was only some four feet above the roof of the catwalk. *Held:* Contributory negligence does not appear on the face of the complaint as a matter of law.

3. Master and Servant § 41—

Superiors of the injured employee are within the immunity of G.S. 97-9 when their orders, upon which alleged liability is predicated, are given in the conduct of the employer's business, and such supervisory employees are improperly made additional parties defendant upon the motion of the original defendant in an action by the personal representative of a deceased employee against the third person tort-feasor.

4. Same—

While in an action by the employer or the insurance carrier against the third person tort-feasor, such defendant may plead the negligence of the employer in bar of recovery by subrogation, where the personal representative of the deceased employee alone sues the third person tort-feasor, such defendant is not entitled to joinder of the employer as an additional party defendant upon allegations that the employer was guilty of concurring negligence constituting the primary cause of the injury.

PLAINTIFF'S and additional defendants' appeal from *Sink, J.*, April 17 and 18, 1950, DAVIDSON Superior Court.

The plaintiff's intestate was killed by contact with a live wire while he was an employee of the Dixie Furniture Company, later involved in this

proceeding. His widow, present administratrix, filed a claim for compensation with the Industrial Commission, and it was there found that his death was caused by an accident arising out of and in the course of his employment with this company. Under the schedule provided in the Workmen's Compensation Act the Industrial Commission awarded to her and dependents $6,000 as compensation, together with other items specified in the statute; of which the insurance carrier has paid the $6,000 and will in due time pay the minor items awarded.

The insurance carrier filed an affidavit setting forth its interest in the proceeding and the amount paid under the Industrial Commission's award, which under the statute is excluded from jury evidence. G.S. 97-10.

It is unnecessary to reproduce in full, or even in summary, the voluminous charges and countercharges in the pleadings. We confine this statement to matters critically bearing on the orders, motions, and demurrers which were subjects of controversy in the lower court and of the present appeal.

After necessary formal statements which are omitted, the plaintiff complains: That the defendant City of Lexington as a municipal corporation, maintains streets and sidewalks within the limits of the city and is the owner of electric light and power lines which furnish electricity and power to the citizens of the city and to corporations and persons doing business therein and charges for the electricity so furnished; that it was at the time of intestate's injury engaged in the business of selling electric current to various purchasers throughout the city at a profit; that it had authority, control and supervision of the upkeep of the streets and sidewalks within the city and of its electric light and power lines within the said limits; and that particularly it had authority, control and supervision of East Fourth Avenue, South Salisbury Street in said city and that it maintained, controlled and had authority and supervision over electric light and power lines and the poles to which said lines are attached.

Of the Lexington Utility Commission it is complained that the same was created by an Act of the Legislature, Session of 1935, Chapter 22, Public-Local and Private Laws of North Carolina, and was given full charge and control and general supervision and management of the electric light plant and other utilities of the City of Lexington with the power to collect all rents and profits accruing therefrom and making all disbursements on account of same and with full charge and control of the construction, repairing and alteration or enlargement of the electric light plant, the waterworks plant and the sewerage plant and the full power and authority to make all necessary contracts relating to the same, including the purchase of all necessary sites, machinery, supplies and

other property and the employment of the necessary labor and help in said construction, repairs, alteration, and enlargement; with other powers and duties set out in the foregoing laws of 1935 which are made a part of the complaint; that the said defendant was at all times referred to in the complaint, and is now an agency of the City of Lexington and that the employees or servants and agents of the defendant Lexington Utility Commission are in fact the employees and agents and servants of the defendant City of Lexington; and that the servants, agents and employees of the Lexington Utility Commission were on the 2nd day of December 1949, the date of intestate's injury, acting as employees of the City of Lexington and were under the direction of the City of Lexington and its agency, the Lexington Utility Commission.

That the defendant City of Lexington and the defendant Lexington Utility Commission had been for many years engaged in the business of furnishing and selling for profit electric current throughout the City of Lexington and other areas of Davidson County and were acquainted with the dangers of electricity and of high voltage electric wires and that they knew from years of handling said electric current that wires were dangerous and unsafe unless properly insulated and kept at a proper distance from the ground or from buildings adjacent to the said electric wires.

Coming to the circumstances of the injury, the complaint further sets out that on or about 30 May 1949, the Dixie Furniture Company, a corporation located particularly on South Salisbury Street and East Fourth Avenue in the City of Lexington, applied to the authorities of the City of Lexington for permission to erect a tramway running across South Salisbury Street from the southeast side to the northwest side of South Salisbury Street and running thence across East Fourth Avenue from the northeastern side thereof to the southwestern side thereof in order that the said company might move its manufactured furniture backwards and forwards from its buildings already erected to a new building which it was erecting or had erected on the south side of East Fourth Avenue and on the west side of South Salisbury Street.

It alleged further that after the furniture company applied for permission to build the said tramway or catwalk across these streets to its new building lately erected, the City of Lexington, through its servants, agents and employees, granted the said permission to build the tramway to the said new building; and in order to enable the furniture company to build the tramway or catwalk the defendants through their servants, agents and employees moved a number of electric lines which theretofore had been fastened to a pole along the south curb of East Fourth Avenue and placed them upon poles on the north side of East Fourth Avenue, and raised the said wires in order to clear the contemplated catwalk or tramway to be built by the furniture company; that they raised together the

low voltage wires a short distance above the top of the roof of the contemplated catwalk and along with them raised several high voltage wires approximately four feet above the top of the roof of the catwalk; and that at the time the said defendant moved the said low voltage wires and high voltage wires from the south side to the north side of the street, the said wires were uninsulated at many places and were in an unsafe or dangerous condition to the knowledge of the said defendants. And that the city knew or should have known that the said wires were uninsulated and that there were large parts of the insulation broken off from both the low voltage and high voltage wires and that the said defendants failed to replace the said uninsulated wire with the wires having proper insulation but that they strung the said low voltage and high voltage wires above the point where the top of the proposed catwalk or tramway was to reach, knowing at the time that the said wires were dangerous and unsafe with reference to any persons who might be engaged in building the said tramway or catwalk or to any persons who might from time to time be upon or in the said tramway or catwalk.

It is further alleged that on 2 September 1949 the plaintiff's intestate, at the time employed as a carpenter by the Dixie Furniture Company, Inc., was engaged in completing the task of putting the roof on the catwalk or tramway above described, and that he and other persons working with him had completed the job of nailing on or affixing the galvanized tin roof and were engaged in the act of covering the center of the said roof with galvanized capping which was being put on in sections ten feet in length; that the plaintiff's intestate was on top of the roof of the catwalk nailing down the capping while a fellow worker named David T. Smith was handing up the sections of capping through the uncovered portion of the center of the roof to the plaintiff's intestate, and that he handed up one section of said capping to plaintiff's intestate, and as the plaintiff's intestate pulled the said section through the uncovered portion of the roof, the said capping came in contact with an uninsulated portion of one of the high tension wires of the defendant, resulting in his electrocution and immediate death; and that the death of the plaintiff's intestate was proximately caused by the carelessness and negligence of the defendants through their servants, agents and employees.

The specific acts of negligence are set up in the complaint including:

(a) That they carelessly and negligently placed the uninsulated wires bearing electric current on their poles in their new position when they knew their uninsulated and dangerous condition and allowed the same to remain so strung, when they knew and had been advised on various occasions that the tramway was to be erected under the said wires and across East Fourth Avenue and that men would be engaged in the building of said tramway and in the covering of same.

(b) That they carelessly and negligently failed to notify the Dixie Furniture Company, its agents, servants and employees, and especially the plaintiff's intestate that they had strung high tension wires across to the place where the proposed catwalk was to be built and that the said high tension wires were uninsulated and that the covering on said wires had come off and that the dangerous wires were exposed and were likely to come in contact with any object or any person that might be engaged in the erection of the said catwalk.

(c) That the defendants carelessly and negligently failed to notify the plaintiff's intestate and others engaged in the construction of said catwalk that at least two or three of the said wires above the said catwalk were of an extremely high voltage, namely 2300 volts, and that they were extremely unsafe and that any contact with the said high voltage wires would cause immediate death.

(d) That they carelessly and negligently allowed the said high voltage wires and the low voltage wires to remain uninsulated after they were moved from the south side of East Fourth Avenue to the north side thereof and for a period of several months without replacing said wires with new and insulated wires.

(e) That they carelessly and negligently failed and refused to cut off the current from the said wires at a time when they knew that work was progressing thereunder and in that they carelessly and negligently allowed the plaintiff's intestate and others to work immediately under and between them without warning them as to the difference in voltage carried on the said wires and without warning them about the uninsulated portions hereinabove referred to.

(f) That they carelessly and negligently failed and refused to raise the said high tension wires to a safe distance above the top of the catwalk so as not to come in contact with any portion of materials being used in the building or roofing of the same.

(g) That they carelessly and negligently failed and refused to use proper care in the construction and maintenance and operation of their electric wires at the places above referred to when they knew or should have known that persons were likely to come in contact with the said wires while the said catwalk was being constructed and thereafter.

(h) That the defendants carelessly and negligently violated the provisions and regulations and rules laid down by the State of North Carolina with reference to the manner in which wires charged with electric current shall be strung on poles along highways and streets and adjacent to the buildings on said streets and highways.

The complaint alleges further that due notice had been given to the City of Lexington of the claim and demand of the plaintiff in the sum of $100,000, complying with Section 34, Chapter 5, of the Public-Local and

Private Laws of North Carolina, Session 1941, and that said claim and demand has not been paid and the 30 days had elapsed since the same was presented; and that the plaintiff's intestate died on the 2nd day of September, 1949, and that this action was instituted on the 11th day of February, 1950, within a year after the death of the said intestate.

Other allegations of the complaint relate to the health, skill and earning capacity of the intestate and to the matter of damages.

The City of Lexington filed a demurrer to the complaint as not stating a cause of action with respect to the defendant City of Lexington, (first as to negligence of this defendant); (a) because it appears from the complaint that the defendant Lexington Utility Commission was in full charge and control of the electric light plant and the construction, repair, alteration or enlargement of the plant; and that the City of Lexington had nothing to do therewith; and that (b) and (c) the complaint does not allege any duty on the part of this defendant or violation of any duty.

Second, (as to contributory negligence of Essick). With respect to the contributory negligence of plaintiff's intestate, that said contributory negligence affirmatively appears on the face of the complaint in that he placed himself in a position of danger which was open and obvious to any person of ordinary prudence and carelessly and negligently handled metal roofing in close proximity to a power line in such manner as to contact the power line while standing on a tin roof.

On 3 April 1950, the Lexington Utility Commission moved to have Dixie Furniture Company, H. T. Link and A. F. Taylor made parties defendant and the Clerk of the Superior Court made an order making said parties. To this order the plaintiff and the additional defendants so made objected and excepted and gave notice of appeal to the Superior Court.

The defendant Lexington Utility Commission answered, admitting more formal allegations of the complaint and contraverting others, and denying its negligence. It pleads contributory negligence on the part of Essick. This defendant in a second further answer, defense and cross-action (in paragraphs 16 to 26) sought to charge the Dixie Furniture Company, H. T. Link and A. F. Taylor with negligence in bringing about the injury and death of Essick, concluding that if this defendant was guilty of any negligence "the co-defendants Dixie Furniture Company, H. T. Link and A. F. Taylor were guilty of primary negligence toward the plaintiff's intestate, which primary negligence was the direct, intentional, positive, active and actual cause of said accident and of the death of the plaintiff's intestate, and in the event this defendant should be held negligent and liable to the plaintiff, then this defendant is entitled to a judgment over against said co-defendant Dixie Furniture Company, H. T. Link and A. F. Taylor to the end that this defendant, a municipal

corporation engaged in operating a public utility, should be exonerated and saved harmless by said co-defendants."

Thereafter, and before the time for filing reply or answer of Lexington Utility Commission, the plaintiff and the additional defendants, Dixie Furniture Company, H. T. Link and A. F. Taylor, to wit, on April 3, 1950, filed a motion to strike from the complaint of the Utility Commission paragraphs 16 to 26, inclusive, containing all of the second further answer and defense, and with specified prayers for relief relating thereto. Upon notice to parties and after agreement as to the time and place for the hearing, the appeal from the Clerk of the Court relating to the making of additional parties Dixie Furniture Company, H. T. Link and A. F. Taylor, and objection and exception thereto by the plaintiff and said additional parties, the motion of said plaintiff and additional parties to strike from the record the foregoing specified allegations and the demurrer of the City of Lexington to the complaint, were all heard before Judge Hoyle Sink and judgment rendered therein on 18 April, 1950.

In his judgment Judge Sink allowed the motion of the plaintiff to strike the second further defense from the answer of the Utility Commission and sustained the demurrer of the City of Lexington upon the ground that the complaint establishes upon its face the contributory negligence of plaintiff's intestate.

To the ruling of the court sustaining the above portion of the demurrer plaintiff objected and excepted.

The court thereupon affirmed the order of the Clerk of the Superior Court making Dixie Furniture Company, H. T. Link and A. F. Taylor parties to the action, and to this ruling of the court affirming said order the plaintiff and additional defendants Dixie Furniture Company, H. T. Link and A. F. Taylor objected and excepted.

The court thereupon allowed the motion of plaintiff to strike from the answer all of paragraphs 16 to 26, inclusive, containing the second answer and defense and cross-action of the Lexington Utility Commission and pertinent prayers for relief and all reference in the answer referring to the said Dixie Furniture Company, H. T. Link and A. F. Taylor as defendants or co-defendants, and that the words "defendants" or "co-defendants" be stricken out. The defendant Lexington Utility Commission was allowed 20 days to file additional pleadings.

To the ruling of the court sustaining paragraph 2 of the demurrer of the defendant City of Lexington, the plaintiff in apt time objected, excepted thereto and to the signing of the order; and gave notice of appeal; to the ruling of the court sustaining the order of M. P. Cooper, Clerk of the Superior Court, dated 3 April 1950, making Dixie Furniture Company, H. T. Link and A. F. Taylor additional parties defendant to

the action, the plaintiff and the additional parties defendant, Dixie Furniture Company, H. T. Link and A. F. Taylor each objected and excepted; objected and excepted to the signing of the judgment, and appealed.

The assignments of error are as follows:

"1. The plaintiff assigns as error that the Court erred in holding as a matter of law that the plaintiff's intestate was guilty of contributory negligence upon the allegations set forth in the complaint.

"2. The plaintiff and additional defendants, Dixie Furniture Company, H. T. Link and A. F. Taylor assign as error the action of the Court in affirming the Order of M. P. Cooper, Clerk Superior Court, Davidson County, dated April 3, 1950, making Dixie Furniture Company, H. T. Link and A. F. Taylor additional parties defendant to this action."

On the hearing of the appeal in this Court the Utility Commission demurred *ore tenus* to the complaint as not stating a cause of action on the ground that it affirmatively appears on the face thereof that plaintiff's intestate was contributorily negligent in bringing about his injury and death.

The Dixie Furniture Company, H. T. Link and A. F. Taylor, referred to as "additional defendants," demurred *ore tenus* to the "cross-action" of the Lexington Utility Commission against them on the ground that it appears on the face of the record that compensation has already been paid plaintiff in full under the Workmen's Compensation Act, by which all parties are bound, and the Superior Court had no jurisdiction to entertain it.

S. A. DeLapp and Don A. Walser for plaintiff, appellant.

S. A. DeLapp, Don A. Walser, and Smith, Wharton, Sapp & Moore for Dixie Furniture Company, H. T. Link and A. F. Taylor, additional defendants, appellants.

Jones & Small and P. V. Critcher for City of Lexington and Lexington Utility Commission, defendants, appellees.

SEAWELL, J. On this appeal we have to deal with a variety of unusual claims set up by the appellees and controverted by the appellants, and quite a number of novel concepts of applicable law relating to the defenses available in the instant case. The legal controversy arises in part over the apparent inability to reconcile provisions of the Workmen's Compensation Act with the common law, which it very substantially amends, and

in many particulars, indeed those most essential to the effectiveness of the act, it abrogates.

We may observe initially that the very life of the Workmen's Compensation Act lies in its invasive and innovating substitution of statute law in a field theretofore left entirely to the common law,—in the retreat from the outmoded methods of the common law to a more modern concept of economy in industry and to related law;—from uncertainty and war and waste to security and peace and productivity in industry and labor. Where radical and systematic changes have been made in setting up a system of such wide scope as we find in the Workmen's Compensation Act, and one so markedly remedial in its nature, the break with the past must necessarily be viewed with liberality in order to accomplish its purposes; and its provisions, liberally construed, given that effectiveness which alone will protect the act from erosion and regression.

The Workmen's Compensation Act is not a mere island in the sea of common law. The statutes creating it, amended from time to time, are superior to the common law in those respects in which they can and do, amend or abrogate it. There is no presumption of superiority in the common law where they seem to clash.

In order that the *rationale* of this decision may be clear, we take up the various motions, orders and judgments of the court in the order presented in the record.

On the final hearing the judge allowed the plaintiff's motion to strike out all of the second further answer and cross-action of the answer of the Utility Commission, including paragraphs 16-26, and from this there was no appeal; it is not before us.

The City of Lexington demurred to the complaint as not stating a cause of action (a) on the ground that it showed no negligence of defendant, and (b) that it appears on the face of the complaint that plaintiff's intestate was contributorily negligent in bringing about his injury and death. And on the hearing in this Court the Utility Commission demurred to the complaint, *ore tenus,* on similar grounds.

As appears in the statement the Dixie Furniture Company, employer, and H. T. Link and A. F. Taylor, employees, respectively the treasurer and the superintendent of the plant, all referred to as "additional parties," were made parties by order of the clerk of the court, from which order the said additional parties appealed.

On the hearing of the appeal here the "additional parties" above named, demurred *ore tenus* "to the cross-action against them" on the grounds stated above.

1. On the hearing in the Superior Court the judge declined to allow the demurrer to the complaint based on the ground it did not allege negligence on the part of defendant; but sustained the demurrer and

motions to dismiss on the ground that it appeared conclusively on the face of the complaint that plaintiff's intestate was contributorily negligent in bringing about his injury. On this demurrer that question alone is before us; and on examination of the allegations of the complaint we are of the opinion that the demurrer in that respect should not have been sustained, and the order to the contrary is reversed.

As the case is yet for trial before the jury, we make no extended discussion of the point, simply saying that contributory negligence of the plaintiff's intestate does not appear on the face of the complaint as a matter of law.

2. The question of additional parties may be considered in connection with the *ore tenus* demurrer of the "additional defendants" to any cross-action against them set out in the answer.

There are three of the additional parties—the employer, Dixie Furniture Company, and the employees Link and Taylor. If these employees, Link and Taylor, are under the protection of the act in the same manner that their employer is protected by it, it is manifest that they have no business in this action as parties. And the same result will follow if they have no rights to be dealt with in the cross-action.

The appellees point out that since it has been held by this Court that an employee may maintain a common law action against a fellow employee for negligent injury, although both are within the "coverage" of the Workmen's Compensation Act, *ergo* the common law should be available to a third person in an action brought against him for negligence, in which he may plead, *contra,* the negligence of the employer in an action under the statute, G.S. 97-10, to the extent of the subrogation therein sought. Avoiding for the nonce the *non sequitur* in that reasoning, (to which we later refer), we discuss the two cases which the defendants cite as supporting their position: *Tscheiller v. Weaving Company,* 214 N.C. 449, 199 S.E. 623, and *McCune v. Manufacturing Co.,* 217 N.C. 351, 8 S.E. 2d 219.

These cases bring up the construction of G.S. 97-9 of the Workmen's Compensation Act which has not hitherto been reviewed by this Court. This section of the act brings within the same immunity afforded the employer "those conducting his business." If the defendants Link and Taylor come within that definition they have obviously no place as parties defendant in this action. In neither of cited cases was G.S. 97-9 brought to the attention of the Court or mentioned in the opinions. We think this fact is significant in our present and first construction of the statute.

In *Tscheiller v. Weaving Co.,* the plaintiff was employed by the defendant company along with several hundred other persons. She brought the action against the Weaving Company and an individual, Banks McArver, a fellow employee, who was engaged in selling for the company

sandwiches, food and drinks, exclusively to the employees of the mill. McArver was in full charge of that activity. She brought the suit to recover for injuries following the consumption of toxic food sold by McArver, acting for the company. The presumption of the adoption of the Workmen's Compensation Act by all the parties prevailed and the suit was dismissed as to the Mill Company. It was retained as to McArver, (as a common law action), who was held not to be within the protection of the Act.

McArver was clearly conducting his employer's business in that particular instance by any definition we may give that term; and we do not understand that the statute means that the persons protected by the Act in the same manner as the employee must take part in the conduct of all the employer's business activities. Ordinarily there is no individual in a corporation so omnipotent; nor is there anyone but the master whose influence is so all-pervasive. We have no space to call attention to the contradictions and fantastic situations that must arise under the application of G.S. 97-10 unless 97-9 is given its weight in an *in pari materia* interpretation of both sections, and the immunity given in Section 97-9 to "those conducting the business" be given a liberal construction and its definitions and intendments carried through the provisions of 97-10.

Otherwise, for example, the injured employee may sue his fellow employee under the common law, but not his employer; and yet standing in the shoes of the original employee as subrogee, the employer may sue its other employee and recover out of him in complete subrogation for all it has had to pay as an award without the slightest recognition of any coverage of the act or immunity granted by Sec. 97-9.

In the *McCune case* the employee was subjected to a vicious assault by the foreman in effecting his discharge and ejectment from the premises. Here again there is no question the foreman was the superior of McCune on whom the assault was made; and if considered as negligence should be immune from a common law suit under the definition in G.S. 97-9. However, this case might well have been decided on the principle that a vicious assault by a fellow workman acting as *alter ego* of the employer was not within the contemplation of the Act and it conferred no immunity. We quote from Horovitz, "Injury and Death under Workmen's Compensation Laws," p. 336:

> "Where the *employer* is guilty of a felonious or *wilful* assault on an employee he cannot relegate him to the compensation act for recovery. It would be against sound reason to allow the employer deliberately to batter his helper, and then compel the worker to accept moderate workmen's compensation benefits, either from his insurance carrier or from himself as self-insurer. The weight of

authority gives the employee the choice of suing the employer at common law or accepting compensation."

See cited cases.

At any rate, for the reasons stated, these cases are not controlling here.

Link, as treasurer, and Taylor, as superintendent of the plant, were clearly within the pale of 97-9, as those who conduct the business and entitled to the immunity it gives.

The defendants, however, have admitted that they have no right, under G.S. 1-240, or other law, to bring the "additional defendants" in for the purpose of contribution as joint tort-feasors. *Brown v. R. R.*, 202 N.C. 256, 162 S.E. 613.

Furthermore, neither Link nor Taylor is a necessary or proper party to any cross-action or defense against the employer in respect to its demand for reimbursement by reason of subrogation arising from the fact that it has paid an award. They have paid no award and have no interest in the subject, no right of being dealt with for complete determination of the controversy. The motion by these "additional defendants" to be dismissed as parties to the action should have been allowed.

The making of the employer, Dixie Furniture Company, a party defendant, and retaining it as such brings up a more serious question.

Under *Brown v. R. R.*, 204 N.C. 668, 169 S.E. 419, when an award has been made and the employer has paid it, or is bound to do so, an action at common law may be brought by the employer, or the injured employee, or in case of death, by the personal representative of the deceased employee, in the manner set out in the statute, G.S. 97-10, in which the employer may, on the principle of subrogation, become reimbursed *pro tanto* for the award so paid. And as against this right, the party thus sued may plead in bar of recovery by subrogation the negligence of the employer in producing the injury.

As the pleadings now stand we are of the opinion that the making of Dixie Furniture Company in the case a party defendant is not justified.

It follows that the judgment of the court below dismissing plaintiff's action on the ground of contributory negligence of the intestate Essick and retaining the "additional defendants" as parties defendant in the action is in error and must be reversed. It is so ordered.

The cause is remanded to the Superior Court of Davidson County for such further proceedings as may be proper.

Reversed and remanded.

GLADYS HUNTER WILSON v. A. K. ANDERSON AND ZOE ANDERSON STRAWN, INDIVIDUALLY AND AS ADMINISTRATORS OF THE ESTATE OF HARRY P. HUNTER; HENRY LEE ANDERSON, WILLIAM T. ANDERSON, JR., RUTH S. A. GREENWALD, AND JANE BROOKE ANDERSON.

(Filed 9 June, 1950.)

1. Adoption § 4—

Adoption is solely statutory and is a judicial declaration of the status of a child in relation to the adopting parent in the exercise of a prerogative exclusive to the State.

2. Adoption § 10—

A decree of adoption has the same force and effect as that of any other judgment.

3. Adoption § 4—

Statutes relating to adoption should be construed *in pari materia* as constituting one law.

4. Descent and Distribution § 6—

Ordinarily an adopted child cannot inherit from relatives of the parent by adoption in the absence of express statutory provision.

5. Adoption § 4—

The successive amendments to and rewritings of the adoption statutes reveal plainly a legislative intent that each shall have prospective effect.

6. Statutes § 10—

Statutes are presumed to operate prospectively only.

7. Descent and Distribution § 1—

While the General Assembly has power to make or change statutes of descent and distribution, and ordinarily the law in effect at the time the person dies intestate governs the descent and distribution of his property, such statutes are subject to general rules of statutory construction and, when necessary, should be construed in connection with other statutes relating to the same subject matter.

8. Adoption § 10: Judgments § 29—

A decree of adoption which prescribes and limits the right of the adopted child to inherit property has the force and effect of a judgment of a court of competent jurisdiction, and comes within the general rule that parties and their privies are ordinarily bound by a judgment.

9. Statutes § 10—

A statute will not be given retroactive effect when such construction would interfere with vested rights or with judgments already entered.

10. Descent and Distribution § 6—

G.S. 21-1 (14) and G.S. 128-149 (10) have prospective effect only, and therefore a child adopted in 1919 under the law prescribing that such child

should be entitled to inherit only from the adopting parent, is not entitled to inherit either realty or personalty from the brother of her deceased father by adoption, even though the brother dies subsequent to the effective date of the 1947 amendments to the statutes of descent and distribution.

APPEAL by plaintiff and by defendants from *Bobbitt, Resident Judge,* 18 March, 1950.

Civil action to have plaintiff, an adopted child of a deceased brother, declared an heir and distributee of Harry P. Hunter, deceased, and as such to be seized and possessed of one-half interest in the real estate of which he died seized, and to be entitled to one-fifth distributive share of the personal property of which he was possessed at his death, heard upon motion of plaintiff for judgment on the pleading in accordance with the purpose of the action thus stated.

These are the facts alleged in complaint of plaintiff and admitted in answer of defendants as shown in the record on this appeal:

I. Harry P. Hunter, a resident of Mecklenburg County, North Carolina, died intestate on 3 October, 1949, seized and possessed of certain specifically described real estate and certain personal property, in said county, and his nephew, A. K. Anderson, and his niece, Zoe Anderson Strawn, defendants herein, were appointed, and are now acting as administrators of his estate.

II. Harry P. Hunter, never married, and was survived by: (1) The plaintiff, Gladys Hunter Wilson, the lawfully adopted child for life of Malcolm B. Hunter and his wife E. H. Hunter, brother and sister-in-law of Harry P. Hunter, who predeceased him, and who had no children born to them,—the order of adoption bearing date of 25 April, 1919; and (2) the defendants A. K. Anderson, Zoe Anderson Strawn and Harry Lee Anderson, children of Zoe Hunter Anderson and her husband, who were sister and brother-in-law of Harry P. Hunter, and who predeceased him, and defendants William T. Anderson, Jr., Ruth D. Greenwald, and Jane Brooke Anderson, children of William T. Anderson, who was son of the said Zoe Hunter Anderson, sister of Harry P. Hunter, and who also predeceased him.

The cause came on for hearing before the resident judge of the district, upon the above admitted facts, and the court was of opinion and held:

"That the statutes of Descent and Distribution, as amended by 1947 Session Laws, Chapter 832 and Chapter 879 (G.S. 29-1 (14) and G.S. 28-149 (10)) were in full force and effect at the death of Harry P. Hunter and control the descent of real estate and the distribution of personal property in this cause; that in respect of real property the plaintiff, Gladys Hunter Wilson, is entitled to an undivided one-half interest therein, taking *per stirpes* through her adoptive father, Malcolm B. Hunter, the share he would have inherited had he survived the deceased;

that in respect of personal property the plaintiff, Gladys Hunter Wilson, if entitled to take at all would take *per capita,* not by, through or from her adoptive father on the principle of representation, but on account of her own relationship to the deceased, if any, and that since the plaintiff has no relation of kinship to the deceased she does not participate in the distribution of the personal property of his estate." And thereupon the court adjudged:

"1. That the respective interests of the parties in the real estate of Harry P. Hunter, deceased, are as follows:

"(a) Gladys Hunter Wilson, as adopted child of Malcolm B. Hunter, a one-half undivided interest.

"(b) A. K. Anderson, Zoe A. Strawn, and Henry Lee Anderson, as nephews and niece of Harry P. Hunter and in the same degree of relationship, each a one-eighth undivided interest.

"(c) William T. Anderson, Jr., Ruth S. A. Greenwald and Jane Brooke Anderson, as children of William T. Anderson, a deceased nephew of Harry P. Hunter, each a one-twenty-fourth undivided interest.

"2. That the plaintiff has no interest as a next of kin or distributee in the personal property of the estate of Harry P. Hunter.

"3. That the respective interests of the defendants in the personal property of the estate of Harry P. Hunter, deceased, are as follows:

"(a) A. K. Anderson, Zoe A. Strawn and Henry Lee Anderson, as nephews and niece of Harry P. Hunter and in the same degree of relationship, each a one-fourth interest.

"(b) William T. Anderson, Jr., Ruth S. A. Greenwald and Jane Brooke Anderson, as children of William T. Anderson, a deceased nephew of Harry P. Hunter, each a one-twelfth interest."

Plaintiff objects, and excepts to (1) denial of her motion for judgment on the pleadings in the form presented in her motion; (2) so much of the conclusions of law as hold that plaintiff, for reason stated, does not participate in the disposition of the personal property of the estate of Harry P. Hunter; (3) so much of the judgment as adjudges that plaintiff has no interest as a next of kin or distributee in the personal property of said estate; (4) to so much of the judgment that adjudges the interests of the individual defendants in the personal property of said estate; and (5) to the signing and entering of the judgment containing the aforesaid conclusions of law and paragraphs 2 and 3 as set out therein, and appeals to the Supreme Court and assigns error.

And defendants object and except (1) to refusal of the court to sign judgment tendered by them; (2) to the conclusion of law contained in the judgment signed: "That the statutes of Descent and Distribution as amended by 1947 Session Laws, Chapter 832 and Chapter 879 (G.S. 29-1 (14) and G.S. 28-149 (10)) were in full force and effect at the death of

Harry P. Hunter and control the descent of real property and the distribution of personal property in this cause"; (3) to so much of the conclusions of law that holds "That in respect of real property the plaintiff, Gladys Hunter Wilson, is entitled to an undivided one-half interest therein, taking *per stirpes* through her adoptive father, Malcolm B. Hunter, the share he would have inherited had he survived the deceased"; (4) to the inclusion in the judgment of numbered paragraph 1 thereof as hereinabove set forth; and (5) to the signing and entering of the judgment containing the conclusions of law set out above, etc., and appeal to the Supreme Court and assign error.

John H. Small for plaintiff.
Francis H. Fairley for defendants.

WINBORNE, J. Decision on the appeals of plaintiff and of defendant turns upon the answer to this question: Do the statutes of descent and distribution, as amended by 1947 Session Laws, Chapter 832 (G.S. 29-1 (14)) and Chapter 879 (G.S. 28-149 (10)), apply to an adoption made in the year 1919 under the statute pertaining to adoptions, Chapter 2 of Revisal of 1905, as it then existed? In the light of pertinent statutes, and of decisions of this Court, and of rules for interpreting legislative acts, we are of opinion and hold that this question merits a negative answer.

In this connection, it is appropriate to make these general observations as to the law relating to adoptions. The purpose of an adoption is to change the status of a child in relation to its adoptive parent. The State alone can determine when the relation of parent and child ceases, and in what respects it shall do so. Adoption is a status unknown to common law, and can be accomplished only in accordance with provisions of statutes enacted by the legislative branch of the State government. Under statutes providing for adoption through judicial proceedings instituted by filing a petition to a court of competent jurisdiction alleging certain requisite facts from which the court decrees the status and the right of the child, the court is said to act judicially in rendering the judgment. And the decree of adoption obtained by judicial proceedings is regarded as a judgment of the court, and is given the force and effect of any other judgment. 2 C.J.S. 367, *et seq.* Adoption of Children, Sections 1, 6, 40. See also *Truelove v. Parker*, 191 N.C. 430, 132 S.E. 295.

Moreover, in reference to other laws, it is said that "All adoption laws and statutes *in pari materia* therewith in force in a State should be read together, as constituting one law." 2 C.J.S. 377, Adoption of Children, Section 6 (b). And here it is appropriate to note that in the year 1919,

at the time plaintiff was adopted, the statutes of descent and distribution in this State contained no rules regarding the rights of adopted children in those respects. In this connection, an adopted child cannot usually inherit from relatives of the adoptive parent unless there is an express statute to that effect. 2 C.J.S. 452, Adoption of Children, Section 63 (b). And the decisions of this Court are to the effect that the law in force at the time of the adoption governs the right of the child to inherit; so that under the law as it existed in 1919 a child adopted for the life of the child, acquired by adoption the right to inherit the real estate of the adoptive parent, and to take his personal property, in the event he die intestate, but acquired no right to inherit or to take through him such property of his collateral relative who might die intestate. *Grimes v. Grimes,* 207 N.C. 778, 178 S.E. 573; *Phillips v. Phillips,* 227 N.C. 438, 42 S.E. 2d 604.

But the General Assembly of 1947 inserted in the statutes of descent and distribution rules in that respect relating to adopted children, as follows:

Chapter 832 of 1947 Session Laws of North Carolina, amending the General Statutes relating to descents, as it pertains to adopted children, provides in Section 1 that Section 29-1 of the General Statutes be amended by adding a new rule to read as follows:

"Rule 14: An adopted child shall be entitled by succession or inheritance to any real property by, through, or from its adoptive parents the same as if it were the natural, legitimate child of the adoptive parents."

The act provided that "all laws and clauses of laws in conflict herewith are hereby repealed" and that this "act shall become effective July 1st, 1947."

And Chapter 879 of 1947 Session Laws of North Carolina amending the General Statutes relating to distribution as it pertains to adopted children, provides in Section 1 that General Statutes be amended by adding to G.S. 28-149 a new section to read as follows: "10. An adopted child shall be entitled by succession, inheritance, or distribution of personal property, including, without limiting the generality of the foregoing, and recovery of damages for the wrongful death of such adopted parent by, through, and from its adoptive parents the same as if it were the natural, legitimate child of the adoptive parents." And the act provides that "All laws and clauses of laws in conflict with this act are hereby repealed," and that "this act shall become effective July 1st, 1947."

Hence, the question arises as to the effect, if any, of these amendments to the statutes of descent and distribution upon the rights of a child adopted under the adoption law as it existed in the year 1919 at the time plaintiff was adopted.

It is appropriate, therefore, to review the statutes of this State, enacted from time to time, providing for the adoption of minor children by judicial proceeding, and declaring the effect of orders of adoption entered in such proceedings.

The statute, Chapter 2 of the Revisal of 1905, pertaining to "Adoption of minor children," in effect on 25 April, 1919, the date on which plaintiff was adopted by Malcolm B. Hunter, gave to the jurisdictional court power to sanction and allow an adoption by an order granting letters of adoption. Rev. 176. And in Section 177 the statute declared that "such order, when made, shall have the effect forthwith to establish the relation of parent and child between the petitioner and the child during the minority or for the life of such child, according to the prayer of the petition, with all the duties, powers and rights belonging to the relationship of parent and child, and in case the adoption be for life of the child, and the petitioner die intestate, such order shall have the further effect to enable such child to inherit the real estate and entitle it to the personal estate of the petitioner in the same manner and to the same extent such child would have been entitled to if such child had been the actual child of the person adopting it: Provided, such child shall not so inherit and be so entitled to the personal estate, if the petitioner specifically set forth in his petition such to be his desire and intention."

This declaration is in practically the same language used by the General Assembly in the original act providing for adoption of minor children, Laws 1872-3, Chapter 155, Section 3, and as brought forward in the Code of 1883, Section 3.

Thus it appears that the General Assembly declared there that the order of adoption provided for as above stated, shall have two effects: (1) The establishment of the parent and child relationship between the petitioner and the adopted child, with all the duties, powers and rights belonging to such relationship. (2) The grant to the child a limited right of inheritance, that is, the right to inherit the real estate, and to take or share the personal property of the petitioner only.

It is also noted that the provisions of Rev. 177 were brought forward in almost identical language and incorporated in the Consolidated Statutes of 1919 as Section 185, a part of Chapter 2 relative to proceedings for adoption of minors. C.S. 185. The Consolidated Statutes of 1919 became effective 1 August, 1919. See C.S. 8107.

Moreover, in 1933 the entire statute, as it appeared in the Consolidated Statutes of 1919, Sections 182 to 191, both inclusive, was repealed and rewritten by the General Assembly. See Chapter 207, P.L. 1933. As so rewritten subsection 5 of Section 1 deals with the effect of the order of adoption, and it is in almost the same wording as C.S. 185. And in Section 10 of the act it is provided that "All proceedings for the adoption

of minors in courts of this State are hereby validated and confirmed, and the orders and judgments therein are declared to be binding upon all parties to said proceedings and their privies and all other persons, until the orders or judgments shall be vacated as provided by law."

And in 1935 the entire statute, as so rewritten in the 1933 Act, P.L. 1933, Chapter 207, was repealed and rewritten by the General Assembly. See Chapter 243, P.L. 1935. And as so rewritten the provisions of the 1933 Act, P.L. 1933, Chapter 107, in material aspect, particularly subsection 5 of Section 1 and Section 10 as above set forth, were reincorporated in almost identical language.

And it is noted that the adoption statute, as rewritten in 1935, Chapter 243 of P.L. 1935, was amended by the General Assembly of 1941. See Chapter 281, P.L. 1941. As so amended, in Section 4 of the amended act, subsection 5 of Section 1 of the 1935 Act was rewritten in substantially the same language, except as to the effect of the order of adoption in respect to inheritance, etc. But in Section 8 of this 1941 Act, it is provided that the provisions of Section 4 of the Act shall apply only to adoptions hereafter made. See *Phillips v. Phillips, supra.*

And, in passing, it may be noted that the statute on adoption of minors became a part of General Statutes on its effective date, 31 December, 1943. And it may also be noted that Chapter 885 of the 1947 Session Laws of North Carolina, purporting to rewrite Chapter 48 of the General Statutes relating to "Adoption of minors" was declared inoperative and void. See advisory opinion—Appendix, 227 N.C. 708, 43 S.E. 2d 73.

But the General Assembly of 1949 did rewrite said Chapter 48 of the General Statutes, expressly to incorporate the provisions of said Chapter 885 of 1947 Session Laws, to read as sections of the General Statutes. See Chapter 300 of 1949 Session Laws of North Carolina.

And so rewritten the Act provides in pertinent part: G.S. 48-3, who may be adopted; G.S. 48-4, who may adopt children; G.S. 48-15, The petition for adoption, *inter alia,* must state: (6) that it is the desire of the petitioners that the relationship of parent and child shall be established between them and said child; and (8) the desire of the petitioners that the said child shall, upon adoption, inherit real and personal property in accordance with the statutes of descent and distribution; G.S. 48-23, "Effect of final order. The final order forthwith shall establish the relationship of parent and child between the petitioners and the child, and, from the date of the signing of the final order of adoption, the child shall be entitled to inherit real and personal property from the adoptive parents in accordance with the statutes of descent and distribution"; G.S. 48-28 (b), "The final order of adoption shall have the force and effect of, and shall be entitled to, all the presumptions attached to a judgment rendered by a court of general jurisdiction"; G.S. 48-34, "Past

adoption proceedings validated. All proceedings for the adoption of minors in courts of this State are hereby validated and confirmed and the orders and judgments heretofore entered therein are declared to be binding upon all parties to said proceedings and their privies and all other persons, until such orders or judgments shall be vacated as provided by law; provided that this section shall not apply to litigation pending on the effective date of this Act in which the validity of a prior adoption proceeding is involved"; and G.S. 48-35, "Prior proceedings not affected. Adoption proceedings pending on date of ratification shall not be affected, except that the provisions of G.S. 48-34 shall apply thereto, and such proceedings shall be completed in accordance with provisions of the statutes in effect at the time such proceedings were instituted; provided that the petitioners in proceedings pending on date of ratification may discontinue such proceedings by taking voluntary nonsuits and, upon paying the costs accrued in such discontinued proceedings, may institute new proceedings under the provisions of this Act, in which cases all the provisions of this Act shall apply." And the Act provides that all laws and clauses of laws in conflict with this Act are repealed, and that the Act shall become effective upon ratification. It was ratified 11 March, 1949.

Thus, an inspection of the foregoing provisions of the various acts amending and rewriting the provisions of the adoption statutes, reveals plainly a legislative intent that each shall have prospective effect.

Statutes are presumed to operate prospectively only. *Hicks v. Kearney,* 189 N.C. 316, 127 S.E. 205; *Commrs. v. Blue,* 190 N.C. 638, 130 S.E. 743; *Sutton v. Davis,* 205 N.C. 464, 171 S.E. 738. Indeed, in these acts, respectively, the General Assembly has expressly declared respect for all prior proceedings.

Moreover, this Court, in *Grimes v. Grimes, supra,* a case similar in factual situation to that in hand, in respect of an adoption prior to 16 August, 1924, and speaking of the provisions of C.S. 185 and Chapter 207, P.L. 1933, had this to say: "Since the statute is in derogation of the common law and works a change in the canons of descent, it must be construed strictly and not so as to enlarge or confer any rights not clearly given. The statute gives no power to the adopted child to inherit through the adoptive parent, or from any source other than the 'estate of the petitioner.' The statute limits the right to inherit to the property of the adoptive parent, and it cannot be construed to give the adopted child the right to inherit from his father's ancestors or other kindred, or to be a representative of them. By the adoption the child is not made issue or heir general, nor is he made the kin of the kindred of the adoptive parent. The effect of the adoption is simply to create a personal status between the adoptive parent and the child adopted, so that the adopted child may

inherit from the adoptive parent such estate of the adoptive parent as such parent, during his lifetime, might voluntarily have given to such child."

And, continuing in the *Grimes case:* "The right to inherit property by reason of blood kinship is a natural one. The right to inherit property created by adoption is an artificial one. The status established by adoption proceedings is a contractual status, and while one may assume the status of a father to a stranger if he so desires, he cannot impose upon his kindred the status of kinship to such stranger. Adoption is 'a judicial act, creating between *two persons* certain relations, purely civil, of paternity and filiation.' Black's Law Dictionary."

Again, "While the statute gives to the adopted child the right to inherit the real estate and to share in the personal estate of the adoptive parent, it leaves the adopted child in the same relationship to all others as he occupied before the adoption . . . When he asserts his right as an adopted child of his uncle, he does so, not by virtue of the blood, but solely by virtue of the statute."

The case *Phillips v. Phillips, supra,* treated the subject in respect to an adoption in the year 1924. The opinion of this Court followed the decision in *Grimes v. Grimes, supra.*

The foregoing review of statutes and decisions leads to the conclusion that the rights of plaintiff are controlled and governed by the provisions of the adoption statute in effect on the date of her adoption, and that under such statute her right to inherit real estate, and to take or share in personal property is limited to that of her adoptive parents, and no other, unless, perchance, the rules shown in the amendments of 1947 to the statutes of descent and distribution enlarge her rights.

In this connection it may be conceded that the General Assembly of North Carolina has power to make and change statutes relative to the descent and distribution of property within the State, and that ordinarily the disposition of the property of a person dying intestate is governed by the statutes in force at the time of his death. But such statutes are subject to the general rules of statutory construction. And when necessary the statute should be considered in connection with other statutes affecting the same subject matter. 26 C.J.S. 1003-5, Descent and Distribution, Sections 12, 13 and 18.

Hence, when the Acts of 1947 creating the new rules of descent and distribution relative to rights of an adopted child are read in connection with the statute pertaining to the adoption of minor children in effect at time plaintiff was adopted, it is seen that the right of plaintiff to inherit and take property is prescribed and limited by a court order which has the force and effect of a judgment of a court of competent jurisdiction.

Ordinarily the rule is that parties and their privies are bound by such judgment. *Meacham v. Larus & Brothers Co.*, 212 N.C. 646, 194 S.E. 99.

And it is noted, by way of repetition, that the General Assembly in all of the Acts, including Chapter 885 of 1947 Session Laws and the 1949 Act, relating to adoption proceeding, hereinabove reviewed, has declared all such orders and judgments to be binding upon all the parties to said proceedings and their privies and all other persons, until vacated as provided by law.

Indeed, in this State a statute will not be given retroactive effect when such construction would interfere with vested rights, or with judgments already entered. *Morrison v. McDonald*, 113 N.C. 327, 18 S.E. 704; *Commrs. v. Blue, supra; Hospital v. Guilford County*, 221 N.C. 308, 20 S.E. 2d 332.

In *Morrison v. McDonald, supra*, the principle is epitomized in this headnote: "The legislature has no right, directly or indirectly, to annul in whole or in part a judgment already rendered and to re-open and rehear judgments by which rights of the parties are finally adjudicated and vested." To the same effect are *Commrs. v. Blue, supra*, and *Hospital v. Guilford County, supra*.

Therefore, it is held in the case in hand that the said new rules of descent, G.S. 29-1 (14), and of distribution, G.S. 128-149 (10), are effective prospectively only, and are unavailing to a child adopted under the adoption statute, Chapter 2 of Revisal of 1905.

In the light of the above holding, there is error in the judgment, from which appeal is taken, in so far as it holds (1) that the 1947 amendments to the statutes of descent and distribution control the descent of real estate and the distribution of personal property of which Harry P. Hunter died seized and possessed, and (2) that in respect of the said real estate plaintiff is entitled to an interest therein, taking through her adoptive father, Malcolm B. Hunter, the share he would have inherited had he survived his brother, Harry P. Hunter, deceased. But there is no error in the holding that since plaintiff has no relation of kinship to the deceased she does not participate in the distribution of the personal property of his estate.

Hence, the cause will be remanded for further proceedings in accordance with this opinion.

On plaintiff's appeal—Affirmed.

On defendants' appeal—Error and remanded.

MATTIE A. McLEOD RICE, JULIA BRYAN, W. A. ROSY, MARGARET THOMAS, ALICE BRYAN JOHNSON, JOSEPH BRYAN, McLEOD BRYAN, JULIA M. BRYAN CAVINESS, CLYDE A. McLEOD, ALEX ROSY AND MARY ROSY MARKS, v. WACHOVIA BANK & TRUST COMPANY, AS EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF THE ESTATE OF ALEX H. McLEOD, DECEASED; BENJAMIN WATSON THOMAS, ARTHUR RICE THOMAS, ROBERT ALEXANDER THOMAS AND MARY MARTHA THOMAS, THE LAST FOUR NAMED BEING THE MINOR CHILDREN OF MARGARET THOMAS; JOSEPH ROSY AND BETTY ROSY, THE LAST TWO NAMED BEING THE MINOR CHILDREN OF W. A. ROSY; THE UNBORN ISSUE OF PLAINTIFF, MATTIE A. McLEOD RICE; THE UNBORN ISSUE OF THE CHILDREN OF MATTIE A. McLEOD RICE; THE UNBORN ISSUE OF PLAINTIFF, MARGARET THOMAS; THE UNBORN ISSUE OF THE CHILDREN OF SAID MARGARET THOMAS; THE UNBORN ISSUE OF PLAINTIFF, JULIA BRYAN; THE UNBORN ISSUE OF THE CHILDREN OF SAID JULIA BRYAN; THE UNBORN ISSUE OF PLAINTIFF, W. A. ROSY; THE UNBORN ISSUE OF THE CHILDREN OF SAID W. A. ROSY; THE UNBORN ISSUE OF ALL PERSONS IN POSSE.

(Filed 9 June, 1950.)

1. **Appeal and Error § 6c (2)—**

A sole exception to the signing of the judgment presents only whether the court correctly applied the law to the facts found.

2. **Executors and Administrators § 24—**

While the courts look with favor on family settlements, neither the terms of a will nor of a testamentary trust will be modified merely because the beneficiaries dislike its provisions, but such an agreement will be approved only when the right of infants are not prejudiced and when such modification is necessary in order to preserve the trust.

3. **Same—**

Where a caveat has been filed which, if successful, would defeat provisions for the benefit of certain heirs, minors *in esse* and not *in esse*, a family agreement which provides for modification of the trust in certain material aspects but which provides for the preservation of the *corpus* of the trust estate and protects the rights of the infant beneficiaries therein, is properly approved, since under the circumstances the filing of the caveat creates an exigency not contemplated by the testator and the family settlement is, therefore, advantageous to the infant beneficiaries.

APPEAL by Wachovia Bank & Trust Company, as Executor and Trustee under the Last Will and Testament of Alex H. McLeod, deceased; Robert N. Page, III, Guardian *ad Litem* for all minor defendants; and J. Vance Rowe, Guardian *ad Litem* for the unborn issue of Mattie A. McLeod Rice, *et als.*, from *Phillips, J.*, at March Term, 1950, of MOORE.

Petition for approval of a family settlement.

Dr. Alex H. McLeod died on 19 June, 1948, leaving a last will and testament in which he disposed of his estate of the approximate value of $359,000.00. The will was duly admitted to probate in common form in the office of the Clerk of the Superior Court of Moore County, N. C. The estate consists, among other things, of cash on hand, about 2,200 acres of valuable timber and farming land, town properties, etc.

The testator never had any child born to him. He married Carrie B. McLeod, but legally divorced her some years before his death. He made certain devises and bequests, but the bulk of the estate was bequeathed and devised to the Wachovia Bank & Trust Company, in trust.

The trustee is authorized and empowered to sell and convey by proper deeds of conveyance, at any time, all the testator's real estate, with the exception of the farm lands, and all personal property, and to invest and reinvest the net income derived from the trust estate.

The trustee is directed to keep and provide for the management of the farms for a period of twenty-one years after his death. At the expiration of this period, two of the farms are disposed of under the Ninth Item of the will, paragraphs (d) and (e). The residue of the estate is then to be converted into cash and distributed as follows:

"Pay seventy-five (75) per cent thereof to the heirs at law of my dead sister, Margaret M. Rosy; pay seventy (70) per cent of the remaining amount in the hands of my trustee after the payment aforesaid directed to the heirs at law of W. A. Rosy; and five (5) per cent of said remainder to the heirs at law of Julia Bryan, and the balance or twenty-five (25) per cent of said remainder to the heirs at law of my sister, Mattie A. Rice,—the children or heirs at law of any such child who may be dead to take in equal shares the share of their ancestor *per stirpes.*"

Additional facts and pertinent findings of fact by the court are hereinafter set out.

"The parents of the testator, Alex H. McLeod, died several years before the death of said testator, Alex H. McLeod, and after the death of his said parents, the nearest of kin and heirs at law of the said Alex H. McLeod was his brother, Robert L. McLeod, and his two sisters, Margaret M. Rosy and Mattie A. Rice; and both his brother, Robert L. McLeod, and his sister, Margaret M. Rosy, died leaving the children and heirs at law hereinafter mentioned prior to the death of the said Alex H. McLeod and prior to the date of said last will and testament of said testator, Alex H. McLeod, as admitted to probate as aforesaid. His sister, Mattie A. Rice, is still living." (Finding of Fact No. VI.)

Robert L. McLeod, brother of the said Alex H. McLeod, died some years before the death of the testator, leaving eight living children and two grandchildren, who are the sole heirs of a deceased son.

Margaret M. Rosy left as her sole heirs at law, two children, to wit, W. A. Rosy and Julia Bryan. These children under the terms of the Ninth Item of the will, paragraph (g), get 75 per cent of the trust estate when distributed. The heirs of W. A. Rosy get 17.50 per cent. The heirs of Julia Bryan get 1.25 per cent, and the heirs of Mattie A. Rice get 6.25 per cent.

Julia Bryan is married and her husband is now living, and they have four children now living and of full age.

W. A. Rosy is married and his wife is still living, and they have four children now living, two of whom are minors.

Mattie A. Rice, the sister of the testator, is a widow, an elderly lady seventy-one years of age, and is the beneficiary under the terms of the will of a bequest of only $1,500.00 under the Third Item of the will.

The sole child and heir at law of Margaret A. Rice is Margaret Thomas, three of whose children are devised a farm in paragraph (e) of the Ninth Item of the will. Margaret Thomas is married and her husband is still living. They have four children, all of whom are minors.

"On the 5th day of August, 1949, Mattie A. McLeod Rice, sister of the testator, Alex H. McLeod, Clyde A. McLeod, one of the children of the brother of said testator, Robert L. McLeod, deceased, and Julia Rosy Bryan, the niece of said testator, filed the caveat shown by the record to the last will and testament of the said Alex H. McLeod, and all the legatees named in said will and all the persons who could be interested in such caveat proceeding and the property therein involved have been made parties to said caveat proceeding and duly served with notice thereof, as provided by law, and guardians *ad litem* duly appointed for all infant parties and pleadings filed by such guardians for said infant parties. Of the parties served with the process required by law, the following aligned themselves as caveators: Bessie McLeod Williams, Mattie Neal McLeod Green, Louise McLeod Henderson and Ruth McLeod Allen. All the other parties to the proceeding who filed pleadings, including the guardians for the infant parties, aligned themselves as propounders of the will." (Finding of Fact No. XIII.)

"This action is brought to obtain the approval of the court of the family settlement set up in the complaint, the terms of which are contained in the copy thereof made a part of the complaint as Exhibit B and to modify and engraft the same as a part of the will of the said Alex H. McLeod, and compel the Executor and Trustee to abide by and observe the terms of said family settlement; and the Executor and Trustee of said will has filed answer to the complaint, as shown by the record, and likewise therein asked the advise of the court regarding a proper and legal construction of the will and the parties who legally take

the legacies contained in the will, as shown by the answer of said Executor and Trustee." (Finding of Fact No. XIV.)

"That if the said caveat proceedings are prosecuted to a final determination, it would act as a barrier to the establishment of family peace, and the trial of said cause would doubtless attract wide attention and publicity and would tend to expose to the public gaze intimate family affairs which should be guarded within the family; that such a trial would further disrupt and tend to destroy in material degree the peace, honor and dignity of the family and doubtless plunge the family and the parties interested in said litigation into litigation extending over a period of several years and would be attended with a large amount of expense, uncertainty and risk thereby either defeating or seriously jeopardizing the trust estate created by the testator under his said will; that, because of the phraseology in certain provisions of said will, the trust estate might be difficult to administer without frequently resorting to the courts for judicial interpretation, thereby creating additional expense against the estate." (Finding of Fact No. XVII.)

"That if the caveat is sustained, Mattie A. McLeod Rice would be entitled to a one-third interest in the estate; W. A. Rosy and Julia Bryan would be, together, entitled to a one-third interest in said estate as the children of Margaret McLeod Rosy; and the eight children and two grandchildren, representing the ninth child of Robert L. McLeod, deceased, brother of the testator, Alex H. McLeod, would be entitled to a one-third interest in said estate; and if the caveat is sustained, the interest of Mattie A. McLeod Rice would be greatly increased, and the interest of the other beneficiaries under the will would be either greatly reduced or fully destroyed, and the interest of all minors named in the will would be completely destroyed and the intention of the testator entirely defeated." (Finding of Fact No. XVIII.)

"That under all the circumstances existing, as aforesaid, the settlement proposed is for the best interest of all the parties, including all the present, prospective and contingent beneficiaries; that such settlement would prevent dissipation and waste of the assets of the estate and would more nearly accomplish the primary objectives and effectuate the real intentions of the testator than could be hoped for by a rejection of said settlement and relegation of the parties to a bitter family strife and long drawn out litigation, and, by reason thereof, the trust created by the testator should be modified according to the exigencies of the situation now existing and in accordance with the terms of said family settlement." (Finding of Fact No. XXI.)

"That the plaintiffs are keenly interested in protecting the interests of the minors involved and the rights of the unborn children and are of opinion that the approval of said family settlement will be for the best

interests of all persons interested in the assets of said estate, both born and unborn, and an approval of said settlement will preserve for them a substantial portion of the estate free from the dissipation of litigation and the risk of a bitterly prosecuted caveat which might destroy and wipe out their entire interests in the estate or a material part thereof." (Finding of Fact No. XXII.)

"That the interests of all minors who are parties to this action and by any possibility might be entitled to any of the property and assets of said estate have been carefully guarded and protected in this action by the appointment of guardians *ad litem* to represent said minors and parties *in esse* and not *in esse*, and said guardians *ad litem* have filed answers representing said infant parties in this action, and should there be, by chance, a small reduction in the principal and/or the income or the accumulations of income which all minors and after-born persons might be entitled to receive under the terms of said last will and testament, such reduction, under the terms of said family agreement, would be off-set many times by the benefits and protection naturally and necessarily arising from said settlement and the possibility that said parties would receive nothing in the event the caveat upon the trial of the issues arising thereon should be sustained." (Finding of Fact No. XXIII.)

The court approved the family settlement, which had been agreed upon and executed by all the original caveators, the children of Julia Bryan, W. A. Rosy and Margaret Thomas.

Under the terms of the family agreement, Item One through subsection (b) of the Ninth Item of the will, are to remain in full force and effect as therein set forth.

The family settlement provides for the annual distribution of the income from the trust estate; and it is agreed that the respective interests vested as of the death of the testator, subject to be divested should the holder thereof die prior to the termination of the trust.

Among other things, it is agreed in the family settlement, subject to the approval of the court, that:

1. Margaret Thomas does sell and assign her interest in the trust estate to her mother, Mattie A. Rice, for the term of her mother's life, or until the termination of the trust estate whichever occurs first. Upon the death of Mattie A. Rice, or upon the termination of the trust if it should occur first, Margaret Thomas does sell and assign to her children, share and share alike, the total principal sum of her legacy, to be paid to said children or to their duly appointed guardian, upon the termination of the trust estate. Likewise, the income from this legacy is to be paid annually to these children or their guardian, pending the termination of the trust, should Mattie A. Rice die prior to its termination.

2. Clyde A. McLeod is to be paid the sum of $5,000.00, from the principal of the trust estate, which sum is to be charged to Julia Bryan. It has been determined and agreed that this will reduce the interest of Julia Bryan in the trust estate from 37½ per cent to 35½ per cent.

3. The estate is to be kept intact for 21 years, as provided in the will, and the designated beneficiaries and devisees are to receive the income from the trust estate annually, but no part of the principal is impaired in any other respect. But, on the contrary, the interests of all minors who are beneficiaries under the will and whose interests would have been completely destroyed if the caveators had been successful, will be preserved.

The judgment of the court below sets out in detail the manner in which the trust estate is to be administered under the agreement, and further provides: "That the contract of settlement, copy of which is attached to the complaint herein as Exhibit B, is hereby approved by the court as to the property and fiscal rights of the parties therein agreed upon and adjusted, and, to this extent, is adjudged to be legally binding upon the parties thereto and is hereby made legally binding upon all other parties in interest, including the Executor and Trustee of the will of the testator, Alex H. McLeod, and all the guardians *ad litem* appointed and made parties to this action, and all minors and unborn persons in interest, and all the parties to this action."

The guardians *ad litem* and the Trustee excepted and appealed.

McKinnon & McKinnon, W. A. Leland McKeithan, and W. D. Sabiston, Jr., for Mattie A. McLeod Rice, Julia Bryan, Margaret Thomas, Alice Bryan Johnson, Joseph Bryan, McLeod Bryan, Julia M. Bryan Caviness, and Clyde A. McLeod. J. Talbot Johnson and H. F. Seawell, Jr., for W. A. Rosy, Alex Rosy and Mary Rosy Marks.

Spence & Boyette, W. Frank Taylor, and Joyner & Howison for Wachovia Bank & Trust Co.

J. Vance Rowe, Guardian ad litem, "In Propria Persona," for the unborn issue of Mattie A. McLeod Rice, the unborn issue of Margaret Thomas, the unborn issue of Julia Bryan, the unborn issue of W. A. Rosy, the unborn issue of the children of Mattie A. McLeod Rice, the unborn issue of the children of Margaret Thomas, the unborn issue of the children of Julia Bryan, the unborn issue of the children of W. A. Rosy, and the unborn issue of all such unborn persons.

Robert N. Page, III, Guardian ad litem, "In Propria Persona," for Benjamin Watson Thomas, Arthur Rice Thomas, Robert Alexander Thomas, Mary Martha Thomas, Joseph Rosy and Betty Rosy.

DENNY, J. The only exception taken by the appellants was to the signing of the judgment. This exception presents the single question whether the facts found by the court are sufficient to support the judgment, or, to put it another way, whether the court correctly applied the law to the facts found. *Roach v. Pritchett,* 228 N.C. 747, 47 S.E. 2d 20; *Brown v. Truck Lines,* 227 N.C. 65, 40 S.E. 2d 476; *Swink v. Horn,* 226 N.C. 713, 40 S.E. 2d 353; *Redwine v. Clodfelter,* 226 N.C. 366, 38 S.E. 2d 203; *King v. Rudd,* 226 N.C. 156, 37 S.E. 2d 116; *Lee v. Board of Adjustment,* 226 N.C. 107, 37 S.E. 2d 128; *Fox v. Mills, Inc.,* 225 N.C. 580, 35 S.E. 2d 869; *Rader v. Coach Co.,* 225 N.C. 537, 37 S.E. 2d 609, and cited cases.

"Family agreements looking to the advantageous settlement of estates or to the adjustment of family differences, disputes or controversies, when approved by the court, are valid and binding. They are bottomed on a sound public policy which seeks to preserve estates and to promote and encourage family accord. *Spencer v. McCleneghan,* 202 N.C. 662, 163 S.E. 753; *In re Estate of Wright,* 204 N.C. 465, 168 S.E. 664; *Reynolds v. Reynolds,* 208 N.C. 578, 182 S.E. 341; *Bohannan v. Trotman,* 214 N.C. 706, 200 S.E. 852; Schouler, Wills, Executors and Administrators, (6d.) sec. 3103." *Fish v. Hanson,* 223 N.C. 143, 25 S.E. 2d 461; *Redwine v. Clodfelter, supra; Bank of Wadesboro v. Hendley,* 229 N.C. 432, 50 S.E. 2d 302.

Ordinarily courts look with favor upon family settlements. But such agreements will not be approved if the right of infants are prejudiced thereby. Neither will the terms of a testamentary trust be modified merely because the beneficiaries thereof dislike its provisions. The modification of the terms of such a trust will be approved only when such modification is deemed necessary in order to preserve the trust. *Redwine v. Clodfelter, supra; In re Reynolds,* 206 N.C. 276, 173 S.E. 789.

This Court, speaking through *Barnhill, J.,* in *Redwine v. Clodfelter, supra,* said: "A court of equity will not modify or permit the modification of a trust on technical objections, merely because its terms are objectionable to interested parties or their welfare will be served thereby. It must be made to appear that some exigency, contingency, or emergency has arisen which makes the action of the court indispensable to the preservation of the trust and the protection of infants. *Reynolds v. Reynolds, supra;* (208 N.C. 578, 182 S.E. 341); *Cutter v. Trust Co., supra* (213 N.C. 686, 197 S.E. 542); 65 C.J. 683, sec. 549."

In the instant case, a caveat had been filed, and the caveators represented families or persons who would have inherited five-sixths of the testator's estate, had the will been set aside. Moreover, if the caveators had insisted upon pressing the caveat proceedings, and had been successful in setting the will aside, the devises to the heirs at law of W. A. Rosy,

Julia Bryan and Mattie A. Rice would have been defeated. This created an exigency not contemplated by the testator. The parties, in view of this exigency, reached an agreement which provides for the preservation of the *corpus* of the trust estate, and protects the rights of the infant beneficiaries therein. The trust provisions are modified to the extent of permitting and directing the income from the estate to be distributed annually, rather than to accumulate for 21 years. And the annual income due the infant devisees, pending the termination of the trust, will be paid to their respective guardians, to be used or preserved for their benefit. The settlement, under the circumstances, appears to be advantageous to the infant devisees.

The trial judge, in the exercise of the judicial discretion of a chancelor in the supervision of trusts and estates of infants, approved the settlement and directed that its terms be carried out.

The Executor and Trustee is likewise given the instructions it requested in its answer, with respect to the administration of the trust estate.

No reason for disturbing the judgment entered below is made to appear. Affirmed.

MRS. BERNICE MATTHEWS, WIDOW OF P. C. MATTHEWS, FOR AND IN BEHALF OF HERSELF AND HER THREE MINOR CHILDREN, W. H. MATTHEWS, R. P. MATTHEWS AND C. A. MATTHEWS, v. CAROLINA STANDARD CORPORATION, EMPLOYER, AND THE EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, CARRIER.

(Filed 9 June, 1950.)

1. Master and Servant § 50—

The burden is upon claimant to show (1) injury by accident, (2) suffered in the course of employment, and (3) arising out of the employment.

2. Master and Servant § 40d—

"In course of" the employment as used in the Workmen's Compensation Act refers to the time, place and circumstances in which the injury by accident occurs.

3. Master and Servant § 40c—

"Out of the employment" as used in the Workmen's Compensation Act refers to the origin or cause of the accident and implies some causal relation between the employment and the injury.

4. Same—

Findings to the effect that during lunch hour the employees were free to go as they pleased, that deceased employee had stopped his work for the lunch period and, in attempting to board a truck moving within the prem-

ises of the employer, fell and was fatally injured, with further evidence that the employee had been given no order and had no duty connected either with the truck or its contents, and was acting according to his own will, *is held* insufficient to show affirmatively that the injury resulted from a hazard incident to the employment, and supports the ruling of the Industrial Commission that it did not arise out of the employment.

5. Master and Servant § 47—

The mere fact that at the time of hearing a claim the chairman of the Industrial Commission was financially interested in organizing a compensation insurance company, entirely unrelated to the company sought to be held liable upon the claim, *is held* insufficient to upset the award rendered by the unanimous commission, it further appearing by affidavits that the chairman's decision in the case was not influenced by his interest in organizing a separate and distinct insurance company.

APPEAL by defendants from *Gwyn, J.*, November Term, 1949, of RICHMOND. Reversed.

This was a claim under the Workmen's Compensation Act for compensation for the injury by accident and resultant death of P. C. Matthews which it was alleged arose out of and in the course of his employment by defendant Carolina Standard Corporation.

The claim was heard by the Industrial Commission with result that the hearing commissioner found that decedent's injury and death did not arise out of and in the course of his employment by defendant Corporation and denied compensation. On appeal to the full commission the findings, conclusion and award of the hearing commissioner were affirmed, and plaintiff appealed to the Superior Court. In the Superior Court it was held that on the facts reported the conclusion of the Industrial Commission should be reversed and the case remanded with instructions that award of compensation be made. Defendants excepted and appealed to this Court.

Jones & Jones for plaintiff, appellee.

Pierce & Blakeney for defendants, appellants.

DEVIN, J. The question presented by the appeal is whether the facts found by the Industrial Commission on the evidence reported were sufficient to support the conclusion that the injury by accident resulting in the death of P. C. Matthews did not arise out of his employment by the defendant Carolina Standard Corporation. Appellants contend there was error in the judgment below in reversing the conclusion of the Industrial Commission on the facts found and remanding the case for an award of compensation.

The evidence upon which the Industrial Commission made its findings and conclusions tended to show that decedent was employed as a general laborer by defendant Corporation in and about its planer mill and lumber yard, performing various duties under the direction of Production Foreman Page, being paid an hourly wage. The work hours were 8 to 4:45, except that from 12 noon to 12:45 work was stopped for lunch. During this time employees were not paid, and were free to eat lunch there or go anywhere they wished. Most of them ate their lunch on the premises, some went home for lunch and some went to a store a quarter of a mile away. The decedent lived 3 miles from the plant and usually brought his lunch with him but sometimes went to the store for something to drink or eat. It does not affirmatively appear that he brought his lunch with him on the day of his injury.

On 13 February, 1947, Matthews had been working under the direction of Page until shortly before noon, and at the signal for noonday stoppage Matthews was near the planer mill. At this time a truck belonging to Settle Dockery and loaded with lumber for delivery to defendant Corporation was on the yard. The truck was being driven by Dockery's employee Gardner. The truck had been driven into the yard from Greene Street, two blocks away, and turned around and headed out. The lumber had been checked a few minutes before noon. The driver had been told by Page where to unload the lumber and a man named Ball got in the cab with him to show him where a part of the lumber was to be placed. It was the driver's duty to unload the lumber without assistance. Page got on the running board of the truck to ride to the office. As the truck started, a few minutes after 12 o'clock, Matthews, who was last observed in rear of the truck, suddenly ran to get on the truck and in some way fell under the rear wheels of the truck and was killed.

It was testified without contradiction that Matthews had no duty to perform in or about the truck or the lumber loaded thereon, and had received no orders or permission to get on the truck, nor had he been told to do anything that would necessitate his getting on it. He had nothing to do with showing where the lumber was to be put, or with unloading it. It was then past noon and all work had stopped for the lunch period. The truck was moving east toward Greene Street when the decedent attempted to get on.

The hearing commissioner's findings and conclusions were stated as follows:

"That the decedent, P. C. Matthews, sustained an injury by accident, February 13, 1947, a short time after 12 o'clock noon, when he attempted to board a moving tractor-trailer truck on the defendant employer's premises and fell beneath the rear wheels of the tractor which ran over him, resulting in his immediate death; that the decedent's lunch hour

was from 12 o'clock noon, to 12:45; that said injury by accident did not arise out of nor in the course of decedent's employment with the defendant employer, Carolina Standard Corporation.

"The evidence tends to show that the decedent had been checking lumber with a group of fellow employees and that either slightly before 12 o'clock noon, or exactly at 12 o'clock noon, he had finished this work and started toward the planer mill; that at that time a fellow employee heard the whistle blow for lunch and immediately started for home; that the decedent arrived at the planer mill and then for some unexplained reason attempted to board a tractor-trailer truck, which was delivering lumber to the defendant employer and which had just started moving; that just prior to the accident and while attempting to board the truck, no one heard the claimant's deceased say anything. The evidence is clear and uncontradicted that the lunch hour had been called and that it was the custom for most of the employees to drop whatever they were doing immediately upon being notified of the lunch hour and to get their lunch or go home to eat or to a cafe. The evidence is clear that during the lunch period that the employees were free to go anywhere they desired.

"In the instant case there is no evidence as to the intent of the decedent in attempting to board the moving truck, but there is the evidence that the decedent had left his particular job which was 150 feet from the truck; that the lunch hour had been called; that he had not been given orders to do anything else. Therefore, the Commission is of the opinion that the evidence is insufficient to sustain a finding that the accident arose out of and in the course of the employment and that there was any causal connection between the injury and the employment."

On the appeal to the full commission the findings and conclusions of the hearing commissioner were affirmed with notation that the full commission after a careful study of all the evidence in the case "cannot find that it arose out of his employment because there is no evidence in the record, so far as the full commission has been able to discern, that any of the duties of the deceased required him to be at the place where he was at the time he was killed; neither is there any evidence that the deceased had any duty imposed on him by his employment at the time he was killed to be boarding the truck which ran over him and killed him."

Plaintiff appealed to the Superior Court only on the ground that the opinion of the full commission was "contrary to the law and the evidence in the case." The Judge of the Superior Court being of opinion "that a case of liability had been made out, and that no other conclusion may be supported by the facts," reversed the conclusion of the Commission and remanded the case for an award of compensation.

While the report of the hearing commissioner is not as orderly as it should have been in setting out separately and distinctly the facts found

and the conclusions based thereon, the report does set out the evidence which is uncontradicted and upon it the finding that the injury and death of decedent did not arise out of nor in the course of his employment by the defendant corporation. This finding was modified by the full commission's finding only that the injury by accident did not arise out of his employment.

In this state of the record we conclude that the Commission has found from the facts in evidence that they were insufficient to show any causal connection between the injury suffered and the employment of decedent by the defendant corporation. After a careful examination of all the evidence reported by the Commission, we think this conclusion was supported by the evidence and should have been upheld.

The burden of proof was on the plaintiff. *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760; *McGill v. Lumberton*, 215 N.C. 752, 3 S.E. 2d 324. To make out a valid claim plaintiff was required to show (1) injury by accident, (2) suffered in the course of decedent's employment, and (3) arising out of his employment by the defendant corporation. *Withers v. Black*, 230 N.C. 428, 53 S.E. 2d 668; *Taylor v. Wake Forest*, 228 N.C. 346, 45 S.E. 2d 387; *Wilson v. Mooresville*, 222 N.C. 283, 22 S.E. 2d 907; *Plemmons v. White's Service, Inc.*, 213 N.C. 148, 195 S.E. 370; G.S. 97-2 (f). The plaintiff here has shown the first and second of these requisites, but there was no evidence to support the third. *Bolling v. Belk-White Co.*, 228 N.C. 749, 46 S.E. 2d 838.

In the interpretation of the Workmen's Compensation Act uniformly the decisions of this Court have declared that the phrase "in course of" refers to the time, place and circumstance under which the injury by accident occurred, while the words "out of the employment" refer to the origin or cause of the accident, as springing from the work the employee is to do or out of the service he is to perform. *Withers v. Black, supra; Taylor v. Wake Forest, supra; Conrad v. Foundry Co.*, 198 N.C. 723, 153 S.E. 266; *Hunt v. State*, 201 N.C. 707, 161 S.E. 203; *Plemmons v. White's Service, Inc.*, 213 N.C. 148, 195 S.E. 370; *Wilson v. Mooresville*, 222 N.C. 283, 22 S.E. 2d 907; *Brown v. Aluminum Co.*, 224 N.C. 766, 32 S.E. 2d 320; *Rewis v. Ins. Co.*, 226 N.C. 325, 38 S.E. 2d 97. "There must be some causal relation between the employment and the injury." *Conrad v. Foundry Co., supra.* "The risk must be incidental to the employment." *Hunt v. State, supra.* "Whether an accident arose out of the employment is not exclusively a question of fact. It is a mixed question of fact and law." *Plemmons v. White's Service, Inc., supra. Howell v. Fuel Co.*, 226 N.C. 730, 40 S.E. 2d 197;

We do not regard the decisions in *Brown v. Aluminum Co.*, 224 N.C. 766, 32 S.E. 2d 320; *Robbins v. Hosiery Mills*, 220 N.C. 246, 17 S.E. 2d 20; *Gordon v. Chair Co.*, 205 N.C. 739, 17 S.E. 485; *Bellamy v. Mfg. Co.*,

200 N.C. 676, 158 S.E. 246, or *Chambers v. Oil Co.*, 199 N.C. 28, 153 S.E. 594, as inconsistent with the conclusion we have reached on the facts of this case.

Here the evidence clearly shows that during the work stoppage for the lunch period, the decedent had no work to do, no service to perform. His time was his own. In attempting to get on the moving truck he was under no order or duty connected either with the truck, the lumber or the business of the yard. He acted according to his own will. The truck was headed toward the street. It began to move. He ran to get on it and fell under the wheel. No word was spoken. The Industrial Commission did not find what purpose he had in mind. But it was not necessary to find that. The Commission did find his injury had no causal connection with his employment, and the burden was on plaintiffs to show affirmatively that it arose out of his employment. True he was on the premises of his employer at the time but under no duty. According to the evidence presented and the findings of the Commission the injury did not result from a hazard incident to his employment. *Bryan v. T. A. Loving Co.*, 222 N.C. 724, 24 S.E. 2d 751.

Injuries suffered by employees on the employer's premises during lunch hour have been considered by the courts in other jurisdictions in numerous cases, and the allowance of compensation therefor generally held determinable upon whether the hazard was incidental to the employment or had no causal relation thereto. 6 A.L.R. 1151 (note); 17 N. C. Law Review 458. As illustrative of this distinction it was held in *Thomas v. Proctor & Gamble,* 104 Kan. 432, that where an employee during work stoppage at lunch hour was injured as result of engaging in activities which were customarily carried on with the knowledge and approval of employer, such practices were considered as conditions under which the business was carried on, and injuries incident thereto compensable. In *Geary v. Anaconda Copper Mining Co.,* 120 Mont. 485, where the employee was subject to call during lunch time and in effect forced to eat on the premises and was injured in a hand-ball game customarily permitted by employer, compensation was allowed. In *Zarba v. Lane,* 322 Mass. 122, it was said, "if he (the employee) is upon his employer's premises occupying himself consistently with his contract of hire in some manner pertaining to or incidental to his employment," an injury sustained during noon hour would be compensable. But in *Mutti v. Boeing Aircraft Co.,* 25 Wash. 871, compensation was denied where the employee, during lunch period when he was free to go where he pleased and was not under control of employer, went to attend to a personal matter on the premises and was injured when the building was struck by a falling airplane. And in *Luteran v. Ford Motor Co.,* 313 Mich. 487, where an employee on the premises during the lunch hour was struck by a baseball

bat accidentally let slip by a fellow employee, compensation was denied, there being no evidence baseball playing was sponsored or encouraged by the employer.

We conclude that upon the record and the entire evidence in the case at bar, the finding that the injury by accident for which claim is made did not arise out of decedent's employment was supported by the evidence, and that the ruling of the court in reversing the action of the Industrial Commission must be held for error. *Greer v. Laundry,* 202 N.C. 729, 164 S.E. 116; *Moore v. Drug Co.,* 206 N.C. 711, 175 S.E. 96; *Lockey v. Cohen, Goldman & Co.,* 213 N.C. 356, 196 S.E. 342; *McNeill v. Construction Co.,* 216 N.C. 744, 6 S.E. 2d 491; *Blevins v. Teer,* 220 N.C. 135, 16 S.E. 2d 659.

One other matter perhaps should be considered, as it appears in the record and is referred to in the briefs.

While the appeal from the Industrial Commission was pending in the Superior Court, the plaintiff filed motion in that court to set aside the decision of the Commission on the ground that the chairman of the Commission, T. A. Wilson, was disqualified to act in this case for the reason that he was a subscriber for stock and financially interested in the Textile Insurance Company, a casualty insurance company, at the time this case was being heard by the Commission. The motion was supported by affidavit filed 5 November, 1949. It appeared from this and other affidavits filed that Mr. Wilson had been a member of the Industrial Commission since it was created by the General Assembly in 1929; that the Textile Insurance Company was in process of organization but not licensed to do business when this case was heard in 1948; that Mr. Wilson retired in April 1949 and is now an officer of the Textile Insurance Company; that neither Mr. Wilson nor the Textile Insurance Company had any connection with the defendant Mutual Liability Insurance Company of Wisconsin or any other party to this proceeding; that the decision of the Industrial Commission in this case was unanimous; that no objection to Mr. Wilson's acting was made at the hearing, nor until some time after the appeal had been filed in the Superior Court; that at the time the affidavits were filed in support of plaintiff's motion Mr. Wilson was no longer a member of the Commission. By affidavit Mr. Wilson denies his decision in this case was influenced by his interest as subscriber for stock in the Textile Insurance Company. The local manager of defendant Mutual Liability Insurance Company, the insurance carrier in this case, also filed an affidavit, testifying to the disinterestedness of Mr. Wilson.

The Judge below did not consider this question, as his decision was in favor of plaintiff on other grounds, and plaintiff did not appeal. There is no assignment of error properly presenting the question, though it is discussed in plaintiff's and defendants' briefs. Under these circumstances

we express the opinion that the facts shown are insufficient to warrant vacating the findings and conclusions of the Industrial Commission on the ground set forth in plaintiff's motion.

For the reasons hereinbefore stated we conclude that there was error in reversing the action of the Industrial Commission, and that the defendants were entitled to an affirmance of the findings and conclusions of the Industrial Commission.

Judgment of the Superior Court is

Reversed.

RICHARD N. WHITEHEART AND HIS WIFE, MARTHA T. WHITEHEART, PETITIONERS, v. JENNIE GRUBBS, RESPONDENT.

(Filed 9 June, 1950.)

1. Boundaries § 2—

Ordinarily, the specific description prevails over the general, and it is only when the specific description is ambiguous or insufficient, or reference is made to a fuller and more accurate description, that the general description is allowed to control or is given significance.

2. Same—

A specific description by courses and distances which is clear and complete prevails over the general description of the land conveyed as being "a 25 foot strip off the west side" of a designated lot.

3. Adverse Possession § 8—

Where there is a lappage in the specific descriptions in respective deeds to adjacent lots derived from a common source, each deed constitutes color of title as to the lappage under the lines and boundaries called for in the deed, and seven years use and occupancy of the lappage by respondent or those under whom she claims, ripens title in her, G.S. 1-38, even though her deed was executed subsequent to the deed for the adjacent lot, there being no evidence of actual occupation of any part of the lappage by the owner of the adjacent lot.

4. Adverse Possession § 3—

Where there is a lappage in the specific descriptions in respective deeds to adjacent lots derived from a common source, testimony of respondent, claiming under the subsequently executed deed, that she did not intend to claim anything except what she owns and that she did not want the lappage if it were not hers, but that she had bought and paid for the land, does not negate the hostile character of her possession, but at most is to be considered by the jury in passing upon whether her possession was adverse.

5. Appeal and Error § 39e—

The sustaining of objection to a question cannot be held prejudicial when the record fails to disclose what the answer of the witness would have been.

6. Appeal and Error § 39f—

Exceptions to the charge will not be sustained if the charge, when read contextually, does not contain prejudicial error.

7. Trial § 31b—

Under the 1949 amendment to G.S. 1-180 (Chap. 107, Session Laws 1949) the court is not required to state the evidence except to the extent necessary "to explain the application of the law thereto."

APPEAL by petitioners from *Sink, J., at* 24 October 1949 Term, of FORSYTH.

Procession proceeding instituted 7 December, 1948, to establish dividing line between lands of petitioners and lands of respondent,—converted into an action in the nature of an action to quiet title. G.S. 1-399; G.S. 41-10; *Simmons v. Lee,* 230 N.C. 216, 53 S.E. 2d 79.

The record shows that the controversy relates to land in Rosedale Heights, plat of which is recorded in the office of the Register of Deeds of Forsyth County in Plat Book 5, at page 59.

The petitioners and respondent claim under a common source of title—J. H. White.

The petitioners claim by *mesne* conveyances as follows: (1) A deed from White to Warren Edwards, dated and registered in the year 1928; (2) a deed from Edwards to I. T. Vestal, dated and registered in the year 1934; (3) a deed from Vestal to Alberta Vestal Stewart, dated and registered in the year 1934; and (4) a deed from Stewart to Richard N. Whiteheart and wife, the petitioners, dated and registered in the year 1944.

The respondent claims under a deed from J. H. White to C. E. Miller, dated and registered in the year 1931, and a deed from Miller to Jennie Grubbs, the respondent, dated in the year 1932, and filed for registration in the year 1934.

In the course of the trial in Superior Court, witnesses for the parties illustrated their testimony by references to a diagram on a blackboard, intended by the parties as a rough approximation of the recorded plat of the property. However, by stipulation of the parties, for the record, a photostatic copy of the recorded plat is substituted for the blackboard diagram, and is designated Exhibit A.

This plat shows the property to be situated at the northeast corner of Rose Street and Mill Street,—Rose Street being on the west side and Mill Street on the south. Lots 21, 22, 23, 24 and 25, referred to in the evidence, are shown on the plat. Lot 23 is on the said corner. Lot 24 adjoins and lies east of lot 23. Lot 25 adjoins and lies east of lot 24. Each of these lots has frontage of sixty feet on the north side of Mill Street, and extend northwardly approximately one hundred fifty feet.

The widths of these three lots on the north are as follows: Lot 23—53.3 feet; lot 24—53.3 feet; and lot 25—53.7 feet; a total of 160.3 feet.

And lot 22 adjoins and lies north of lots 23, 24 and 25. It fronts fifty feet on Rose Street and extends eastwardly between parallel lines—fifty feet apart—throughout. The southern line is 160.3 feet in length, the same as the total north width of lots 23, 24 and 25, above given. The northern line of lot 22 is 154.5 feet in length, the same as the southern line of lot 21 which adjoins and lies north of lot 22.

The course of the east line of lots 25 and 22 is North 5° 55″ East.

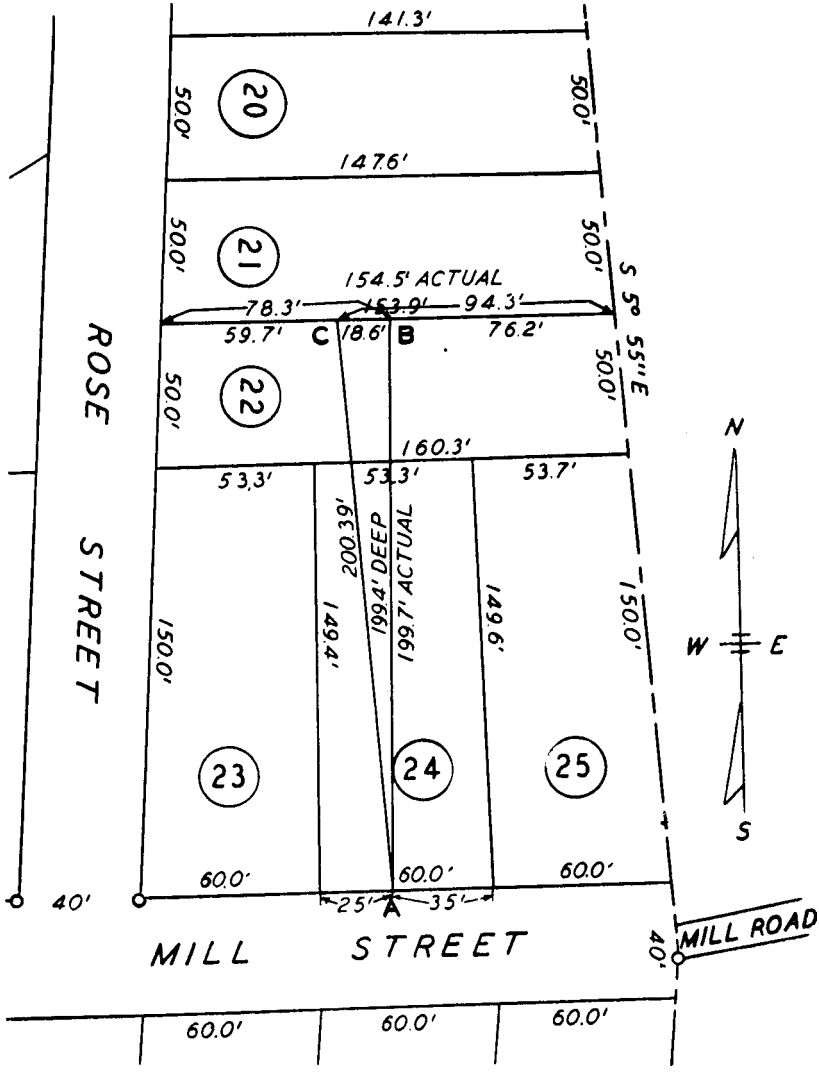
The description in the deed from J. H. White (1928) to Warren Edwards, and in each of the deeds through and under which petitioners claim title, reads as follows: "Beginning at a stake on Mill Street, the southeast corner of lot #23, and running east 25 feet to a stake; thence north 199.4 feet to the north line of lot #22; thence west 78.3 feet; thence south 50 feet to the northwest corner of lot #23; thence east 53.3 feet to the northwest corner of lot #24; thence south 149.4 feet to the beginning on Mill Street, the same being known and designated as parts of lots numbers 22 and 24 on the plat of Rosedale Heights, recorded in the office of the Register of Deeds in Plat Book 5, page 59, to which plat reference is made for a more particular description."

And the description in the deeds from J. H. White (1931) to C. E. Miller, and from Miller to respondent, and under which she claims title, reads as follows: "Beginning at an iron stake in the north margin of Mill Street, it being the southeast corner of lot 25, and running thence northwardly with the east line of lots 25 and 22, 200 feet to an iron stake, it being the northeast corner of lot 22; thence westwardly with the south line of lot 21, 95 feet to an iron stake in the south line of lot 21; thence southwardly on a new line 200 feet more or less to an iron stake in the north margin of Mill Street; thence eastwardly with the north margin of Mill Street 95 feet to the beginning, and being known and designated as all of lot 25, all of lot 24, except a 25 foot strip off of the west side, and the east end 50 by 95 feet, of lot 22, as shown on the plat of Rosedale Heights as recorded in Plat Book 5, at page 59, in the office of the Register of Deeds of Forsyth County."

The calls of the descriptions in the deeds under which petitioners claim, and of the description in the deeds under which respondent claims, as superimposed upon the recorded plat, as aforesaid, show a lappage,—triangular in shape, starting at a point designated "A" in the north margin of Mill Street; and running northwardly to a point "B" in the north line of lot 22 and in south line of lot 21,—represented to be 76.2 feet west of the northeast corner of lot 22; and 78.3 east of the northwest corner of lot 22; and running westernly with the dividing line between lots 22 and 21 to point "C" in said line representing to be in said line

18.6 feet west of the point "B," and 94.8 feet from the northeast corner of lot 22; and running thence in a southerly direction to the point "A" on Mill Street as aforesaid.

Petitioners claim to the line A-B. Respondent claims to the line A-C. In her answer, respondent denies the location of the dividing line to be as alleged by petitioners in their complaint, and avers that she owns the land covered by the description in her deed, and, hence, that the proceed-



ing is not one of disputed boundary line, but of title. And respondent pleads in her answer, as bar to petitioners' right to recover any part of the lappage, that she has had adverse possession of all the lappage, so represented on the plat, under color of title for more than seven years as provided in G.S. 1-38, and for twenty years as provided in G.S. 1-40.

Upon the trial in Superior Court, and after petitioners first had rested their case, J. H. White and Robert Edwards, son of Warren Edwards, testified as witnesses for respondent. Their testimony tends to show that at the time White was selling the twenty-five feet frontage on Mill Street to Warren Edwards (1928), White, with the assistance of Robert Edwards, and in the presence of Warren Edwards, measured with a tape line 95 feet from the southeast corner of lot 25, and put in an iron stake, a Ford shaft or axle, in the north margin of Mill Street, represented on the plat as the point "A"; that he then measured off 95 feet from the northeast corner of lot 22, and put in an iron stake, a Ford shaft or axle, in the north line of lot 22, represented on the plat as point "C"; that these iron stakes are there now, and are at the same locations; that there was never any dispute between White and Edwards or between Edwards and respondent after she purchased as to the location of the line A-C as the dividing line between them.

Respondent and her son, R. V. Grubbs, also testified in her behalf. Their testimony tends to show that when she bought from C. E. Miller there was an out-house or toilet located "almost against the stob" at the point "C"; that it has been maintained ever since, with a path from the house along the line A-C; that in 1933 her son set out two mimosa trees on the property east of the line A-C and west of the line A-B, and she has looked after them, and claimed them as her own ever since; that in 1932 respondent put up and has maintained clothes-line posts and clothes-line on the area east of line A-C and west of line A-B; that on this area she has had a plum tree, grape vines, some apple trees, and peach trees; that she has gathered grapes ever since she has been living there,—the grape vine being there when she purchased; that on this area respondent has had a chicken yard, and cultivated a part of it as a garden,—ploughing up to the path that leads to the out-house or toilet; that from the street to the front of the house and on back by the house she has a rose-bush and a dogwood tree; and that respondent has a lawn, and has sowed grass and mowed the lawn along the front to the line A-C. The testimony offered by respondent further tends to show that when she was negotiating with Miller for the purchase of the property, he showed her, on the ground, stakes at the corners—including the iron stake at the point "C," and that she measured some of the lines; that the property she bought fronted 95 feet on Mill Street and 95 feet on the south line of lot 21; and that after she bought "none of the parties that lived in the house

where Mr. Whiteheart now lives put a lawn on or put out shrubbery or otherwise tended or improved any part of the land east of line C-A which" she claims as her line.

And there was testimony tending to show that from the iron stake at point "C" there was nothing to obstruct the view along the line to the point "A."

The respondent, through her counsel of record, in open court, upon the conclusion of all the testimony and before the beginning of the argument, concluded that she had no right or title to the lands and premises in dispute save and except upon her pleadings as they relate to (1) the seven-year statute of adverse possession under color of title, and (2) the twenty-year statute of adverse possession.

The case was submitted to the jury on these three issues, which the jury answered as shown:

"1. Has the respondent, Jennie Grubbs, been in possession of the real property indicated within the points A, B and C under known and visible lines and boundaries and under color of title for seven years preceding the commencement of this action, as alleged in her reply?

"Answer: Yes.

"2. Have the respondent, Jennie Grubbs, and her predecessors in title possessed the real property within the points A, B and C under known and visible lines and boundaries adversely to all other persons for twenty years preceding the commencement of this action, as alleged in her reply?

"Answer: No.

"3. Are the petitioners Richard N. Whiteheart and his wife, Martha T. Whiteheart, the owners and entitled to the immediate possession of the lands lying westward of the line as alleged by them in their petition?

"Answer: No."

From judgment declaring respondent to be the owner of the land in question, etc., petitioners appeal to the Supreme Court and assign error.

Ingle, Rucker & Ingle for plaintiffs, appellants.

Parker & Lucas for defendant, appellee.

WINBORNE, J. Appellants state in their brief five questions as being presented by their assignments of error on this appeal. The first three appear to be predicated upon their exception to the denial of their motions for judgment as of nonsuit as to respondent's further defense based on her pleas of adverse possession of the land in controversy. The fourth relates to the exclusion of certain evidence. And the fifth relates to alleged failure of the trial judge to properly charge the jury. After

careful examination of the questions so raised, we hold that prejudicial error is not made to appear.

As to the three questions relating to nonsuit: The first and basic contention of appellants is that the description in the deeds under which the respondent claims does not cover the land in controversy represented by the letters A to B to C and back to A. This contention, apparently, is based upon the assumption that the specific or particular description in these deeds is controlled by the general description which follows.

In this connection, 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,* 120 N.C. 4, 26 S.E. 626; *Loan Asso. v. Bethel,* 120 N.C. 344, 27 S.E. 29; *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; *Lewis v. Furr,* 228 N.C. 89, 44 S.E. 2d 604; *Lee v. McDonald,* 230 N.C. 517, 53 S.E. 2d 845.

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; *Lewis v. Furr, supra.*

Applying this principle to description in the deeds under consideration, the particular description is clear and specific, and, when considered in connection with the admitted plat, leaves no room to doubt that it covers the land in controversy. Such being the case, it prevails over the general description which follows.

The second question, taking for granted that the description in respondent's deed covers the land in controversy, assumes that the "evidence fails to disclose the essential elements of notoriety with respect to the boundaries under adverse possession."

In this connection, since the deeds under which petitioners claim and the deeds under which respondent claims cover the land in controversy, the subject of the relative rights of the parties in respect to the lappage is presented. The pertinent rules in this respect, established by decisions of this Court, are set forth by *Stacy, C. J.,* in *Vance v. Guy,* 224 N.C. 607, 31 S.E. 2d 766, in this manner:

"1. Where the title deeds of two rival claimants to land lap upon each other, and neither is in actual possession of any of the land covered by both deeds, the law adjudges the possession of the lappage to be in the one who has the better title.

"2. If one be seated on the lappage and the other not, the possession of the whole interference is in the former.

"3. If both have actual possession of some part of the lappage, the possession of the true owner, by virtue of his superior title, extends to all not actually occupied by the other."

And the subject is fully discussed in the case of *Currie v. Gilchrist,* 147 N.C. 648, 61 S.E. 581, and summarized in part as follows: "We may therefore take it to be settled by this Court by a long and unvarying line of decisions that if the person who claims under the elder title have no actual possession on the lappage, such possession, although of a part only, by him who has the junior title, if adverse and continued for seven years, will confer a valid title for the whole of the interference,—the title being out of the State." See *Berry v. Coppersmith,* 212 N.C. 50, 193 S.E. 3, and cases cited.

Testing the case in hand by these rules, there is no evidence that petitioners or those under whom they claim have been in actual occupation of any of the lappage. And there is evidence that respondent has been in actual occupation of it.

Hence, her possession, if adverse and continued for seven years, would confer a valid title for the whole of the lappage. Adverse possession must be under known and visible lines and boundaries, and under colorable title. G.S. 1-38. In the present case the lines and boundaries, as the evidence tends to show, are well defined, visible, and known. And the deed to respondent under which she claims is sufficient to constitute color of title. *Lofton v. Barber,* 226 N.C. 481, 39 S.E. 2d 263.

The third question is based upon the express assumption that "the testimony of the defendant (respondent), as a witness on her own behalf, discloses that she had no intent of claiming possession against the true owner."

While respondent, under cross-examination, said that it has never been her intention to claim anything except what she owns, that if she could not hold this land honestly, she does not want it, and that she did not want the property if it were not hers, she does say that she bought it and paid for it. At most these statements were fit to be considered by the jury in passing on the question as to whether her possession was adverse. See *Dawson v. Abbott,* 184 N.C. 192, 114 S.E. 15.

The fourth question is a challenge to the ruling of the court in sustaining objection to this question: "If you had known that an earlier deed had conveyed this property that is in dispute to Mr. Whiteheart or somebody owned it before him, a deed that was earlier than your deed from Mr. Miller, it wouldn't have been your purpose to claim that property, would it, that is in dispute?" The record does not disclose what the answer of the witness would have been. In the absence of such a show-

ing error is not made to appear. *Wilson v. Scarboro*, 169 N.C. 654, 84 S.E. 1017.

The fifth question is directed to the charge of the court,—to portions of the charge given, and to failure to state the evidence and to comply with provisions of G.S. 1-180. Reading the portions to which exceptions are taken in proper connection with that which precedes and that which follows each, prejudicial error is not made to appear. And in connection with the alleged failure to comply with provisions of G.S. 1-180, it must be noted that this statute was rewritten by Chapter 107 of 1949 Session Laws of North Carolina. Under this statute, as so rewritten, the judge is not required to state the evidence given in the case "except to the extent necessary to explain the application of the law thereto." Testing the charge by this provision of the statute, it may not be successfully contended that the presiding judge failed in his duty in this respect.

All assignments of error have been given due consideration and in the judgment below, we find

No error.

ROSA P. MADDOX, ADMINISTRATRIX OF THE ESTATE OF FELIX L. MADDOX, DECEASED, v. GEORGE W. BROWN AND QUEEN CITY COACH COMPANY, A CORPORATION.

(Filed 9 June, 1950.)

1. Trial § 22c—

Contradictions in plaintiff's evidence do not justify nonsuit.

2. Trial § 23a—

If upon the whole evidence there are inferences tending to support plaintiff's case, nonsuit is properly refused.

3. Trial § 22a—

The evidence must be taken in the light most favorable to plaintiff on motion to nonsuit.

4. Automobiles § 18h (2)—

Evidence tending to show that defendant's bus was following closely behind the motorcycle ridden by intestate on the inside or passing lane of a four lane highway, that the bus, traveling 35 or 40 miles per hour in approaching an intersection with a paved highway, was overtaking the motorcycle and continuously and repeatedly sounded its horn and pulled to its left in an attempt to pass, and that, without slackening speed, the curving front on the right side of the bus struck the rear of the motorcycle on its left side, *is held* sufficient to be submitted to the jury on the issue of negligence of the bus company.

5. Negligence § 11—

Contributory negligence is negligence on the part of plaintiff in failing to exercise the care which an ordinarily prudent man would observe under the circumstances, which proximately concurs with the negligence of defendant in producing the injury.

6. Negligence § 19c—

Nonsuit on the ground of contributory negligence can be properly entered only when contributory negligence and also the conclusion that such contributory negligence proximately concurred in producing the injury, are established by plaintiff's own evidence as the sole reasonable inferences that can be drawn therefrom.

7. Automobiles § 18h (3)—Plaintiff's evidence held not to show as matter of law that contributory negligence was proximate cause of injury.

The evidence tended to show that intestate was riding his motorcycle in the second or passing lane of a four lane highway, followed by defendant's bus, that the vehicles were approaching an intersection with a paved highway, and that the bus, overtaking the motorcycle, repeatedly blew its horn and bore to its left in attempting to pass the motorcycle, and that the curving front of the right side of the bus hit the left rear of the motorcycle. *Held:* While the evidence may establish contributory negligence on the part of intestate, it does not establish as a matter of law that such contributory negligence proximately concurred in producing the injury, and nonsuit on the ground of contributory negligence is properly denied.

DEFENDANTS' appeal from *Patton, Special Judge,* October 3, 1949, Extra Civil Term, MECKLENBURG Superior Court.

This action was instituted in the lower court by plaintiff to recover damages for the death of her intestate husband which occurred in a collision of a passenger bus of the defendant Company and a motorcycle which the intestate was riding. At the time of the collision the defendant Brown was operating, or driving the bus as employee of the Company on one of its regular runs. It is alleged that Brown was negligent in the operation of the bus and that his negligence proximately caused the injury and death. The defendants denied negligence, and set up the affirmative plea that Maddox was contributorily negligent in producing his injury and death, if any negligence existed on their part.

The collision took place on the four-lane Wilkinson Boulevard, "Highway No. 29," leading westward from Charlotte to Gastonia, just before reaching the Berryhill Road intersection, on the Charlotte side. Both vehicles were traveling West, in the direction of Gastonia.

The two outside lanes of the highway were used for regular traffic, and the two inside lanes were used for passing. The lanes were marked off with surface stripes, with a white double line along the center of the highway.

Near the Berryhill Road intersection there were several structures, including a filling station on the right side of the highway.

The evidence is here summarized, and partly quoted from the record at points regarded by the parties as critical on review.

The weather was clear and the highway was dry. Vision was unobstructed to the west from the point of the collision, and from the direction in which the parties were traveling, for a distance in excess of 500 feet.

There was a Gulf service station on the North side of the highway, about 750 feet east of the point of collision; and on the North side of the highway at its intersection with the Berryhill Road, there is a Richfield service station. Along the 750 feet above referred to there were several residences; and there was a service station on the Southeast corner of the intersection of the highway with the Berryhill Road. The latter is a paved road.

In addition to the vehicles in collision there was a milk truck being operated by Ernest Black, Jr., (a witness), also traveling in a westerly direction in the extreme right hand lane of traffic, which was passed by the bus at a point approximately 500 feet East of the intersection of the highway and the Berryhill Road. Maddox, operating the motorcycle, was 50 to 100 feet in front of the milk truck at the time the bus passed the latter.

The bus was in the middle of the passing lane for some time before passing the milk truck, and constantly thereafter until it turned left, traveling 35 to 40 miles an hour, going on and overtaking Maddox.

The following physical facts concerning the bus and the motorcycle were in evidence, bearing upon the manner of the collision, and relative positions of these vehicles at the time:

The lower part of the bus, except the bumper, was painted red. The damage to the motorcycle, and the physical marks left upon it after the collision, were as follows: The rear number plate and bracket were bent to the left; and there was a worn place on the left handle bar grip; a worn place on the front tip of the front fender; and there was some red paint on the left side of the number plate. The motorcycle was painted black and grey. There was damage to the end of the left handlebar.

The bus was of the pusher type, so arranged inside that the driver's seat is in the front, near the windshield, this being the front of the body of the bus; there is no hood or motor in front of the driver.

After the collision the bus had the following marks of damage: There were scratches just beyond—(to the rear)—of the curved portion of the right door, from six to eight inches in length. Right below this there were marks indicating they were made with rubber. (The motorcycle handlebars were tipped with rubber handgrips, the left of which after-

wards presented the appearance of being scraped.) The scratch was about a foot below the window of the right door of the bus.

Mrs. John Leggette testified that she was a passenger in the bus concerned in the collision; was seated on the right-hand side of the bus on the second seat from the front door entrance, next to the aisle. Her attention was not attracted until just before the collision, when she heard the driver blowing the horn. He was blowing it constantly; she sat up and looked straight out through the windshield. At the time the bus was in the second lane, next to the center line; she could not tell how far it was from the front of the bus out to the man riding the motorcycle when she first saw him, because she could not see the ground between the windshield and the distance of the motorcycle. The driver was blowing his horn and pulling to the left. When he pulled to the left the man on the motorbike pulled to the left, every time he blew the horn and moved over the man on the motorbike moved over; "his head kept moving as we moved." The two moved to the left more than one time. "I couldn't answer how many times, but it was several times before the collision. We just kept moving to the left and he kept moving to the left and he kept blowing the horn. The man kept coming over until we were in the center of the highway . . . and the man on the motorbike turned around and looked directly around at us just like that, and then it happened . . . I did not experience any sensation of the speed decreasing. I do not have any idea of what length of time transpired from the time I looked up and saw the man until the time the collision took place."

George Wallace testified for the plaintiff that on the day of the collision he was working on the State highway; that just before the collision he went into the service station on the North side of the crossroad to get a drink. While he was in there he heard a horn blowing, "it blowed a long time, several times, a long ways, blowed a long ways." He further said that when he heard it he hurried up and "got done drinking" and went out, and thinking that somebody's horn got hung up, he walked out in front of the filling station. When he looked back towards Charlotte he saw a motorcycle in the lane next to the center of the highway; when he saw the motorcycle the bus was behind about 35 feet.

When the bus driver went to pull around the motorcycle he pulled to the left and the motorcycle pulled to the left, out in front of the driver. When they came together the right wheels of the bus were right in the middle of the crack, in the middle of the highway. The bus pulled over to the left-hand side of the highway above the filling station and stopped. He further stated what when he first saw the two vehicles they were something like about 500 feet toward Charlotte from where he was; at that time the motorcycle was in the second lane. The motorcycle "just stayed right in front of the bus all the time, the bus driver blowing for him to

get out of the way and pulled over, too. He never did pull out of the way of the bus at all. Just stayed in front all the time."

The defense sought to impeach the witness by contradictory testimony given upon another hearing.

There was further evidence of the plaintiff with relation to the damages.

At the conclusion of the plaintiff's evidence the defendants demurred and moved for judgment of nonsuit, which motion was denied.

The defendants' evidence was substantially contradictory to that of the plaintiff. Brown, the driver, however, admitted that Maddox, riding the motorcycle, was ahead of him when he passed the intervening milk truck, but contended that Maddox turned from the right lane into the passing lane. He stated that he did not put on brakes at that time, and when the bus and motorcycle collided Maddox was thrown some feet ahead of the point of impact and that he turned to the left to avoid running over the body.

Plaintiff introduced evidence in rebuttal and rested.

At the conclusion of all the evidence the defendants renewed their demurrer and motion to nonsuit, which was overruled.

Three issues were submitted to the jury: On the negligence of the defendants; on the contributory negligence of the plaintiff; and on damages. All the issues were answered in favor of the plaintiff.

The defendants moved to set aside the verdict for errors of law, which motion was denied, and defendants excepted. To the ensuing judgment the defendants objected, excepted, and appealed.

Smathers & Carpenter for plaintiff, appellee.

Robinson & Jones for defendants, appellants.

SEAWELL, J. Our view of the record in this case leads us to the conclusion that decision must hinge on the demurrer to plaintiff's evidence and motion to nonsuit. There are numerous exceptions to the admission of evidence; and the charge to the jury is almost completely bracketed with exceptions. We have examined the record closely in these respects and do not find in these exceptions any reason to disturb the verdict.

Our discussion of the legal sufficiency of the evidence to be submitted to the jury, both on the question of defendant's negligence and that of the plaintiff's contributory negligence, must fall within familiar lines.

1. The plaintiff is not required to present a perfect case or evidence free from contradictions in its support in order to recover. *Barlow v. Bus Lines,* 229 N.C. 382, 49 S.E. 2d 793. In this case *Chief Justice Stacy,* writing the opinion of the Court, said: "Discrepancies and con-

tradictions, even in plaintiff's evidence, are for the twelve and not for the court;" citing *Emery v. Ins. Co.*, 228 N.C. 532, 46 S.E. 2d 309; *Bank v. Ins. Co.*, 223 N.C. 390, 26 S.E. 2d 862; *Shell v. Roseman*, 155 N.C. 90, 71 S.E. 86; numerous authorities to the same effect may be found in the annotations to G.S. 1-183, at p. 233. See also, *Potter v. Supply Co.*, 230 N.C. 1, 31 S.E. 2d 908.

If upon the whole evidence there are inferences tending to support plaintiff's case, that is, evidence pointing to the proximate negligence of the defendant, motion for nonsuit cannot be allowed,—the case is for the jury, who alone may judge of its weight and dispose of its contradictions and repugnances. *Potter v. Supply Co.*, 230 N.C. 1; *Thomas v. Motor Lines*, 230 N.C. 122, and cases cited; *Gladden v. Setzer*, 230 N.C. 269, and cases cited.

It is familiar law that on demurrer to the evidence and motion to nonsuit, the evidence must be taken in the light most favorable to the plaintiff. *Wingler v. Miller*, 223 N.C. 15, 25 S.E. 2d 160; *Ross v. Atlantic Greyhound Corp.*, 223 N.C. 239, 25 S.E. 2d 852; *Lindsey v. Speight*, 224 N.C. 453, 31 S.E. 2d 371; *Atkins v. White Transportation Co.*, 224 N.C. 688, 32 S.E. 2d 209; *Buckner v. Wheeldon*, 225 N.C. 62, 33 S.E. 2d 480. See cumulative citations under G.S. 1-183.

The evidence cannot be said to be without reasonable inferences in support of the contention of the plaintiff that the defendant Brown was negligent, and that his negligence was the proximate cause of the injury and death of the intestate. Legitimate inferences from the evidence as a whole may be drawn tending to show that the defendant, after passing the milk truck, continued in the passing lane without returning to his own right-hand lane of traffic, which he might easily have done; that he persisted in following plaintiff's intestate, rider of the motorcycle, and blowing at him either continuously or continually, for approximately 500 feet before overtaking him at the point of collision; and that during said time he was constantly endeavoring to force Maddox out of his path by repeated warnings in order to pass him on the left, when his right lane of traffic was free from obstruction; that during this time, still traveling at the rate of 35 or 40 miles per hour, he brought his bus into a zone near the intersection of a paved highway in which there was an additional danger which duty required an ordinarily prudent man to observe; that very near this intersection he came in contact with the rider of the motorcycle who lost his life by impact with the bus. Physical markings upon the two vehicles support the view that when this occurred the motorcycle rider was still in advance of the bus and received the impact first to the rear of the motorcycle on the curving front of the bus; and the testimony of Mrs. Leggette, a passenger in the bus who looked through the windshield and saw Maddox in advance of the bus and testified he turned his

face toward the bus and looked immediately before the collision, goes to the same effect.

The body of Maddox appears from the evidence to have been found very near the center line of the highway. The conclusion may be drawn from this evidence that the defendant did not observe due care in an attempt to pass the rider of the motorcycle to his left; and that the injury and death of Maddox might have been avoided if he had observed that degree of care necessary in negotiating the intersection or that the tragedy might have been avoided if he had decreased his speed and passed him on the right.

2. There is no difference between the negligence of a plaintiff and the negligence of a defendant in so far as the rule of measurement is concerned; both are required to exercise the care which an ordinarily prudent man would observe under the circumstances. But in either event the bare existence of negligence signifies nothing unless it is proximately concerned in producing injury and death.

The earliest case in our Reports recognizing the power of the trial judge to take a case from the jury because of the contributory negligence of the plaintiff is *Neal v. R. R., infra.*

In *Wood v. Bartholomew,* 122 N.C. 177, 29 S.E. 959, (Spring Term, 1898), *Furches, J.,* speaking then for the Court on this subject, that is contributory negligence, said: "The burden of the issue of contributory negligence is on the defendants. It is an affirmative issue and cannot be found by the Court. It must be determined by the jury. *White v. R. R.,* 121 N.C. 484, 27 S.E. 1002; *State v. Shule,* 32 N.C. 153." But in *Neal v. R. R.,* 126 N.C. 634, 36 S.E. 117, (Spring Term, 1900), the opinion of the Court, written by the same *Justice,* established an entirely novel and contradictory doctrine: stating of defendant's plea of contributory negligence of the plaintiff, "When the defendant demurred to the plaintiff's evidence, and but one construction can reasonably be drawn from it, that is, it could not reasonably mean different things, we cannot see why it did not become a question of law, as much so as if the facts stated in the evidence had been agreed to as the facts in the case. And if this is so, it certainly became a question of law for the court." *In arguendo* stating that "the function of the jury is to find the facts. This must mean disputed facts and must be exercised where there is evidence proving or tending to prove the facts disputed." (p. 406)

Douglas, J., and *Clark, J.,* filed able dissenting opinions.

In one respect these questions are water in the tailrace; under this decision, which still prevails, it is within the power of the courts to determine that the affirmative plea of the defendant that plaintiff was contributorily negligent is so established by plaintiff's own evidence that it may be found by the court as a matter of law without submission to

the jury. But there comes from the history of its adoption a persistent warning to the Court to observe the narrow terms of our charter and the imminent danger of exceeding it; and that in no instance should the case go from the box to the bench unless no reasonable mind could draw any other inference than that the plaintiff was contributorily negligent upon his own evidence.

The condition is thus described in *Manheim v. Blue Bird Taxi Corp.*, 214 N.C. 689, 691, 200 S.E. 682, as: "A judgment of involuntary nonsuit on the ground of contributory negligence of the plaintiff cannot be rendered unless the evidence is so clear on that issue that reasonable minds could draw no other conclusion."

In *Conley v. Pearce-Young-Angel Co.*, 224 N.C. 211, 29 S.E. 2d 740, *Mr. Justice Barnhill*, writing the opinion of the Court, said: "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." *Nichols v. Goldston, Hix v. Goldston*, 228 N.C. 514, 46 S.E. 2d 320.

We are simply "touching the base," by way of remembering the restricting condition upon which we exercise the extraordinary power conferred upon us in this way.

In the instant case, as in many others before us, the inter-action of conduct between the plaintiff's intestate and the driver of the bus at critical moments has been so interwoven with many factors entering into the situation at the Berryhill intersection that we cannot say as a matter of law that plaintiff's intestate was guilty of contributory negligence. While it is not necessary for us to indicate any opinion as to that negligence, it is of course much easier to be convinced that the plaintiff's intestate was contributorily negligent than it is to arrive at the conclusion that he was so as a matter of law.

The case was properly left to the jury on both issues and they have spoken. We find

No error.

IONIC LODGE #72 F. & A. A. M. v. IONIC LODGE FREE ANCIENT & ACCEPTED MASONS #72 COMPANY, W. S. SCALES, AND GEORGE W. HARRIS.

(Filed 9 June, 1950.)

1. Associations § 5—

Since an unincorporated fraternal association is given power to acquire and hold property in its common name, G.S. 39-24, G.S. 39-25, and may be served with summons and sued in the manner provided by G.S. 1-97 (6), it *is held* that such association has capacity to sue in its common name.

2. Corporations § 45—

A corporation which has had its charter suspended by the Secretary of State on certificate of the Commissioner of Revenue that it had not reported or paid its tax, Sec. 801, Revenue Act of 1937, is deprived of the power of engaging in its ordinary business, but is not deprived of the capacity to be sued and defend suits against it.

3. Pleadings § 22b—

While motion to amend the complaint is addressed to the discretion of the trial court, when the court erroneously dismisses the action on the ground that plaintiff has no capacity to sue, and thereupon denies plaintiff's motion to be allowed to amend, the order denying the motion to amend will be stricken out on appeal without prejudice to plaintiff to renew its motion in order that it may be properly considered in the discretionary power of the court.

4. Judgments §§ 10, 30—

Where the clerk enters a default judgment declaring plaintiff to be the owner of an undivided interest in lands in accordance with the facts alleged in the complaint, but does not appoint a receiver or make provision for an accounting as prayed for, the judgment is conclusive as to title, but the suit remains pending in the Superior Court for such further relief to which plaintiff may be entitled consequent upon the adjudication of title. G.S. 1-211.

PLAINTIFF'S appeal from *Clement, J.*, April, 1950, FORSYTH Superior Court.

The plaintiff, an unincorporated Masonic fraternal order, society or association, brought this action *sub nomine* "Ionic Lodge No. 72, F. & A. A. M.," against "Ionic Lodge #72 Free Ancient & Accepted Masons Company," alleged to be a corporation, and the individual defendants W. S. Scales and Geo. W. Harris. Summons against the Corporate defendant was returned: "Company process officer or its agent cannot be found in Forsyth County," and on March 12, 1949, service of summons and complaint was made on Secretary of State Thad Eure. The individual defendants were duly served.

The complaint alleges that the defendant corporation was organized to serve as trustee for the plaintiff lodge to hold the title to one-fourth undivided interest in certain property described in the complaint for the use and benefit of plaintiff, and to that end the defendant was created a non-stock corporation. That in pursuance of this purpose the defendant company acquired a record title to the described property, and at the request of plaintiff lodge issued non-negotiable certificates of stock in said company to various members of plaintiff lodge, it being understood and agreed that they were to be held for its benefit, and that they should be surrendered, and that the member-holders did not thereby acquire any interest in the property so held for its benefit, or any claim of ownership against the lodge or the corporation, the certificates to be and remain merely *indicia* of membership in the lodge, "it being the intent of the lodge, the defendant company, and all members in both organizations that the beneficial ownership of the property described should at all times be held for the use of the plaintiff lodge."

It is alleged that the charter of the defendant corporation was thereafter suspended, (the further record and pleadings disclose that this action was taken by the Secretary of State under authority of Section 801 of the Revenue Act of 1937); and it is contended that thereupon title did "reinvest in plaintiff."

It is further alleged that defendants Scales and Harris knew the above facts and were bound by them, but that they have connived to obtain title to the property, and have collected rents from rental of the premises for a long series of years, amounting to upwards of $20,000, one-fourth of which, it is alleged, should be accounted for to plaintiff as owner of one-fourth interest in the building. The building itself, it is alleged, is worth approximately $25,000.

The plaintiff prays for recovery of $5,000 rents of the building; restraint of individual defendants from interfering with the title; that they be required to account; that a receiver be appointed, etc.

Summons and complaint having been served in the manner stated, and complaint having been duly filed, and the defendants not having answered, the plaintiff applied to the Clerk of the Superior Court for judgment by default, G.S. 1-211.

The motion was allowed, and, on April 19, 1949, the Clerk rendered and entered judgment, which after formal recitals of notice and failure to answer, is as follows:

> "Now, therefore, it is ordered, adjudged and decreed that the defendant company was and has been, up to the signing of this judgment the holder of a one-fourth undivided interest for the benefit and use of the plaintiff, in property described as follows:

"'In the city of Winston-Salem, N. C. Beginning at the corner of Lot #12 and running southwardly on the west side of Chestnut Street 44 feet and 3 inches to 7th Street; thence westwardly with 7th Street 100 feet to an alley; thence northwardly with said alley 39 feet and 11 inches to the line of Lot #12; thence eastwardly with the line of Lot #12, 100 feet more or less to the beginning, said lot being known as Lot #13 on the Show Ground Platt, recorded in the Register's Office, Forsyth County, N. C., in Book of Deeds 42, page 274, being the same property as conveyed to the Baltimore Building & Loan Association of Baltimore City by J. S. Grogan, Trustee, by deed dated 20 day of March, 1894, and recorded in Office of Register of Deeds for Forsyth County, N. C., in Book of Deeds 47, page 177.'

"said description being set forth in paragraph three of the complaint in this cause.

"And it is further ordered and adjudged that the full and complete beneficial ownership of said tract or such portion as was held of record by the defendant company be vested in the plaintiff, free from all claims of the defendant company, its heirs, successors and/or assigns."

On the following April 28, 1949, Geo. W. Harris filed with the Clerk an answer to the original complaint in which he denied the principal allegations thereof.

Summons was issued to Robert L. Scales, Executor of W. S. Scales, (who died after service of notice and while the action was pending). The executor answering, denied the substantial portion of the complaint; and set up for a "further defense and plea in bar" the plea that the defendant corporation or company was "incorporated under the laws of the State of North Carolina, but its franchise and power to function as a legal entity were forfeited and terminated on the 1st day of May, 1939, and that it has now no legal existence;" and asks that the case be dismissed as to him. This answer was filed August 2, 1949.

On November 17, 1949, the defendants Harris and Scales, Exr., filed a written motion seeking to set aside the judgment on the ground that on May 1, 1939, the "corporate functions" of the defendant "Ionic Lodge, F. & A. A. Masonic #72 Company" had been suspended by order of the Secretary of State, and allege that, as a legal consequence they are, as stockholders vested with title to the one-fourth undivided interest in the property described and are entitled to the rents therefrom.

This motion was denied by the Clerk of the Court on the 15th day of March, 1950, and movents appealed to the Superior Court.

On April 19, 1950, plaintiff filed a motion to amend the complaint by withdrawing paragraph one and substituting therefor an allegation that J. G. Giles, Willie McCarnel, and Frank Dixon are the duly elected trustees of plaintiff, and revising "the style of the cause" to read correspondingly.

On April 20, 1950, at the hearing the defendants supplemented their formal motion to dismiss the action by demurrer *ore tenus* to the complaint on the ground "that it appears upon the face thereof that the plaintiff has no legal capacity to sue."

The various appeals, demurrer and motions were heard before *Clement, J.*, who, setting up in the premises thereto the matters to which the judgment applies, rendered judgment as follows:

> "Now, therefore, the motion of plaintiff to amend the complaint is denied, and the demurrer to the complaint by the defendants Robert L. Scales, executor of the will of W. S. Scales, and George W. Harris, and their motion to dismiss the action are hereby allowed, and it is accordingly ordered, adjudged and decreed that the judgment signed and entered by the Clerk herein on the 19th day of April, 1949, is void and of no legal effect and is hereby set aside, and the Clerk is directed and ordered to mark void or strike the judgment from the record and to certify this judgment and order to the Register of Deeds of Forsyth County, who shall duly record it and make a marginal reference thereto on the record of the Clerk's judgment, which the plaintiff procured to be recorded in the Register's office in Book 537 of Deeds of Trust, at page 64."

To this judgment the plaintiff excepted and appealed, assigning as errors: (1) Dismissing plaintiff's action; (2) declaring void plaintiff's judgment by default before the Clerk; (3) denying plaintiff's motion to amend the complaint. Other assignments of error are formal.

Elledge & Browder and Eugene H. Phillips for plaintiff, appellant.
Ingle, Rucker & Ingle for defendants, appellees.

SEAWELL, J. The grounds on which Judge Clement acted in reversing the Clerk of the Superior Court were sufficiently made clear in the premises to his judgment and those grounds were: (a) That the unincorporated fraternal society has no capacity to sue or be sued, and having no standing in a court of law and equity, the judgment rendered in its behalf was null and void; and (b) that the defendant corporation with the remarkable appellation, "Ionic Lodge Free Ancient & Accepted Masons

#72 Company," having had its charter suspended by the Secretary of State for nonpayment of revenue tax was thereby deprived of its power to "function," was, during the suspension, in no better position than a dissolved corporation,—barred from all activities, particularly the capacity to sue or defend in the courts.

Of these in order.

1. *Of the capacity of the plaintiff to sue in its common name, the demurrer ore tenus to the complaint and the motion to dismiss the action.* The appellant contends that the demurrer to the complaint and motion to dismiss based on the incapacity of the plaintiff to sue in the manner attempted came too late after a year of quiescence. We may dispose of the critical analyses and niceties of distinction which occupy many pages of the briefs by supposing the objections to have been timely made and considering them on their merits. *Ball-Thrash v. McCormick,* 162 N.C. 471, 78 S.E. 303; *Brewer v. Abernathy,* 159 N.C. 285, 74 S.E. 1025; *Tucker v. Eatough,* 186 N.C. 505, 120 S.E. 57. If the plaintiff had the legal capacity to sue with respect to its property and the incident property rights, both the motion and the demurrer grounded on the contrary theory are ineffective.

Following the strict rule of the common law our courts have uniformly held that unless given that capacity by some pertinent statute, an unincorporated association has not the capacity to sue. *Tucker v. Eatough, supra; Kerr v. Hicks,* 154 N.C. 266, 268, 70 S.E. 468.

Tucker v. Eatough cites *United Mine Workers of America v. Coronado Coal Co.,* 259 U.S. 344, 66 L. Ed. 965, and quotes:

> "Undoubtedly at common law an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member."

The appellants contend, and we think correctly so, that the plaintiff comes within the pale of recently enacted statutes vesting them with that capacity.

Chapter 133 of the Public Laws of 1939, incorporated in the General Statutes as Sec. 39-24 to Sec. 39-27, inclusive, relates to voluntary organizations and associations. G.S. 39-24 provides as follows:

> "Voluntary organizations and associations of individuals organized for charitable, fraternal, religious, or patriotic purposes, when organized for the purposes which are not prohibited by law, are hereby

authorized and empowered to acquire real estate and to hold the same in their common or corporate names."

Sec. 39-25 authorizes conveyance in the common name.

It is strongly persuasive that having been given the power to acquire, hold and convey property under its common name there must go with it the capacity to sue and be sued in respect to it.

In arguendo the capacity of the plaintiff to sue in *United Mine Workers v. Coronado Coal Co., supra,* was based largely on this principle; and the case of *Taff-Vale R. Co. v. Amalgamated Soc. of Railway Servants,* A. C. 426, 1 B. R. C. 832, quoted in the *Coronado Case,* was decided altogether on that principle. The *Coronado Case* quotes from the *Taff-Vale Case* as follows:

> *"Mr. Justice Farwell,* meeting the objection that the union was not a corporation and could not be sued as an artificial person, said: 'If the contention of the defendant society were well founded, the legislature has authorized the creation of numerous bodies of men capable of owning great wealth and of action by agents, with absolutely no responsibility for the wrongs that they may do to other persons by the use of that wealth and the employment of those agents.'
>
> "He therefore gave judgment against the union. This was affirmed by the House of Lords. The legislation in question in that case did not create trade-unions but simply recognized their existence and regulated them in certain ways, but neither conferred on them general power to sue, nor imposed liability to be sued."

Furthermore, in 1943 the General Assembly, by enacting Chapter 478, amended G.S. 1-97 by adding to it paragraph 6 as follows:

> "Any unincorporated association or organization, whether resident or nonresident, desiring to do business in this state by performing any of the acts for which it was formed, shall, before any such acts are performed, appoint an agent in this state upon whom all processes and precepts may be served, and certify to the clerk of the superior court of each county in which said association or organization desires to perform any of the acts for which it was organized the name and address of such process agent. If said unincorporated association or organization shall fail to appoint the process agent pursuant to this subsection, all precepts and processes may be served upon the secretary of state of North Carolina. Upon such service, the secretary of state shall forward a copy of the process or precept

> to the last known address of such unincorporated association or organization. Service upon the process agent appointed pursuant to this subsection or upon the secretary of state, if no process agent is appointed, shall be legal and binding on said association or organization, and any judgment recovered in any action commenced by service of process, as provided in this subsection, shall be valid and may be collected out of any real or personal property belonging to the association or organization."

It is contended by the appellees that this subsection still refers to "unincorporated fraternal beneficial organizations, fraternal benefit order, association and/or society issuing certificates or policies," etc., mentioned in Sec. 4. There is no internal reference to section 4 or sec. 6, and no similarity of content; and there is no reason why it should be so categorized and plenty of reason why it should not. Not only is G.S. 1-97 directed to the method of service covering a number of cases not connected with paragraph 4, but the provisions of paragraph 6 are as general with reference to "unincorporated associations" as could well be devised.

Subsection 4 provides for service on a beneficial association issuing certificates or policies of insurance "as is now or hereafter provided for service of process on corporations: Provided, this paragraph shall only apply in actions concerning such certificates and/or policies of insurance." The further provision for service on associations, as applied to those mentioned in paragraph 4, would be not only supererogatory but contradictory. We think the plaintiff comes within the pale of subsection 6.

The statute does not in direct language confer upon an association like the plaintiff the capacity to sue and be sued in its common name; but its intent and effect cannot be mistaken. In a similar situation in *Ex parte Hill,* 165 Ala. 365, 51 So. 786, the Supreme Court of Alabama observed:

> "To provide for the service of process implies the power to issue such process; and the power to issue or serve judicial process implies an action or suit pending or to be commenced by such process. The power to serve judicial process upon an individual, association, or corporation implies necessarily that such individual, corporation, or association is suable or subject to the process of the court for which such process issues."

And it can hardly be questioned that if the association might be sued in its common name by service upon the process agent or the secretary of state, it follows as a corollary conclusion that it has also the capacity to sue. We so hold.

It follows that the motion to dismiss plaintiff's action and the demurrer thereto should have been declined and overruled.

2. *Of the corporate defendant's capacity to be sued and to defend.* The picture of the corporation whose charter has been suspended by the Secretary of State under Section 801 of the Revenue Act of 1937, on certificate of the Commissioner of Revenue that it has not reported or paid its tax, as drawn by the appellees, is harsher than the statute contemplates. It is permitted to breathe a little and survive the period of suspension so that it may have power to conduct its ordinary business activities if the Commissioner subsequently reports to the Secretary of State, and the suspension is automatically ended. The law has not given to either of these State agencies the power to dissolve or extinguish the corporation or write upon their files a *hic jacet.* There are many ways in which the corporation may be dissolved. Amongst them: voluntary surrender of its charter, expiration of the period of existence named in the charter, by court action for adequate cause, and others; but not under the statute cited. The statutes usually provide that a corporation dissolved in this manner will have time to wind up its affairs, and provide for the manner in which this may be done.

For reasons *a fortiori* and by a fair interpretation of the statute, while depriving the corporation of the power to engage in the ordinary business for which it has been chartered, it has not taken away from it the incidental powers necessary to its survival; the power to protect its property in a court of law, either by assertion or defense of right. These are convenient, of course, for the performance of the general activities which the statute bars, but they are exigent when no other means is provided to protect the property and property rights belonging to the corporation and to its stockholders to whom the corporation stands in trust relation.

Who shall defend it? Is the suspended corporation an acceptable party in the forum where its rights are finally determined,—*persona standi in judicio?* It would be an amazing paradox indeed if the fact that the corporation failed to pay its debt to the state should operate to absolve it from its obligations to others.

This is not an open question here. In *Trust Co. v. School for Boys,* 229 N.C. 738, 743, 51 S.E. 2d 183, the question was directly raised and the decision was contrary to the present contention of the appellees. We see no necessity of extending the discussion beyond what was said there.

3. *Of the plaintiff's motion to amend the complaint.* There remains for consideration the denial of plaintiff's motion to amend the complaint. Ordinarily the motion might have been within the discretion of the court—the basis on which His Honor purported to deny it. But it is evident that he ignored the conditions under which that discretion might

have been exercised, in attempting to dismiss the action; in that view the phrase "in the discretion of the court" merely presents a term and not a reality. The court cannot achieve double security for its order in this way.

The suit is still pending. The judgment in controversy went only as far as the clerk conceived his jurisdiction to extend; he did not appoint a receiver; he did not make provision for accounting; he did not attempt to exercise equitable powers of any sort. These things were left to the Superior Court where further proceedings are within its orderly jurisdiction. The judgment is by default final as to the title of the property; and the rights of the plaintiff consequent upon this adjudication are still open to pursuit.

Since the statute G.S. 39-24 provides that fraternal organizations may acquire and hold property "in their common or corporate names" and to convey it in the "common name," G.S. 39-25, as we have said, we see no reason why the plaintiff may not sue or defend *in eodem nominee;* and we understand this to be the intent of the law, G.S. 1-97 (6). At any rate we are of the opinion that the order of His Honor was improvidently made and it is therefore stricken out without prejudice to the plaintiff to renew its motion in the court below.

For these reasons the judgment under review is reversed and the cause is remanded to the Superior Court of Forsyth County for judgment in accordance with this opinion, and such further proceedings as may be proper.

Reversed and remanded.

LIZZIE MASON WHITE v. B. V. DISHER, C. C. DISHER AND A. H. DISHER, D/B/A COMMERCIAL MOTORS OF WINSTON-SALEM, AND COMMERCIAL FINANCE COMPANY.

(Filed 9 June, 1950.)

1. Trial § 22a—

The evidence must be considered in the light most favorable to plaintiff on motion to nonsuit.

2. Usury § 1—

The maximum legal rate of interest in this State is 6% per annum, G.S. 24-1.

3. Usury § 9e—

Evidence in this case *is held* sufficient to be submitted to the jury on the question of whether defendant finance company loaned plaintiff a cer-

tain sum secured by chattel mortgage on an automobile and knowingly charged and received interest on said sum in excess of the legal rate, and its motion to nonsuit in plaintiff's action to recover double the amount of interest paid, G.S. 24-2, was properly denied.

4. Principal and Agent § 7d—

Plaintiff introduced in evidence account books and receipts for payments on a loan from the corporate defendant which she testified was negotiated by the individual defendant as its agent. The corporate defendant admitted it was in the business of lending money and that the individual defendant is its employee. *Held:* The evidence is sufficient to show authority of the individual defendant to make loans for the finance company and to make statements for it in the scope of his employment by ratification at least.

5. Appeal and Error § 39g—

Where, in a suit to recover double the amount of usurious interest paid, the jury answers the issue as to the amount plaintiff is entitled to recover in a sum less than double the amount of interest it found was paid on the loan, the verdict is not prejudicial to defendant and it may not complain thereof.

6. Appeal and Error § 39e—

The admission of evidence over objection cannot be held prejudicial when the same evidence is thereafter admitted without objection.

APPEAL by defendant Commercial Finance Company from *Clement, J.*, at January Term, 1950, of FORSYTH.

Civil action to recover for penalty for usurious interest. G.S. 24-2.

The record shows that it is admitted in the pleadings that plaintiff is a resident of Forsyth County, North Carolina; that defendant Commercial Finance Company is a corporation organized and existing under the laws of North Carolina, with its principal office in Forsyth County, and defendant C. C. Disher is its president; that the Commercial Finance Company is engaged in the business of lending money, and that B. V. Disher, C. C. Disher and A. H. Disher are employees of said company; that B. V. Disher, C. C. Disher and A. H. Disher are residents of Forsyth County, and are engaged in the business of selling automobiles under the trade name of Commercial Motors of Winston-Salem, and that said defendants have their place of business in the same building and in the same office as the Commercial Finance Company; and that on 16 August, 1947, B. V. Disher, C. C. Disher and A. H. Disher, doing business as Commercial Motors of Winston-Salem, owned and had title to a 1942 Cadillac 4-door sedan of given motor and serial numbers.

Plaintiff further alleged in her complaint, filed in the action, in pertinent part, substantially these facts: That on or about 16 August, 1947,

plaintiff purchased a 1942 Cadillac, fordor sedan, as aforesaid, from defendants at the place of business of Commercial Motors and Commercial Finance Company; that the purchase price for said Cadillac as fixed by the defendants was $2,500, to be paid by plaintiff transferring and conveying title to her 1941 Oldsmobile to defendants for $1,000, and the balance of $1,500 "to be financed by defendants and paid by plaintiff within 15 months from date of purchase, in equal monthly installments, with interest thereon"; that on or about said date, immediately after the terms and conditions of the sale were agreed upon, and in the same place of business, and at the request of defendants A. H. Disher and B. V. Disher, plaintiff signed an application for a loan for $1,500 for fifteen months duration, on the loan application form of Commercial Finance Company; and also at the request of said defendants, plaintiff signed another printed form which was not filled in as to amounts, after defendants assured her that the $1,500 balance of purchase price, together with the interest thereon, would be properly inserted therein by defendants, and an installment account book for the loan would be sent to her as soon as it could be properly prepared by defendants; that thereafter on or about 1 September, 1947, plaintiff received an account booklet from defendants, in which it was stated that the amount of $1,973.25 was owed by plaintiff to defendants; that immediately thereafter, upon inquiry by her, defendants again assured plaintiff that the balance of purchase price charged for the Cadillac was $1500, and told her that $473.25 were defendants' charges for the loan and use of, and forbearance on, the said $1500 for the period of fifteen months; and that thereafter on 16 September, 1947, plaintiff paid defendants $131.55 on said loan and account, and a like amount each month thereafter except February and December 1948, to and including January 1949; and defendants have charged and received from plaintiff a total amount of $1977.53 for the said loan of $1500 for a period of sixteen months; that defendants C. C. Disher, B. V. Disher and A. H. Disher, doing business as Commercial Motors and the Commercial Finance Company, through its agents and employees, the individual defendants aforesaid, did intentionally, knowingly and unlawfully charge, take and receive from plaintiff the sum of $477.53 as interest on a loan of $1500 for a period of 16 months,—they well knowing and intending that said interest charge on said loan of $1500 was far in excess of the legal rate allowed by law, G.S. 24-1; and that by reason thereof defendants and each of them have forfeited all right to any interest on the loan, and have become jointly and severally indebted to plaintiff in an amount double the total interest charged and collected, to wit, $955.06. And upon these allegations plaintiff prays judgment against defendants, jointly and severally.

Defendants, B. V. Disher, C. C. Disher and A. H. Disher, answering, denied in material aspects the allegations of the complaint, and for further defense aver that the price of the Cadillac purchased by plaintiff was $2973.25, on which a credit of $1000 was allowed for plaintiff's Oldsmobile, leaving a balance of $1973.25, payable in fifteen monthly installments of $131.55 each.

And defendant Commercial Finance Company, in its answer, denied in material aspects the allegations of the complaint, and for further defense avers that it is a holder in due course of a note executed by plaintiff to Commercial Motors in principal amount of $1973.25, secured by a purchase money chattel mortgage given by plaintiff at the time the Cadillac automobile was purchased; and that no part of the payments made by plaintiff to it constituted interest on any loan for no loan had been granted to plaintiff.

Upon the trial in Superior Court, plaintiff offered evidence tending to support the allegations of her complaint. Robert White, husband of plaintiff, testified in pertinent part: "I know A. H. 'Mike' Disher, one of the defendants. I talked with him in August of 1947 concerning the purchase of a 1942 Cadillac. He brought the car by my home on Saturday, the 16th . . . I asked him what he wanted for this one. He said $2500. I says, 'I ain't got that kind of money.' He says, 'Well, we will finance the rest. We will make a loan or finance . . . make a loan for the rest of the money.' He would take care of the rest of it for me. The rest was $1500 . . . He was going to allow me $1000 for my Oldsmobile . . . After we talked . . . I . . . talked to my wife and we agreed to purchase the car. I told her to go and sign the papers . . . My wife later came back with . . . the same Cadillac that Mike Disher showed me . . ."

Plaintiff, as a witness in her own behalf, testified in pertinent part: ". . . I know the defendants C. C. Disher and A. H. Disher. I also know the defendant B. V. Disher . . . I purchased a Cadillac from one of these defendants in August 1947 . . . My dealings . . . were with B. V. Disher. On August 16th I went to B. V. Disher's office. I gave him the title to our 1941 Oldsmobile automobile. The title was in my name . . . He said to me that 'I am lending Robert $1500 of a loan on a Cadillac car,' said 'The Cadillac cost $2500 and I am allowing him $1000 for his Oldsmobile' . . . He said the payments on the car was . . . on the loan was $1500, and the payments was $131.55 a month. I said, 'Oh, no . . . that is too much a month.' So he says, 'I'm giving you 15 months to pay' . . . I called Robert, and I told him the payments was $131.55 a month, and Robert told me he thought we could make it, and I told him, and he put that on this paper, and after I told him that, he handed me the paper and says 'Sign here, Lizzie.' I signed this paper

. . . where he asked me, and . . . he asked me to sign my name on this blank paper . . . and after I signed . . . he handed it to me to read. When I looked . . . I saw on this paper . . . the questions and answers where I had answered and on this paper it said $2500 for a Cadillac sedan . . . No paper that I signed had anything typed on it. When I went to make the first payment on September 16th I gave B. V. Disher $131.55 in the window. He gave me a receipt and this book . . . I . . . looked at this book and saw the balance was $1841.70, after having paid $131.55." "Q. That is, the balance after you had paid $131.55?" A. "Yes, sir, and I said that 'You told me the loan was $1,500 . . . It is not supposed to be $1841.70.' He told me that was for the use of their money for 15 months." (Objection) . . . Later on and without objection, plaintiff continued: "I noticed the balance at the top of the booklet . . . It was $1973.25. I asked him what that was for. He told me that was for using their money for 15 months. He again told me at that time that the balance of the purchase price for the automobile was $1500. This is the booklet that they gave me down there when I made my first payment on the loan."

Plaintiff here introduced as plaintiff's Exhibit 1 this booklet entitled "Commercial Finance Company, Account No. 2136—Lizzie Mason White."

Then plaintiff continued with her testimony, in part, as follows: ". . . I paid them $1891.70 in all. I went back to Commercial Finance Company's office in January 1949. I told the same Mr. Disher that I had come to make the last payment on the car, but the car was in the shop for repairs and asked him would he hold the last payment a little longer until I got the car out of the shop. He said he would . . . and I asked him to lend me $100 to get the car out of the shop, and he said he would. He told me to come back on Monday . . . When I went back I talked with Mike, and Mike wrote a check of $100 and gave it to me . . . When I went back to make the last payment, I carried the old book that shows $1973.25 at the top, which at that time had a balance at the bottom of $135.83. I gave this book and $60 to the cashier, who told me that would not be credited to the old book but that she would make a new book . . . She gave me this book and a receipt."

Plaintiff here introduced in evidence as plaintiff's Exhibit 2 the booklet entitled "Commercial Finance Company, Account No. 3655, Lizzie Mason White," which showed a payment of $60 on 9 February.

Plaintiff further testified: "The cashier told me the $60 would not be paid on the old note because the balance of $135.83 had been transferred along with the $100."

Plaintiff's Exhibit 1 bears these notations: "The amount to be financed $1973.25—Payment Schedule No. of months: 15 Months. Amt. Monthly: 131.55. First pay. due Sept. 16-47." Then there follows list of payments under headings "Date of payment - - Amount - - Balance due - - Rec. By - - ." The first item under these headings respectively is "9-16— 131.55 - - 1841.70 - - B.V.D."

There are twelve others for 131.55,—six of which under heading "Rec. By" these letters "BVD." And the last item bears these notations: "11-22 - - 127.27 - - 135.83 - - S. B."

Plaintiff also introduced in evidence a number of receipts from Commercial Finance Company totalling $1897.42, sample of which is the one relating to payment under "Date Sept. 16-47" on "Account No. 2136" "131.55," bearing as caption the word "Receipt," under which on successive lines are the words "Commercial Finance Co." "Winston-Salem, N. C."

At the close of plaintiff's evidence, the defendants and each of them moved for judgment as of nonsuit. The motion was allowed as to B. V. Disher, C. C. Disher and A. H. Disher, d/b/a Commercial Motors of Winston-Salem, N. C., but was denied as to defendant Commercial Finance Company,—to which it excepted.

Thereupon Commercial Finance Company, having offered no evidence, rested its case and renewed its motion for judgment as of nonsuit. The motion was denied, and it excepted.

The case was submitted to the jury on these issues, which the jury answered as shown:

"1. Was a loan of $1,500.00 made to the plaintiff by the defendant Commercial Finance Company, as alleged in the complaint?

"Answer: Yes.

"2. If so, did the defendant knowingly take and receive from the plaintiff on said loan a greater rate of interest than 6 per cent per annum?

"Answer: Yes.

"3. If so, what amount of interest was paid by the plaintiff on said loan?

"Answer: $391.70.

"4. What sum, if any, is the plaintiff entitled to recover of the defendant?

"Answer: $473.25."

And from judgment on the verdict defendant Commercial Finance Company appeals to Supreme Court, and assigns error.

William S. Mitchell for plaintiff, appellee.

Eugene H. Phillips for defendant, appellant.

WINBORNE, J. Is there error in the ruling of the court in denying the motion of the appealing defendant, Commercial Finance Company, for judgment as of nonsuit at the close of all the evidence? This is the main question presented on the appeal, and the evidence shown in the record, in the light of applicable principles of law, directs a negative answer. The evidence of plaintiff stands unchallenged, save and except by pleading of defendant. And taking the evidence in the light most favorable to plaintiff, as must be done in considering a motion for judgment as of nonsuit, it appears that it is sufficient to take the case to the jury, and to support the verdict rendered by the jury.

In this State it is provided by statute, G.S. 24-1, that "the legal rate of interest shall be six per cent per annum for such time as interest may accrue and no more."

And it is further provided in G.S. 24-2 that "the taking, receiving, reserving or charging a greater rate of interest than six per cent per annum, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or his legal representative or corporation by whom it has been paid, may recover back twice the amount of interest paid in an action in the nature of an action for debt . . ."

Applying these statutes to the present case, the evidence of plaintiff is susceptible of a finding by the jury that the transaction, in so far as the Commercial Finance Company is concerned, was a $1500 loan made by it to plaintiff. The jury has found that it was a loan. And the evidence is sufficient to support a finding by the jury that defendant Commercial Finance Company knowingly took and received from plaintiff on the loan a greater rate of interest than six per cent per annum. And the jury has so found. Moreover, the evidence is sufficient to support the finding by the jury as to the "amount of interest paid by plaintiff on said loan."

It is contended, however, that there is no evidence that B. V. Disher had authority (1) to make loans for the defendant Commercial Finance Company, or (2) to make statements for the company in the scope of his employment.

In this connection, defendant, Commercial Finance Company, admits that it is engaged in the business of lending money and that B. V. Disher is its employee. Taking this in connection with the documentary evidence, the two account books and the receipts for payments made by plaintiff to this defendant, the whole is sufficient to show at least ratification of the acts of B. V. Disher in the transaction here involved.

McNeely v. Walters, 211 N.C. 112, 189 S.E. 114; *Jones v. Bank,* 214 N.C. 794, 1 S.E. 2d 135.

Furthermore, the fact that the jury, in answering the issue as to what amount, if any, is plaintiff entitled to recover of the defendant, fixed the amount at less than twice the amount of interest found to have been paid by plaintiff on the loan, is not prejudicial to defendant, and in respect to it, defendant has no cause for complaint.

There are other exceptions, to only one of which is it deemed necessary to give express consideration.

It is contended that the court erred in permitting plaintiff to testify that he said that the sum here in controversy "was for the use of their money for 15 months." As to this contention, if it be conceded that evidence of his authority be lacking at the time, it is seen that plaintiff later testified without objection to the same statement of B. V. Disher. Hence the benefit of the prior objection is lost.

"It is thoroughly established in this State that if incompetent evidence be admitted over objection, but the same evidence has theretofore or thereafter been given in other parts of the examination without objection, the benefit of the exception is ordinarily lost," *Brogden, J.,* in *Shelton v. R. R.,* 193 N.C. 670, 135 S.E. 772, citing cases. See also more recent cases to same effect: *S. v. Hudson,* 218 N.C. 219, 10 S.E. 2d 730; *S. v. Oxendine,* 224 N.C. 825, 32 S.E. 2d 648; *S. v. Godwin,* 224 N.C. 846, 32 S.E. 2d 609; *S. v. Anderson,* 228 N.C. 720, 47 S.E. 2d 1; *S. v. Strickland,* 229 N.C. 201, 49 S.E. 2d 469; *Fanelty v. Jewelers,* 230 N.C. 694, 55 S.E. 2d 493.

All other assignments of error have been duly considered, and are found to be without merit.

Hence, in the judgment below, we find

No error.

M. B. BAME v. PALMER STONE WORKS, INC.

(Filed 9 June, 1950.)

1. Master and Servant § 14a—

Where an employer who regularly employs more than five employees in his business elects not to operate under the Workmen's Compensation Act, an injured employee may maintain an action against him at common law, in which action contributory negligence, negligence of a fellow employee, and assumption of risks are not available as defenses. G.S. 97-3, G.S. 97-4, G.S. 97-14.

2. Same—

An employer who has elected not to operate under the provisions of the Workmen's Compensation Act may be held liable by the employee in an action at common law for an occupational disease when such disease is contracted as the result of negligence of the employer in failing to exercise ordinary care to provide a reasonably safe place in which to work, which proximately causes such occupational disease. Evidence in this case of such negligence and proximate cause *held* sufficient to take the case to the jury.

3. Negligence § 20—

An instruction that it is important for the jury to understand what is meant by negligence as "implied" in cases of the character in suit, *held* reversible error.

4. Appeal and Error § 22—

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

5. Master and Servant § 14a—

The doctrine of *res ipsa loquitur* does not apply to the contraction of silicosis by an employee of a stone company.

6. Limitation of Actions § 19—

Where the three year statute of limitations is pleaded in an action at common law to recover for silicosis contracted by plaintiff as the result of alleged negligence of defendant in failing to use reasonable care to provide a reasonably safe place to work, G.S. 1-52 (5), an instruction which fails to limit recovery to those injuries proximately resulting from negligent acts of defendant committed within three years next before the institution of the action, must be held for error.

APPEAL by defendant from *Gwyn, J.*, at October Term, 1949, of STANLY.

Civil action instituted 2 February, 1949, to recover damages for disease allegedly proximately caused by negligence of defendant.

Plaintiff alleges in his complaint, and defendant admits in its answer, that defendant, a North Carolina corporation, with principal place of business in the county of Stanly, is now and was at the times alleged, engaged in the business of cutting and preparing for market tombstones and monuments made of marble, granite and stone, and, though it had more than five employees regularly employed in its business, it did not operate under the provisions of the Workmen's Compensation Act of North Carolina,—having rejected the provisions thereof on 29 December, 1938.

Plaintiff further alleges in his complaint in summary these facts: That he, the plaintiff, has been employed by defendant from time to time for the past twenty years, as a stonecutter in its place of business; that the last employment was for a period of about eighteen months ending the second week in July 1948, when, as a result of his physical condition,

he was compelled to discontinue his work; and that he now has, and has had for some time, active silicosis of the second or third degree, which disease was contracted through inhalation of rock dust created while working with defendant and as the proximate result of its negligent failure to provide for him a safe place in which to work; that plaintiff and other employees of defendant were required to use in an enclosed building a rotary or grinding wheel to grind and cut granite and stone,—thereby creating a constant and heavy fog of granite and stone dust in which he was required to work and breathe forty hours each week; and that at all times when said work was being performed, there was a sufficient amount of said dust to impair and infect one's lungs with silicosis,—and in fact did so affect his lungs; and that he is now unable to perform any work or labor.

Plaintiff alleges, in his complaint, briefly stated, these acts of negligence proximately causing his diseased condition: (1) That defendant compelled the use of rotary or grinding wheels in cutting, shaping and polishing its granite and stone—an out-moded means not generally used, because they create such enormous amount of rock dust as to make their use extremely hazardous to persons working in an enclosed building in which same operated,—all of which defendant knew, or by the exercise of ordinary care, should have known; (2) that defendant, having knowledge of the condition created by the use of rotary or grinding wheels, failed to provide and keep in good operating condition, an adequate system to eliminate the dust, thereby constituting its workshop an unsafe and hazardous place in which plaintiff in the discharge of his duties was required to work, when defendant knew, or by the exercise of ordinary care should have known that failure to so provide for the elimination and discharge of said dust particles would endanger, or be likely to endanger the health and person of plaintiff; (3) that defendant failed to provide mask or other device to be worn by plaintiff to cut down and minimize the inhalation of the dust, and (4) that defendant failed to provide a sprinkling and dampening system to "wet down" the said dust particles so as to prevent inhalation by plaintiff,—a common, accepted and customary practice in such industries as that of defendant.

Plaintiff further alleges that the generally accepted method of cutting granite and stone is with pneumatic chisels and hammers.

Defendant, answering, admits that plaintiff, from time to time over a period of several years, has been employed by it,—the employment ending on or about the second week in July 1948; but denies in material aspect other allegations of the complaint. And by way of further answer and defense, defendant avers: That plaintiff's cause of action, if any he has, accrued more than three years prior to 2 February, 1949, the date on which summons was issued in this action, and pleads the three-year statute

of limitation, G.S. 1-52 (5), in bar of any recovery by plaintiff in this action.

Upon the trial in Superior Court, plaintiff offered evidence tending to support the allegations of his complaint, and defendant offered evidence tending to support the averments of its answer.

Particularly plaintiff as a witness for himself, testified in part: "I . . . have lived in Albemarle 21 years. Before I went to work for the Palmer Stone Works the last time my physical condition was good. Had no pain or sickness about the chest or lungs . . . I stopped working for the defendant on account of silicosis . . . I am disabled. This silicosis causes me to have shortness of breath, hurting in the chest . . . back and stomach . . ". And on cross-examination plaintiff continued, in part: "I first began working in a stone cutting plant about three years before I came to Albemarle. That was in Durham, N. C. . . . I worked there three years . . . When I came to Albemarle, my first work in any stone cutting industry was with Palmer Stone Works . . . That period of employment, beginning in 1928 or 1929, lasted about a year, or maybe less. When I left the Palmer Stone Works the first time, I worked in the stone industry several months at Stone Mountain, Georgia. Then came back to Palmer Stone Works. I worked for them several years that time . . . I worked in Charlotte . . . Have worked some in Mt. Airy and in two plants in Salisbury . . . At Palmer Stone Works, I worked from 1942 to some time in 1946; then went to Salisbury and worked about five months . . . The last 18 months period I worked for the defendant began in January 1947. I did stone cutting when I came back there . . . I first operated the grinding wheel in January 1947 . . . Defendant did not have any . . . when I worked there in 1944 and 1945 . . . When I came back in January 1947, four or five of them were in use, right on the job. They put them in use while I was in Salisbury . . . Some dust was created by the use of the pneumatic tools. From 1929 until January 1, 1947, with the exception of a period of three or four years when I was off, I cut stone with pneumatic tools and surfacing machine and bumper . . . all produce some dust. I breathed some of it; it gets up in your nose, in your throat, and you spit it out. I recall getting dust in my nose and throat by using tools in a stone cutting plant the first day I went into a plant . . . in 1929. I got dust in my nose and throat when I was working all those different places . . . Charlotte, Mt. Airy, Georgia, Salisbury and Albemarle . . . That was granite dust . . . I say I have silicosis now. That was caused by breathing stone dust into my nose and throat and lungs . . . The dust I got at Palmer Stone Works went into my nose and mouth and into my lungs. You can't get it as bad at these other places, because they tried to hold it down—wet the ground. They've got a good suction . . . There

weren't but three or four men working there . . . I had a card that I could work in 1941 . . . good for two years. The State Hygiene come out there in 1942 for examination, and he said 'You are all right, go ahead.' I . . . had a fluoroscope examination in 1944." And on redirect examination, plaintiff testified: "I couldn't tell that I had any ill effects from any stone dust until right about the time I quit Palmer Stone Works in the second week in July 1948."

And a medical expert, Dr. Otto J. Swisher, as witness for plaintiff, testified that he examined Mr. Bame on 29 August, 1949, and made an X-ray of him then; that he has silicosis in the second stage, moderately advanced; that with silicosis in that stage the lungs are comparatively filled with fibrous tissue, which impedes the getting of oxygen to the blood to supply the lungs with oxygen; that it leaves a man with less breathing space; makes him tired and weak with shortness of breath, and cough; that he does not have any appetite and is very susceptible to most any disease that might involve the lungs; that he becomes easily fatigued; that plaintiff is permanently disabled; that in his opinion the silicosis with which Mr. Bame is suffering will grow progressively worse.

The doctor, on further examination, testified that in his opinion, from his examination of the plaintiff on 29 August, 1949, he had had tuberculosis in the previous years, which was shown by a healed calcified lesion, indicating that once upon a time he had had chronic . . . healed tuberculosis, in the right chest wall; that a generally tired, fatigued condition is a possible result of tuberculosis; that a hurting in the chest is an effect of tuberculosis in very rare cases; that free silica, such as comes from granite, does not cause tuberculosis; that from his examination of plaintiff, there was no way to tell when he contracted silicosis; and that from his examination of plaintiff he found some evidence of long-standing tuberculosis.

The case was submitted to the jury on three issues, first, as to the plea of the statute of limitations, second, as to whether plaintiff was injured and damaged by the negligence of defendant, as alleged in the complaint, and, third, as to what amount, if anything, plaintiff is entitled to recover of defendant. The jury answered the first issue in the negative, and the second in the affirmative, and assessed damages.

From judgment on the verdict, defendant appeals to Supreme Court and assigns error.

Morton & Williams for plaintiff, appellee.

Brown & Mauney, Helms & Mulliss, and James B. McMillan for defendant, appellant.

WINBORNE, J. Among the several assignments of error presented by appellant for consideration on this appeal, there is the one relating to the denial of its motions, aptly made, for judgment as of nonsuit. It is urged that the motion should have been allowed on the ground (1) that the employer is not liable to employee under the common law for diseases contracted during the course of employment; and (2) that plaintiff has failed to show that any negligence of defendant within the period of the statute of limitations was the proximate cause of his present complaints. In the light of appropriate principles of law applied to the evidence in the case, we are of opinion and hold that neither of these grounds is tenable.

In connection with the first contention, it is admitted that defendant, as employer, has rejected the provisions of the North Carolina Workmen's Compensation Act, Chapter 97 of General Statutes, and did not operate under it. G.S. 97-3 and G.S. 97-4. It does not appear that plaintiff, as employee, has elected not to operate under the act. Hence, plaintiff may not invoke the provisions of the said act, but is relegated to a common law action to recover damages for any injury he may have suffered in the course of his employment by defendant. And in such case the statute G.S. 97-14 provides that "An employer, who elects not to operate under this article, shall not in any suit at law instituted by an employee subject to this article to recover damages for personal injury or death by accident, be permitted to defend any such suit at law upon any or all of the following grounds: (a) That the employee was negligent. (b) That the injury was caused by the negligence of a fellow employee. (c) That the employee assumed the risk of injury."

Thus, ordinarily, there is involved in such an action only the issues of actionable negligence, and damages.

In the light of these provisions, we are of opinion that, where an occupational disease is contracted by an employee, in the course of his employment, as the result of negligence of the employer in failing to exercise ordinary care to provide a reasonably safe place in which to do his work, a common law action for damages may be maintained by the employee against the employer. The purpose of such action is the redress of a wrong.

And while the subject of occupational disease, as it is related to the North Carolina Workmen's Compensation Act has been the subject of decisions of this Court, for instance, *McNeely v. Asbestos Co.*, 206 N.C. 568, 174 S.E. 451, the question of liability of employer, at common law in such cases, is of first impression in this State, we find it has been the subject of decisions in other jurisdictions. The decisions are summarized in 35 American Jurisprudence 533, Master and Servant, Section 105, in this manner: "On the subject of the liability of an employer, at common

law, for an occupational disease contracted by an employee, there is considerable conflict of opinion. There are many statements, often pure dicta, to be found in decided cases that no action lies at common law for damages for an occupational disease, and this view has been crystallized by some decisions expressly denying any such common law liability. Such statements and decisions seem broad enough to exclude any recovery in an action at law for an occupational disease even where there has been some negligence on the part of the employer. The trend and weight of authority, however, recognizes the liability of an employer to an employee for an occupational disease incurred by the employee in the course of his employment where some negligence can be laid at the employer's door,—such as failure to provide a safe place in which to work . . . or where the employer has some superior knowledge of the danger to employees, to warn the employee of the danger he is incurring." For further analysis of the subject, see Anno. 105 A.L.R. 80.

As to the second contention, the evidence appears to be sufficient to take the case to the jury on the question of proximate cause.

However, certain of the assignments of error relating to exceptions to portions of the charge appear to be well taken.

First, Exception 9: To that portion of the charge in which the court gave instructions as to actionable negligence. In doing so, it appears that the court prefaced these instructions with this statement: "It is important for you to understand at the outset, gentlemen, what is meant by negligence as implied in cases of this character."

Appellant contends that the reasonable meaning of this portion of the charge is that on the facts which the jury had heard from the witnesses, an implication or presumption arose that the defendant was negligent. In this connection the word "implied," as defined by Webster, means "virtually involved or included; involved in substance; inferential; tacitly conceded." Hence, when the word "implied," as used by the court, is given this meaning, it is prejudicial to defendant. For no such concession is made, nor is negligence implied.

On the other hand, plaintiff, appellee, says that "When one considers the charge of the court in its entirety, it is convincingly obvious that the meaning of the word 'applied' was ascribed to the word 'implied.'" Probably the word "applied" may have been used. But, howbeit, we must accept the record as it comes to us. The record imports verity, and this Court is bound by it. See, among others, these recent opinions: *Ericson v. Ericson*, 226 N.C. 474, 38 S.E. 2d 517; *S. v. Gause*, 227 N.C. 26, 40 S.E. 2d 463; *S. v. Wolfe*, 227 N.C. 461, 42 S.E. 2d 515; *Yarn Co. v. Mauney*, 228 N.C. 99, 44 S.E. 2d 601; *Morgan v. Coach Co.*, 228 N.C. 280, 45 S.E. 2d 339; *S. v. Robinson*, 229 N.C. 647, 50 S.E.

2d 740; *S. v. Cockrell,* 230 N.C. 110, 52 S.E. 2d 7; *S. v. Chase,* 231 N.C. 589, 58 S.E. 2d 364.

Even so, plaintiff, appellee, contends that the doctrine of *res ipsa loquitur* is applicable in this case. This contention is not well founded.

Second: Exception 14 is directed to a portion of the charge relating to the first issue; Exceptions 15, 16 and 17, to a portion of the charge relating to the second issue; and Exception 18, to a portion of the charge relating to the third issue. Defendant's challenge to the correctness of these portions of the charge is predicated upon the contention that the case is one where plaintiff complains of continuing separate acts of negligence and continuing separate injuries from day to day while he was working, and that if he has a cause of action in this case it consists of a right to recover damages for such injuries proximately caused by negligence of defendant within the three years next before the action was commenced.

It is contended that the portions of the charge to which these exceptions relate fail to make clear this limitation upon the right of plaintiff to recover. It is pointed out particularly that in those portions relating to the issue of negligence and to the issue of damages no reference is made to the principle that the damages must be confined to such as proximately resulted from negligent acts of defendant committed within three years before the action was brought. In the light of the evidence in the case, it appears that these contentions have merit, and that the omissions referred to are prejudicial to defendant.

Other assignments of error are not considered.

For causes stated, there must be a

New trial.

WACHOVIA BANK & TRUST CO., EXECUTOR OF LAURA L. ALLEN, v. ANN IRENE ALLEN, ADA HUSK ALLEN, LAURA LOLINE ALLEN SAUNDERS, NETTIE ALLEN THOMAS VOGES AND HUSBAND, HENRY E. VOGES, LAURA THOMAS HALL AND SOSNIK & SOSNIK, INC.

(Filed 9 June, 1950.)

1. Wills § 33c—

Where a woman of 63 years of age, without children, is the owner of lands devised to her with provision that if she should die without issue testatrix' executor should sell the property and divide the proceeds among testatrix' heirs, it may be assumed for all practical purposes that devisee holds only a life estate in the premises.

2. Conversion § 8—

Where a will provides for the sale of land and the distribution of the proceeds of sale, the beneficiaries must ordinarily take in the character which the will impresses upon the property, but they may by unanimous consent, including remaindermen and other holders of future interest, elect to reconvert and take the property as land, in which case the executor's power of sale is extinguished.

3. Conversion § 8: Executors and Administrators § 12b—All persons having beneficial interest in proceeds of lands having elected to reconvert, such reconversion is effective and defeats executor's power to sell.

The land in suit was devised to testatrix' daughter with provision that if she should die without issue the lands should be sold and the proceeds divided among the other children of testatrix, the issue of deceased children to take the share of their parents. The devisee is now a woman 63 years old without children, and the other children of testatrix are *sui juris*. The devisee and the remaindermen executed a fifty year lease with the joinder of the children *sui juris* of a deceased child of testatrix. The executor and the guardian *ad litem* for any issue which may be born to any of the beneficial owners, represented to the court that execution of the lease was for the benefit of all interested parties. *Held:* Under the facts and circumstances, a court of equity has power to authorize the executor to execute the proposed lease and to direct that the executor should not sell the lands, but that upon the death of the devisee without issue title should vest in the other children of testatrix or their issue, since all persons having any interest in the property have elected to reconvert, and further the lease may be construed as a family agreement for the settlement of the estate.

APPEAL by plaintiff from *Clement, J.*, at March Term, 1950, of FORSYTH.

This is an action instituted for the purpose of ascertaining whether or not the Court would approve the execution of a long-term lease by the plaintiff, on behalf of the estate of Laura L. Allen, under the facts disclosed by the record.

Laura L. Allen died owning a tract of land fronting 85 feet on Spruce Street in the City of Winston-Salem near the intersection of Spruce Street and Fourth Street. By her will, she devised this property as follows:

"Second. I devise and bequeath to my children Annie and Sidney E. Allen equally, the house known as #318 Spruce Street in the City of Winston, N. C. In the event of the death of either one of these children without issue the survivor shall inherit the deceased one's interest and should the surviving one die without issue, I will and direct my Executor to sell said property at public or private sale and divide the proceeds among my surviving children, share and share alike, the issue of any deceased child receiving the share which their deceased parent would have received if living."

Laura L. Allen died in 1908. She was survived by six children:

(1) Sidney E. Allen who died in 1923 intestate and without issue, being survived by his wife, Pauline B. Allen. In the case of *Pauline B. Allen v. Hazel Saunders, et al.*, 186 N.C. 349, this Court determined that Pauline B. Allen as the widow of Sidney E. Allen had a dower interest in the property which is the subject matter of this suit. The whereabouts of Pauline B. Allen are not known and she is not a party to this suit. This would appear to be immaterial, however, in view of the fact that she conveyed her dower interest and all other interest which she had in this property to Ann Irene Allen in 1924.

(2) Laura Loline Allen Saunders who is still living but whose husband died in 1922. Mrs. Saunders was born in 1874 and is, therefore, nearly 76 years of age and has no children.

(3) Ada Husk Allen who was born May 12, 1884, and is, therefore, 66 years of age. She is now living, and has never married and has no children.

(4) Ann Irene Allen who was born November 6, 1886, and is, therefore, more than 63 years of age. She is now living, has never married and has no children.

(5) Minnie Stirewalt Allen who was born September 21, 1881. She never married and died September 21, 1924. Her will devised and bequeathed any interest which she may have had in the property, which is the subject of this suit, to Ada Husk Allen and Ann Irene Allen.

(6) Nettie Allen Thomas who was born January 30, 1877, and died May 20, 1935. Her husband, Hansel P. Thomas, died January 11, 1942. Nettie Allen Thomas was survived by two children:

(a) Nettie Allen Thomas who was born November 17, 1902, and is, therefore, more than 47 years of age. She was married to Henry E. Voges August 31, 1946. She and her husband are both living and have no children.

(b) Laura Thomas who was born August 23, 1905, and who is, therefore, more than 44 years of age. She was married to Roger Hall but was divorced from him in 1948. She is still living but has no children.

The will of Nettie Allen Thomas devised all interest which she may have had in the property, which is the subject of this action, to her two children, Nettie Allen Thomas Voges and Laura Thomas Hall.

Laura L. Allen executed her will in 1905 and died in 1908. The executor promptly settled her estate and filed its final account 28 December, 1911. The executor was duly reinstated by order of the Clerk of the Superior Court of Forsyth County on 11 January, 1950, and authorized to institute this action.

The court found as a fact that all the defendants have been served with summons and a copy of the complaint or have accepted service; that

Sosnik & Sosnik, Inc., has filed answer and made appearance at the hearing through its counsel of record; that Charles F. Vance, Jr., was regularly appointed as guardian *ad litem* for any issue who may be hereafter born to any of the beneficial owners of the property described in the complaint and for any other persons not named as parties to this action, known or unknown, *in esse* or *in posse,* who may have any interest in said property; that said guardian *ad litem* accepted service of the summons and copy of the complaint and has faithfully investigated all questions of fact and law raised by the complaint and has filed answer and personally appeared at the hearing of this cause; that the remaining defendants have filed no answer and the time for answering has expired with no extension of time to answer having been sought or granted.

Miss Ann Irene Allen, who is the present owner of the property, which is the subject of this action (because of the prior death of Sidney E. Allen, without leaving issue surviving, and the acquisition of his widow's dower interest therein), together with her two surviving sisters and the two children of a deceased sister (and the husband of one of these children) have signed a 50-year lease which is set out in the record. The lessee is Sosnik & Sosnik, Inc.

The lessee now occupies a building fronting on Fourth Street and running back to the lot which is the subject of this suit. The capital stock of the lessee has recently been acquired by Thalheimers, of Richmond, Va., and Sosnik & Sosnik, Inc., plans to expand its ladies ready to wear business into a department store. The lessee intends (although it is not so obligated by the terms of the lease) to build upon the lot, which is the subject of this action, and combine its present quarters with the additional building. Any building erected upon the leased land must meet the specifications set out in the lease, and any such building will become the property of the lessors at the expiration of the lease.

The approval of the lease is regarded by the Executor, the plaintiff herein, and by all of the beneficial owners of the property as very desirable. The lease will yield a net annual income of approximately 6% on the appraised value of the land and the lessee is obligated to pay all taxes assessed against the property during the term of the lease. The property is unimproved and the best rent the owners have ever been able to obtain prior to this lease was $25.00 a month for use as a parking lot. This rent was barely sufficient to cover the taxes assessed against the property, leaving no income of consequence for the owner.

After a careful consideration of the terms of the proposed lease, the court found as a fact that "It is in the best interests of all persons now living who have any interest in the property described in Finding of Fact and Conclusion of Law No. 3 of this judgment and likewise in the best interests of any issue who may hereafter be born to said persons that the

proposed lease be consummated and that it is not in the best interests of said persons now living or of any issue who may be born to them for the said property to be sold by the Executor of Laura L. Allen as provided in her will; that circumstances have changed; that this is a matter in which only the family of Laura L. Allen is beneficially interested and that the Executor of Laura L. Allen, through one of its responsible officers, has stated to this Court from the witness stand that it believes the said lease to be in the best interests of all parties concerned and that Wachovia Bank and Trust Company as Executor of Laura L. Allen has no objection to executing said lease as one of the lessors provided the Court approves such action."

Whereupon the court authorized the plaintiff as Executor of the last will and testament of Laura L. Allen to execute and deliver the lease described herein, and further ordered and decreed as follows:

"At the death of Ann Irene Allen, if said lease is still in effect, neither Wachovia Bank and Trust Company, as Executor of Laura L. Allen, nor its successor, if any, as Executor, shall sell the property described in Finding of Fact and Conclusions of Law No. 12, but title to said property is hereby decreed to vest, upon the death of Ann Irene Allen without issue (subject to said lease if still in effect), in any of the children of Laura L. Allen then living, share and share alike, the issue of any deceased child receiving the share which their deceased parent would have received if living."

The plaintiff appeals and assigns error.

Womble, Carlyle, Martin & Sandridge for plaintiff, appellant.

Ratcliff, Vaughn, Hudson & Ferrell for defendant, Sosnik & Sosnik, Inc., appellee.

Charles F. Vance, Jr., Guardian Ad Litem, in propria persona.

DENNY, J. The question presented for our determination is simply this: Did the court, under the facts and circumstances disclosed on this record, have the power to authorize the Executor of the last will and testament of Laura L. Allen to execute the proposed lease and to decree that if said lease is still in effect, at the death of Ann Irene Allen, neither the Wachovia Bank & Trust Company, as Executor of Laura L. Allen, nor its successors, if any, shall sell the leased property, but that title thereto shall vest, upon the death of Ann Irene Allen without issue (subject to said lease) in any of the children of Laura L. Allen then living, share and share alike, the issue of any deceased child to take the share their deceased parent would have taken if such parent had survived the said Ann Irene Allen?

Ann Irene Allen is now more than 63 years of age. She has never married and has no children. And while courts hold to the view that there is possibility of issue as long as there is life, we know such view, when applied to elderly women, is contrary to human experience. *Cole v. Cole,* 229 N.C. 757, 51 S.E. 2d 491. Therefore, we may assume that for all practical purposes Ann Irene Allen holds only a life estate in the premises involved herein. At the present time there are four persons who will take under the terms of the will of Laura L. Allen, if they survive the life tenant, to wit, Laura Loline Allen Saunders, a sister, who is 76 years of age and has no children, Ada Husk Allen, a sister, who is 66 years of age and has no children, Nettie Allen Thomas Voges, a niece, who is 47 years of age, married but has no children, and Laura Thomas Hall, a niece, who is 44 years of age, divorced and has no children.

Ordinarily, persons claiming property under a will must take it in the character which the instrument has impressed upon it. *Seagle v. Harris,* 214 N.C. 339, 199 S.E. 271. But the doctrine of reconversion is recognized in this jurisdiction. *Proctor v. Ferebee,* 36 N.C. 143; *Duckworth v. Jordan,* 138 N.C. 520, 51 S.E. 109; *Seagle v. Harris, supra.*

"Where land is directed to be converted into money . . . all the parties entitled beneficially thereto have the right to take the property in its unconverted form, and thus prevent the actual conversion thereof, and this right to take the realty instead of the proceeds is not limited to beneficiaries who also hold the legal title. In the case of land, the election of one of the beneficiaries alone will not change the character of the estate; all the persons so beneficially interested must join, and all must be bound. . . . Remaindermen and other holders of future interests cannot elect so as to affect the interests of owners of prior estates; but they may make an election binding on themselves and their own real and personal representatives." 18 C.J.S. sec. 55, p. 83, citing *Anderson v. Wise,* 144 Kan. 612, 62 P. 2d 805; *Harper v. Chatham Nat. Bank,* 40 N.Y.S. 1084, 17 Misc. 221; *Seagle v. Harris, supra; Clifton v. Owens,* 170 N.C. 607, 87 S.E. 502; *Bonded B. & L. Association v. Konner,* 118 N. J. Eq. 546, 180 A. 570; *In re Hennessy's Estate,* 278 N.Y.S. 700, 155 Misc. 53, 13 C.J. p. 889.

In the instant case, every person who has any interest in the land involved, vested or contingent, or who would have any interest in the property under the statute of descent if Laura L. Allen had died intestate, has joined in the execution of the proposed lease. Not only have all the beneficial owners expressed a desire to have the court approve the lease, but the Executor of the last will and testament of Laura L. Allen and the guardian *ad litem* have informed the court that, in their opinion, it is for the best interest of all interested parties for the lease to be approved and executed by the Executor on behalf of the estate of Laura L. Allen.

We hold that the execution of the proposed lease by the life tenant and all the remaindermen is tantamount to an election by the remaindermen to take the property in its unconverted form, if and when the life tenant dies without issue. Such election extinguishes the power of sale as set forth in the will. *Duckworth v. Jordan, supra.* This view is supported in 19 Am. Jur.—Equitable Conversion, sec. 30, p. 23, *et seq.,* where it is said: "It is a well settled rule in equity that where a testator directs land to be sold and the proceeds thereof distributed among certain designated beneficiaries, such beneficiaries may elect, before the sale has taken place, to take the land instead of the proceeds. When they have so elected and sufficiently manifested their election, the authority to sell the land cannot thereafter be exercised by the executor, but is extinguished. The estate is thereby reconverted into real property, and, by reason of such reconversion, the relation of the beneficiaries to the land is the same as if it had been directly devised to them. This right of election rests upon the presumption that the power of sale given to the executor was intended for the benefit of the beneficiaries and that since they are the absolute owners of the land, they have the right to direct its disposition."

The owner of the life estate and all the remaindermen, having approved and executed the proposed lease, and each one of them being *sui juris,* such parties, as well as those inheriting from or through them, would be bound by the provisions contained in the lease, and by the election to take the real property in lieu of the proceeds from the sale thereof. *Buffaloe v. Blalock, ante,* 105.

In the light of the facts disclosed by the record herein, we hold that the court below, in the exercise of its equity powers, had ample authority to approve the execution of the lease under consideration by the Wachovia Bank & Trust Co., as Executor of the last will and testament of Laura L. Allen and to decree that the remaindermen take the property in its unconverted form, if and when Ann Irene Allen should die without issue.

Moreover, we think the proposal to lease the property, and forego a sale thereof, might well be construed as an agreement in the nature of a family settlement, or as a contract for the final settlement of the estate. *Kirkman v. Hodgin,* 151 N.C. 588, 66 S.E. 616.

The judgment of the court below will be upheld.

Affirmed.

ORMAN SPIVEY v. MRS. EVELYN NEWMAN (Now MRS. J. M. KERR).

(Filed 9 June, 1950.)

1. Automobiles § 19—

While the driver of a car is not an insurer of the safety of his guests, he is liable for an injury to a guest proximately resulting from his negligence in the operation of the automobile.

2. Same—

Evidence to the effect that as plaintiff, an invited guest, was in the act of seating himself and closing the door, defendant suddenly put the car in motion, causing the door to swing violently back and hit plaintiff on the forehead, *is held* sufficient to be submitted to the jury on the question of the actionable negligence of defendant in failing to ascertain whether the plaintiff was in a position of safety before she put the car in motion.

3. Automobiles § 20a—

Opposing inferences as to whether plaintiff was contributorily negligent in the manner in which he attempted to board defendant's automobile as an invited guest, *held* permissible upon plaintiff's evidence, and therefore nonsuit on the ground of contributory negligence was properly denied.

4. Trial § 23f: Pleadings § 24a—

Variance between allegation and proof as to whether plaintiff was standing in the street in the act of boarding defendant's car as a guest, or whether he was in the car in the act of seating himself, when defendant's act in suddenly putting the car in motion caused the door to swing violently backward and strike plaintiff's forehead, *is held* insufficient to mislead defendant to her prejudice in maintaining her defense upon the merits, and therefore the variance was immaterial and does not justify nonsuit.

5. Evidence § 47—

Exceptions to the testimony of an expert witness based upon proper hypothetical questions supported by the evidence as to the cause of suffering alleged to have been endured by plaintiff are untenable.

6. Appeal and Error § 39e—

The admission of testimony over objection cannot be prejudicial when the same testimony is thereafter given without objection.

7. Evidence § 30e—

Testimony of an expert as to the disclosures of an X-ray picture of plaintiff's head is properly excluded when such picture is not authenticated as being actually an X-ray picture of plaintiff's head.

8. Evidence §§ 21, 22½—

The trial court may properly sustain objection to a question asked on re-direct examination which is merely repetitious and directed to matter fully testified to by witness on his direct examination, however proper the matter may have been in the first instance.

9. Trial § 33—

Where through inadvertence the issue submitted to the jury uses the word "defendant" when the word "plaintiff" was intended, the trial court may, upon the matter being called to his attention by the jury after they had deliberated for some hour and twenty minutes, correct the issue and have the jury resume its deliberations.

10. Trial § 31b—

It is proper for the trial court to instruct the jury to the effect that it should take the law from the court rather than from counsel.

11. Negligence § 20—

The court's instructions on contributory negligence *held* without error in this case.

12. Same—

Instructions in this case as to proximate cause *held* correct and to have plainly charged that foreseeability is an essential element of proximate cause.

APPEAL by defendant from *Phillips, J.*, and a jury, at the September Term, 1949, of GUILFORD.

The plaintiff, an invited guest, sued the defendant, his host, to recover damages for personal injury allegedly suffered as the proximate result of the negligence of the defendant in the operation of an automobile.

According to the allegations of the complaint, the injury in question was sustained under these circumstances: "That when the plaintiff reached the point on the sidewalk approximately opposite the automobile in which the defendant was waiting, he stepped off of the sidewalk, and at the invitation of the defendant started to board her automobile; that at this time the traffic light changed from red to green . . . and the defendant, without waiting for plaintiff to get into her automobile, placed the same in motion while the plaintiff was in the act of entering the same, so that the door of the said automobile was thrown backward by the forward impetus of the automobile in such a manner as to strike the plaintiff a violent blow on the forehead over his right eye, inflicting serious and permanent injury."

The defendant answered, denying actionable negligence on her part and pleading contributory negligence on the part of the plaintiff.

The plaintiff testified at the trial that he was injured in this way: "When I stopped at her car I stepped off into the street and had started into the car, opened the door, was getting into the car and in the act of getting seated. By that time the light had turned from red to green. The other cars had left, and she, of course, was ready to leave and in a hurry to go, evidently; so the car started off with a sudden violent jerk as I was turning to close the door. The door came to, and when it came

to, I was leaning out to close it, and it hit my head. That is the way the blow occurred. It hit my head over the right eye, middle of the forehead. The hinges to the door of that car are to the front, which makes the door close towards the back. As the car started, the jerk of the car caused the door to come back and hit me. And that is the way the accident happened, when I was trying to get the door closed, and was in the act of sitting down."

The plaintiff offered other testimony tending to show that the blow on his head produced a cerebral injury, which caused him to suffer with convulsive seizures at times, necessitated his hospitalization for considerable periods, and impaired his capacity to work in a substantial manner.

The defendant presented evidence indicating that the plaintiff opened the door of her automobile quickly, and bumped his head in so doing; that this was his only violent contact with her automobile, or with any part of it; that at the time he bumped his head the plaintiff was outside the automobile, and the automobile was standing still; that he then entered the automobile, and seated himself beside her; that at the time she put the automobile in motion its doors were closed, and the plaintiff was sitting down; that the bump on the plaintiff's head was of a trivial nature; and that there was no causal relation between such bump and the suffering alleged to have been endured by the plaintiff.

The verdict of the jury was as follows:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff, by his own negligence, contribute to his injury? Answer: No.

3. What amount of damages is the plaintiff entitled to recover? Answer: $5,000.00.

Judgment was entered upon the verdict, and the defendant appealed, assigning as errors the matters mentioned below.

Thomas Turner and J. J. Shields for plaintiff, appellee.

P. W. Glidewell, Sr., and Welch Jordon for defendant, appellant.

ERVIN, J. We give first consideration to the sixth and fifteenth exceptions, which are based on the refusal of the trial court to dismiss the action upon a compulsory nonsuit under the statute. G.S. 1-183.

The driver of a motor vehicle is not an insurer of the safety of a person riding therein as an invited guest. But he is required by law to exercise reasonable care to protect such person from harm. Accordingly, he is liable for an injury to a guest proximately resulting from his negligence in the operation of the automobile. *Wright v. Wright,* 229 N.C. 503, 50 S.E. 2d 540; *Henderson v. Powell,* 221 N.C. 239, 19 S.E. 2d 876;

Montgomery v. Blades, 218 N.C. 680, 12 S.E. 2d 217; *White v. McCabe,* 208 N.C. 301, 180 S.E. 704; *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761. When the evidence presented by the plaintiff at the trial and this rule of law are laid side by side, it is manifest that such evidence was sufficient to establish actionable negligence on the part of the defendant. It tended to show that the plaintiff suffered personal injury as the proximate consequence of the negligent failure of the defendant to ascertain whether he was in a position of safety before she put her car in motion. *Hernandez v. Murphy,* 46 Cal. App. 2d 201, 115 P. 2d 565; *Moore v. Davis* (La. App.), 199 So. 205; *Corrigan v. Clark,* 93 N.H. 137, 36 A. 2d 631.

Moreover, it cannot be said that the plaintiff was contributorily negligent as a matter of law in that he attempted to board the automobile of the defendant or to seat himself therein in a dangerous fashion. Under the testimony opposing inferences were permissible on this particular aspect of the case, and it was, therefore, a question of fact for the jury whether the plaintiff was guilty of contributory negligence. *Groome v. Davis,* 215 N.C. 510, 2 S.E. 2d 771; *King v. Pope,* 202 N.C. 554, 163 S.E. 447.

Furthermore, the record does not justify the conclusion that the proof presented by the plaintiff established a cause of action different from that alleged by him. Even if it be taken for granted that the evidence offered did not correspond in all respects with the allegations of the complaint, the resultant variance must be adjudged immaterial; for nothing in the record suggests that it actually misled the defendant to her prejudice in maintaining her defense upon the merits. G.S. 1-168; *Simmons v. Lumber Co.,* 174 N.C. 220, 93 S.E. 736; *Mode v. Penland,* 93 N.C. 292.

These things being true, the trial court rightly refused to nonsuit the action.

Certain assignments of error are addressed to the admission of testimony given by the plaintiff's physician, Dr. Willard Cardwell, a conceded medical expert. It is well settled in the law of evidence that a physician or surgeon may express his opinion as to the cause of the physical condition of a person if his opinion is based either upon facts within his personal knowledge, or upon an assumed state of facts supported by evidence and recited in a hypothetical question. *Patrick v. Treadwell,* 222 N.C. 1, 21 S.E. 2d 818; *Yates v. Chair Co.,* 211 N.C. 200, 189 S.E. 500; *Godfrey v. Power Co.,* 190 N.C. 24, 128 S.E. 485; *Martin v. Hanes Co.,* 189 N.C. 644, 127 S.E. 688; *Brewer v. Ring,* 177 N.C. 476; 99 S.E. 358; *Taylor v. Power Co.,* 174 N.C. 583, 94 S.E. 432; *Ridge v. R. R.,* 167 N.C. 510, 83 S.E. 762, L.R.A. 1917E, 215; *Lynch v. Manufacturing Co.,* 167 N.C. 98, 82 S.E. 6; *Holder v. Lumber Co.,* 161 N.C. 177, 76 S.E. 485; *Pigford v. R. R.,* 160 N.C. 93, 75 S.E. 860, 44 L.R.A. (N.S.)

865; *Beard v. Railroad*, 143 N.C. 136, 55 S.E. 505; *Summerlin v. Railroad Co.*, 133 N.C. 550, 45 S.E. 898. As we interpret the record, the third, fourth and fifth exceptions related to the hypothetical question asked Dr. Cardwell by counsel for plaintiff. This hypothetical question was framed properly, and merely elicited from the physician his opinion as to the cause of the suffering alleged to have been endured by the plaintiff. Hence, these exceptions are without validity. The defendant maintains with some plausibility that the trial court erred in receiving the portion of Dr. Cardwell's testimony, which is the subject of the first and second exceptions. Be this as it may, these exceptions are not subject to review in this court for the same witness gave substantially the same testimony without objection in other portions of his examination. *Indemnity Co. v. Perry*, 200 N.C. 765, 158 S.E. 560; *Smathers v. Jennings*, 170 N.C. 601, 87 S.E. 534; 5 C.J.S., Appeal and Error, section 1735.

The seventh, eighth and eleventh exceptions challenge rulings excluding testimony of the defendant's medical witness, Dr. A. J. Tannenbaum, that he had examined a skiagraph which he assumed to be an X-ray photograph of the plaintiff's skull, and that such picture disclosed "no objective evidence of bony disorder." Expert evidence as to what a duly authenticated X-ray picture shows is undoubtedly admissible where it tends to aid the jury to understand the nature and extent of injuries involved in the action on trial. *Eaker v. International Shoe Co.*, 199 N.C. 379, 154 S.E. 667. The trial court rightly rejected Dr. Tannenbaum's interpretation of the skiagraph in question, however, for it did not appear by competent evidence that such X-ray photograph was actually a picture of the plaintiff's skull. These observations of a text writer seem pertinent here: "An X-ray picture cannot be authenticated in the same manner as an ordinary photograph, that is, by testimony that it is a correct representation of the object it purports to picture, since it purports to show only shadows of objects not otherwise visible to the eye. To authenticate an X-ray picture two things are generally required: (1) It must be shown that the picture offered is actually a picture of the object or part of the body of which it is claimed to be a picture. (2) It must be shown by satisfactory evidence that the picture is accurate, in the sense that it conforms to the standard of accuracy of X-ray pictures generally." 32 C.J.S., Evidence, section 712.

Dr. Tannenbaum testified fully on his direct examination that in his opinion the plaintiff was suffering from hysteria. Counsel for the defendant undertook to have him repeat this identical testimony on his re-direct examination, and the trial court sustained the objection of plaintiff to such repetition. The ninth, tenth, twelfth, thirteenth, and fourteenth exceptions, which question this ruling, are not maintainable. A trial court has discretionary power to exclude or limit the repetition

of questions and answers, however proper such questions and answers may have been in the first instance. *In re Smith's Will,* 163 N.C. 464, 79 S.E. 977; 70 C.J., Witnesses, section 861.

Due to inadvertency in transcription, the second issue was originally submitted to the jury in these words: "Did the *defendant,* by his own negligence, contribute to his injury?" After deliberating for an hour and twenty minutes, but before answering any of the issues, the jury returned into open court, and called the trial judge's attention to the typographical mistake. The judge forthwith reformed the issue by substituting the word "plaintiff" for the term "defendant," and the jury resumed its deliberations. At that time the defendant noted her eighteenth exception to the "action of the trial court in submitting an erroneous and incorrect issue of contributory negligence to the jury, and in thereafter making a correction of the issue after the jury had been deliberating for an hour and twenty minutes."

Nothing in the record indicates that the defendant was prejudiced in any way by the original wording of the second issue, or by its subsequent rephrasing by the trial judge. For this reason, the eighteenth exception is overruled.

The sixteenth, seventeenth, nineteenth, and twentieth exceptions are directed to the charge, and to a statement of the trial court to the jury concerning views on the law expressed by counsel for defendant at a time when the jury returned into the courtroom and requested further instruction on a particular phase of the law relating to contributory negligence. These assignments of error cannot be sustained.

The statement of the judge was tantamount to an admonition that the jury should take the law from the court rather than from counsel. The instructions on contributory negligence, which the defendant challenges, conformed to repeated decisions of this Court. *McKinnon v. Motor Lines,* 228 N.C. 132, 44 S.E. 2d 735; *Roberson v. Taxi Service, Inc.,* 214 N.C. 624, 200 S.E. 363; *Cashatt v. Brown,* 211 N.C. 367, 190 S.E. 480; *Liske v. Walton,* 198 N.C. 741, 153 S.E. 318; *Davis v. Jeffreys,* 197 N.C. 712, 150 S.E. 488; *Bailey v. R. R.,* 196 N.C. 515, 146 S.E. 135; *Elder v. R. R.,* 194 N.C. 617, 140 S.E. 298; *Boswell v. Hosiery Mills,* 191 N.C. 549, 132 S.E. 598; *Construction Co. v. R. R.,* 185 N.C. 43, 116 S.E. 3; *Construction Co. v. R. R.,* 184 N.C. 179, 113 S.E. 672. Moreover, the instructions as to proximate causation were correct, and made it plain to the jury that foreseeability of injury is an essential element of proximate cause in the law of negligence. *Shaw v. Barnard,* 229 N.C. 713, 51 S.E. 2d 295; *Wood v. Telephone Co.,* 228 N.C. 605, 46 S.E. 2d 717; *Nichols v. R. R.,* 228 N.C. 222, 44 S.E. 2d 879; *Boyette v. R. R.,* 227 N.C. 406, 42 S.E. 2d 462; *Lee v. Upholstery Co.,* 227 N.C. 88, 40 S.E. 2d 688; *Rattley v. Powell,* 223 N.C. 134, 25 S.E. 2d 448; *Montgomery v. Blades,*

222 N.C. 463, 23 S.E. 2d 844, rehearing denied in 223 N.C. 331, 26 S.E. 2d 567; *Luttrell v. Mineral Co.*, 220 N.C. 782, 18 S.E. 2d 412.

The twenty-first and twenty-second exceptions are formal, and require no discussion.

The judgment will be upheld; for there is in law

No error.

RADIO STATION WMFR, INC., v. EITEL-McCULLOUGH, INC.

(Filed 9 June, 1950.)

1. **Appeal and Error § 40d—**

While findings of fact supported by the evidence are conclusive on appeal, inferences or conclusions of law therefrom are reviewable.

2. **Process § 8d—**

Whether a corporation is "doing business" in this State within the purview of G.S. 55-38 is an inference of law and of fact to be drawn from the specific facts found, and is subject to review on appeal.

3. **Same—Foreign corporation held not doing business in this State so as to subject it to service by service on Secretary of State.**

Findings that a foreign corporation, engaged in the business of manufacturing certain goods and selling them direct to retail distributors in this State, maintained a sales representative here to aid in promotion of sales to dealer representatives and facilitate sales directly to customers in company with dealer representatives, and an agent to investigate complaints by purchasers who is without authority to compromise or adjust them, its established procedure being for the customer to return defective merchandise directly to the corporation, and also an agent here to facilitate the collection of delinquent or slow accounts owed by dealer representatives, without evidence that such agent had authority to collect or receive money on behalf of the corporation, *held* insufficient to support the conclusion that it was doing business in this State for the purpose of service of summons under G.S. 55-38.

DEFENDANT'S appeal from *Bennett, Special Judge*, February 1950 Term of GUILFORD Superior Court (High Point Division).

The plaintiff began this action in the Superior Court of Guilford County against the defendant, a foreign corporation, to enforce the written guarantee of filament tubes furnished the plaintiff through a local dealer.

The defendant not having appointed any agent in the State upon whom service of process might be obtained, plaintiff made service upon the Secretary of State pursuant to the provisions of G.S. 55-38. Defendant's

counsel made a special appearance and moved to dismiss the action for want of service.

The court below made the following findings of fact:

"(1) That the defendant is a foreign corporation, domesticated under the laws of the State of California and that said corporation is doing business in the State of North Carolina and at the time of the service of summons was doing business within said state.

"(2) That service of process was originally had upon Thad Eure, Secretary of State of North Carolina, and that the defendant has not designated an agent within the State of North Carolina on whom service may be had.

"(3) That the defendant is engaged in the manufacture for sale in wholesale lots of filament tubes for use in radio transmitting equipment; that defendant has designated six dealer representatives in various cities in North Carolina as exclusive outlets for the sale of said tubes in North Carolina; that said dealer representatives are engaged in the sale of said tubes and in the sale of products of other manufacturers.

"(4) That the defendant encloses in each carton in which tubes are packed in California and shipped to dealers in North Carolina a written guarantee for one year from the date of purchase or 1000 hours of filament life, whichever is earliest, and that said guarantee is contained in the original sealed carton and thus delivered to purchasers in North Carolina; that local dealer representatives, in making sales of said tubes, call attention of customers to the presence of said written guarantee and absolve themselves of personal liability as to quality of each tube.

"(5) That during the year 1948, in consideration of said written guarantee, plaintiff purchased a quantity of said tubes in North Carolina from two of said six local dealer representatives.

"(6) That there is a continuous solicitation of orders from customers carried on by the defendant through local dealer representatives and that said defendant employs a sales representative who travels in North Carolina to aid in promotion of sales to dealer representatives and to facilitate sales directly with customers in company with said dealer representatives; that defendant further employs the services of an agent whose duty among others is to investigate complaints by customers in North Carolina regarding inferior tubes manufactured by defendant.

"(7) That ordinarily tubes are shipped from the defendant in California directly to local dealer representatives but sometimes are shipped directly to customers.

"(8) That among other provisions said aforesaid written guarantee contains an outline of procedure to be followed by a customer in returning defective tubes to defendant, which outlined procedure requires

return directly to the defendant by railway express and subsequent reshipping direct to customer by defendant.

"(9) That the defendant employs an agent or agents who facilitate the collection of delinquent or slow accounts owed by local dealer representatives in North Carolina to defendant through personal contact therewith.

"(10) That the defendant does not deal directly with the customer in so far as collection of price of tubes is concerned.

"Upon the foregoing facts the court being of the opinion that the defendant corporation is doing business within the State of North Carolina within the meaning and intent of G.S. 55-38, and the court so finds as a fact as aforesaid."

Upon such findings the court below denied the motion of defendant's counsel and overruled the special appearance. From the judgment defendant, through counsel, appealed; the only assignment of error being "that the court erred in rendering the judgment set out in Record."

Counsel for defendant in the case upon appeal conceded that the findings of fact contained in the judgment were supported by sufficient competent evidence and upon such concession and by agreement the evidence offered by the parties was omitted from the record.

Harriss H. Jarrell for plaintiff, appellee.

B. L. Herman and E. F. Upchurch, Jr., for defendant, appellant.

SEAWELL, J. If the findings of fact are supported by the evidence they are as conclusive as the verdict of a jury and are not subject to review. *Matthews v. Fry,* 143 N.C. 384, 55 S.E. 787; *Cox v. Boyden,* 175 N.C. 368, 95 S.E. 548; *Tyer v. Lumber Co.,* 188 N.C. 268, 124 S.E. 305; *Tinker v. Rice Motors, Inc.,* 198 N.C. 73, 150 S.E. 701; *Lumber Co. v. Finance Co.,* 204 N.C. 285, 168 S.E. 219; *Brown v. Coal Co.,* 208 N.C. 50, 178 S.E. 858. But this principle does not preclude the review of inferences or conclusions of law. *Power Co. v. Moses,* 191 N.C. 744, 133 S.E. 5.

In the case at bar the objection made was not that the facts found are not supported by the evidence but that the facts found and incorporated in the judgment do not support the judgment itself. In this case the court was passing on the single question as to whether service of summons upon the Secretary of State was valid and the objection was pointed to the single question of law and fact, to be inferred from the more specific findings of fact, as to whether the defendant was doing business in this state. The finding of fact number one is obviously an inference drawn from the more specific facts found in the other numbered paragraphs and the validity of its finding and conclusion of law rests within their

compass. It remains only to be seen if the findings of fact are sufficient to sustain the ruling of the court below.

Justice Conner, in *Commercial Trust v. Gaines*, 193 N.C. 233, 136 S.E. 609, stated: "It has been generally held that a foreign corporation cannot be held to be doing business in a state, and therefore subject to its laws, unless it shall be found as a fact that such corporation has entered the state in which it is alleged to be doing business and there transacted, by its officers, agents or other persons authorized to act for it, the business in which it is authorized to engage by the state under whose laws it was created and organized. The presence within the state of such officers, agents or other persons, engaged in the transaction of the corporation's business with citizens of the state, is generally held as determinative of the question as to whether the corporation is doing business in the state."

In *Ruark v. Trust Co.*, 206 N.C. 564, 174 S.E. 441, *Stacy, C. J.*, states the rule in this way: "The expression 'doing business in this state,' as used in C.S. 1137 (now G.S. 55-38), means engaging in, carrying on or exercising, in this State, some of the things, or some of the functions, for which the corporation was created."

What, then, has the defendant done to bring itself within the rule expressed in *Commercial Trust Co. v. Gaines, supra*, and *Ruark v. Trust Co., supra?*

A careful perusal of the findings of fact reveals that the defendant, a foreign corporation domesticated under the laws of the State of California, is engaged in the manufacture, for sale in wholesale lots, of filament tubes and that it has chosen to sell its products in North Carolina to six exclusive retail outlets designated "dealer representatives." These retail outlets in turn sell the product to consumers. That such is true is borne out by the finding that the defendant employs a sales represenative to aid in promotion of sales to the so-called "dealer representatives" and an agent to facilitate the collection of delinquent or slow accounts owed by the dealer representatives. That the dealer representatives are not agents of the defendant and that the defendant is not doing business in this state because of any acts of such dealer representatives is most apparent. We believe the rule laid down by *Stacy, C. J.*, in *R. R. v. Cobb*, 190 N.C. 375, 129 S.E. 828, to be most apt: "He who acts as distributor for another and not merely as distributor of goods manufactured by the other, acts as his agent." And the finding that there is a continuous solicitation of orders carried on by the defendant through such dealer representative is repugnant to the other findings.

The defendant employs a sales representative who travels in North Carolina to aid in promotion of sales to dealer representatives and to facilitate sales directly with customers in company with such dealer representatives. Ordinarily the tubes are shipped from the defendant in

California directly to local dealer representatives, but sometimes are shipped directly to customers.

This Court held in *Plott v. Michael,* 214 N.C. 665, 200 S.E. 429, that the presence in this State of a travelling salesman of a foreign corporation who merely took orders subject to approval at the home office of the corporation for goods to be subsequently shipped into the state did not constitute doing business in the state on the part of the corporation. Such ruling has universal acceptance. *Green v. Chicago B. & Q. R. Co.,* 205 U.S. 530; *International Shoe Co. v. Lovejoy,* 257 N.W. 576; *Locke v. American Distilling Co.,* 97 F. 2d 297; 18 Fletcher's Cyclopedia Corporations, sec. 8718; 20 C.J.S., sec. 1920 (8); 23 Am. Jur., sec. 38.1. But here the scope of activity of the employee of the defendant appears to be even more restricted.

The defendant employs the services of an agent to investigate complaints by customers in North Carolina regarding inferior tubes manufactured by defendant. It does not appear that he is vested with any authority to compromise or adjust any matter or to deal with the customer in any way except to acquire information upon which the defendant may or may not act. Indeed, the defendant encloses in each carton of its product a written guarantee, such guarantee containing an outline of procedure to be followed by a customer in returning defective tubes to defendant. Such procedure requires return of the tubes directly to the defendant by railway express and subsequent reshipping directly to the customer by the defendant.

Lastly, the defendant employs an agent or agents who facilitate the collection of delinquent or slow accounts, owed by the dealer representatives in North Carolina, through personal contact. We must assume that the word "facilitate," defined by Webster to mean "to make easy or less difficult; to free from difficulty or impediment," was used advisedly by the court below and that in fact such employee had no authority to act for the defendant beyond the scope of facility, and did not collect or receive money, on behalf of the defendant, from the debtor.

"To give the courts of a state jurisdiction *in personam* over a foreign corporation, otherwise than by voluntary appearance, it is essential that it not only be doing business, either intrastate or interstate, within the state, but that such business which the corporation is conducting in the state be a part of that for which it was organized and not a mere incident thereto." 18 Fletcher Cyclopedia Corporations, sec. 8714, n. 20, and cases cited thereunder.

In *Oyler v. J. P. Seebury Corporation,* 29 F. Supp. 927, a case markedly similar to this, the Court, in sustaining the motion of defendant to quash service and dismiss the suit, said: "An ineffectual is not changed to an effectual by being joined with another ineffectual. A non-resident

corporation does not hazard its isolation by doing permitted things in an outside state, even though there are several of them."

We think that this succinctly states the proposition at hand. Mere incidental services not substantially of the character of the business carried on by the defendant is not of the nature to subject it to the control and regulation of the state law or to invoke state law for its protection or to bring it within the pale of the statute which makes "doing business" in this state essential to its application.

It follows that the service of summons cannot be sustained as valid, and the judgment is, therefore,

Reversed.

MRS. LELIA KIRKLEY v. MERRIMACK MUTUAL FIRE INSURANCE COMPANY.

(Filed 9 June, 1950.)

1. Insurance § 43a—

While a policy covering accidental damage or loss to an automobile, except by collision, like other policies, will be construed strictly against the insurer when the provisions therein are ambiguous, yet the intention of the contracting parties as gathered from the instrument itself is controlling.

2. Same—

"Accidental" ordinarily implies that which is unintended, unexpected, unforeseen and fortuitous, and refers to the event or occurrence which produces the result and not to the result.

3. Same—

A policy covering all property damage to an automobile resulting from direct and accidental loss of or damage to the vehicle, except loss caused by collision, *is held* not to cover damage to the wooden frame of the station wagon insured caused by wood-boring insects entering at an unknown time and manner and remaining therein for an unknown period, certainly in the absence of evidence that the original infestation took place during the life of the policy.

APPEAL by plaintiff from *Patton, Special Judge*, at December Extra Civil Term, 1949, of MECKLENBURG.

This is an action to recover for alleged accidental loss or damage under the provisions of an automobile policy, issued by the defendant on 1 May, 1947, on the plaintiff's Special De Luxe 1946 Plymouth Station Wagon, and renewed each year thereafter until and including 1 May, 1949. The required premium was paid on the policy and the renewals thereof through 1 May, 1949, and the policy was in full force and effect from

1 May, 1947, until it was canceled by the defendant on 15 September, 1949.

The comprehensive loss or damage clause contained in the insurance policy, reads as follows: "Any direct and accidental loss of or damage to the automobile except loss caused by collision of the automobile with another object or by upset of the automobile or by collision of the automobile with a vehicle to which it is attached. Breakage of glass and loss caused by missiles, falling objects, fire, theft, explosion, earthquake, windstorm, hail, water, flood, vandalism, riot or civil commotion shall not be deemed loss caused by collision or upset."

The plaintiff alleges:

"In the month of June, 1949, the plaintiff discovered that some form of wood-boring beetle had got into the wooden portions of said station wagon and had eaten out large portions of such wood and weakened other portions so that the entire wooden frame work of the station wagon was seriously weakened and damaged. Portions of the body more particularly destroyed or damaged were the wheel house rail, window rail, and front quarter post of the left rear quarter; the wheel house rail, window rail, and front quarter post of the right rear quarter; right running board; left running board; left rear door, and right front door; all to the plaintiff's damage in the sum of $500.00.

"The aforesaid damage to the plaintiff's automobile constituted accidental damage to the said automobile in that such damage was entirely unforeseen by the plaintiff, occurred without the will or design of the plaintiff or of any other person, was unexpected, unusual and undesigned, the nature and type of the wood-boring beetle causing said damage being highly unusual in this section of the country, in fact unknown to experts, the method of entry into said station wagon being unknown, and the very presence of such beetles or any other wood-boring bug in a station wagon being a highly unusual occurrence."

The defendant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, in that:

(1) The complaint does not allege that any direct and accidental damage occurred during the effective dates of the insurance.

(2) The complaint shows on its face that the alleged damage was caused by the infestation of some type of beetle, termite or other wood-boring insect and was not a direct and accidental damage as contemplated by the defendant's policy of insurance.

The court below sustained the demurrer and entered judgment accordingly. The plaintiff excepted, appealed and assigns error.

Jones & Small for plaintiff.

Smathers & Carpenter for defendant.

DENNY, J. Does damage to the wooden frame of the plaintiff's station wagon caused by wood-boring insects, entering at an unknown time and in an unknown manner and remaining therein for an unknown period, constitute direct and accidental damage or loss, as contemplated under the provisions of the comprehensive loss or damage clause of the automobile insurance policy issued to the plaintiff by the defendant? This question in our opinion must be answered in the negative.

The so-called comprehensive coverage policy is written for the purpose of including all property damages to an automobile resulting from "direct and accidental loss of or damage to such automobile except loss caused by collision . . ." Even so, in our opinion, the loss complained of in this action is not "accidental" within the meaning of the provisions of the policy, although the loss sustained may be traceable to the infestation of the wooden portions of the body of the plaintiff's station wagon by some kind of wood-boring beetle.

The mere fact that an occurrence is infrequent or unusual or even unexpected, does not necessarily make it an accident within the meaning of a casualty insurance policy. It is the general rule to construe such policies strictly against the insurer when the provisions therein are ambiguous, but like any other contract the intention of the contracting parties must be gathered from the instrument itself. *Crowell v. Ins. Co.*, 169 N.C. 35, 85 S.E. 37; *McCain v. Ins. Co.*, 190 N.C. 549, 130 S.E. 186; *Jolley v. Ins. Co.*, 199 N.C. 269, 154 S.E. 400; *Woodell v. Ins. Co.*, 214 N.C. 496, 199 S.E. 719; *Stanback v. Ins. Co.*, 220 N.C. 494, 17 S.E. 2d 666; *Bailey v. Ins. Co.*, 222 N.C. 716, 24 S.E. 2d 614.

"Accidental" means, in common speech, that which is unintended, unexpected, unforeseen and fortuitous, or, to put it another way, an accident in its ordinary sense is an event caused by some casualty, disaster, chance, mishap, misadventure, or hazard. It is defined in Black's Law Dictionary, 3rd Ed., p. 23, as "an unforeseen event, occurring without the will or design of the person whose mere act caused it; an unexpected, unusual, or undesigned occurrence; the effect of an unknown cause, or, the cause being known, an unprecedented consequence of it; a casualty." See also *North American Accident Ins. Co. v. Henderson*, 180 Miss. 395, 177 So. 528; *New York Life Ins. Co. v. Wood*, 182 Miss. 233, 190 So. 819; *Stuart v. Occidental Life Ins. Co.*, 156 Ore. 522, 68 P. 2d 1037; *U. S. Mutual Accident Asso. v. Barry*, 131 U.S. 100, 33 L. Ed. 60; *Crutchfield v. R. & D. R. R. Co.*, 76 N.C. 320; *Harris v. Ins. Co.*, 204 N.C. 385, 168 S.E. 208; *Mehaffey v. Ins. Co.*, 205 N.C. 701, 172 S.E. 331, and *Fletcher v. Trust Co.*, 220 N.C. 148, 16 S.E. 2d 687.

The damages sustained by the plaintiff may have been unusual and unexpected, but were they the result of "direct and accidental loss," as contemplated in the comprehensive clause of the insurance policy in-

volved? The infestation apparently existed over a period of years. It did not cause an accident directly or otherwise, unless we construe the infestation of the station wagon by wood-boring beetles to be an accident. For ordinarily, the words "accident" and "accidental" refer to the event or occurrence which produces the result and not the result. *Fletcher v. Trust Co., supra.*

Therefore, conceding, but not deciding, that the infestation was an accident and that the loss complained of resulted therefrom, there is no allegation in the plaintiff's complaint to the effect that the entry and damages caused by the wood-boring beetle referred to in the complaint, occurred between the effective dates of the policy. In fact there is no allegation as to the identity of the insect or beetle, nor as to the rapidity with which it usually destroys wood of the type and character used in constructing the body of plaintiff's station wagon. It is quite possible, since the nature and type of the wood-boring beetle, causing the damage complained of, is unknown in this section of the country, and the station wagon is a 1946 model, and the method of entry into said station wagon is alleged to be unknown, that the original infestation took place prior to 1 May, 1947.

The case is a novel one, but in our opinion the judgment sustaining the demurrer should be

Affirmed.

ARCHIBALD LEWIS BASS v. JAMES W. INGOLD AND J. W. WEAVER, ORIGINAL DEFENDANTS, AND BRYAN A. DIXON AND WESTINGHOUSE ELECTRIC CORPORATION, ADDITIONAL DEFENDANTS.

(Filed 9 June, 1950.)

1. Torts § 6—

Where an additional defendant is brought in by the original defendant for the purpose of contribution under G.S. 1-240, the propriety of such joinder will be determined by the pleadings of the original defendant, unaffected by any pleadings filed by plaintiff.

2. Same: Automobiles § 20b—

Where the driver of a car is under the control and direction of a passenger who is the employee driver's superior, any negligence of the driver is imputable to the passenger and bars any action by the passenger against him, and therefore in an action by the passenger against the owner of the other vehicle involved in the collision, the employee driver is improperly joined as an additional defendant on motion of the original defendant for the purpose of contribution as a joint tort-feasor. G.S. 1-240.

3. Torts § 6: Master and Servant § 41—

Two employees, traveling in an automobile in the discharge of the employer's business, had a collision with another vehicle. In an action by the employee passenger against the owner and driver of such other vehicle, the employee driver is improperly joined as an additional defendant on motion of the original defendant for the purpose of contribution as a joint tort-feasor, since the employee driver is immune from liability under the provisions of G.S. 97-9.

BRYAN A. DIXON'S appeal from *Harris, J.*, January 1950 Civil Term of DURHAM Superior Court.

This action was instituted in the Superior Court of Durham County by the plaintiff, Archibald Lewis Bass, to recover damages for personal injuries sustained by him on December 13, 1948, as a result of a collision of a car, driven by Bryan A. Dixon, in which he was a passenger, with that of the defendant, J. W. Weaver. The vehicle of defendant Weaver was being operated by an agent or employee of Weaver, the defendant James W. Ingold, in the course of his employment. The plaintiff alleges that his personal injuries were proximately caused by the negligence of the defendant Ingold.

The defendants Ingold and Weaver by way of answer, cross-action and request for affirmative relief by contribution alleged that Bryan A. Dixon was contributorily negligent; that he was driving a vehicle owned by Westinghouse Electric Corporation as an employee of such corporation and in the course and scope of his employment; that the plaintiff was an employee of the corporation and, at the time of the collision, was acting in the course and scope of his employment; that the plaintiff was the immediate superior and supervisor of Dixon in the employment of Westinghouse Electric Corporation and, as such, had the right and duty to, and did, exercise control and direction over the operation of the car driven by Dixon. The defendants further alleged that any contributory negligence of Dixon was imputable to the plaintiff and such contributory negligence was pleaded in bar of recovery. The defendants further pleaded that if they should be held to be guilty of any negligence causing injury to the plaintiff, and if the plaintiff should be held not guilty of any contributory negligence imputable to him, then Dixon and the Westinghouse Electric Corporation were also guilty of negligent acts and conduct which concurred with the negligence of the defendants in producing the injuries and damages sustained by the plaintiff. The defendants moved that Dixon and the Westinghouse Corporation be made parties defendant as joint tort-feasors pursuant to the provisions of G.S. 1-240 in order that joint liability be determined and adjudicated and the defendants Ingold and Weaver might have contribution in the event of any recovery

by plaintiff. Dixon and the corporation were thereupon made parties defendant upon order of the Clerk.

The additional defendant, the Westinghouse Electric Corporation, made a special appearance and moved to dismiss, as to it, the cross-action of the original defendants on the grounds that the rights and obligations of the plaintiff and the corporation arose out of and were exclusively controlled and defined by the Workmen's Compensation Act (G.S., Ch. 97), such act being exclusive of all other rights and remedies between them; that the plaintiff was the only person having any right or remedy against the corporation by reason of the injuries sustained by him in the collision; that plaintiff had made claim for compensation in accordance with the Workmen's Compensation Act and that such compensation was duly paid after approval by the Industrial Commission; that the corporation was not, and could not be, a joint tort-feasor with the original defendants with respect to the plaintiff within the meaning of G.S. 1-240. The motion was sustained and no appeal was taken from the order sustaining such motion.

The plaintiff filed a reply to the further answer and defense of the original defendants in which he specifically denied that at the time of the collision, or on any other occasion he was the immediate superior and supervisor of the additional defendant Dixon, in the employment of Dixon by the Westinghouse Electric Corporation. He averred that he was employed in the sales department of the corporation and that Dixon was employed in the service department.

The additional defendant, Bryan A. Dixon, demurred to the answer and cross-action of the original defendants, stating as grounds therefor that facts sufficient to state a cause of action were not stated therein for the reason that it appeared on the face of the answer and cross-action that he was a fellow-employee of the plaintiff at the time of the collision; that the plaintiff was the immediate superior and supervisor of him, Dixon; that said Bass had the right and duty to, and did, exercise control and direction over the operation of the automobile being driven by Dixon, and that the negligence, if any, of Dixon was imputable to the plaintiff; that proof of such facts would constitute a bar to plaintiff's claim against Dixon and would relieve the original defendants of all liability and afford no ground upon which to base an action for contribution against Dixon.

The court below overruled the demurrer of the additional defendant Dixon, assigning as reasons therefor:

(a) That under the complaint, the answer and cross-action of the original defendants and the reply of the plaintiff, there arises a disputed issue of fact as to whether the plaintiff was a superior of the additional defendant Dixon, and as to whether he had the right to or did control the operation by Dixon of the vehicle occupied by the plaintiff, so as to form

the basis for the imputation of any alleged negligence on the part of Dixon to the plaintiff.

(b) That proof alone of negligence on the part of Dixon, proximately contributing to the injury of the plaintiff would therefore not constitute a complete bar to the plaintiff's action.

(c) That if the jury should find that the plaintiff had no right to, and did not, control the operation of the vehicle by Dixon then the original defendants would have sufficient ground in law upon which to base a claim for contribution on the part of Dixon, arising under their allegations of negligence on his part contributing proximately to the injury of the plaintiff.

For the foregoing reasons, the court held that there arises under all the pleadings an issue of contingent liability for contribution on the part of the additional defendant Dixon, which should be determined in this action, and that Dixon is a proper party defendant to this action for such purpose, under the provisions of G.S. 1-240.

From the order of the court below, the additional defendant Bryan A. Dixon, appeals, the sole exceptive assignment of error being to the signing of the order overruling the demurrer of such defendant.

A. J. Fletcher and F. T. Dupree, Jr., for defendant Dixon, appellant.

Fuller, Reade, Umstead & Fuller and James L. Newsom for defendants, appellees.

SEAWELL, J. The defendants, Ingold and Weaver, sought to bring in the additional defendants for contribution as joint tort-feasors under G.S. 1-240 and for no other purpose. The Westinghouse Electric Corporation is no longer in the picture. The "additional" defendant, Bryan A. Dixon, demurred to the further answer and cross-action of the original defendants as it related to him for the reason that on the face of it, the defendants made the affirmative plea above set out in the statement of the case, to which we refer. The demurrer was overruled, partly, it appears in deference to allegations in plaintiff's pleading which His Honor assumed raised an issue of fact, but, the additional parties were not brought in at the instance of the plaintiff but solely on the motion of defendants and within the limits of that pleading the demurrer must stand or fall.

We think it clear that a person riding in a car driven by another person whose superior he is and over whom he has the control and direction in the operation of the car and presently exercising such control and direction is thereby barred from any action for injury proximately caused by the negligence of the driver, which, in law, is imputable to him, and therefore forms no basis for a cross-action bringing the driver in as a

party-defendant on the theory of contribution as a joint tort-feasor. *Evans v. Johnson,* 225 N.C. 238, 34 S.E. 2d 73.

It appears from the record, however, that Bass, the plaintiff, and Dixon, were fellow employees of the Westinghouse Corporation, which was dismissed from the action on the ground that it was not amenable to the provisions of G.S. 1-240, and could not be brought in for contribution as joint tort-feasor. The appellant contends that under G.S. 97-9 he is entitled to the same immunity.

The matter is fully discussed in *Essick v. City of Lexington, ante,* 200, and on principles there held applicable we are of the opinion that the order or judgment of the Superior Court was in error in retaining the appellant, Dixon, as a party defendant. The judgment is reversed and appellant dismissed as party to the action.

Reversed.

STATE v. CLAUDE E. SHACKLEFORD.

(Filed 9 June, 1950.)

1. Criminal Law § 5a—

The test of responsibility of a person charged with a criminal offense is the capacity to distinguish between right and wrong at the time and in respect of the matter under investigation.

2. Criminal Law § 31h—

Testimony of an expert psychiatrist as to his opinion in regard to defendant's psychopathic personality, which the expert testifies has nothing to do with defendant's ability to distinguish between right and wrong, is immaterial, irrelevant and incompetent, and is properly excluded.

3. Rape § 3—

The provisions of Sec. 4, Chap. 299, Session Laws of 1949, amending G.S. 14-21, provides merely that the jury may recommend life imprisonment even though the jury find facts from the evidence sufficient to constitute rape, and that the judge shall instruct the jury that such verdict may be returned, but the statute makes no change in the elements constituting the crime of rape or the rules of evidence in such prosecutions, and therefore evidence otherwise incompetent is not rendered admissible because directed to an appeal for mercy.

4. Criminal Law § 81c (2)—

An exception to the charge will not be sustained when the charge, read contextually, could not have misled the jury.

5. Criminal Law § 78e (2)—

A misstatement of the contentions must be brought to the trial court's attention in apt time in order for an exception thereto to be considered on appeal.

6. Criminal Law § 79—

Assignments of error not set out in appellant's brief and in support of which no reason or argument is stated or authority cited are deemed abandoned. Rule of Practice in the Supreme Court, No. 28.

APPEAL by defendant from *Sharp, Special Judge,* at 29 August, 1949, Criminal Term of GUILFORD—High Point Division.

Criminal prosecution upon an indictment charging defendant with the capital felony of rape upon a certain named female child, who was under the age of twelve years. G.S. 14-21, as rewritten 1949 Session Laws of North Carolina, Chapter 299, Section 4.

Defendant, upon arraignment, pleaded not guilty.

The evidence offered by the State, upon the trial in Superior Court, tends to show that on the night of 11 August, 1949, defendant, a man thirty-three years of age, committed the crime of rape upon a certain named female child, who, at the time, was ten years of age. The child, testifying as a witness for the State, portrays in minute detail a sordid story of the offense committed upon her by defendant. And her testimony was corroborated by the evidence as to her mutilated physical condition, blood-stained articles of her clothing, and of his clothing, and linoleum from the floor of his automobile, as well as by the testimony of a doctor, who examined and treated her, and by others who saw defendant with the child in his automobile the night of 11 August and the morning of 12 August.

The evidence for the State tended to show that defendant was drinking whiskey on the night of 11 August, and there was evidence to the contrary.

Defendant did not testify as a witness. But he offered evidence tending to show that he was drinking on the night of 11 August; that he has become quite a drinker; that he drinks a lot; that he usually does his drinking away from home because he avoids his mother when he is drinking; that when a small child about six years of age a telephone pole fell on his head; that thereafter he had headaches; that on another occasion he was hit under the edge of his eye with a baseball; that he married at seventeen, and left home to make a home of his own; that he had a number of encounters with the law,—such as petty larceny, drunkenness, immoral conduct, reckless driving, and served time for killing a man while he was in the Army.

Defendant also introduced a doctor as a witness, a medical expert, an expert psychiatrist, by whom he offered to show in the absence of the jury, that in his opinion, based upon the history given, defendant has a psychopathic personality. The doctor in defining psychopathic personality testified that it is "a defect that a person is born with rather than a disease which he acquires, and has nothing whatever to do with his

intellectual appreciation of the difference between right and wrong, or of his ability to know the nature and consequences of his acts. It does not affect that intellectually. It does not affect his ability to feel emotionally. It is believed to be a lack of maturity in a certain portion of the brain which has nothing to do with the intelligence, but has to do with emotions and will and the moral sense. And these people are unable to profit by experience and rewards and punishments do not affect them, and they are, in so far as the present state of our knowledge goes, incurable and permanent in that condition." The expert elaborated on the definition as applicable to defendant. But upon objection all the testimony was excluded. Defendant excepted. And the case was submitted to the jury.

Verdict: Guilty of rape as charged in the bill of indictment.

Judgment: Death by the administration of lethal gas in the manner provided by law.

Defendant appeals to Supreme Court, and assigns error.

Attorney-General McMullan, Assistant Attorney-General Rhodes, and Walter F. Brinkley, Member of Staff, for the State.

York, Morgan & York and Haworth & Mattocks for defendant, appellant.

WINBORNE, J. While defendant sets forth in the record on appeal a great many assignments of error, he debates in his brief mainly the group relating to the exclusion of the expert testimony pertaining to psychopathic personality. In excluding the testimony error is not made to appear.

In this connection, it is noted that in this State the test of responsibility of a person charged with a criminal offense is the capacity to distinguish between right and wrong at the time and in respect of the matter under investigation. *S. v. Brandon*, 53 N.C. 463; *S. v. Potts*, 100 N.C. 457, 6 S.E. 657; *S. v. Harris*, 223 N.C. 697, 28 S.E. 2d 232; *S. v. Matthews*, 226 N.C. 639, 39 S.E. 2d 819; *S. v. Swink*, 229 N.C. 123, 47 S.E. 2d 852; *S. v. Creech*, 229 N.C. 662, 51 S.E. 2d 348.

"He who knows the right and still the wrong pursues is amenable to the criminal law,"—*Stacy, C. J.*, in *S. v. Jenkins*, 208 N.C. 740, 182 S.E. 324, citing *S. v. Potts, supra*.

Considering this test with the statement of the expert psychiatrist that psychopathic personality "has nothing whatever to do with" a person's "intellectual appreciation of the difference between right and wrong, or of his ability to know the nature and consequences of his acts," it becomes apparent that the proffered testimony is immaterial, irrelevant and incompetent, and was properly excluded.

But defendant, in his brief filed here, calls attention to Section 4 of Chapter 299 of 1949 Session Laws of North Carolina, in which the statute G.S. 14-21 pertaining to punishment for rape is rewritten, and contends that since by this act the General Assembly has empowered the jury to exercise its discretion, within limitations, in fixing punishment in cases of rape, there is more compelling reason for admitting in evidence the testimony excluded by the trial court.

In this connection, the statute as so rewritten by the General Assembly reads: "Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." It is noted that the only changes in the statute are embraced within the terms of the proviso.

However, it is clear from a reading of the amendment that the General Assembly did not attempt to make any change in the elements constituting the crime of rape, or in the rules of evidence applicable in the trial on a charge of rape. Rather, it is patent that the sole purpose of the act is to give to the jury the right on the evidence in the case to render a verdict of guilty of rape, with recommendation of life imprisonment, even though the jury may find facts sufficient to constitute rape as defined by the statute. In the case of *Ashbrook v. State*, 49 Ohio App. 298, 197 N.E. 214, this headnote epitomizing the opinion is pertinent to subject under consideration: "The action of a jury in recommending or failing to recommend mercy in a first degree murder case is a matter entirely within its discretion; it is not an issue in the case, nor can evidence be introduced directed specifically toward a claim for mercy." Compare *S. v. McLean*, 224 N.C. 704, 32 S.E. 2d 227. Prior to the amendment a verdict of guilty of rape made punishment by death imperative.

Moreover, the clause "and the court shall so instruct the jury," merely directs the court to instruct the jury that such verdict may be returned.

Each of the other two exceptions treated in defendant's brief have been considered, and fail to show merit. Both are directed against portions of the charge. The one is to a portion of the instruction on reasonable doubt. When read in connection with that which immediately precedes, it is not likely that the jury could have misunderstood the meaning of the term. And the other is to a portion of the charge in which the court was stating a contention of defendant. If it were a misstatement of contention, it does not appear that defendant called the matter to the attention of the court. Failing in this, objection is waived.

Moreover, other assignments of error set forth and grouped in the record on appeal are not set out in appellant's brief filed here, nor is reason or argument stated, or authority cited in support thereof. Hence they are taken as abandoned. Rule 28 of Rules of Practice in the Supreme Court, 221 N.C. 544, at page 562.

After careful consideration, we find in the judgment from which appeal is taken,

No error.

JAMES THURMAN BERRY (EMPLOYEE) v. COLONIAL FURNITURE COMPANY (EMPLOYER) AND MARYLAND CASUALTY COMPANY (CARRIER).

(Filed 9 June, 1950.)

1. Master and Servant § 55d—

A sole assignment of error to the signing of the judgment of the Superior Court affirming the award of the Industrial Commission presents only the question whether the facts found by the Industrial Commission support the award of compensation.

2. Master and Servant § 40a—

In order for an injury to an employee to be compensable under the Workmen's Compensation Act it must result from an accident arising out of and in the course of employment.

3. Master and Servant § 40d—

The words "in the course of" the employment as used in the Workmen's Compensation Act refer to the time, place, and circumstances under which an accident occurs.

4. Master and Servant § 40c—

The words "arising out of the employment" as used in the Workmen's Compensation Act refer to the origin or cause of the accident, and while not capable of precise definition, imply some causal connection between the accident and the employment.

5. Same—

An accidental injury received by an employee while riding in a truck on a vacation pleasure trip does not arise out of the employment notwithstanding that the employer furnished the vacation trip as a matter of good will and personal relations among the employees and paid the entire expenses of the trip in accordance with its agreement entered into at the time of the employment as a part of the remuneration and inducement to its employees.

APPEAL by defendants from *Halstead, Special Judge,* at January Civil Term, 1950, of ALAMANCE.

Proceeding under North Carolina Workmen's Compensation Act to determine liability of defendants to claimant.

The Commissioner before whom the case was heard, in opinion filed, after making preliminary incidental findings, found from the evidence these facts: "That the claimant in this case, several months prior to July 25, 1948, was employed by the defendant company as a credit manager at a salary of $240.00 per month, and at the time of his employment it was understood and agreed that the company did not carry hospitalization insurance for the benefit of its employees but that as a matter of good-will and personal relations among employees, they always gave them a trip at the company's expense to the seashore each year, and this was understood and agreed to at the time of the employment as a consideration in connection with the employment and work; and based upon this understanding and agreement, the claimant in this case accepted the terms of the agreement and went to work and continued to work for the defendant in a satisfactory manner until Saturday, July 24th, 1948, when Mr. Smith, the manager of the defendant company told his employees that the time of year had come for them to take the trip to the coast, as was agreed to at the time of employment, and arrangements were made and consummated for such trip, which trip was being made in accordance with the employment agreements and personnel policies of the defendant store. So on Saturday evening, July 24th, after the store had closed for the day's work, the defendant employer took the company truck and placed therein mattresses and other equipment to make the same comfortable, both for riding and sleeping purposes, and some four or five of the employees, including the manager, boarded the truck in Burlington and drove to Morehead City, N. C., that night, where they camped and slept in and about the truck. Early Sunday morning, July 25th, it was decided that they would drive the truck from Morehead City over to Beaufort, N. C., where they proposed to take a boat and do some deep-sea fishing, all of which was being furnished and paid for by the defendant company as part of their personal relations; and while on the way to Beaufort from Morehead City, and while the truck in which they were riding was being driven by the manager of the defendant company and was being furnished to the employees with all charges for meals and transportation paid, the truck ran over a rough place in the street or highway and the claimant, Berry, toppled out over the back end gate and received serious head and bodily injuries as a result of the fall to the pavement and was knocked unconscious . . .; that the claimant was disabled from the date of the injury on July 25, 1948, until the date of the hearing, etc."

The Commissioner thereupon makes the following conclusion: "The question has been raised as to whether this injury arose out of and in

the course of the claimant's employment for the defendant. Under the facts and circumstances in this case, the Commissioner thinks it did and so holds for the reason that the trip in question was held out as a part of the remuneration and an inducement at the time of employment and that it was a custom of the company to furnish these trips with all expenses paid as a matter of good personal relations." And the Commissioner thereupon directed that an award issue, etc., and the same was issued.

Defendants, thereupon, appealed to the full Commission from the findings of fact and conclusions of law contained in the opinion filed by the hearing Commissioner, and the award entered, and applied for a review of the award so entered.

Upon such appeal, and after hearing, and "review of all the competent evidence, findings of fact and conclusions of law, and . . . of the award of the hearing Commissioner" the full Commission approved "the findings of fact, conclusions of law and award of the hearing commissioner."

Notice of formal award followed, and defendants appealed from the award and judgment so entered to the Superior Court of Alamance County, etc.

When the matter came on for hearing in Superior Court, on appeal thereto, upon the facts found and set out in the opinion and findings filed by the North Carolina Industrial Commission, the judge presiding "being of the opinion that the plaintiff sustained an injury by accident arising out of and in the course of his employment and being thereby entitled to the full benefits of the provisions of the North Carolina Workmen's Compensation Act," adjudged "that the award of the North Carolina Industrial Commission be and the same is hereby in all respects affirmed . . ."

Defendants objected to the signing of the judgment. Objection was overruled, and defendants excepted and appealed to the Supreme Court and assign error.

H. Clay Hemric for plaintiff, appellee.

R. M. Robinson for defendants, appellants.

WINBORNE, J. Since the only assignment of error presented for decision on this appeal is based upon exception to the signing of the judgment, *Simmons v. Lee,* 230 N.C. 216, 53 S.E. 2d 79, there arises this question: Do the facts found by the North Carolina Industrial Commission support the award of compensation to the claimant, approved by the judge of Superior Court? A negative answer is in keeping with decisions of this Court, applying pertinent provisions of the North Carolina Workmen's Compensation Act, now Chapter 97 of the General Statutes.

See in particular *Ridout v. Rose's Stores, Inc.*, 205 N.C. 423, 171 S.E. 642; *Hildebrand v. Furniture Co.*, 212 N.C. 100, 193 S.E. 294; *Plemmons v. White's Service, Inc.*, 213 N.C. 148, 195 S.E. 370; *Wilson v. Mooresville*, 222 N.C. 283, 22 S.E. 2d 907; *Taylor v. Wake Forest*, 228 N.C. 346, 45 S.E. 2d 387. See also *Barber v. Minges*, 223 N.C. 213, 25 S.E. 2d 837.

In this connection, under the North Carolina Workmen's Compensation Act, Chapter 97 of the General Statutes, the condition antecedent to compensation is the occurrence of an injury (1) by accident (2) arising out of and (3) in the course of employment. See *Taylor v. Wake Forest, supra*, where pertinent decisions of this Court are cited.

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.*, 198 N.C. 723, 153 S.E. 266; *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, supra; Plemmons v. White's Service, Inc., supra; Lockey v. Cohen, Goldman & Co.*, 213 N.C. 356, 196 S.E. 312; *Wilson v. Mooresville, supra; Taylor v. Wake Forest, supra; Matthews v. Carolina Standard Corp.*, decided contemporaneously herewith.

The term "arising out of employment," it has been said, 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; Taylor v. Wake Forest, supra.*

"Arising out of" in the language of *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.*, 205 N.C. 34, 169 S.E. 825; *Bain v. Mfg. Co.*, 203 N.C. 466, 160 S.E. 301; *Plemmons v. White's Service, Inc., supra; Wilson v. Mooresville, supra; Taylor v. Wake Forest, supra; Matthews v. Carolina Standard Corp., supra.*

Applying these principles to the facts as found by the Industrial Commission, in the present case, it is obvious that the outing, or fishing trip, "after the store had closed for the day's work" on Saturday, is not incidental to claimant's employment. And there is no causal relation between an injury by accident suffered while on such outing and the employment. The factual situation here is similar to that in *Hildebrand v. Furniture*

Co., supra. In reversing an award of compensation there *Clarkson, J.*, writing for this Court, said: "The trip was an 'outing,' not to further directly or indirectly the employer's business. The evidence in the case indicated that Wesley Williams was a volunteer in making the trip and that the trip was for pleasure and not for business." So it was in the present case. Business hours were over. The trip was for pleasure and not for business.

Hence, we hold that the facts found by the Industrial Commission do not support an award of compensation within the meaning and intent of the North Carolina Workmen's Compensation Act.

Therefore the judgment below is hereby reversed, and the cause will be remanded for further proceeding in accordance with the decision here made.

Reversed.

CHARLOTTE COCA-COLA BOTTLING COMPANY, A CORPORATION, v. EUGENE G. SHAW, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 9 June, 1950.)

1. Taxation § 1c—

The power to classify subjects of taxation carries with it the discretion to select them, and a wide latitude is accorded taxing authorities, particularly in respect of occupational taxes, under the power conferred by Art. V, Sec. 3, of the Constitution of North Carolina.

2. Taxation § 1a—

The General Assembly may levy a tax on one aspect of a business or occupation and also an additional tax on another aspect or different development of the business of the same taxpayer, provided the tax applies equally to all in the same class, since double taxation, as such, is not prohibited by the Constitution and is valid if the rule of uniformity is observed.

3. Taxation § 30—

A bottling company which owns and distributes as a part of its business a large number of machines for distributing its product which it places on location with merchants and others under agreement, is liable for the occupational tax of $100.00 levied under the provisions of G.S. 106-65.1 and is also liable for a tax of $15.00 on each such distributing machine under G.S. 105-65.2, and the statute is not so uncertain and vague as to be unenforceable.

4. Same—

The tax of $15.00 on each soft drink dispensing machine levied by G.S. 105-65.2 applies regardless of whether the distributor controls the coin box keys and collects the intake, paying a fixed rent or share of the receipts

to the owner of the premises, or charges the retailer a fixed amount for servicing the machines and permits the retailer to control the coin box keys and retain the intake.

5. Taxation § 23½—

The construction given a taxing statute by the Commissioner of Revenue, though not controlling, will be given consideration by the courts. G.S. 105-264.

6. Same—

Where a taxing statute uses the alternative conjunction "or" it creates tax liability on any coming within a description permissible under the statute.

APPEAL by plaintiff from *Patton, Special Judge*, February Term, 1950, of MECKLENBURG. Affirmed.

This was an action to obtain refund of taxes paid under protest. The Commissioner of Revenue levied assessment for license taxes for 3 years on plaintiff corporation as distributor of coin operated drink dispensers, under G.S. 105-65.1. On agreed facts the court held plaintiff not entitled to the refund claimed, and dismissed the action. Plaintiff appealed.

Shannonhouse & Bell and Raymond W. Bradley, Jr., for plaintiff, appellant.

Attorney-General McMullan and Assistant Attorneys-General James E. Tucker and Peyton B. Abbott for defendant, appellee.

DEVIN, J. From the facts agreed it appeared that plaintiff was engaged in the business of bottling and selling Coca-Cola at wholesale, and in connection therewith owned and distributed a number of machines equipped to dispense or deliver bottled Coca-Cola upon the insertion of a coin. These machines or dispensers were placed on location by plaintiff in stores and other places under agreement that plaintiff, retaining title, should install the machines and keep them supplied with bottles of Coca-Cola and ice; the merchant to pay as compensation therefor 10c more per case of Coca-Cola than the regular price, the merchant to retain key to coin box of the machine and remove the coins at will. The compensation received by plaintiff was not more than the cost of the service, but profit was derived from increased sales of Coca-Cola. Plaintiff was free to cease to furnish merchandise or to remove the machines at any time.

In view of the business thus conducted the Commissioner of Revenue levied assessment on plaintiff for the annual occupation tax of $100 imposed by G.S. 105-65.1 on distributors of drink dispensers, and also for an additional tax of $15 per machine on each of these vending machines

placed by plaintiff with its customers. Payment was made under protest and suit instituted to recover.

The pertinent parts of the statute (G.S. 105-65) under which this tax was claimed are as follows:

"(1) Every person . . . engaged in the business of operating, maintaining or placing on location anywhere within the State of North Carolina any merchandising dispenser, in which is kept any article of merchandise to be purchased, . . . shall apply for and procure . . . a statewide license to be known as an annual distributor's or operator's license, and shall pay for such license the following tax: Distributors or operators of drink dispensers $100.

"(2) In addition to the above annual distributor's or operator's license, every person, . . . distributing or operating any of the above dispensers . . . shall apply for and obtain . . . a statewide license for each dispenser . . ., and shall pay therefor the following tax: Drink dispensers $15."

The power of the General Assembly to enact the statute quoted is not questioned by the appellant, but the view is urged upon us that the transactions engaged in by the plaintiff upon which the assessment was levied do not come within the terms of G.S. 105-65.1, and further that the terms of the statute are so uncertain and vague as to render it unenforceable and therefore void.

It has been declared by this Court that the power to classify subjects of taxation carries with it the discretion to select them, and that a wide latitude is accorded taxing authorities, particularly in respect of occupation taxes, under the power conferred by Art. V, sec. 3, of the Constitution. *Leonard v. Maxwell*, 216 N.C. 89 (94), 3 S.E. 2d 316; *Henderson v. Gill*, 229 N.C. 313, 49 S.E. 2d 754; *Mining Co. v. Lord*, 262 U.S. 172. Double taxation, as such, is not prohibited by the Constitution, and is not invalid if the rule of uniformity is observed. 51 A.J. 338. By levying an excise tax on one aspect of a business or occupation the State is not precluded from levying an additional tax on another aspect or different development of the business of the same taxpayer, if the tax applies equally to all in the same class and there is reasonable ground for the distinctive classification. *Express Co. v. Charlotte*, 186 N.C. 668 (675), 120 S.E. 475; *S. v. Bridgers*, 211 N.C. 235, 189 S.E. 869; *Snyder v. Maxwell*, 217 N.C. 617, 9 S.E. 2d 19; *Nesbitt v. Gill*, 227 N.C. 174, 41 S.E. 2d 646; *Henderson v. Gill*, 229 N.C. 313, 49 S.E. 2d 754; *Hertz v. Louisville*, 294 Ky. 568, 147 A.L.R. 306. Thus, the same person may be required to pay an occupation license tax as a merchant, and also an additional tax for selling cigarettes, and another tax on each coin operated vending machine, and different rates on different machines according to the class of merchandise dispensed. *Snyder v. Maxwell, supra.*

Here, the plaintiff is engaged in the business of bottling and selling Coca-Cola at wholesale, and in connection therewith owns and distributes as part of its business a large number of machines for dispensing bottles of Coca-Cola, and places them on location with merchants and others under agreement. It is thus "engaged in the business of placing on location" within the state "merchandising dispensers." Its transactions come within the terms of the statute requiring payment of an occupation license tax therefor of $100. We think plaintiff liable for the tax imposed by subsection (1) of the quoted statute upon "distributors of drink dispensers."

The statute, subsection (2), prescribes also that "in addition to the above annual distributor's license" every person distributing any of the above dispensers shall pay on each drink dispenser distributed a tax of $15.

It may be noted, as evidence that the Legislature regarded operations such as carried on by this plaintiff as being covered by G.S. 105-65.1, that a statute was enacted in 1949, now codified as G.S. 105-250.1, which provides that every person who owns and places on location other than on his own premises, under any lease or rental agreement, coin operated machines of any type whatsoever upon which tax is levied under G.S. 105-65.1, "hereinafter referred to as a distributor," shall file a quarterly information report with the Commissioner of Revenue. Apparently the purpose of this statute is to enable the Commissioner of Revenue to be advised as to the number of machines placed on location by the distributor; as otherwise there would be no necessity for such a report from one who pays a single annual occupation license tax. The implication is permissible that a tax on each machine was regarded as having been imposed by G.S. 105-65.2, and was so acted upon by the Commissioner of Revenue. The construction given a taxing statute by the Commissioner of Revenue will be given consideration by the Court, though not controlling. G.S. 105-264; *Knitting Mills v. Gill,* 228 N.C. 764, 47 S.E. 2d 240; *Valentine v. Gill,* 223 N.C. 396, 27 S.E. 2d 2; *Powell v. Maxwell,* 210 N.C. 211, 186 S.E. 326.

We think the operations of the plaintiff as shown by the agreed facts come within the terms of the statute, and that the statute is not so uncertain and vague as to be unenforceable.

The appellant also argues that the statute, G.S. 105-65.1, was intended to cover only what is known as the operation of a "vending machine route," rather than the transactions carried on by the plaintiff. The business so denominated as appears from the facts agreed consists in purchasing merchandise at wholesale and retailing it through coin operated machines which are placed on location on the premises of others who shelter the machine for a fixed rent or for a share of the receipts.

The operator of the "route" visits the locations at intervals, fills these machines with merchandise and collects the intake, retaining control of the machines by holding the coin box keys.

We cannot agree that the business thus described is the only classification of distributors of drink dispensers intended to be selected by the lawmakers, or that it would relieve the plaintiff of liability for the taxes imposed by G.S. 105-65.1. Agreement that license tax on the machine or dispenser should be assumed by the merchant with whom placed would not relieve the plaintiff if under the statute it is liable therefor.

The frequent use in the statute of the alternative conjunction "or" has the effect of enlarging the scope of tax liability, and bringing within the purview of the statute all the persons and subjects therein designated, and permitting a choice of any therein defined. The department charged with the collection of license taxes, therefore, had the duty to enforce tax liability on any coming within a description permissible under the language of the statute.

The ruling of the court below that the plaintiff was not entitled to refund of the taxes paid must be

Affirmed.

STATE v. DEWICK W. DOOLEY.

(Filed 9 June, 1950.)

1. Automobiles § 30d—

Circumstantial evidence tending to identify defendant as the driver of the car which was driven in a reckless manner, *held* sufficient to be submitted to the jury. G.S. 20-140.

2. Criminal Law § 53j—

After instructing the jury that in appraising the testimony it should take into consideration the demeanor of the witnesses, the likelihood for bias, and their knowledge of the facts, the court charged that the State contended that its testimony came from officers and from disinterested witnesses while defendant's witnesses were interested. There was nothing in the record to show that either of defendant's witnesses was interested. *Held:* The reference to defendant's witnesses as being interested must be held for prejudicial error even though contained in the statement of contentions.

3. Criminal Law § 53k—

In this prosecution for reckless driving the State contended that defendant's repeated denials that he was driving, made immediately after he left the car, and before he was charged, indicated consciousness of guilt. *Held:* A charge that defendant contended that such statements

purportedly made by him were unworthy of belief, in stating his contention, must be held for prejudicial error.

APPEAL by defendant from *Sink, J.*, November Term, 1949, of FORSYTH. New trial.

The defendant was charged with reckless driving in violation of G S. 20-140. From judgment imposing sentence, consequent upon a verdict of guilty, the defendant appealed.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State, appellee.

W. Dennie Spry and Richmond Rucker for defendant, appellant.

DEVIN, J. The defendant assigns error in the denial by the court of his motion for judgment of nonsuit, and also in the court's instructions to the jury in several particulars to which exceptions were noted.

This necessitates consideration of the evidence adduced at the trial, which may be summarized as follows: The evidence offered by the State tended to show that on the evening of 21 July, 1949, between the hours of 8 and 9 p.m. an automobile identified as that of defendant struck an automobile parked next to the curb on North Marshall Street in Winston-Salem. Defendant's automobile was then backed off and driven through a red light, and after traversing several streets was seen holding up traffic on a busy street while attempt was being made to disengage the bumper of defendant's car from the fender of another car with which it had come in contact and to drive it over the curb into the parking space or garage in the rear of the Frances Hotel. The front of defendant's automobile was damaged. The witness who first observed defendant's automobile on this occasion testified he saw only one person in it, a man without a shirt and wearing glasses. The State also offered other evidence, largely circumstantial, tending to show that defendant was the driver. When the defendant came from the automobile after it had come to rest in the rear of the hotel, he was heard to say to the spectators who had assembled, "Scatter! Scatter! I wasn't driving." And to the officer who came up and inquired where his car was he replied, "I wasn't driving." Two shirts were found in the back of defendant's automobile.

Defendant did not testify, but effort was made to show that two men were in the automobile, both without shirts and wearing glasses, and that defendant was not the one driving. Defendant offered two witnesses, one of whom testified he saw defendant's automobile driven out from the rear of the Frances Hotel about 7:30 p.m. with two men in it, defendant and another, neither wearing a shirt, and that the other man was driving. The other witness, the proprietor of a service station located some two

miles distant, testified that between 8:45 and 9 p.m. on this date defendant and another man drove up to his place, both without shirts, and the other man was driving the automobile.

That defendant's automobile had been driven recklessly on this occasion was not seriously controverted, but it was contended the evidence was insufficient to identify the defendant as the driver. About this point the contest was waged. We think, however, that while no witness positively identified the defendant as the driver, there was circumstantial evidence of this fact sufficient to carry the case to the jury, and that defendant's motion for judgment of nonsuit was properly denied.

The defendant noted numerous exceptions to the judge's charge to the jury. Most of these are without merit. But in two instances we think the court inadvertently used language which under the circumstances here disclosed must be held sufficiently prejudicial to require a new trial.

As appears from the record before us, the court charged the jury as follows: "You will take into consideration in appraising the testimony the attitude and the demeanor of the witnesses who have gone upon the stand, the likelihood for bias, for prejudice, for knowing the true facts and testifying thereto, the State contending and insisting that some of the testimony came from officers on the part of the State, and some came from disinterested witnesses, while the defendant's witnesses are interested."

While the reference to the defendant's witnesses as being interested, in contrast to the disinterestedness of the officers and the State's witnesses, was stated in the form of a contention, the implication probably found lodgment in the minds of the jury that the testimony of defendant's witnesses should be appraised by them in the light of their interest. There was nothing in the record to show that either of them was related or in any legal respect interested. These were the only witnesses offered by defendant whose testimony tended to show defendant was not the driver of the automobile on the occasion charged. The suggestion that the defendant's witnesses were less credible than those testifying for the State, though not so intended by the court, likely proved hurtful to defendant's defense.

The defendant also noted exception to the following excerpt from the charge: "The defendant insists that on the occasion of the officer appearing there and on the occasion of his (defendant's) coming out from the garage, if you should find, beyond a reasonable doubt, that he did come out from behind the garage, as contended for by the State, that such statements as were purportedly made by him are unworthy of your belief in that, as he contends, you should not interpret them to imply guilt upon his part."

The reference here was to purported statements by the defendant, "I wasn't driving." What was doubtless meant was that, in reply to the State's contention that by repeated denials that he was driving the defendant did "protest too much," the defendant contended this should not be interpreted to imply guilt. However, the instruction from the court, as it appears in the record, that the defendant contended such statements were "unworthy of your belief" was likely to be misunderstood by the jury to the defendant's prejudice.

Under the circumstances we think there should be another hearing, and it is so ordered.

New trial.

CHARLIE E. BATCHELOR v. WILLIAM M. BLACK AND ALDERT S. ROOT, JR.

(Filed 9 June, 1950.)

1. **Automobiles §§ 18h (2), 18h (3)—Evidence in this action to recover for collision at intersection held to warrant submission of issues of negligence and contributory negligence.**

Plaintiff's testimony to the effect that before attempting to enter an intersection with a through highway, he brought his car to a full stop, looked, and not seeing a vehicle approaching from either direction, started across the intersecting highway, and that as the rear wheels of his car crossed the center line of the intersecting highway his car was struck from the right by the car driven by one defendant and owned by the other defendant, who was a passenger therein, which vehicle was traveling at a rate of 75 to 80 miles per hour and knocked plaintiff's car some 35 feet from the point of impact, *is held*, notwithstanding plaintiff's admission on cross-examination that he had taken two or three swallows of liquor some five and one-half hours prior to the time of the collision, properly submitted to the jury on the issues of negligence and contributory negligence.

2. **Trial § 31b—**

The court need not read a statute to the jury, a simple explanation of the law without the involvement of the technical language of a statute being preferable. G.S. 1-180.

3. **Automobiles § 18i—**

Where there is evidence that plaintiff had drunk a small quantity of intoxicating liquor some time before the collision, but no evidence that his alleged intoxication was the proximate cause of the collision, a charge giving the defendants the full benefit of such evidence is sufficient, and the court is not required to enter into a speculative discussion on the law of drunken driving.

4. **Appeal and Error § 39f—**

An exception to an excerpt from the charge will not be sustained when the instructions construed contextually do not disclose reversible error.

BATCHELOR *v.* BLACK.

DEFENDANTS' appeal from *Grady, Emergency Judge,* January 1950 Civil Term, DURHAM Superior Court.

This action was instituted in the Superior Court of Durham County by the plaintiff, Charlie E. Batchelor, to recover from the defendants, William H. Black and Aldert S. Root, Jr., for property damage and personal injury alleged to have been sustained by him as a result of a motor vehicle collision. On the night of October 7, 1947, the plaintiff, accompanied by Remus Mitchell and Susan Mitchell, was operating his automobile in a southerly direction along the Alston Avenue Road in Durham County. At the intersection of Alston Avenue Road and Highway 54 there was a collision between plaintiff's vehicle and the automobile of defendant Root, which was being driven in an easterly direction along Highway 54 by the defendant Black, accompanied by Root and Richard McElvoy. As a result of such collision the plaintiff's vehicle was damaged and he sustained personal injuries which he alleges were proximately caused by the negligence of the defendant Black in the operation of the vehicle and participated in by the defendant Root.

The defendants deny negligence on their part and allege that the plaintiff was contributorily negligent in bringing about the injuries sustained by him.

The case went to the jury and resulted in a verdict and judgment for plaintiff.

This appeal is chiefly concerned with the defendants' demurrer to the evidence and motion to nonsuit, which were overruled, and to the instructions given to the jury. The plaintiff's evidence, summarized and stated as bearing upon these objections, is as follows:

Plaintiff testified that sometime between 11:00 and 12:00 o'clock on the night of October 7, 1947, he was driving his vehicle, at a speed of from 30 to 35 miles per hour, south on Alston Avenue Road toward the intersection of Alston Avenue Road and Highway 54; that there was a stop sign on Alston Avenue Road about 10 or 15 feet from Highway 54; that he pulled by the stop sign just a little "because there was a bunch of hedges about as high as your head and I had to get out a little further, I figured, to get across safe, to see down Highway 54 to the right;" and stopped between the sign and Highway 54; that he "looked up and down Highway 54 in both directions to see whether or not there were any other cars approaching the intersection, and there wasn't;" that he could see down Highway 54 in a westerly direction "a couple hundred yards." After that, he testified, he pulled on out into the highway, crossing at the intersection at a speed of from 10 to 15 miles per hour in low gear; that he looked westwardly again when the lights of the other vehicle became visible to him; that at the time he observed the lights the front wheels of his vehicle were at the center of the Highway 54 and that the

defendants' vehicle was from 75 to 100 feet from him and traveling toward him at a speed which he estimated to be from 75 to 80 miles per hour; that he speeded up in an effort to clear the intersection but was unable to do so before the defendants' car collided with his. He further testified that the defendants' vehicle struck his car at both doors on the right side and that the force of the impact knocked his car about 40 feet into a yard to the southeast of the intersection, demolishing his car and causing his injuries. Plaintiff also testified that his vehicle was in good mechanical condition; the lights and brakes good; the steering mechanism all right, windshield and window clean.

Ed Lowe, testifying for the plaintiff, stated that he came to the scene of the collision within two or three minutes of its occurrence and that he observed where the impact took place; that it appeared that the rear wheels of plaintiff's car had just crossed the white line of Highway 54 over on the right side of Alston Avenue Road going south; that the plaintiff's car came to rest 35 feet from the point of impact; that plaintiff's car "looked like it was tore all to pieces. It was kind of smashed up together." The witness further testified that "if you were anywhere within 16 feet of the intersection you could see down the highway."

George Council testified for the plaintiff that he reached the intersection soon after the collision occurred; that he observed the plaintiff pinned under a tree and that the plaintiff's car was on top of the tree; that the tree was between six and seven inches in diameter. He further testified that the distance from the intersection to the point where the car had stopped was about 35 feet.

R. H. Morgan, Jr., testified that to the west of the intersection there was a curve in Highway 54 beginning about 184 feet from the intersection; that the curve itself covered around 200 feet; that the distance from the edge of the pavement of Highway 54 to the stumps of the hedge bordering Alston Avenue Road (the hedge having since been cut away) was about nine feet. He further testified that there was a heavy fog and mist that night.

Other evidence bearing on the extent of the personal injuries and property damage sustained by the plaintiff was introduced.

On cross-examination plaintiff testified that he had taken two or three swallows of liquor some five and one-half hours prior to the time of the collision, but denied that he was intoxicated.

The defendants' evidence was in substantial contradiction, particularly with regard to the question of intoxication of plaintiff. Plaintiff's evidence in rebuttal added nothing substantial to the foregoing summary.

At the conclusion of plaintiff's evidence and again at the conclusion of all the evidence defendants demurred and moved for judgment as of

nonsuit, which was denied. Defendants appealed. Exceptions of defendants are noted in the opinion.

Basil M. Watkins and Charles W. White for defendants, appellants.

James R. Patton, R. M. Gantt, and J. Grover Lee for plaintiff, appellee.

SEAWELL, J. The propriety of the submission of the evidence to the jury on both issues, that of negligence of the defendants and that of contributory negligence of the plaintiff is so obvious on inspection of the foregoing evidence that we refrain from extended discussion. *Hobbs v. Queen City Coach Co.*, 225 N.C. 323, 34 S.E. 2d 750; *Crone v. Fisher*, 223 N.C. 635, 127 S.E. 2d 642.

The exceptive assignments of error to the judge's charge present two items which we discuss because of the importance attached to them in the argument:

(a) The failure of the court to read as requested that section of the law dealing with the operation of motor vehicles while under the influence of liquor and to charge the jury with respect thereto.

This Court has repeatedly held that the court need not read a statute to the jury, and in fact the opinions tend to discourage the practice. While the court must apply the law to the evidence (G.S. 1-180) this is often better accomplished by a simple explanation without the involvement of the technical language of the statute.

In the instant case the judge was not required to enter into a speculative discussion based on the alleged intoxication of the plaintiff in the absence of any evidence pointing to it as a proximate cause of the injury. In his charge upon the second issue, the court gave the defendants the full benefit of such evidence, pertinent to that issue, as the defendants were able to adduce.

(b) As to the exceptive assignment of error regarding the rights and mutual obligations of those about to enter an intersection at the same time, the challenged instruction, standing alone, is subject to criticism, but taken in connection with the whole charge does not disclose reversible error. *Braddy v. Pfaff*, 210 N.C. 248, 186 S.E. 340; *In re Will of Hardee*, 187 N.C. 381, 121 S.E. 667.

Other exceptions not specifically discussed have been examined and we find no merit in them. The case appears to have been fairly tried and submitted to the jury, and they have spoken.

In the record we find

No error.

STATE v. ALPHONSO HERBIN.

(Filed 9 June, 1950.)

1. **Homicide § 27f—Charge held erroneous in failing to apply law of self-defense to defendant's evidence.**

Defendant's evidence was to the effect that there was a disturbance in his place of business, during which a shot was fired, and that he approached the scene of the disturbance armed with a pistol to restore order. *Held:* A correct abstract instruction as to the law of self-defense, followed by an instruction that if defendant pointed his pistol at deceased, he would have made the first assault and would have had to withdraw from the difficulty with notice to his adversary before he could kill in self-defense, must be held for error in failing to apply the law to defendant's evidence and in making the right of self-defense upon the evidence to depend solely upon whether defendant first pointed his pistol at deceased.

2. **Criminal Law § 53d—**

It is insufficient for the court to merely state the contentions of a party without declaring and explaining the law applicable to his version of the occurrence as supported by his evidence. G.S. 1-180.

APPEAL by defendant from *Phillips, J.*, at November Term, 1949, of GUILFORD (Greensboro Division).

Criminal prosecution tried upon indictment charging the defendant with the murder of one James Arthur Dawkins.

When the case was called for trial, the Solicitor for the State announced he 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.

The evidence discloses that at the time of the shooting the defendant operated two places of business next door to each other, on the Freeman Mill Road, South of Greensboro. One of these places was operated as a supper club and the other was used as his home and as a dance hall. The defendant, his housekeeper and three children lived in the home. The room used as a dance hall had been used for the operation of the supper club prior to the construction of the new building which was completed in December, 1948.

According to the State's evidence, the deceased James A. Dawkins, along with Lucille Goss, Carrie Goss, Maureen Gibson, June Simmons and George McCoy, went to the dance hall for an evening of entertainment on 27 February, 1949. Just before going into the dance hall, the deceased gave Lucille Goss his automatic pistol for safekeeping. She placed it in the bosom of her dress. The party ordered some whiskey, drank it and danced a while. There were some 25 or 30 people in the dance hall. Lucille Goss left the hall for a short time and when she returned, the deceased was talking to a girl who did not belong to their

party. Lucille Goss pulled the pistol from her bosom and pointed it towards the deceased, and George McCoy, thinking she was going to shoot, said "Don't do that" and snatched the pistol out of her hand, and it fired in the floor. The pistol was then delivered to the deceased at his request.

The evidence further discloses that someone notified the defendant of the disturbance and he got his pistol, a .32 calibre, and went over from the supper club to the dance hall. The evidence is in sharp conflict as to what happened after the defendant entered the dance hall. The State's evidence tends to show the defendant entered the hall with his pistol drawn and pointed it at the deceased; that he then disarmed the deceased and as he backed away with a gun in each hand, McCoy grabbed the defendant's right hand and pushed it up and the gun was discharged into the ceiling; that McCoy then released the defendant, leaving only the deceased with the defendant, when another shot was fired which killed Dawkins.

On the other hand, the defendant testified that he entered the hall with his pistol in his left hand; that he looked around and saw James Dawkins with a pistol; that he said "Put that gun away, you might hurt somebody." Dawkins then pointed the gun directly at him and asked him what he had to do with it. He was so close to him that he grabbed the gun. McCoy and Dawkins tried to take Dawkins' gun away from the defendant. They scuffled back through a little hall, which is three by four feet, into the back porch, which is closed in. The back porch is six by seven feet. They continued to scuffle across that and into the kitchen, which is eight by twelve feet. They scuffled through the kitchen and about halfway through the dining room, when the gun went off and Dawkins was killed; that all three of them had their hands on the gun when it went off.

According to the testimony of the arresting officer, it was 25 or 30 feet from the dance hall to where Dawkins was killed. Dawkins was killed by a bullet from his own gun.

From a verdict of murder in the second degree and judgment entered pursuant thereto, the defendant appeals and assigns error.

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

P. W. Glidewell, Sr., and Worth Henderson for defendant.

DENNY, J. The sole exception brought forward and argued as required by Rule 28 of the Rules of Practice in the Supreme Court, 221 N.C. 562, is the exception to the following portion of his Honor's charge: "Now the court charges you if you find from the evidence in this case

that the defendant did point this pistol at James Dawkins, that he then made the first assault because that would be an assault with a deadly weapon within the meaning of the law."

The court had previously charged the jury correctly on the law of self-defense as it applies to one who is in a place where he has a right to be, in his home or in his place of business. The jury was then instructed that if the defendant brought on the difficulty, "before he could claim that he was fighting in self-defense and be justified in that, he would have to withdraw from the difficulty and let his adversary know he had withdrawn from the difficulty before he could kill in self-defense." As a general proposition of law, this instruction is correct. *S. v. Bryson,* 200 N.C. 50, 156 S.E. 143. But the instruction which followed, and of which the defendant complains, eliminated, for all practical purposes, any consideration by the jury of the evidence upon which the defendant relied in support of his plea of self-defense, and left the jury to determine only the question as to whether or not the defendant pointed a pistol at the deceased. The court did not apply the law as to the legal rights of the defendant while in his home and place of business to defendant's evidence if the jury should find his version of what took place was true. *S. v. Pennell,* 224 N.C. 622, 31 S.E. 2d 857; *S. v. Anderson,* 222 N.C. 148, 22 S.E. 2d 271; *S. v. Roddey,* 219 N.C. 532, 14 S.E. 2d 526; *S. v. Glenn,* 198 N.C. 79, 150 S.E. 663; 26 Am. Jur., 264. His contentions were given and the law on the right of self-defense adequately and correctly stated as an abstract proposition. But the court did not explain the law arising upon the evidence in the case, bearing on the defendant's plea of self-defense, except in the manner referred to herein. G.S. 1-180; *Lewis v. Watson,* 229 N.C. 20, 74 S.E. 2d 484; *S. v. Spruill,* 225 N.C. 356, 34 S.E. 2d 142; *S. v. Baker,* 222 N.C. 428, 23 S.E. 2d 340; *S. v. Roddey, supra.*

It is error simply to state the contentions of a party and not declare and explain the law applicable to the facts which the jury may find from the evidence offered in support of such contentions. *Lewis v. Watson, supra; Nichols v. Fibre Co.,* 190 N.C. 1, 128 S.E. 471.

We think the exception is well taken and that the defendant is entitled to a more adequate charge in this respect.

For the reason stated, there must be a

New trial.

MRS. NANCY DALTON JOHNSON (EMPLOYEE), v. THE ERWIN COTTON MILLS COMPANY (EMPLOYER) AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY (CARRIER).

(Filed 9 June, 1950.)

Master and Servant § 55d—

Where opposing inferences reasonably may be drawn from the evidence before the Industrial Commission, its findings are conclusive upon the courts, even though the opposite conclusion is equally tenable upon the evidence.

APPEAL by plaintiff from *Harris, J.*, September Term, 1949, of DURHAM. Affirmed.

This was a proceeding to establish plaintiff's claim for compensation under the Workmen's Compensation Act for an injury by accident arising out of and in course of her employment by defendant Erwin Cotton Mills.

Claimant was a seamstress employed by defendant and engaged in hemming sheets. According to her testimony in doing this work she sat in a chair at a table on which the hemming was done. At her left on the table were 50 to 70 sheets piled up as high as her shoulder. With her left hand she would reach back, take hold of a sheet and pull it across to the right horizontally at about the level of her shoulder. Some of the sheets had short corners or were wrinkled or biased, requiring more exertion to pull them into proper position. November 15, 1947, she had one sheet that was "real short," which she had to "stretch real hard" to make the hem come out even. As she did so she felt something slip, and immediately felt intense pain in her arm and shoulder. She said, "As I stretched the sheet and turned, my arm, the place slipped and broke." She continued to suffer pain, but worked for some six weeks. The doctor's diagnosis was myositis or inflammation of the muscle, due to muscle strain of the shoulder, and the treatment prescribed was physiotherapy. Usefulness of claimant's arm has been impaired to a degree. No occupational disease as defined in the statute was indicated. G.S. 97-53.

There was also evidence on behalf of the defendant describing the manner of operation in which claimant was engaged as not requiring the lifting of the arm above the waistline, and that the handling and hemming of sheets as testified by plaintiff on the occasion alleged was according to the usual and customary method of doing this work. The hearing commissioner also in company with the claimant viewed the premises and the method of doing the work in which plaintiff had been engaged and observed no unusual effort in handling sheets or such as to require arm movement as described by claimant.

Upon the evidence offered the Commission found "that the claimant was doing her usual and customary work in hemming sheets at the time of the alleged injury," and "that the claimant did not sustain an injury by accident arising out of nor in the course of her employment, to her left shoulder," and denied compensation. This finding and conclusion was affirmed on appeal by the full commission, and again by the Superior Court.

Plaintiff appealed to this Court.

Harvey Harwood, R. O. Everett, and Kathrine R. Everett for plaintiff, appellant.

I. Weisner Farmer for defendants, appellees.

DEVIN, J. Claimant's evidence standing alone would have been sufficient to have warranted the Industrial Commission in finding that she suffered an injury by accident arising out of and in the course of her employment, compensable under the Workmen's Compensation Act, in accord with the decision in *Edwards v. Publishing Co.*, 227 N.C. 184, 41 S.E. 2d 592. The claimant strongly urged that findings should have been made in favor of compensation based upon her testimony. But upon all the evidence adduced the Commission reached the contrary conclusion, and this was affirmed by the judgment of the Superior Court, applying the principle stated in *Slade v. Hosiery Mills*, 209 N.C. 823, 184 S.E. 844; and *Neely v. Statesville*, 212 N.C. 365, 193 S.E. 664. As the statute makes the Commission the fact finding body and its determination conclusive if supported by competent evidence, the only question presented by this appeal is whether there was any evidence reasonably tending to support the result here reached.

After a review of the entire record and the evidence properly considered by the Commission, we are of opinion that the findings and conclusions of the Commission were supported by evidence and are binding upon the court. The evidence permits the inferences therefrom which were drawn by the Commission, though other inferences appear equally plausible. *Rewis v. Ins. Co.*, 226 N.C. 325, 38 S.E. 2d 97. The courts are not at liberty to reweigh the evidence because different conclusions might have been reached. *Tenant v. Peoria & Pekin Union R. Co.*, 321 U.S. 35.

The judgment of the Superior Court is

Affirmed.

STATE v. HATTIE GAVIN.

(Filed 9 June, 1950.)

1. Abortion § 9a—

In a prosecution for abortion, testimony of the woman that she went to defendant by reason of newspaper articles stating that defendant had performed abortions, *is held* incompetent as hearsay and extremely prejudicial to defendant, entitling her to a new trial.

2. Criminal Law § 48d—

The court's action in striking incompetent evidence and instructing the jury not to consider it cannot be held to have rendered its admission harmless when the court thereafter by its own question elicits the same incompetent testimony from the witness and refers to such testimony in its charge.

APPEAL by defendant from *Frizzelle, J.*, and a jury, in criminal action tried in the Superior Court of DUPLIN.

The defendant was tried at the May Special Term, 1949, of the Superior Court of Duplin County upon a two-count indictment. The first count charged her with using drugs and instruments to destroy an unborn child in violation of G.S. 14-44, and the second count charged her with using drugs and instruments to produce the miscarriage of a pregnant woman contrary to G.S. 14-45.

Notwithstanding timely objections and exceptions by the accused, the woman on whom the abortion was alleged to have been performed was permitted to testify in behalf of the State as follows:

"Q. Where did you get the information that Hattie Gavin would perform an abortion?

"A. I was home two summers ago on my vacation, and I read it in the papers.

"Q. Read what in the papers?

"A. About a girl and her.

"Q. About what?

"A. About she had performed one on a lady, and it was in the paper. Then I read about another girl in Greensboro."

After receiving this evidence, the trial court made this statement to counsel and jurors: "Well, I think it is inadmissible, gentlemen. I am going to strike it. Gentlemen of the jury, don't consider it."

Immediately afterwards, the trial court propounded this inquiry to the woman: "You went to her (*i.e.*, the defendant) by reason of a news item you saw?" She replied: "Yes, sir." The accused noted an exception to the question and answer.

The charge to the jury included this instruction: "The State contends it has offered evidence tending to show that sometime theretofore she had

read some item in the newspapers, relating to Hattie Gavin, and that in consequence of that, she came to her home."

The jury found the defendant guilty on the first count, and not guilty on the second count. Prayer for judgment was continued from time to time until the January Term, 1950, of the Superior Court of Duplin County, when the defendant was sentenced to imprisonment in the State Prison. She thereupon excepted to the judgment and appealed, assigning the admission of the testimony set out above and the foregoing portion of the charge as error.

Attorney-General McMullan and Assistant Attorney-General Rhodes for the State.

E. Walker Stevens and Rivers D. Johnson for defendant.

ERVIN, J. The testimony of the State's witness to the effect that two years before the trial she read newspaper articles stating that the accused had performed abortions on two other women was highly prejudicial hearsay, and ought to have been excluded. *Randle v. Grady,* 228 N.C. 159, 45 S.E. 2d 35; *Teague v. Wilson,* 220 N.C. 241, 17 S.E. 2d 9; *Greene v. Carroll,* 205 N.C. 459, 171 S.E. 627; *Young v. Stewart,* 191 N.C. 297, 131 S.E. 735.

We are convinced that the prejudicial effect of the incompetent evidence was not removed from the minds of the jurors by the statement of the trial judge that he was "going to strike it," or by his direction to the jurors not to consider it. This opinion is not based solely upon the theory so ably expounded by *Mr. Justice Winborne* in the recent case of *S. v. Choate,* 228 N.C. 491, 46 S.E. 2d 476. It rests in substantial measure upon the significant fact that subsequent to its attempted withdrawal, the trial court recalled the illegal testimony to the minds of the jurors with much vividness by eliciting from the State's witness evidence that she visited the accused because of "a news item" she had read, and by instructing the jury that the State contended that such witness "had read some item in the newspaper, relating to Hattie Gavin, and that in consequence of that she came to her home."

For these reasons, the conviction and judgment are vacated, and the defendant is granted a

New trial.

The defendants asserted at the trial that the governing body of the City of Durham caused the permit to be withheld from plaintiffs because it concluded that they intended to use the proposed building as a nursing home, infirmary, or hospital, and not as a hotel as recited in their application. The court found that "there is no competent evidence to support such conclusion, and that no basis in fact has been shown therefor, and that said conclusion is arbitrary and unreasonable." Moreover, it is to be noted that the municipal authorities had no legal power to refuse a building permit for the cause assigned even if they had grounds for believing such cause to exist. The law declares that "if the right of the applicant to erect the building for which the permit is sought is otherwise absolute, it is no ground for the denial of the permit or of a mandate to compel its issuance that the applicant intends to put the building when erected to an improper use; the question as to the legality of the alleged intended use must await determination in proper proceedings after such use is attempted to be made of the building." 34 Am. Jur., Mandamus, section 188. See, also, in this connection: G.S. 160-179, and 62 C.J.S., Municipal Corporations, section 227 (3).

The action of the defendants in refusing the permit to the plaintiffs cannot be justified by Ordinance No. 990 of the governing body of the City of Durham. This ordinance is void for conflict with the statute now codified as G.S. 160-178, which clearly contemplates that procedures for the enforcement of zoning ordinances shall be uniform.

For the reasons given, the judgment is

Affirmed.

O. F. BOLES v. C. LEE HEGLER AND JAMES HEGLER, TRADING AS THOMASVILLE TRANSIT COMPANY, AND JOHNNY MONROE GARDNER.

(Filed 9 June, 1950.)

1. Automobiles § 18h (3)—

Evidence disclosing that plaintiff's automobile was parked on a bridge 40 feet wide, leaving a space of 30 feet for the passage of traffic, that the driver of defendants' bus was blinded by the lights of an approaching car and hit the rear of plaintiff's car, and that the bridge constituted part of a city street and the parking of cars on the bridge was customary, *is held* not to warrant nonsuit on the ground of contributory negligence, since even though the parking of the car on the bridge was negligence *per se*, G.S. 20-161, whether such negligence under the circumstances was a proximate cause of the injury is a question for the jury.

2. Negligence § 19c—

Nonsuit on the ground of contributory negligence may be properly entered only when the evidence tends to show as the sole reasonable conclusion that can be drawn therefrom that plaintiff was guilty of contributory negligence and that such contributory negligence contributed to the injury as a proximate cause thereof.

APPEAL by defendants from *Crisp, Special Judge,* March Term, 1950, of FORSYTH. No error.

This was an action to recover damages for injury to plaintiff's automobile, alleged to have been caused by the negligent operation of defendants' bus. Issues of negligence, contributory negligence and damage were answered by the jury in favor of plaintiff, and from judgment on the verdict defendants appealed.

Elledge & Browder for plaintiff, appellee.

Craige & Craige for defendants, appellants.

DEVIN, J. The only error assigned by defendants was the denial of their motion for judgment of nonsuit. It was not controverted that there was evidence of negligence on the part of the defendants, but it was contended the evidence conclusively established the contributory negligence of the plaintiff, entitling defendants to the allowance of their motion on this ground.

The rule is well settled that in order to sustain a nonsuit on this ground the evidence tending to show contributory negligence must be so clear that no other conclusion reasonably can be drawn therefrom. *Maddox v. Brown, ante,* 244; *Carruthers v. R. R., ante,* 183; *Samuels v. Bowers, ante,* 149; *Cole v. Koonce,* 214 N.C. 188, 198 S.E. 637.

The material facts were these: As a part of Waughtown Street in Winston-Salem is a bridge over the tracks of the Southbound Railway. The bridge from east to west is 148 feet long and 40 feet wide from curb to curb, as wide or wider than the paved street on either side, and slightly higher. On the evening of 29 October, 1948, plaintiff's son, who was employed in the vicinity, left plaintiff's automobile parked on the north side of the bridge next to the curb, 10 or 11 feet from the west end of the bridge. Other cars were then parked on this side of the roadway on the bridge as seems to have been the custom. It was not clear whether at that time there were "no parking" road signs at eastern end of the bridge. At 10:15 p.m. defendants' bus approached the bridge traveling west at the rate of 20 to 25 miles per hour and struck the rear of plaintiff's automobile causing substantial damage. Defendant Gardner, who was driving the bus, testified that when he was about halfway across the bridge he was blinded by the lights of an automobile approaching the bridge

from a side street west, and slowed down to 15 or 20 miles per hour. At a speed of 20 to 25 miles per hour he could have stopped the bus in 30 feet. Defendants' driver further testified as he approached there was then only plaintiff's automobile parked on the bridge, and that he saw it just before he was blinded by the lights of the car approaching from the west. He estimated he was 40 feet from plaintiff's automobile when he first saw it, and later reduced his estimate to 25 or 30 feet, but it would seem if he was halfway across the bridge and the plaintiff's automobile was parked 10 or 11 feet from the west end of the bridge, he must have been 50 feet or more away when he became aware of the presence and location of plaintiff's automobile.

Furthermore, as the bridge was 40 feet wide from curb to curb, and plaintiff's automobile was parked against the curb on the north, this would have left a clear space of 30 feet for the passage of other vehicles. The car approaching from the side street west was 10 or 15 feet from the bridge when its lights blinded defendants' driver.

The parking of plaintiff's automobile on a highway bridge was prohibited by G.S. 20-161, and the general rule is that the violation of a statute enacted in the interest of safety constitutes negligence *per se*, but it is equally well settled that before negligence or contributory negligence can be established as determinative of the action, causal connection between the result and the disregard of the statutory mandate must be made to appear. *Holland v. Strader,* 216 N.C. 436, 5 S.E. 2d 311.

So that, the question after all was one of proximate cause. *Lee v. Upholstery Co.*, 227 N.C. 88, 40 S.E. 2d 688; *Wood v. Telephone Co.*, 228 N.C. 605, 46 S.E. 2d 717; *McIntyre v. Elevator Co.*, 230 N.C. 539 (544), 53 S.E. 2d 528. Was the parking of plaintiff's automobile on the bridge under the circumstances here disclosed a proximate cause of the injury sustained, or was it "merely a circumstance of the accident and not its proximate cause?" The answer to this question was properly left for the determination of the jury. *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88; *Allen v. Bottling Co.*, 223 N.C. 118, 25 S.E. 2d 388; *Atkins v. Transportation Co.*, 224 N.C. 688, 32 S.E. 2d 209; *Cummins v. Fruit Co.*, 225 N.C. 625, 36 S.E. 2d 11; *Barlow v. Bus Lines,* 229 N.C. 382, 49 S.E. 2d 793; *Bus Co. v. Products Co.*, 229 N.C. 352, 49 S.E. 2d 623.

The question of contributory negligence is usually one for the jury. It is only when but one inference may be drawn from the facts in evidence that the court will declare that an act was or was not the cause of the injury complained of or per force constituted contributory negligence. "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." *Conley v. Pearce-Young-Angel Co.,* 224 N.C. 211, 29 S.E. 2d 740; *Nichols v. Goldston,* 228 N.C. 514, 46 S.E. 2d 320;

Thomas v. Motor Lines, 230 N.C. 122 (131), 52 S.E. 2d 377; *Maddox v. Brown, ante,* 244.

We conclude there was no error in denying defendants' motion for judgment of nonsuit.

In the trial we find

No error.

STATE v. O. L. WERST.

(Filed 9 June, 1950.)

1. Criminal Law § 52a (2)—

Where the evidence for the prosecution is sufficient to make out a case, nonsuit on the ground that the defendant's evidence tends to establish a defense is properly denied. G.S. 15-173.

2. Criminal Law § 81c (3)—

Any error in the exclusion of testimony is rendered harmless when the witness is later permitted to give the testimony.

3. Criminal Law § 81c (2)—

The charge will be read as a whole.

APPEAL by defendant from *Clement, J.,* and a jury, at the January Term, 1950, of FORSYTH.

The defendant was charged with feloniously assaulting Hattie D. Cook with a deadly weapon, to wit, a pistol, with intent to kill, and inflicting upon her serious injury not resulting in death. G.S. 14-32. The State offered evidence tending to show that the accused angrily, intentionally, and unnecessarily discharged his 32-caliber pistol into a small group of inoffending persons, and thereby seriously wounded the prosecuting witness. The defendant presented evidence, indicating, however, that the prosecuting witness sustained her injury while the accused was reasonably endeavoring to prevent her and a multitude of companions from trespassing upon his premises. The jury acquitted the defendant of the felonious assault and battery charged in the indictment, but convicted him of a less degree of that crime, to wit, an assault with a deadly weapon. G.S. 15-169. Judgment was pronounced on the verdict, and the defendant appealed, assigning the refusal of the trial judge to dismiss the prosecution upon a compulsory nonsuit, the rejection of certain testimony of his witness, Velma Smoot, and various portions of the charge as error.

Attorney-General McMullan, Assistant Attorney-General Moody, and John R. Jordan, Jr., Member of Staff, for the State.

Whitman & Motsinger for defendant.

ERVIN, J. The testimony of the prosecution was sufficient to take the case to the jury and to support the verdict for the State. *S. v. Cancelmo,* 86 Or. 379, 168 P. 721. Consequently the court rightly refused to dismiss the action upon a compulsory nonsuit under G.S. 15-173. Whatever error the court below may have committed in temporarily excluding the evidence of the defendant's witness, Velma Smoot, as to the circumstances confronting the accused at the time in controversy was rendered harmless when the same evidence was subsequently given by the same witness without objection on her further examination. *Eaves v. Coxe,* 203 N.C. 173, 165 S.E. 345. When it is read as a whole, the charge is free from legal error. *Wyatt v. Coach Co.,* 229 N.C. 340, 49 S.E. 2d 650.

For the reasons given, the trial and sentence are sustained.

No error.

MAGGIE RICHARDSON v. ZELLA WELCH AND WINIFRED A. FISHEL, GUARDIAN FOR ZELLA C. WELCH.

(Filed 9 June, 1950.)

Pleadings § 31—

Allegations against one who is not a party to an action, and which have no bearing on the plaintiff's right to obtain the relief sought, do not constitute proper pleadings and should, on motion, be stricken therefrom.

APPEAL by defendant, Winifred A. Fishel, Guardian for Zella C. Welch, from *Crisp, Special Judge,* at February Term, 1950, of FORSYTH.

Civil action instituted to recover for services rendered to Zella Welch. Thereafter Zella Welch was adjudged incompetent and Winifred A. Fishel was duly appointed as her Guardian, and made a party defendant.

An amended complaint was filed and the plaintiff alleges that compensation was denied the plaintiff by reason of the improper influence and conduct of the brother of Zella Welch, who is not a party to the action.

The defendant moved to strike these allegations, the motion was denied, and the defendant Guardian appealed, assigning error.

Geo. W. Braddy for plaintiff.

Elledge & Browder for defendant.

PER CURIAM. Allegations against one who is not a party to an action, and which have no bearing on the plaintiff's right to obtain the relief sought, do not constitute proper pleadings and should, on motion, be stricken therefrom.

The motion to strike, interposed below, should have been granted. The ruling of the court below is

Reversed.

STATE v. JOHN L. PETERSON.

(Filed 9 June, 1950.)

Obscenity § 2—

Evidence in this prosecution of defendant for peeping secretly into a room occupied by a woman, *held* sufficient to be submitted to the jury. G.S. 14-202.

APPEAL by defendant from *Harris, J.*, at January Term, 1950, of DURHAM. No error.

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

R. M. Gantt for defendant, appellant.

PER CURIAM. The defendant was convicted by the jury of violating the statute (G.S. 14-202) which makes it a misdemeanor to "peep secretly into any room occupied by a woman." From judgment imposing sentence defendant appealed.

The only error assigned by the defendant is the denial of his motion for judgment of nonsuit. It was contended that the evidence was insufficient to show that the lighted room into which the defendant was seen peeping on the night in question was then occupied by a woman. But from the record we note a State's witness testified he saw the defendant looking through a venetian blind into a room usually occupied by a woman, that the defendant ran, and as witness, in immediate pursuit, passed this window he "saw someone in the room, a woman in the room."

We think the evidence sufficient to carry the case to the jury.

In the trial we find

No error.

STATE v. LINWOOD EARL SUMMERLIN.

(Filed 7 July, 1950.)

1. Conspiracy § 1—

A conspiracy is an unlawful combination or agreement of two or more persons to do an unlawful thing or to do a lawful thing in an unlawful manner or by unlawful means.

2. Conspiracy § 5—Acts and declarations of each conspirator in furtherance of the common design is competent against other conspirators.

The State's evidence tended to show an agreement to rob, successively, three separate places. *Held:* Evidence of the agreement to rob the place first on their list, and change of plans to first rob one of the other places, the one named in the indictment, which agreement was actually executed, is competent against defendant conspirator even though he was not present when the plans were changed and was not charged in the indictment with any offense in connection with the agreement to rob the place first agreed upon by the conspirators, since all acts or declarations by any of the conspirators in furtherance of the common design is competent against each of the others.

3. Criminal Law § 29b—

Evidence of guilt of a crime other than that charged in the indictment is competent when such evidence tends to show *quo animo*, intent, design, guilty knowledge or *scienter*, or to make out the *res gestæ*, or to exhibit a chain of circumstantial evidence in respect to the matter charged.

4. Conspiracy § 5—

Where the indictment charges conspiracy to rob named persons of rings, and other valuable property, and the evidence shows an agreement to commit the offense charged together with agreement as to the disposition of the loot, *held* acts and conversations among the conspirators with reference to the disposition of the rings taken pursuant to the robbery is competent against other conspirators even though they did not actually participate in the efforts to dispose of the rings, since the disposition of the property was a part of the proven unlawful design.

5. Criminal Law § 81c (3)—

The admission of evidence over objection cannot be held prejudicial when evidence of similar import is admitted without objection.

6. Criminal Law § 35—

Error in permitting a witness to testify that statements made to the witness by defendant were to the same effect as the testimony theretofore adduced, is rendered harmless when the witness thereafter testifies in detail as to what the witness had told him.

7. Criminal Law § 53f—

A charge to the effect that certain evidence was offered solely as bearing upon the credibility of a witness "if in fact it does corroborate him" will not be held as an expression of opinion that the evidence did cor-

roborate the witness when later in the charge the court specifically instructs the jury that it should be the sole judge of whether the testimony did in fact corroborate the witness.

8. Criminal Law § 48d—

The court has the power to withdraw incompetent testimony theretofore admitted when no prejudice results to defendant.

9. Criminal Law § 48c—

Where testimony incompetent as to one defendant is admitted without objection and without request that its admission be limited, an exception thereto will not be sustained.

10. Criminal Law § 53j—

An instruction that the law regards with suspicion the testimony of accomplices and other interested parties, will not be held for error when the court follows such instruction with a full and accurate instruction as to the credibility of such testimony.

11. Criminal Law § 81c (3)—

Where no relative of the appealing defendant testified at the trial, such defendant cannot be prejudiced by the court's instruction as to credibility to be given the testimony of relatives.

12. Criminal Law § 53j—

The court's charge as to the credibility to be given the testimony of an accomplice *is held* without error in this case.

13. Criminal Law § 81c (2)—

When the charge is without prejudicial error when considered as a whole, exceptions thereto will not be sustained.

APPEAL by defendant from *Morris, J.*, at January Term, 1950, of WAYNE.

This is a criminal prosecution in which Linwood Earl Summerlin and Woodrow Stroud were tried upon two bills of indictment. The first bill of indictment charges that Woodrow Stroud, R. E. Sherron, Norman Hart, Crawford C. Woods, Claud Chappell and Linwood Earl Summerlin entered into a criminal conspiracy to commit robbery with firearms and to steal and carry away rings, money and other property belonging to the persons named in the bill of indictment. The second bill of indictment charges that Linwood Earl Summerlin, Woodrow Stroud and Robert Sherron committed the crime of aiding, abetting and assisting Crawford C. Woods, Claud Chappell and Norman Hart unlawfully to take from and rob the owners named in the bill of indictment of the sum of $1500.00 in money and five men's rings valued at $2000.00, it being alleged that this was accomplished with firearms.

The defendants, Claud Chappell, R. E. Sherron, Norman Hart and Crawford C. Woods, entered a plea of guilty under the first bill of indictment. And R. E. Sherron also entered a plea of guilty under the second bill of indictment.

Linwood Earl Summerlin and Woodrow Stroud pleaded not guilty to both bills of indictment.

The place where the actual robbery occurred as a result of the alleged conspiracy is known as the "Hole-in-the-Wall," and is located in Wayne County, N. C., near Goldsboro.

The evidence discloses that Chappell lived in Raleigh and had served six years in the Penitentiary for robbery and became acquainted with Hart while in prison. He also served a prison term of two years for larceny. He admitted that he had been charged with robbery three times and had entered a plea of guilty in each case.

Hart lived in Raleigh and worked in a shoe shop. He had been convicted of robbery from the person in Moore County and received a sentence of 15 to 20 years. He became acquainted with Chappell while in prison and had known Sherron since July or August, 1949. He had also been convicted on a whiskey charge and for stealing an automobile.

Woods had lived in Durham all his life and was convicted of a secret assault while he was subject to the juvenile law, and received a sentence of three months and twenty-eight days. He has also been convicted of gambling and other minor offenses. He had known Sherron for five years.

Sherron was living in Durham at the time of the robbery. He knew Woodrow Stroud and had gambled with him in Raleigh. He also knew Hart and knew he had served a term in the penitentiary. He had been convicted of gambling and of manslaughter.

Woodrow Stroud, at the time of his conviction was 29 years of age, and lived in Duplin County, about 26 miles from Goldsboro. He denied knowing any of the other alleged conspirators except Summerlin. It appears from his own evidence that he spent considerable time at Summerlin's place. It also appears that he engaged in gambling.

Summerlin is a native of Wayne County and lived about two miles east of Goldsboro on the Mount Olive highway, where he operated a filling station. He admitted having seen Sherron on one occasion and that he knew the location of the "Hole-in-the-Wall" and had been there when a crap game was going on and that he understood a poker game was operated at this place. He further testified there was some gambling at his place, but that he had not "run a game" in over fifteen months.

The evidence tends to show the defendants conspired to commit three robberies. It was agreed to rob a gambling place in Snow Hill first, then to rob the place known as the "Hole-in-the-Wall," then after the defend-

ant Summerlin had built up a substantial gambling business, at his place of business, he was to notify the other defendants and they were to rob his place.

According to the evidence Hart, Sherron and Chappell were to receive three-fourths of any money taken and of the proceeds from the sale of any jewelry; and, Stroud and Summerlin were to divide the remaining one-fourth between them.

The evidence further tends to show, that on the 9th of November, 1949, pursuant to the previous agreement, and after having received notice from Stroud, Hart and Sherron met Chappell near his home in Raleigh. Sherron had decided not to participate in the actual robbery and had persuaded Woods to take his place by agreeing to give him two-thirds of his (Sherron's) part. The pistols and masks were transferred from Sherron's car to Hart's car. Hart, Woods and Chappell proceeded to Goldsboro where they met Stroud; and, after some negotiations it was decided not to undertake to rob the Snow Hill place because a fish fry or barbecue was going on at that place, but instead they would go to the "Hole-in-the-Wall" and rob the gamblers at that place.

The details of the actual robbery need not be recited here, since the appellant does not challenge the sufficiency of the evidence to support the verdict, but entered numerous exceptions to the admission of evidence and to portions of the charge.

The jury returned a verdict of guilty of conspiracy and of aiding and abetting in the felony of robbery with firearms, as charged, with a recommendation of mercy.

From the judgment imposed, the defendant Summerlin appeals and assigns error.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

J. Faison Thomson, Paul B. Edmundson, and N. W. Outlaw for defendant Summerlin.

DENNY, J. The appealing defendant entered sixteen exceptions to the admission of evidence bearing on the plans agreed upon by all the alleged conspirators to rob a gambling place at Snow Hill, and the reason why the plans were changed on the morning of November 9th, when it was agreed to rob the gamblers at the "Hole-in-the-Wall" instead.

It appears from the evidence that Stroud went to Snow Hill on the morning of November 9th, for the purpose of looking over the situation at the place they planned to rob, and when he returned, he advised against undertaking to rob it because a fish fry or barbecue was being held at the place. After receiving this information, they decided to go to the "Hole-

in-the-Wall" and rob the participants in the gambling at that place. The defendant Summerlin was not with Hart, Stroud, Woods and Chappell when the plans were changed, and they decided to rob the gamblers at the "Hole-in-the-Wall" in lieu of taking a chance on robbing the gambling place at Snow Hill while a fish fry or barbecue was in progress.

The appellant contends that this evidence was incompetent, as against him, because he was not present at any time during these conversations and is not charged with any offense in connection with a conspiracy to rob a place at Snow Hill.

We shall consider this evidence under the rule applicable to the admission of evidence where the State is endeavoring to prove a conspiracy.

"A conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means." *S. v. Whiteside*, 204 N.C. 710, 169 S.E. 711; *S. v. Lea*, 203 N.C. 13, 164 S.E. 737; *S. v. Ritter*, 197 N.C. 113, 147 S.E. 733.

It is seldom indeed that the State can show the existence of a conspiracy by direct proof as it did in this case. *S. v. Whiteside, supra.*

It makes no difference whether Summerlin was present or not when the plans were changed. It is disclosed by the evidence that he did participate in the general plan to rob both places. Therefore, it is immaterial which place was robbed first, and all this evidence, to which the defendant objects, is so related to the plans of the alleged conspirators it was admissible. *S. v. Bennett*, 226 N.C. 82, 36 S.E. 2d 708; *S. v. Smith*, 221 N.C. 400, 20 S.E. 2d 360; *S. v. Dale*, 218 N.C. 625, 12 S.E. 2d 556; *S. v. Andrews*, 216 N.C. 574, 6 S.E. 2d 35; *S. v. Herndon*, 211 N.C. 123, 189 S.E. 173; *S. v. Lea, supra.* "When a conspiracy is established, everything said, written, or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by every one of them, and may be proved against each. It is immaterial when a defendant entered into or became a party to the conspiracy, or how prominent or inconspicuous a part he took in the execution of the unlawful purpose, he is responsible to the fullest extent for everything that is said and done pursuant to the plot." 11 Am. Jur. 571; *S. v. Davenport*, 227 N.C. 475, 42 S.E. 2d 686; *S. v. Biggs*, 224 N.C. 722, 32 S.E. 2d 352; *S. v. Kelly*, 216 N.C. 627, 6 S.E. 2d 533; *S. v. Payne*, 213 N.C. 719, 197 S.E. 573; *S. v. Smoak*, 213 N.C. 79, 195 S.E. 72; *S. v. Batts*, 210 N.C. 659, 188 S.E. 99; *S. v. Stancill*, 178 N.C. 683, 100 S.E. 241. *Stacy, C. J.*, speaking for the Court, said in *S. v. Dail*, 191 N.C. 231, 131 S.E. 573: "It is undoubtedly the general rule of law that evidence of a distinct substantive offense is inadmissible to prove another and independent crime, the two being wholly disconnected and in no way related to each other. *S. v. Adams*, 138 N.C. 688;

S. v. McCall, 131 N.C. 798; *S. v. Graham,* 121 N.C. 623; *S. v. Frazier,* 118 N.C. 1257; *S. v. Jeffries,* 117 N.C. 727; *S. v. Shuford,* 69 N.C. 486. 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,* or to make out the *res gestæ,* or to exhibit a chain of circumstantial evidence in respect to the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions. *S. v. Simons,* 178 N.C. 679. 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."

Exceptions 20, 44, 45 and 46 relate to the acts and conversations among the conspirators with reference to the disposition of the rings taken from the men who were robbed at the "Hole-in-the-Wall." The defendant contends that these acts and declarations occurred not in furtherance of the conspiracy, but after the joint enterprise had ended; and were, therefore, not admissible against any of the alleged conspirators, except those actually participating in the plans or efforts with respect to the sale or disposition of the rings. The defendant further contends he did not participate in any of these conversations or acts in an effort to dispose of the rings. Exception No. 20 is directed to the testimony of Chappell with respect to the disposition of the rings. Exceptions Nos. 44, 45 and 46 are directed to the testimony of Woods relating to the same subject.

Hart was permitted to tell the complete story relating to the unsuccessful efforts of Sherron to dispose of the rings in Baltimore and of Stroud's request to have the rings delivered at Linwood Earl Summerlin's place; and as to a conversation with Sherron to the effect that he could not find Stroud and had left the rings with Summerlin. Most of this evidence was admitted without objection, and all the exceptions taken to the admission of Hart's testimony have been expressly abandoned by the defendant. Likewise, in other parts of Woods' testimony, he was permitted to testify fully about the rings and their efforts to dispose of them; and, the exceptions entered to such testimony have also been abandoned.

In addition to the above testimony, an officer was permitted to testify as to what he had been told about the rings and their delivery to Summerlin and how the defendant Summerlin had become alarmed when he heard Stroud was in jail, and had thrown the rings away; that Summerlin later informed the officer that a colored boy who worked for him had found the rings and they were delivered to the officer. All this testimony was admitted without objection. In addition to this, the defendant went on the stand and corroborated the testimony of the officer with respect

to the rings, how he received them and how he had attempted to get rid of them.

In the light of the facts and circumstances disclosed by the record before us, we do not think the evidence complained of was inadmissible. In the first bill of indictment the defendants were charged with conspiring to steal and carry away rings, money and other valuable property as well as conspiring to commit the felony of robbery with firearms. In the second bill this defendant was charged with aiding, abetting and assisting in the accomplishment of these things. It appears to have been a part of the unlawful design to take these rings, dispose of them and to divide the proceeds upon the basis agreed upon. And when a conspiracy has been sufficiently established or shown, then the acts and declarations of each conspirator done or uttered in furtherance of such unlawful purpose are admissible in evidence against all. *Safie Mfg. Co. v. Arnold,* 228 N.C. 375, 45 S.E. 2d 577; *S. v. Davenport, supra; S. v. Blanton,* 227 N.C. 517, 42 S.E. 2d 663; *S. v. Smith, supra; S. v. Herndon, supra.* Moreover, evidence of similar import was admitted without objection. These exceptions will not be sustained. *S. v. Muse,* 230 N.C. 495, 53 S.E. 2d 529; *S. v. Fentress,* 230 N.C. 248, 52 S.E. 2d 795; *S. v. Anderson,* 228 N.C. 720, 47 S.E. 2d 1; *S. v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824; *S. v. Brown,* 226 N.C. 681, 40 S.E. 2d 34; *S. v. King,* 225 N.C. 236, 34 S.E. 2d 3; *S. v. Matheson,* 225 N.C. 109, 33 S.E. 2d 590; *S. v. Oxendine,* 224 N.C. 825, 32 S.E. 2d 648.

Exception No. 55 is directed to the testimony of Paul C. Garrison, Sheriff of Wayne County. The Sheriff had testified without objection about arresting Hart, Woods and Sherron; and also about his trip to Philadelphia where he arrested Chappell. Chappell, according to the evidence, told the Sheriff he did not want to tell all he knew until he got back. But, the Sheriff testified, "After I got him back, he told me of his participation in the robbery." Q. "What did he tell you? A. "Just what you have heard, practically verbatim." Exception.

The defendant contends the answer was a conclusion on the part of the witness, and violated the general hearsay rule, and invaded the province of the jury, citing *S. v. McLaughlin,* 126 N.C. 1080, 35 S.E. 1037, and Stansbury, N. C. Evidence, Sec. 126.

If the solicitor had pursued his inquiry no further as to what Chappell told him, this exception would be well taken. However, the answer of the witness was not accepted and he was requested by the solicitor to repeat as nearly as he could the conversation between him and Chappell. The Sheriff then testified in detail, without objection, as to what Chappell had told him. The exception will not be upheld.

The defendant's exceptions Nos. 49, 53 and 56 are directed to evidence admitted for the purpose of corroborating the evidence of the witnesses

Wood, Hart and Chappell. As each of the respective witnesses were tendered, the court instructed the jury in substantially the following language: "Gentlemen of the jury, the evidence now about to be elicited from the witness is offered for, and to be received by you, as corroborative evidence, that is evidence bearing upon the credibility of the witness Chappell, if in fact it does corroborate him. You will not consider it as substantive evidence."

The appellant insists this instruction was tantamount to an expression of opinion by the court to the effect that the evidence did corroborate the respective witnesses and took away from the jury the right to say whether or not it did so.

It appears from the record that on the next morning after the above instructions were given, when court convened, the jury was instructed as follows:

"Gentlemen of the jury, yesterday the Sheriff and Deputy Sheriff were offered as witnesses in this case and testified regarding certain conversations they had with the defendants Hart, Chappell and Woods. At that time I instructed you, gentlemen of the jury, that you would consider the evidence of these officers only as corroborative evidence, and not as substantive evidence. For fear there might have been some confusion as the result of my instructions as to how you would consider that evidence, I charge you that corroborative evidence is supplementary to that already given, and tends to strengthen and confirm it, you, the jury, being the sole judges of whether it does or does not strengthen or confirm the testimony already given. As I charged you, gentlemen of the jury, you will consider that evidence as corroborative evidence, and not as substantive evidence. Furthermore, any other evidence, if I have failed to call your attention to it this morning, or any other evidence that was limited by the Court as corroborative, the instruction which I have just given you applies, you being the sole judges as to whether or not it does or does not corroborate, or strengthen, or confirm the testimony already given."

To this instruction the defendant also excepted. We think this instruction was sufficient to remove any doubt from the minds of the jurors as to their duty to pass upon whether or not the evidence offered as corroborative evidence did in fact corroborate, strengthen or confirm the testimony already given. *S. v. Lassiter,* 191 N.C. 210, 131 S.E. 577. These exceptions are overruled.

Exception No. 75 is directed to the withdrawal of certain evidence pertaining to a conversation between Stroud and Sherron subsequent to the robbery in this case. The evidence was admitted on Friday and withdrawn as against Summerlin on the following Monday. According to this evidence, Stroud undertook to get an agreement with Sherron to have him, Woods and Hart testify that he (Stroud) had nothing to do with the

robbery. He offered to pay for Sherron's defense and to help his family. The court, in its discretion, had the right to withdraw this evidence, and the defendant was not prejudiced by its withdrawal. Furthermore, an examination of the record discloses that the evidence complained of was admitted without objection, and the defendant made no request for it to be considered only as against Stroud. The exception will not be upheld. *S. v. Register,* 224 N.C. 854, 29 S.E. 2d 464; *S. v. Johnson,* 218 N.C. 604, 12 S.E. 2d 278; *S. v. Tuttle,* 207 N.C. 649, 178 S.E. 76; *S. v. McKeithan,* 203 N.C. 494, 166 S.E. 336. See, also, Rule 19 (3), Rules of Practice in the Supreme Court, 221 N.C. 558.

The defendant's exception No. 88 is to the following portion of the charge: "The law regards with suspicion the testimony of near relations, parties to the action, or accomplices and other interested parties and those interested in their own behalf."

Standing alone, this instruction is insufficient to meet the requirement of our decisions with respect to the consideration the jury should give the testimony of near relations, interested parties and accomplices. *S. v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606, and cited cases. However, the court followed this instruction with a charge in substantial compliance with our decisions as to defendants and accomplices. *S. v. Davis,* 209 N.C. 242, 183 S.E. 420; *S. v. Holland,* 216 N.C. 610, 6 S.E. 2d 217; *S. v. Parsons,* 231 N.C. 599, 58 S.E. 2d 114. Moreover, no relative, either by blood or marriage, testified in behalf of Summerlin, the appealing defendant. Therefore, he could in no way have been prejudiced by the instruction.

Exceptions Nos. 89, 90, 91 and 92 are directed to the charge with respect to the instructions bearing on unsupported evidence of accomplices. Ordinarily, a defendant may be convicted upon the unsupported testimony of an accomplice, and the court is not required to charge on the rule of scrutiny, as to such evidence, in the absence of a request to do so. Even so, when the trial judge undertakes to state the rule, he must conform substantially to the decisions with respect thereto. The court below did so instruct the jury in this case. These exceptions present no prejudicial error. *S. v. Hale,* 231 N.C. 412, 57 S.E. 2d 322; *S. v. Reddick,* 222 N.C. 520, 23 S.E. 2d 909; *S. v. Herring,* 201 N.C. 543, 160 S.E. 891; *S. v. Casey,* 201 N.C. 185, 159 S.E. 337; *S. v. Ashburn,* 187 N.C. 717, 122 S.E. 833; *S. v. Register,* 133 N.C. 746, 46 S.E. 21.

We have carefully considered the other exceptions to the charge of the court, and when it is considered as a whole, as it must be, we find no prejudicial error therein. *S. v. Oxendine, supra; S. v. Utley,* 223 N.C. 39, 25 S.E. 2d 195; *S. v. Hairston,* 222 N.C. 455, 23 S.E. 2d 885.

The remaining assignments of error have been expressly abandoned or do not show sufficient prejudicial error to warrant a disturbance of the verdict below.

In the trial below we find

No error.

STATE OF NORTH CAROLINA, EX REL. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, v. R. M. KERMON, SR., AND R. M. KERMON, JR., TRADING AS WILMINGTON PLUMBING & HEATING COMPANY, WILMINGTON, NORTH CAROLINA.

(Filed 7 July, 1950.)

1. Master and Servant § 62—

Review of exceptions to the findings of the Employment Security Commission is limited to determining whether the findings are supported by any competent evidence, and the Superior Court may not disregard a finding and substitute its own finding in lieu thereof. G.S. 96-4 (m).

2. Same—

While the determination of whether defendant was an employing unit within the purview of the N. C. Employment Security Law may be a mixed question of law and fact, the courts may not interfere with the conclusion of the Commission if it is supported by any competent evidence.

3. Plumbing and Heating Contractors § 2—

The license required by G.S. 87-21 is for those who install, alter, or restore plumbing, and is not required for the dismantling of plumbing.

4. Master and Servant § 57—

Evidence to the effect that general contractors engaged in the demolition of buildings hired a licensed plumber to dismantle the plumbing in such buildings supports a finding of the Employment Security Commission that the plumber so hired was engaged in the usual business of the contractors, and therefore was an employing unit subject to contributions under G.S. 96-8 (f) (8), prior to repeal.

5. Master and Servant § 59c—

In an action by the Employment Security Commission to determine liability of defendant for contributions under the Act, the defendant may not raise the question of the constitutionality of the statute under which the Commission levied the assessment in question, it being required in order to raise this defense that he pay the contributions under protest and sue for recovery. G.S. 96-10 (f).

6. Administrative Law § 5—

Where a statute provides a procedure before an administrative body for the recovery of a tax or assessment levied under the act, the asserted

defense of the unconstitutionality of the statute under which the assessment was made cannot be heard by the courts until the procedure before the administrative body is exhausted.

APPEAL by plaintiff from *Grady, Emergency Judge,* at September Term, 1949, of NEW HANOVER.

This is a proceeding brought by the Employment Security Commission of North Carolina against R. M. Kermon, Sr., and R. M. Kermon, Jr., trading as Wilmington Plumbing & Heating Company, Wilmington, N. C., to determine the liability of the defendant employing unit under G.S. 96-8 (f) (8) of the Employment Security Law, which subsection became effective 13 March, 1945, and was repealed 18 March, 1947.

Briefly stated, the facts found by the Hearing Commissioner and the Full Commission are as follows:

1. The defendant partnership, hereinafter called company, has never had as many as eight employees for as many as twenty different weeks within a calendar year.

2. During the period under consideration the defendant company installed plumbing for certain individuals and corporations engaged in general contracting, but by stipulation, it is agreed there is no liability by reason thereof for contributions by the defendant. The defendant's liability, if any, is in connection with the dismantling of plumbing.

3. "During 1946 the said company entered into contracts or agreements with certain employing units to perform services for such employing units, and did perform services for them for remuneration, which services constituted a part of the usual trade, occupation, profession or business of the employing units. Such employing units were: John A. Johnson & Sons; M. Shapiro & Son Construction Company; Steinly-Wolfe, Inc.; C. H. Reisdorf, Inc.; Roth-Schenker Corporation; W. B. Gibson & Company, and Hanagan Brothers. The services performed by the said company for the respective employing units hereinbefore named in this finding of fact were over a short period of time, and the company did not perform services for the named employing units for as many as twenty different weeks within the calendar year 1946, or up until March 18, 1947." (Finding of Fact No. 6.)

4. "All of the employing units hereinabove referred to in Findings of Fact Nos. 6 through 13 were liable to the State of North Carolina by reason of Section 96-8 (f) (6) of the General Statutes of North Carolina because of their liability under the Federal Unemployment Tax Act. For each of such employing units the said Wilmington Plumbing & Heating Company performed services for remuneration and such services consisted of removing plumbing and heating fixtures from the buildings which the respective employing units named in Findings of Fact No. 6

were dismantling, and the removal of plumbing fixtures was a necessary part of the business of dismantling buildings." (Finding of Fact No. 14.)

5. Findings of Fact seven through thirteen include the detailed information as to the time the company performed services for remuneration in 1946 for the respective concerns named in Finding of Fact No. 6, while they were engaged in dismantling buildings at Camp Davis, N. C.

In the light of these findings and the provisions contained in the Employment Security Law prior to 18 March, 1947, an order was entered to the effect that the defendant company was an employer within the meaning of the Employment Security Law from 1 January, 1946, to 18 March, 1947, and directing the defendant to report and pay contributions on the wages of all individuals performing services for it during that period.

The defendant company excepted to Finding of Fact No. 6, and appealed to the Superior Court on the ground, as it contends, that there is no evidence to support the finding that plumbing work was a part of the usual trade, occupation, profession or business of the principal contractors for whom the defendant company rendered services.

His Honor found facts contrary to those found by the Commission, and which were to the following effect: That the government required the general contractors to employ a licensed contractor in the State of North Carolina to do this "plumbing and heating" work in conformity with Chapter 52 of the Public Laws of 1931, and since the general contractors were not so licensed, the dismantling, wrecking or removing the plumbing fixtures constituted no part of the usual trade, occupation, profession, or business of the general contractor, consequently judgment was entered reversing the order of the Commission, and the plaintiff appeals, assigning error.

W. D. Holoman, R. B. Overton, and D. G. Ball for plaintiff, appellant.

R. M. Kermon for defendant, appellee.

DENNY, J. The plaintiff is seeking to collect certain contributions from the defendant company which it contends are due under the so-called contractor's clause, formerly known as G.S. 96-8 (f) (8), now repealed and which reads as follows: "'Employer' means (8) Any employing unit, which contracts with or has under it any contractor or subcontractor for any employment which is part of its usual trade, occupation, profession, or business, and each such contractor or subcontractor irrespective of the place of performance of contract; provided, the employing unit would be an employer by reason of any other paragraph of this subsection if it were deemed to employ each individual in the

employ of each such contractor or subcontractor for each day during which such individual is engaged in performing such employment. . . ."

If the removal or dismantling of plumbing fixtures constituted a part of the "usual trade, occupation, profession or business" of the general contractors (or any one of them) who were engaged in the demolition or dismantling of buildings at Camp Davis, then the defendant is liable for the contributions claimed by the plaintiff, otherwise not.

This appeal turns on whether or not there is any competent evidence to support the finding of fact to the effect that the work done by the defendant company did constitute a part of the "usual trade, occupation, profession or business" of the employing units.

The Employment Security Commission under the provisions of our Employment Security Law, G.S. 96-4 (m), has the power and duty "to determine any and all questions and issues of fact or questions of law that may arise under the compensation law . . . When an exception is made to the facts as found by the Commission, the appeal shall be to the Superior Court in term time but the decision or determination of the Commission upon such review in the Superior Court shall be conclusive and binding as to all questions of fact supported by any competent evidence." *Unemployment Compensation Com. v. Willis*, 219 N.C. 709, 15 S.E. 2d 4; *Employment Security Com. v. Roberts*, 230 N.C. 262, 52 S.E. 2d 890. Therefore, the trial judge was empowered to review the evidence and determine whether or not the finding of fact, to which the defendant excepted, was supported by any competent evidence, but he was not authorized to disregard any of the findings of fact of the Commission and to substitute his own findings in lieu thereof. G.S. 96-4 (m).

The general rule with respect to judicial review of findings of administrative agencies is discussed in 42 Am. Jur., Section 214, p. 634, *et seq.*, as follows: "The most commonly accepted standard governing the scope of judicial review rests on a distinction between reviewable questions of law and nonreviewable questions of fact. The analytical basis of this distinction is an attempted differentiation between the functions of an administrative tribunal and those of the court. In general, it is said to be the function of an administrative tribunal to determine the facts of a controversy on issues raised before it and to apply the law to those facts, while it is the function of the reviewing court to decide whether the correct rule of law was applied to the facts found, and whether there was evidence before the administrative tribunal to support the findings made. Consequently, it is said that the legal effect of evidence and the ultimate conclusions drawn by an administrative tribunal from the facts, as distinguished from its findings of primary, evidentiary, or circumstantial facts, are questions of law, particularly where the facts are not disputed and permit no dispute as to inferences to be drawn, the question

depending wholly upon the application of established legal principles to such facts."

In *Beach v. McLean,* 219 N.C. 521, 14 S.E. 2d 515, this Court, speaking through *Barnhill, J.,* said: "The Commission having found the facts in respect to the terms and conditions upon which McLean undertook the work of dismantling and salvaging the machinery purchased by defendant from Superior Yarn Mills, it settled the question of fact involved in the 'finding' or conclusion as to the nature and extent of the contract. Hence, the element of fact involved in the conclusion is settled. Both the court below and this Court are bound thereby. The only question presented is the legal status of McLean under the contract. The Commission's conclusion in this respect is reviewable. *Thomas v. Gas Co.,* 218 N.C. 429."

It would seem the determination of the Employment Security Commission that the appellee was engaged in work which constituted a part of the usual trade, occupation, profession or business of the general contractor was a mixed question of law and fact. Even so, in such instances, if there be any competent evidence to support the conclusion reached by the Commission, neither the Superior Court nor this Court may interfere therewith. *Lockey v. Cohen, Goldman & Co.,* 213 N.C. 356, 196 S.E. 342.

In the case of *Unemployment Compensation Com. v. Harvey & Son Co.,* 227 N.C. 291, 42 S.E. 2d 86, this Court, in passing upon the same question presented on this appeal, said: "The circumstances summarized, *supra,* from the evidence as incidents of the contract and their mutual dealings, are not directed to showing these relations and making available their common-law implications, but to the issue whether the contract was of the nature described in the statute. The judicial determination of that question must depend upon inferences fairly drawn from the evidence by those whose office it is to find the facts. We cannot say that the findings of the Commission are unsupported by evidence, or that they are inadequate to sustain the conclusions drawn from them."

Likewise, in the case of *Employment Security Com. v. Distributing Co.,* 230 N.C. 464, 53 S.E. 2d 674, in considering whether or not there was any competent evidence to support certain findings of fact, the Court said, "Here we may be reminded that on review we are, by the statute, bound by the findings of fact when there is any competent evidence or reasonable inference from such evidence to support them, G.S. 96-4 (m)."

In the instant case, there is evidence to the effect that the defendant company at various times in 1946 entered into contracts with general contractors, who were liable to the State of North Carolina for contributions under the Employment Security Law, to dismantle or take out plumbing facilities that the general contractors had theretofore con-

tracted to dismantle or take out under their respective contracts. It will also be noted there is no exception to Finding of Fact No. 14, to the effect that the defendant company performed services for the general contractors named in Finding of Fact No. 6, for remuneration and such services consisted of removing plumbing fixtures from buildings which the respective employing units were dismantling, and the removal of plumbing fixtures was a necessary part of dismantling buildings. Furthermore, one of the partners of the defendant testified, "I don't recollect what our contract stated in regard to the taxes and insurance to be paid by the employer that we were doing work for. If I am not mistaken I had to make up a payroll report and turn it over to them (the general contractors) for the time our men worked on the job. . . . The work was contracted for on a unit basis per house. The bids for the job were let out under government supervision. . . . We were paid directly by the contractors. We worked on these various jobs with these contractors."

The other member of the defendant partnership testified that his information was to the effect that the government required the general contractors to secure a licensed contractor in North Carolina to dismantle the plumbing fixtures in conformity with Chapter 52 of the Public Laws of 1931. This witness, however, further testified that he knew nothing of the contracts between the government and the general contractors except what was contained in his own contracts with them. And there is no evidence of any such requirement or information being contained in the defendant company's contracts. Moreover, there is nothing in the act referred to above that would indicate that it is necessary for a wrecking contractor to have a plumber's license to dismantle plumbing. The license required by G.S. 87-21 is to install, alter or restore plumbing.

The constitutionality of Chapter 52 of the Public Laws of 1931, regulating the plumbing and heating business, was upheld as a valid exercise of the police power to promote the health and safety of the people, in the case of *Roach v. Durham*, 204 N.C. 587, 169 S.E. 149. In discussing the Act, the Court said: "The manifest purpose of the law is to promote the health, comfort, and safety of the people by regulating plumbing and heating in public and private buildings. The business of putting into buildings tanks, pipes, traps, fittings and fixtures for conveying water, gas, and sewage requires proficiency and skill, the want of which is the source of epidemics, as the lack of proper heating is the source of danger, discomfort and disease. To require proficiency and skill in the business mentioned is, as this Court has said, an exercise of the police power 'for the protection of the public against incompetents and impostors.'" *S. v. Ingle*, 214 N.C. 276, 199 S.E. 10; *S. v. Mitchell*, 217 N.C. 244, 7 S.E. 2d 567.

We think when the evidence adduced in the hearing below is considered in the light of our decisions, it is sufficient to support the finding that the dismantling of plumbing was a part of the usual trade or occupation of the general contractors, engaged in the demolition or dismantling of buildings at Camp Davis within the meaning of the statute, G.S. 96-8 (f) (8). And it was not necessary to find that the general contractors were licensed plumbing and heating contractors, authorized to install, alter or restore plumbing and heating equipment in this or any other state. The question here as it was in *Unemployment Compensation Com. v. Harvey & Son Co., supra,* is simply this: Was the work done by the defendant company an integral part of the dismantling of the buildings at Camp Davis, which the general contractors had contracted to do? We think this question must be answered in the affirmative.

The fact that the defendant company was a specialist in its work and licensed by the State as a police regulation is not contrary to the position that it was engaged in employment which was a part of the usual trade, occupation, profession or business of the general contractors. This same question was raised in the case of *Willard v. Bancroft Realty Co.,* 262 Mass. 133, 159 N.E. 511, under a somewhat similar provision in a workmen's compensation act. The defendant was constructing an addition to a hotel, and the Workmen's Compensation Act provided for compensation for injured employees of independent or subcontractors who contracted to do "all or part of the work comprised in the job which a general contractor is carrying on," unless the work of the independent or subcontractor be merely ancillary or incidental to the work of the general contractor. It became necessary to remove a metal fire escape from the outer wall of the building. The general contractor employed a concern who was in the business of welding and cutting iron and steel beams by the use of acetylene gases. In holding the plaintiff was bound by the provisions of the Workmen's Compensation Act, and could not sue at common law, the Court said, "The welding and cutting of metal, although so distinct in character that they are done by contractors and men who do nothing else, are essential elements in the construction of buildings. Such work is not 'merely ancillary and incidental.' Unless it is done, the construction will be impossible. It is not rendered ancillary or incidental by the fact that it is done by a special method in a particular case."

In the instant case the mere fact that the general contractors sublet the removal of the plumbing fixtures to experienced plumbers, does not necessarily exclude the removal of such fixtures from being a part of their usual business in dismantling or wrecking buildings.

The appellee argues and contends the statute under which the Employment Security Commission levied the tax in question is unconstitutional.

The question of the constitutionality of the statute is not before us for decision. The Employment Security Law, in addition to right of appeal from the decision of the Commission, provides that a party who claims a valid defense to the contributions assessed, may pay the tax under protest and sue for its recovery. G.S. 96-10 (f). In the case of *Insurance Co. v. Unemployment Compensation Com.*, 217 N.C. 495, 8 S.E. 2d 619, *Barnhill, J.*, speaking for the Court, said: "Where an administrative remedy is provided by statute for revision, against collection, or for recovery of taxes assessed or collected, the taxpayer must first exhaust the remedy thus provided before the administrative body, otherwise he cannot be heard by a judicial tribunal to assert its invalidity. *Distributing Corp. v. Maxwell*, 209 N.C. 47, 182 S.E. 724; *Hart v. Comrs.*, 192 N.C. 161, 134 S.E. 403; *Maxwell v. Hinsdale*, 207 N.C. 37, 175 S.E. 847"; *Unemployment Compensation Com. v. Willis, supra.*

In our opinion the finding of fact challenged by the defendant was supported by competent evidence, and the plaintiff was entitled to an affirmance of the findings and conclusions reached by the Commission.

The judgment of the Superior Court is

Reversed.

ROBERT B. FEATHERSTONE AND WIFE, HAZEL B. FEATHERSTONE; ETTA JONES CHAMBERS AND HUSBAND, J. E. CHAMBERS; W. READE JONES AND WIFE, FRANKIE W. JONES; JACK T. JONES, UNMARRIED; TOBY P. WINSTON, UNMARRIED; AND LUCILLE PASS, UNMARRIED, PETITIONERS, v. MRS. DALLIE M. PASS, WIDOW, DEFENDANT.

(Filed 7 July, 1950.)

1. Wills §§ 31, 38—

The general rule that lapsed, void, or rejected devises or legacies pass under the residuary clause of the will is subject to the rule that the intent of the testator as expressed in the instrument controls, and therefore where testator makes specific provision for the disposition of the property upon the failure of the devise or bequest, such property cannot fall into the residuary clause. G.S. 31-42.

2. Wills §§ 34b, 38—

Testator devised certain property to his sister for life, remainder to the county to be used as a charitable hospital, with further provision that if the property should not be so used, the county should forfeit the right of possession and title, and the property pass to testator's heirs at law. *Held:* Upon the renunciation by the county after the death of the life tenant, the remainder passes to testator's heirs in accordance with the expressed intent of testator, leaving no interest to pass under the subsequent residuary clause of the will.

3. Wills §§ 33c, 33k, 43—

Testator devised remainder after a life estate to the county for use as a charitable hospital, with further provision that in the event the county should fail to keep the property in a good state of repair and maintain and operate it as a hospital, the county should forfeit its right of possession and title. *Held:* The county was seized with a conditional fee to the premises upon the death of testator with right of possession postponed until the death of the life tenant, and renunciation by the county is tantamount to a failure to comply with the conditions imposed and is an act of forfeiture.

APPEAL by petitioners, Robert B. Featherstone and wife, Hazel B. Featherstone, from *Carr, J.*, at Chambers in Roxboro, N. C., 27 December, 1949.

This is a proceeding to obtain an interpretation of certain pertinent parts of the last will and testament of John C. Pass, a resident of Person County, North Carolina, who died 12 July, 1935.

The testator was a widower at the time of his death and was not survived by any children or grandchildren. He and his sister, Mrs. Lucy Pass Featherstone, resided together for many years in the home of the testator.

The pertinent parts of the will of John C. Pass, read as follows:

"2. I give and devise to my sister, Lucy Pass Featherstone, for the term of her natural life, and no longer, that certain block of property in the Town of Roxboro, lying in the corner of Foushee and Academy streets, and bounded on the North by Academy Street, on the East by the Noell lot, on the South by the lot owned by the estate of Dr. W. A. Bradsher, and on the West by Foushee Street, upon which is located a frame dwelling, and a new brick dwelling, and other buildings.

"3. Upon the death of the said Lucy Pass Featherstone I give and devise the property mentioned and described in section 2 above to Person County, in the state of North Carolina, to be equipped, maintained and used by said county as a hospital, which shall be known as the 'Lucy Pass Memorial Hospital.'

"The devise of this property is made to Person County upon the following terms and conditions: (a) That Person County, through its Board of Commissioners, or other legally constituted authority, shall equip, maintain and use said property continuously and without interruption as a hospital for the white race exclusively; (b) That no white person who is a *bona fide* resident of Person County shall be denied admission to and treatment in said hospital by reason of his or her financial inability to pay for care and treatment, but in order to obtain the benefit of this provision it shall be determined by competent authority that any such applicant is in actual need of hospital care and treatment

and that he or she is not financially able to pay for same. I desire this provision exercised in such a manner as to give as much worthy aid as possible, and at the same time so as to prevent imposition; (c) That in the event this property is not kept in a good state of repair and maintained and operated as a hospital continuously, except when such interruption is due to causes beyond the control of the governing authorities of Person County, and upon the failure to resume the operation of same within a reasonable time after said causes have been remedied or removed, then Person County shall forfeit the right of possession and the title to said property, and the heirs at law of the said John C. Pass shall have the right to enter and take possession of said property and the title to same shall be vested in them as tenants in common; (d) That no portion of said property shall be used for other than hospital purposes, and any violation of this provision shall operate as a forfeiture by Person County.

"14. I give and devise in fee to my sister, Lucy Pass Featherstone, all of the remainder of my property, of whatever kind or nature and wherever located."

The home of the testator was a part of the block of property described in Item 2 of the above will. And Lucy Pass Featherstone, the life tenant, died 19 August, 1948, leaving a last will and testament, in which she devised to her son, Robert B. Featherstone, any interest she might have in the aforesaid property.

The Board of Commissioners of Person County in regular session on 6 September, 1948, all members being present, rejected the devise under the aforesaid will.

The defendant, Mrs. Dallie M. Pass, and all the petitioners other than Robert B. Featherstone and wife, Hazel B. Featherstone, contend that the renounced property goes to the heirs at law of the testator under Item 3, subsection (c) of the will, while the appealing petitioners contend it goes under the residuary clause of the will, Item 14.

From a judgment to the effect that the heirs at law took the property under the terms of the will, Robert B. Featherstone and his wife, Hazel B. Featherstone, appeal, assigning error.

R. B. Dawes, Spears & Hall, and Marshall T. Spears, Jr., for petitioners, appellants.

William D. Merritt and Royster & Royster for petitioners, other than appellants.

Fuller, Reade, Umstead & Fuller, Robert E. Long, and James L. Newsome for respondent, appellee.

DENNY, J. The question for decision is simply this: Since Person County renounced the devise in Item 3 of the last will and testament of John C. Pass, who is entitled to the property?

The appellants contend that upon the renunciation of the devise by Person County, the property passed under the residuary clause of the will of the testator, and that Robert B. Featherstone is now the owner thereof as devisee under and by virtue of the terms of the residuary clause in the will of his mother, the late Mrs. Lucy Pass Featherstone.

The appellants are relying upon the provisions contained in G.S. 31-42, the pertinent parts of which read as follows: "Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will . . ."

It is settled law, in this jurisdiction, by reason of the provisions of the above statute, that where a contrary intent does not appear in a will, ordinarily a lapsed, void or rejected devise will pass under an effective residuary clause. *Faison v. Middleton*, 171 N.C. 170, 88 S.E. 141; *Reid v. Neal*, 182 N.C. 192, 108 S.E. 769; *Van Winkle v. Catholic Missionary Union*, 192 N.C. 131, 133 S.E. 431; *Privott v. Graham*, 214 N.C. 199, 198 S.E. 635; 57 Am. Jur. Wills, Section 1447, p. 971.

It is a rule of construction, however, that the intent of the testator as expressed in his will must control, unless contrary to some rule of law or at variance with public policy. *Buffaloe v. Blalock, ante*, 105, 59 S.E. 2d 625; *Elmore v. Austin, ante*, 13, 59 S.E. 2d 205; *Bank v. Brawley*, 231 N.C. 687, 58 S.E. 2d 706; *House v. House*, 231 N.C. 218, 56 S.E. 2d 695; *Trust Co. v. Shelton*, 229 N.C. 150, 48 S.E. 2d 41; *Trust Co. v. Board of National Missions*, 226 N.C. 546, 39 S.E. 2d 621; *Cannon v. Cannon*, 225 N.C. 611, 36 S.E. 2d 17; *Williams v. Rand*, 223 N.C. 734, 28 S.E. 2d 247. Therefore, under the general rule of construction, applicable both to legacies of personalty and devises of realty, a residuary clause which ordinarily carries any lapsed or ineffectual gifts must yield to a contrary intention on the part of the testator. 57 Am. Jur., Wills, Section 1148, p. 973.

In the instant case the testator did express an intent to have this property go to his heirs at law, and not under the residuary clause, in the event there was a forfeiture by Person County. He expressly provided in the event of such forfeiture "the heirs at law of the said John C. Pass shall have the right to enter and take possession of said property and the title to same shall be vested in them as tenants in common." We think he made a complete disposition of this property and that under the

terms of the will there is no interest, contingent or vested, to fall into and pass under the residuary clause. *Sutton v. Quinerly,* 231 N.C. 669, 58 S.E. 2d 709.

The Supreme Court of Pennsylvania in passing on the identical point, which is now before us, in *In re White's Estate,* 174 P. St. 642, 34 A. 321, said: "The corporate action of the legatees, formally renouncing the legacies, because of their determination not to comply with the conditions implied by acceptance, is equivalent to an adjudicated forfeiture and warrants the claim of the Free Library." The residuary legatees in the above case made the same contention the appellants are making here; and the Free Library was in the identical status of the heirs at law of John C. Pass in the instant case.

It is said in Page on Wills (3rd Lifetime Ed.), Vol. 4, section 1412, p. 156, "If testator makes a specific gift over in the event that the legacy or devise in question is renounced or otherwise fails full effect will be given to such intention," citing *Board of Regents v. Wilson,* 54 Colo. 510, 131 Pac. 422; *Koenig v. Koenig,* 92 Kan. 761, 142 Pac. 261; *In re White's Estate, supra; Bradford v. Leake,* 124 Tenn. 312, 137 S.W. 96; *Milligan v. Greenville College,* 156 Tenn. 495, 2 S.W. 2d 90.

In our opinion the legal effect of the renunciation by Person County was tantamount to a failure to comply with the conditions imposed in the devise and was in itself an act of forfeiture. Person County had been seized with a conditional fee in the premises since 12 July, 1935. Its right of possession, however, had been postponed under the terms of the will until the death of Lucy Pass Featherstone, the life tenant.

The appellees contend that the doctrine of acceleration should be applied in this case in the same manner as it is applied in cases of dissenting widows, citing *Young v. Harris,* 176 N.C. 631, 97 S.E. 609, and similar cases. Be that as it may, we think it was the intent of the testator that if for any reason Person County should fail to accept the devise and comply with the conditions imposed, the title to the property was to vest in his heirs at law and we so hold.

The judgment of the court below is

Affirmed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1950

JOHN P. METCALF v. DEWEY A. FOISTER.

(Filed 20 September, 1950.)

1. Trial § 31b—

Where, in stating the evidence and explaining the law arising thereon, the court deals with all substantial and essential features of the evidence, an objection thereto on ground that the charge failed to comply with G.S. 1-180 cannot be sustained, it being the duty of the objecting party if he desired some subordinate feature to have been presented to the jury to have aptly tendered request for special instructions thereon.

2. Automobiles §§ 16, 18i—

Where plaintiff's evidence discloses that he was standing in an open area used for parking, and not within any marked cross-walk located therein, he is not entitled to instructions as to the right of way of a pedestrian upon entering an intersection or marked cross-walk between intersections.

3. Same—

An open space in a square used for parking is not an intersection within the contemplation of statutes relative to the right of way of pedestrians.

4. Appeal and Error § 39b—

Where the jury answers the issue of negligence in the negative, plaintiff's exceptions to the charge relating to the issue of contributory negligence need not be considered.

5. Appeal and Error § 39f—

Where the charge, read contextually, does not contain prejudicial error, mere inexactness in certain portions thereof will not justify a new trial.

PLAINTIFF'S appeal from *Pless, J.*, Regular January 1950 Term of BUNCOMBE Superior Court.

This is an action to recover damages for a personal injury to plaintiff allegedly caused by the negligent operation of an automobile driven by defendant. It is alleged that a collision and injury occurred while plaintiff, a pedestrian, was attempting to negotiate his passage along the east side of Pack Square, in the City of Asheville, on his way home, by the usual route, after work in the late afternoon or evening.

The plaintiff testified, in substance, that he left his work on Biltmore Avenue about 5:40 p.m., on his way to supper at his home on Broadway, his route passing through Pack Square. Broadway leads off from the Square in a northward direction. He approached the Square on Biltmore Avenue from the south, intending to go to the "information booth" which stands near the monument in the middle of the square, and in front of it. (He then gave a description of Pack Square and the curbing surrounding it, using for illustration a blackboard drawing. No maps accompany the record.) There is a curb running around Pack Square. The sidewalk on Biltmore Avenue approaching the Square was not directly in line with the sidewalk on the opposite side of the Square, that on Biltmore Avenue being offset substantially to the eastward.

There were cars parked in a regular parking place on the eastern side of the Square. Witness was not sure whether there were white lines leading off the place, but knew the places were full of cars, parked headed eastwardly.

Plaintiff testified that he went up Biltmore Avenue to the curb. Seeing one of the lights on the Square was red, and the light on Biltmore Avenue was green, he walked out a distance on the Square, and stopped at about the third tier of parked cars, and immediately behind one of them, and waited until two or three automobiles came around. While he was still watching the light, and it was still green—standing and looking at it,—the defendant "drove up and turned in here and hit me." The bumper of the car struck his leg just below the knee, hitting plaintiff from the side or rear and knocking him down; defendant stopped when he hit plaintiff. At the time it was raining and very near dark. Plaintiff testified that Mr. Foister came to him, and plaintiff said, "Now, what did you hit me for? I was just standing still there." Foister replied, "I could not see you." "He said it was raining so hard and it was so dark he couldn't see through his windshield. I said, 'Well, don't your windshield wipers work?' and he said, 'No.'" Foister then carried him in his car to the restaurant where he worked.

On cross-examination plaintiff testified that there is a cross-walk for pedestrians going across the Square, painted on the street; another cross-walk in front of a drug store, one across Patton Avenue, and another on College Street.

When plaintiff turned from Biltmore Avenue he "turned to the right just a little piece at this corner to get back of those cars; came up here and looked at the light. It was red. Started to go across. Got about between the third and fourth line up and stopped. The light went green. Cars started to go round."

"I was standing in the clear. He attempted to pull into this parking place and there was not a place open." "There was no lane there for traffic to follow. There was no lane where I started to cross. I think there was a mark for the cars to stand in. I think there was a lane for pedestrians to walk across. I don't say the pedestrian lane was right up against the back of these automobiles. I was not against the automobiles. I was behind them. There used to be a pedestrian lane running back of these automobiles along there. I believe I was standing in the lane. I did not know the matter would terminate in a law suit and I didn't take particular attention."

J. C. Chandley, police officer, testified for the plaintiff that he talked with Mr. Foister, who said that he entered Pack Square and made a right turn to the parking space; that his visibility was obscured just a little bit by rain on the windshield; that his windshield wipers were working; that he did not see Metcalf until he bumped into him.

He further testified that there was no mark from the Plaza Theatre corner over straight north to the Island where the monument is located. There was no pedestrian cross-walk there. "The closest marked pedestrian cross-walk to where this accident happened is over in front of B. F. Goodrich. That was marked at the time this accident happened. It is 120 feet from the North curb in front of the Plaza Theatre over to the Island where the monument is located. It is between 40 and 42 feet from the intersection of the curb at the East side of Biltmore Avenue and the North curb along by the Plaza Theatre, back to the curb where it turns north again. It is approximately 50 feet, in my opinion, from the North curb in front of the library to the safety zone, that is, the surface on which traffic travels, city buses, White Transportation buses. From the curb to the safety zone is an open space where traffic travels." "If you extended the sidewalk on the East side of Biltmore Avenue straight across Pack Square, it would be approximately 35 feet to the nearest point on the extended line over to approximately where the accident happened." "The sidewalk on Biltmore Avenue itself is approximately seven feet. If you extended this sidewalk straight across the

Square it would come away out here and not hit the curb. It would come out in the street 16 feet. The Square is that much wider."

Cecil Johnson testified for plaintiff to the effect that he arrived at the scene of the accident shortly after it occurred and that the defendant, Mr. Foister, said that he noticed a place to park just a little past the theatre and sarted to go into this place to park and hit Mr. Metcalf. That it was raining and that he did not know that he hit him; that his windshield wiper was not working; that it was raining and he didn't see him. Mr. Metcalf was working for this witness at the time, running the "Good Enough Place" for him. On cross-examination he denied that he heard Foister tell the officer that his windshield wiper was working; that he didn't hear very well but didn't misunderstand him about the windshield wiper down at the place where he was talking to Mr. Metcalf's son." "He stated that he was looking for a parking place and that he didn't know at the time that he hit Mr. Metcalf."

In his evidence, the defendant, Dewey Foister, testified that when he got to Pack Square he did not immediately see a parking space but was going along slowly and noticed a car starting to move out; that he backed up a little way so as to let this car out and leave it clear, and then started to pull back into the place where he had vacated; he was just crawling; his windshield wiper was operating at the time this happened; that it was drizzling rain; that just as he began to move into the parking lane he saw a body fall right in front of his headlights, and immediately stopped; he didn't feel any jar whatsoever, but stopped and got out and saw the plaintiff. When he got around he was getting up.

Mr. Metcalf and defendant got back into defendant's car and went down to the Good Enough Bar. Defendant testified that his windshield wiper was working. Mr. Metcalf got into Cecil Johnson's car and defendant followed on behind; that he went to Mission Hospital where on examination the attending doctor said he didn't find any fractures and told the plaintiff to go home and put hot poultices on his leg and take some aspirin. Defendant left. He never made any statement that his windshield wiper was not working; that he couldn't see through the window. On the contrary, when Mr. Chandley was making inquiries, he said to him, "Mr. Chandley, you are welcome to go right now and make an examination of my brakes, windshield wiper and everything and see that everything is in first class mechanical order."

On cross-examination the defendant stated that he had good eyesight; that there was nothing in the Square to obscure his vision; that the place was well lighted and that his vision was good. The only thing he could say that prevented his noticing plaintiff was that Mr. Metcalf was wearing a brown coat; that it was a kind of hazy day and that somewhat camouflaged the scene; otherwise he could not account for it. The de-

fendant stated the man was not knocked any distance, was getting up when he got out, and that he couldn't have been more than a foot away from the bumper. He stated that he wasn't expecting to find any pedestrian there.

On re-direct the defendant stated that when he crept into the parking space there was nothing there; there wasn't anybody there when he started in. His wheels were pretty near opposite the white lines marking the parking space.

Oscar Young, testifying for the defendant, stated that on that day just after the accident he rode in the car with Mr. Foister; that Mr. Foister's windshield wiper was working perfectly.

Expert testimony was offered on each side, some experts attributing plaintiff's present condition of phlebitis to the injury sustained at the time of the accident, and others stating that it had no relation to it.

Three issues were submitted to the jury, relating: First, to the alleged negligence of the defendant; second, to the contributory negligence of the plaintiff; and third, to damages.

The jury having answered the first issue, "No," judgment against the plaintiff was entered accordingly, and plaintiff appealed, assigning error.

(Exceptions discussed are given in the opinion.)

Harkins, Van Winkle, Walton & Buck by Kester Walton for plaintiff, appellant.

Thomas A. Uzzell, Jr., and Harry DuMont for defendant, appellee.

SEAWELL, J. Since we do not find merit in exceptions not herein mentioned, we confine discussion to those most stressed by counsel for the appellant, which involve the contention that the trial court failed to explain the law arising on the evidence as required by G.S. 1-180. The 1949 amendment to this section, relieving the trial judge of the necessity of restating the evidence except as necessary to the performance of this duty is not, at least directly, involved.

The exceptions designed to present appellant's contention in this regard, as pointed out in his brief, are numbered in assignments of error as 4, 5, and 8, and consist of bracketed portions of the judge's charge reading as follows:

Exception No. 4.

> "(C) The plaintiff in this case, Gentlemen of the Jury, invokes the alleged violation by the defendant of statute which provides that an automobile shall be equipped with an efficiently working windshield wiper and also invokes the alleged violation by the defendant of the rule or law which says in effect that pedestrians shall have the right of way, so to speak, in pedestrian lanes when the traffic light is

with them. He also invokes the alleged violation by the defendant of his failure to observe the rule of the reasonably prudent man and to keep a lookout in the direction that he is traveling, to see those things that are there for him to see, and to operate his car in consideration and in conformity with the conditions of traffic in the place that he is. (D)."

The assignment of error is as follows:

"The Court erred in the above charge for that the Court referred to certain statutes but erroneously stated the provisions of said statutes, and *for the further reason that the Court failed to charge the duty of the defendant to the plaintiff, as provided for in G.S. 20-172 through 20-174, and other applicable provisions of the statute.*" (Italics ours.)

Exception No. 5:

"(E) If you answer both these features in favor of the plaintiff you have got actionable negligence established, but a finding that he did not have windshield wipers working at that time without a further finding that that was the cause of injury to the plaintiff, as I have defined that to you, would mean that actionable negligence had not been established upon that theory of the case. And, of course, as I say, the plaintiff is invoking these other matters that I have referred to as constituting negligence on the part of the defendant. So you will inquire whether or not the defendant was negligent in any one of the aspects referred to in the evidence and in the Court's charge a moment ago, and if you fail to find, remembering that the burden is upon the plaintiff in this issue, to establish by the greater weight of the evidence that the defendant was negligent, I say if you fail to find that he was negligent in one of those respects, then, of course, the plaintiff could not prevail. (F)"

The assignment of error in this part of the charge is as follows:

"Plaintiff excepts and assigns error to that part of the charge above quoted for that the Court failed to apply to the various aspects of the evidence the principles of law of negligence as prescribed by statute."

The exception referred to in assignment of error No. 8 ("K to L") has no relation to the contention under discussion and is, therefore, not copied.

It will be noted that the appellant attempts to raise the question of failure to comply with G.S. 1-180 by specific exceptions to certain por-

tions of the charge as containing error, with the incidental statement in each connection that the court should have charged *so* and so, but failed to do so. Not conceding or holding that such vital exception to the charge could be raised by this indirection, we may suppose for the purpose of discussion that the exceptions were validly made, with specific reference to the evidence involved and the explanatory law which it is contended the court failed to give. Supposing this, there are, however, two observations to be made, which taken together, we think, deprive the objection of its validity.

First, a perusal of the whole charge leaves us with the impression that the court adequately dealt with the evidence and applicable law as far as substantial clarification requires, although perhaps not precisely in the manner the plaintiff desired; sufficiently, however, to make any further detail a matter of subordinate elaboration, requiring on the part of the plaintiff a request for special instruction, which was not given. *Whiteman v. Transportation Co.*, 231 N.C. 701.

Pertinent to this discussion we find in McIntosh, North Carolina Practice and Procedure, Chapter 14, p. 626, the following:

> ". . . the judge is not required to instruct the jury upon every possible aspect of the evidence, or as to every conceivable inference of fact which might be drawn from it, he should prevent every substantial and essential feature embraced within the issues and arising upon the evidence; and when this has been done, if the parties desire some subordinate feature to be presented, or a fuller statement, they should ask for such special instructions."

Grant v. Bartlett, 230 N.C. 658; *Dulin v. Henderson-Gilmer Co.*, 192 N.C. 638, 135 S.E. 614, 49 A.L.R. 663; *Murphy v. Suncrest Lumber Co.*, 186 N.C. 746, 120 S.E. 342; *Ledford v. Valley River Lumber Co.*, 183 N.C. 614, 112 S.E. 421; *Hill v. North Carolina R. Co.*, 180 N.C. 490, 105 S.E. 184; *Hauser v. Forsyth Furniture Co.*, 174 N.C. 463, 93 S.E. 961; *Cherry v. Atlantic Coast Line R. Co.*, 186 N.C. 263, 119 S.E. 361; *Matthews v. Myatt*, 172 N.C. 230, 90 S.E. 150; *S. v. Merrick*, 171 N.C. 788, 88 S.E. 501; *McCracken v. Smathers*, 119 N.C. 617, 26 S.E. 157; *Oates v. Herrin*, 197 N.C. 171, 148 S.E. 30; *S. v. Hendricks*, 207 N.C. 873, 178 S.E. 557.

It will be noticed that the objections discussed tend to one common purpose: to invoke laws relating to the rights of the pedestrian upon entering an intersection or marked cross-walk between intersections of streets and highways, and that the cited statutes relate to that subject. Therefore, our second observation is that the plaintiff, in his own evidence, has definitely not placed himself within any position where these statutes might be invoked, or the general laws relating to the right of way

of the pedestrian under such circumstances might be available to the plaintiff.

An open space such as Pack Square is of itself hardly an intersection such as is contemplated by the statute sought to be invoked, and if it were the plaintiff has put himself without the pale of the protection of any marked cross-walk located therein, or other situation giving rise to the implications of the statute sought to be invoked.

We should say here that several of the instructions to which objections have been made and which are not here considered, are pertinent not to the issue of negligence, but that of contributory negligence, and that the jury did not reach that issue. We might observe also that there is some inexactness in the charge to the jury on the first issue. But taking the charge contextually we do not regard it as reversible error. No question but that there was ample evidence to sustain the finding for the plaintiff on the first issue had the jury been so minded, but we cannot find that the failure to do so is attributable to misdirection in the instructions given.

We do not find in the record sufficient reason to disturb the verdict.

No error.

ADA S. WILSON v. MARTIN MEMORIAL HOSPITAL, INC., DR. E. C. ASHBY AND DR. L. L. TELLE.

(Filed 20 September, 1950.)

1. **Hospitals § 3—**

In this action against two physicians and a hospital for malpractice, nonsuit as to the hospital *held* properly entered on authority of *Smith v. Duke University*, 219 N.C. 628.

2. **Appeal and Error § 40i—**

In reviewing the trial court's ruling on motion to nonsuit, the Supreme Court will consider the evidence in the light most favorable to plaintiff, giving her every reasonable inference properly deducible therefrom.

3. **Physicians and Surgeons § 10—**

Where the physician engaged by the patient arranges that during his absence the patient should be under the care of another physician, previously unknown to the patient, such substituted physician is the agent of the former in the performance of the necessary services to the patient which the former had contracted to render.

4. **Physicians and Surgeons § 14—**

A physician is not an insurer, and he may be held responsible for the unsuccessful outcome of his treatment only if it proximately results from lack of learning, skill and ability ordinarily possessed by others similarly situated, or from his failure to exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case.

5. Physicians and Surgeons § 20—

Where the evidence is such that the lack of reasonable care and diligence in the application of the physician's knowledge and skill in treating the patient's case is patent, requiring only common knowledge and experience to understand and judge it, expert testimony is not necessary to establish a cause of action for malpractice.

6. Same—Evidence in this case held sufficient to overrule nonsuit in plaintiff's action for malpractice.

Evidence tending to show that one physician, acting as agent of his codefendant, stated that a Caesarean was necessary to deliver plaintiff's child but that he was unable to use his best judgment in the matter, that the operation was not performed, that plaintiff remained in the hospital for more than a week after her baby was born dead, and was then permitted to leave without either of defendant physicians having examined her, and that an examination by another physician after she had returned home disclosed that she had a high temperature, was badly torn and lacerated, and that stitches used to sew lacerated places after the child's birth had pulled loose, or the tissue had decomposed and the stitches pulled out, *is held* sufficient to overrule defendants' motion to nonsuit in an action against them for malpractice.

APPEAL by plaintiff from *Moore, J.*, May Term, 1950, of SURRY.

This was an action to recover damages for injuries alleged to have been caused by the negligence of the defendants while plaintiff was a patient in the hospital of the corporate defendant and under the professional care of the individual defendants.

The plaintiff testified that she was the wife of Ernest Wilson, and when she discovered she was pregnant she engaged the services of defendant Dr. Ashby, and consulted him frequently as to her condition. In accordance with his instructions when birth pains began she went to defendant hospital on Sunday, May 9, 1948, and was put to bed by a nurse. She asked for Dr. Ashby, but he was not there. Monday her pains continued and at lunch time she asked again for Dr. Ashby. That afternoon defendant Dr. Telle, whom she had not known before, came in and said he was checking Dr. Ashby's patients. In reply to her request that something be done for her he promised relief by nine o'clock that night. He made no statement as to the whereabouts of Dr. Ashby and made no examination of the plaintiff. Labor pains continued. She saw Dr. Telle Tuesday morning when X-ray pictures were taken. He said, "It is going to be a case of an operation. This baby is so large you cannot give a natural birth to it." She asked him to hurry up as she could not suffer much more. She became unconscious and remained so until Wednesday afternoon. Thursday morning Dr. Telle came to her bed, felt her pulse and told her to forget about the stitches. She saw Dr. Telle again Friday morning. He felt her pulse but made no checkup or examination of her abdomen or any of the stitches. She saw Dr. Ashby Satur-

day morning. He merely raised her eyelids and said, "You are going to be all right." Neither he nor Dr. Telle made any examination of any part of her body. She remained in the hospital until Friday, the 21st of May, when she was permitted to leave. At that time her bed had an offensive odor. Shortly after she reached home she called in Dr. Flippin, who treated her for two months. Her condition was such that bowel movements passed through her vagina and she was at times unable to control bowel action. This condition still exists causing suffering and inconvenience.

Dr. Flippin testified when he examined her after her discharge from the hospital he found her temperature between 102 and 103, and a profuse discharge. He observed tears and bruises. He said she was torn very badly, and that it looked as if she had been sewed and the stitches had pulled loose or broken down, or the tissues had decomposed and the stitches pulled out.

Plaintiff's husband Ernest Wilson testified he saw Dr. Telle at the hospital on Tuesday and he said, "Your wife is going to have a baby, and it is a Caesarean case because the baby is too large for a natural birth." He told the doctor to go ahead. Plaintiff was being given glucose and looked like she was going into convulsions and had to be held on the bed, and later became unconscious. Dr. Telle told him she was making a little progress and they would wait until five o'clock, though witness urged that he proceed with operation as she was suffering so much. Dr. Telle said they would keep constant check on her, and that by use of X-rays they knew there was no way out but a Caesarean operation; that Dr. Ashby had left his patients in his care. Later when asked about performing the operation which he had said was necessary, Dr. Telle replied, "I am handicapped. Dr. Ashby left his patients in my care, but I still don't have authority to do what I want to do." No explanation was offered. At eight o'clock Tuesday evening when witness left the hospital plaintiff was still "hollering" and Dr. Telle was not there—had gone to a nurses' graduation. This witness saw Dr. Telle Wednesday morning and he said they had to take the baby "from below." Witness saw the baby at the undertaker. Its head was badly bruised and skinned, and there was a black circular indentation in the scalp "like it had been out so far and couldn't get any farther." The baby weighed 11 or 12 pounds. Later Dr. Telle assured witness he would check over plaintiff before she left the hospital, but no examination of any kind was made, and she was permitted to leave. When Dr. Flippin came and examined the plaintiff witness observed a long place apparently unsewed, and that pus was pouring out. Bowel movements came through the vagina.

Another witness for plaintiff testified Dr. Telle said he could not go ahead and use his judgment—he was handicapped.

At the close of plaintiff's testimony defendants' motion for judgment of nonsuit was allowed, and plaintiff excepted and appealed.

John H. Blalock and Dallas C. Kirby for plaintiff, appellant.
Folger & Folger for defendants, appellees.

DEVIN, J. The judgment of nonsuit as to the defendant Martin Memorial Hospital, Inc., was properly entered (*Smith v. Duke University,* 219 N.C. 628, 14 S.E. 2d 643; *Penland v. Hospital,* 199 N.C. 314, 154 S.E. 406), but a different question is presented by plaintiff's appeal from the judgment of nonsuit as to the individual defendants.

In reviewing the trial judge's ruling on the motion to nonsuit, the established rule requires that we consider the evidence offered on behalf of the plaintiff in the light most favorable for her, and that she is entitled to all reasonable inferences in her favor which properly may be drawn from the evidence.

Viewed in this light we think there was some evidence that the defendants Dr. Ashby and Dr. Telle failed to exercise due care in the treatment of the plaintiff, and that this proximately resulted in injury.

The plaintiff's evidence tends to show that Dr. Ashby, who had been engaged to treat the plaintiff professionally in her pregnancy and childbirth, was absent at the time she entered the hospital for her accouchement, and that he arranged for the plaintiff to be under the care of Dr. Telle, previously unknown to the plaintiff, who thereafter treated her. This would seem to permit the inference that Dr. Ashby thereby constituted Dr. Telle his agent for the performance of the necessary services to the plaintiff which he had contracted to render. *Nash v. Royster,* 189 N.C. 408, 127 S.E. 356.

It is the duty of a physician who has agreed to render professional services to a patient not only to use due care and diligence in his treatment of the patient, but he must exercise reasonable care to see that such attention is given as the case properly requires. A physician whose services are thus engaged undertakes that he possesses the requisite degree of learning, skill and ability necessary for the practice of his profession, such as others similarly situated ordinarily possess, and that he will exercise ordinary care and diligence in the use of his skill and in the application of his knowledge in the patient's case, and that he will use his best judgment in the treatment and care of the case entrusted to him.

The physician is in no sense an insurer, nor is he infallible. Absolute accuracy in judgment and in practice is not required, nor may he be held responsible for the unsuccessful outcome of his treatment, unless it proximately result from the omission to use reasonable care and diligence under the circumstances, or from failure to use his best judgment in the

treatment. It is required not only that he have that reasonable amount of knowledge and skill he holds himself out to possess, but also that he use it in the treatment of his patient. *Nash v. Royster,* 189 N.C. 408, 127 S.E. 356; *Covington v. Wyatt,* 196 N.C. 367, 145 S.E. 673; *Covington v. James,* 214 N.C. 71, 197 S.E. 701; *Groce v. Myers,* 224 N.C. 165, 29 S.E. 2d 523; 41 A.J. 198, 201. "It has been repeatedly held here that the physician or surgeon who undertakes to treat a patient implies that he possesses the degree of professional learning, skill and ability which others similarly situated ordinarily possess; that he will exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and exert his best judgment in the treatment and care of the case entrusted to him." *Buckner v. Wheeldon,* 225 N.C. 62 (65), 33 S.E. 2d 480. Liability does not flow from the mere fact of an imperfect result. The physician may only be held responsible for an injury suffered by his patient when the injurious result flows proximately from his omission to exercise reasonable care and diligence in the application of his knowledge and skill to the treatment of his patient. *Grier v. Phillips,* 230 N.C. 672, 55 S.E. 2d 485; *Vann v. Harden,* 187 Va. 555. It is not in all cases essential that plaintiff's assertion of claim for compensation for an injury alleged to have resulted from the failure of the physician to exercise due care in the treatment of his patient should be supported by expert testimony. When the evidence of lack of ordinary care is patent and such as to be within the comprehension of laymen, requiring only common knowledge and experience to understand and judge it, expert testimony is not required. *Groce v. Myers,* 224 N.C. 165, 29 S.E. 2d 553; *Covington v. James,* 214 N.C. 71, 197 S.E. 701; *Richeson v. Roebber,* 349 Mo. 132, 141 A.L.R. 1 (note); *Cornwell v. Sleicher,* 119 Wash. 573; *Connor v. O'Donnell,* 230 Mass. 39.

In the case at bar there is some evidence from the testimony of the plaintiff and others as to statements made by Dr. Telle that he knew from X-rays that the method used for the attempted delivery of the child was impracticable and would likely result in injury. He is reported to have said a Caesarean operation was imperative, and later that he was "handicapped" and unable to use his best judgment. There was also some evidence of failure to exercise ordinary care in the treatment of the serious lacerations resulting from the delivery of the child "from below," and failure to examine and discover the torn stitches and decomposed tissues. According to the testimony of Dr. Flippin she was "torn very badly," and she testified she remained in the hospital for more than a week thereafter, and was then permitted to leave without either of the defendants having made an examination. 141 A.L.R. 111, *et seq.* (Annotation).

Whether there was failure to exercise due care in these particulars and whether such failure was the proximate cause of the injury plaintiff complains of were matters for the jury under proper instructions from the court. Only plaintiff's evidence has been heard. There was no evidence that the defendants were lacking in professional learning or skill, but negligent failure to make such knowledge and skill available to the plaintiff constitutes her complaint. On another hearing defendants will have opportunity to present their defense to these allegations.

For the reasons herein set out the judgment of nonsuit as to defendant Hospital is affirmed, and judgment of nonsuit as to defendants Ashby and Telle is reversed.

N. E. AYDLETT, ADMINISTRATOR OF THE ESTATE OF GROVER CLEVELAND CARTWRIGHT, DECEASED, v. SILAS A. KEIM.

(Filed 20 September, 1950.)

1. Negligence § 10—

The doctrine of last clear chance is applicable only when a sufficient interval elapses between the time defendant discovers or should have discovered plaintiff's perilous position to enable a reasonably prudent man in like position to have avoided the injury notwithstanding plaintiff's contributory negligence.

2. Same—

Defendant's original or primary negligence is barred by plaintiff's contributory negligence and cannot be relied upon by plaintiff as a basis for the doctrine of last clear chance.

3. Automobiles §§ 8a, 16—

Nothing else appearing, a motorist is entitled to assume that a person on the highway will exercise ordinary care for his own safety.

4. Automobiles § 18c—Evidence held insufficient to support submission of issue of last clear chance.

Evidence tending to show that defendant turned to his left to avoid a car standing stationary in front of him on his right side of the highway at night, that a man suddenly appeared some three or four feet to the left of the parked car as defendant was passing it, that defendant swerved to his left, but that the man stumbled or walked into the side of defendant's car, causing injuries resulting in death, without evidence as to how long he had been in this position of peril, *is held* insufficient to support the submission of the issue of last clear chance, since there is no evidence that defendant was put on notice that intestate was drunk, ill, or otherwise incapacitated, or, even so, that defendant could or should have discovered the peril in time to have avoided the injury.

5. Appeal and Error § 23—

Where the exceptions are separately numbered and only one of them is necessary to be considered in disposing of the appeal, the Supreme Court in its discretion may dispose of the case on its merits notwithstanding failure of appellant to separately assign the exceptions as error. Rule of Practice in the Supreme Court 19 (3).

APPEAL by defendant from *Halstead, Special Judge,* at May Term, 1950, of PASQUOTANK.

Civil action to recover damages for wrongful death.

About 7:00 o'clock, or shortly thereafter, on 16 April, 1949, the plaintiff's intestate was operating his motor vehicle southwardly on the highway leading from Elizabeth City to Weeksville. Approximately five minutes before he sustained his fatal injury he was observed on the highway between 400 and 500 yards from the point where the accident occurred, driving his car without lights. The car "was being operated in a zig-zag direction . . . between 5 and 10 miles. The car was zig-zagging between the center line of the road and off on the shoulder on the right side." The plaintiff's intestate parked his car on the right hand side of the highway. The right wheels were off the pavement. The paved highway was approximately 22 feet wide. At the time of the accident the motor of plaintiff's intestate's car was running and the left door was partly open. There was evidence that the plaintiff's intestate had been drinking and was under the influence of liquor shortly before the accident. A pint bottle containing a small amount of whiskey was found on the front seat of Cartwright's car by the officer investigating the accident. It is alleged by the plaintiff in his complaint that his intestate had become ill from fumes of carbon monoxide escaping from the engine of his car or from some other reason unknown to plaintiff, and that he parked his car and got out on the highway where he remained momentarily in a dazed or semi-dazed condition, attempting to relieve himself of said illness.

According to defendant's evidence, he saw the Cartwright car when he had approached within approximately 200 feet of it, and when he got within approximately 100 feet of it he saw it was not moving. He further testified, "I then turned out. There was plenty of room to miss the car, turned to my left and slowed down a certain amount, and later, when I got fairly close, a man appeared out there that was not in view before. He appeared to be about 3 or 4 feet from the car, so I tried to allow plenty of room. I pulled over as far as I could and put on my brakes. . . . I should have missed him two and a half or three feet; I missed him; I heard a bump on the side of my car; it was a very slight bump. I could barely hear it and there was no impact. You could not

feel anything. . . . I stopped as quickly as I could, I judge about 20 feet further and looked for a space to get out of the way."

On cross-examination, the defendant further testified: "When I saw the man naturally I swerved as much as I could to get away. . . . I did not swerve to miss the car and did not say I did. I said I saw the car and that I pulled over to miss it and that when I got closer I saw the man and then swerved to the left. My car did not hit Mr. Cartwright. . . . The man was not standing still. He was moving and that is why I pulled over as far as I could."

Miss Donita Keim, daughter of the defendant, testified: "As we were driving along the highway, I noticed that car parked on the road and did not notice the man until we got up very close to the car, and then, as we went by him, my father swerved to miss him, and he walked into the car. I saw him. He either walked or staggered, but he did go into the car as we passed him. I was sitting on the right side, near the window."

The defendant and his daughter were the only eyewitnesses to the accident. The plaintiff, however, offered several witnesses who testified they heard the screaming of brakes and went to the scene of the accident and found Cartwright lying on his back in front of his car. The defendant's car was parked on the left shoulder of the road about 30 or 35 feet from Cartwright's car. These witnesses testified that the defendant testified at the Coroner's hearing that he did not see the parked car until he was "right close up on it and, of course, when he saw it he threw on the brakes and swerved to the left and when he swerved to the left a man was standing beside it and his car struck him."

The plaintiff in his reply alleges that notwithstanding the negligence of the deceased, if any, the defendant by the exercise of reasonable care and prudence might have avoided the injurious consequences to the plaintiff's intestate.

Issues of (1) negligence, (2) contributory negligence, (3) last clear chance, and (4) damages were submitted to the jury, which answered the first three issues "Yes" and awarded damages. The court entered judgment accordingly, and the defendant excepted and appealed.

John B. McMullan for plaintiff.

L. T. Seawell, of Norfolk, Va., and Worth & Horner for defendant.

DENNY, J. The defendant excepted to the submission of the third issue. Therefore, it becomes necessary to determine whether the evidence adduced in the trial below is sufficient to support a verdict in favor of the plaintiff on that issue. And in our opinion there is no evidence to support an affirmative answer thereto.

The doctrine of last clear chance or discovered peril is firmly established in our law; and is clearly and concisely stated by *Barnhill, J.,*

speaking for the Court in *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 35 S.E. 2d 337, as follows: "The contributory negligence of the plaintiff does not preclude a recovery where it is made to appear that the defendant, by exercising reasonable care and prudence, might have avoided the injurious consequences to the plaintiff, notwithstanding plaintiff's negligence; that is, that by the exercise of reasonable care defendant might have discovered the perilous position of the party injured or killed and have avoided the injury, but failed to do so. *Haynes v. R. R.*, 182 N.C. 679, 110 S.E. 56, and cases cited; *Redmon v. R. R.*, 195 N.C. 764, 143 S.E. 829; *Caudle v. R. R.*, 202 N.C. 404, 163 S.E. 122; *Jenkins v. R. R.*, 196 N.C. 466, 146 S.E. 83; *Taylor v. Reirson*, 210 N.C. 185, 185 S.E. 627."

Applying this doctrine to the evidence in the present case, it does not appear that the defendant was put on notice that plaintiff's intestate was drunk, ill or otherwise incapacitated. Conceding plaintiff's intestate was standing by his car, as contended by the plaintiff, nothing else appearing, the defendant was entitled to assume that he would exercise ordinary care for his own safety. This Court said in *Reeves v. Staley*, 220 N.C. 573, 18 S.E. 2d 246, speaking through *Winborne, J.*: "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," citing numerous authorities. See also *Hobbs v. Coach Co.*, 225 N.C. 323, 34 S.E. 2d 211; *Tysinger v. Dairy Products*, 225 N.C. 717, 36 S.E. 2d 246; *Hill v. Lopez*, 228 N.C. 433, 45 S.E. 2d 539; *Cox v. Lee*, 230 N.C. 155, 52 S.E. 2d 355; *Bobbitt v. Haynes*, 231 N.C. 373, 57 S.E. 2d 361.

Moreover we do not think the evidence before us places the plaintiff's intestate in a place of peril until it was too late for the doctrine of last clear chance to be invoked. "The doctrine is clearly inapplicable where the peril and defendant's discovery of the peril or his duty to discover it arose so shortly before the accident as to afford him no opportunity by the exercise of the greatest possible diligence, to avoid the injury. The doctrine contemplates a last 'clear' chance, not a last 'possible' chance, to avoid the accident; it must have been such a chance as would have enabled a reasonably prudent man in like position to have acted effectively." 65 C.J.S., Negligence, Sec. 137 (2), p. 774, *et seq.* There is no evidence to show how long the plaintiff's intestate had been out of his car, or how long he had been on the highway prior to the discovery of his presence thereon by the defendant. The application of the last clear chance doctrine is invoked only where there was a sufficient interval of time between the plaintiff's negligence and his injury during which the defendant, by

the exercise of reasonable care could or should have discovered the perilous position of the plaintiff in time to avoid injuring him.

The original or primary negligence of a defendant, which would warrant answering the first issue in the affirmative, cannot be relied upon by the plaintiff to recover under the last clear chance doctrine. A recovery on the original negligence is barred in such cases by the plaintiff's contributory negligence. The plaintiff's right to recover, notwithstanding his own negligence, must arise out of a factual situation which gave the defendant an opportunity, through the exercise of reasonable care, to have avoided the injury to him, but failed to do so. *Ingram v. Smoky Mountain Stages, Inc., supra;* 38 Am. Jur., Negligence, Sec. 218, p. 903, *et seq.*

The defendant's exception to the submission of the third issue is sustained.

The answer to the first two issues are determinative of the rights of the parties in this action. The contributory negligence of plaintiff's intestate was conceded by the plaintiff in the trial below and the jury so instructed. Consequently the defendant is entitled to judgment.

The case is remanded for judgment in accord with this opinion.

The plaintiff's motion to dismiss the appeal for failure to group and number the exceptions, as required by Rule 19 (3) of the Rules of Practice in the Supreme Court, is disallowed.

Since the disposition of the appeal necessitated the consideration of only one exception, and the exceptions are separately numbered, although not separately assigned as error, we have elected in our discretion to dispose of the case on its merits without referring the transcript to the clerk or some attorney to state the exceptions as authorized by the rule.

Error and remanded.

J. R. WALLIN v. FRED RICE.

(Filed 20 September, 1950.)

Adverse Possession § 3—

While the possession of one entering upon lands under a deed describing same by metes and bounds is constructively extended to the outermost bounds set out in the deed, such constructive possession does not cover that portion of the land in the actual adverse possession of another, and therefore possession of a part of the boundary described in a deed for more than twenty years does not preclude a claim of adverse possession of a part of the tract by the owner of contiguous lands who has introduced evidence of actual, continuous and hostile possession of such part under known and visible lines and boundaries for more than twenty years.

WALLIN *v.* RICE.

APPEAL by defendant from *Alley, Emergency Judge,* January Term, 1950, of MADISON. New trial.

This was a suit to determine the title to land and to recover damages for trespass thereon.

Issues were submitted to the jury and answered as follows:

"1. Is the plaintiff the owner and entitled to recover the possession of the lands described in his complaint? Answer: Yes.

"2. Did the defendant enter upon said lands and wrongfully cut and remove merchantable timber therefrom, as alleged in the complaint? Answer: Yes.

"3. What damage, if any, has the plaintiff sustained by reason of the cutting and removal of said timber? Answer: $50.00.

"4. Has the defendant been in the actual, open, continuous, notorious, uninterrupted, exclusive and adverse possession of said lands described in his answer and further defense under known and visible lines and boundaries for a period of more than twenty years next before this action was brought, as alleged in his answer and further defense? Answer:.....

"5. Has the plaintiff wrongfully trespassed on the lands of the defendant, referred to in Issue No. 4, and removed timber therefrom, to the injury of the defendant, as alleged in his answer? Answer:.....

"6. What damage, if any, is the defendant entitled to recover of the plaintiff by reason thereof? Answer:....."

From judgment on the verdict defendant appealed.

J. M. Baley, Jr., and Carl R. Stuart for plaintiff, appellee.

Clyde M. Roberts and John H. McElroy for defendant, appellant.

DEVIN, J. Defendant's motion for judgment of nonsuit was properly denied, but we think there was error in the court's instructions to the jury entitling the defendant to a new trial.

The plaintiff's evidence tended to show that in 1911 he entered into possession of a tract of 126 acres of land under a deed which described the land by metes and bounds, and has lived on it ever since, cultivating a portion, devoting a portion to grazing, using wood and timber, and that defendant has entered on a small triangular shaped parcel of this land on the southeast side thereof and cut and removed timber.

Defendant owns a tract of 50 acres of land south of plaintiff's tract but the bounds set out in his deed do not extend beyond or across plaintiff's lines, and defendant admitted he had no deed covering the land in controversy, and that he claimed title to the *locus*—the triangle—only by adverse possession for twenty years. This triangle projects northward from defendant's land into the area included within the boundaries of plaintiff's deed. Defendant testified in substance that he had exercised

acts of ownership on this triangle, making the ordinary use and taking the ordinary profits of which the land was susceptible, cutting timber, and planting patches of beans in the open woodland, and that those acts of possession were done openly, continuously and adversely for more than twenty years. There was also evidence tending to show that the western leg of the triangle was denoted by a wire fence separating the disputed land from the remainder of plaintiff's land, and the eastern leg by a well defined mountain ridge. At the apex was a walnut tree and at the southwest corner was a depression where a corner Spanish oak had stood.

Though the defendant's evidence was sharply contradicted, it is apparent that it was sufficient to go to the jury on the issue of adverse possession of the disputed area.

The court charged the jury as follows: "I charge you then, gentlemen, on that first issue, that if you find by the greater weight of the evidence that the plaintiff is the owner of a paper title such as he has described and has been introduced in here, and that he is in possession of a part of a boundary described in his deeds and title, and has been in possession of it fifty years, that he has used the land for all purposes for which they are susceptible and suitable, and he has got a house on it, he is in possession of any part of it, then I charge you that his possession would extend to the outermost boundaries of his deeds; and if you so find it will be your duty to answer the first issue yes. If you fail to so find it will be your duty to answer the first issue no." The court then instructed the jury if they answered the first and second issue yes, they need not answer the fourth issue, the issue addressed to defendant's claim of title by adverse possession. This issue was not answered.

The court correctly instructed the jury that where land is entered under a deed describing it by metes and bounds and this entry is followed by adverse possession of a portion of the land, the law would extend constructively such possession to the outermost bounds set out in the deed. But there was omission to state in this connection the exception to this rule that such constructive possession would not cover that portion of the land in the actual adverse possession of another. One may assert title to land embraced within the bounds of another's deed by showing adverse possession of the portion claimed for twenty years under known and visible lines and boundaries (G.S. 1-40), but his claim is limited to the area actually possessed, and the burden is upon the claimant to establish his title to the land in that manner. What constitutes adverse possession of land has been many times stated by this Court. *Currie v. Gilchrist,* 147 N.C. 648, 61 S.E. 581; *Locklear v. Savage,* 159 N.C. 236, 74 S.E. 347; *Alexander v. Cedar Works,* 177 N.C. 137, 98 S.E. 312; *Berry v. Coppersmith,* 212 N.C. 50, 193 S.E. 3; *Vance v. Guy,* 223 N.C. 409, 27 S.E. 2d 117.

The defendant here offered no evidence to contradict the testimony that the description in plaintiff's deed covered the disputed triangle, or that plaintiff had resided on the occupied portions of the land described in his deed since 1911. But defendant claimed he had acquired title to this triangle by adverse possession for twenty years. While his evidence of adverse possession was stoutly denied by the plaintiff, we think he has offered enough to entitle him to present his case to the jury under a proper issue addressed to that question.

New trial.

STATE v. AVERY BOWMAN.

(Filed 20 September, 1950.)

1. **Rape § 15—**

The three essential elements of the offense created by G.S. 14-26 are (1) a male person's carnal knowledge of a girl (2) over twelve and under sixteen years of age (3) who has never before had sexual intercourse with any person.

2. **Rape §§ 1, 15—**

"Carnal knowledge" and "sexual intercourse" are synonymous, and exists in a legal sense when there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. G.S. 14-23.

3. **Rape § 18—**

Testimony by prosecutrix that defendant had "intercourse" with her and "raped" her is sufficient evidence of carnal knowledge to be submitted to the jury in a prosecution under G.S. 14-26.

4. **Criminal Law § 52a (2)—**

Nonsuit may not be granted on the ground that the testimony of the State's witnesses was incredible and unworthy of belief, the credibility of the witnesses being for the jury and not the court.

5. **Criminal Law § 42e—**

Defendant is not entitled to attack the credibility of a witness for the prosecution by showing specific acts of misconduct by her.

6. **Criminal Law § 53f—**

The charge of the court, construed as a whole, *held* not objectionable as giving undue prominence to the contentions of the State.

APPEAL by defendant from *Moore, J.*, and a jury, at the June Term, 1950, of STOKES.

The defendant was tried upon an indictment charging him with feloniously obtaining carnal knowledge of a virtuous girl between the ages of twelve and sixteen years in violation of G.S. 14-26.

The sordid testimony given on the trial is stripped of all nonessentials in the statement set forth below.

The State presented testimony tending to show that in October, 1949, the defendant, a man of the age of 43 years, met the prosecutrix, a girl of the age of 13 years, who had never had sexual intercourse with any person, in a place in Stokes County known as the Flat Rock. The prosecutrix testified that thereupon the following event occurred. "He told me he would give me three dollars to let him do it, and I let him have intercourse . . . I said that Avery Bowman raped me. He said he would give me three dollars to let him. . . . When he asked me I told him I couldn't, and he said he would give me three dollars, and I did. . . . He had intercourse with me at the foot of the Rock."

The defendant denied that any act of sexual intercourse had ever taken place between him and the prosecuting witness, and offered testimony tending to discredit the claim that she had not had sexual relations with other male persons prior to October, 1949.

There was a verdict of guilty, and the defendant was sentenced to confinement in the State's Prison, at hard labor, for a period of not less than seven, nor more than ten years. The defendant excepted and appealed, assigning errors.

Attorney-General McMullan and Assistant Attorney-General Rhodes for the State.

J. H. Folger and Fred Folger for the defendant.

ERVIN, J. The statutory felony of obtaining carnal knowledge of virtuous girls between twelve and sixteen years old is created by the following portion of the statute now codified as G.S. 14-26: "If any male person shall carnally know or abuse any female child, over twelve and under sixteen years of age, who has never before had sexual intercourse with any person, he shall be guilty of a felony and shall be fined or imprisoned in the discretion of the court." This enactment is designed to protect chaste girls between the specified ages from predatory males who would rob them of their virtue.

Three essential ingredients must coexist to render a male person guilty of the statutory felony of obtaining carnal knowledge of a virtuous girl between the specified ages. They are: (1) The male person must have carnal knowledge of the girl; (2) the girl must be over twelve and under sixteen years of age; and (3) the girl must never before have had sexual intercourse with any person. *S. v. Swindell,* 189 N.C. 151, 126 S.E. 417. The terms "carnal knowledge" and "sexual intercourse" are synonymous. There is "carnal knowledge" or "sexual intercourse" in a legal sense if there is the slightest penetration of the sexual organ of the female by the

sexual organ of the male. It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient. G.S. 14-23; *S. v. Monds,* 130 N.C. 697, 41 S.E. 789; *S. v. Hargrave,* 65 N.C. 466; *S. v. Storkey,* 63 N.C. 7; Burdick: Law of Crime, section 477; 44 Am. Jur., Rape, section 3; 52 C.J., Rape, sections 23, 24.

The defendant puts his chief reliance upon his assignment of error based on the refusal of the trial court to grant his motion for judgment of nonsuit, which was interposed when the State rested its case and renewed after all the evidence was concluded. G.S. 15-173. His position on this phase of the controversy is twofold.

He asserts initially that his motion to nonsuit the action should have been allowed for want of evidence of sexual penetration. This contention is insupportable. The law did not require the complaining witness to use any particular form of words in stating that the defendant had carnal knowledge of her. *S. v. Hodges,* 61 N.C. 231. Her testimony that the defendant had "intercourse" with her and "raped" her under the circumstances delineated by her was sufficient to warrant the jury in finding that there was penetration of her private parts by the phallus of the defendant. *Ballew v. State,* 23 Ala. A. 274, 124 S. 123; *S. v. Bailly,* 29 S.D. 588, 137 N.W. 352. This being so, there was evidence in behalf of the prosecution tending to establish the coexistence of the three essential ingredients of the charge. *S. v. Bryant,* 228 N.C. 641, 46 S.E. 2d 847; *S. v. Trippe,* 222 N.C. 600, 24 S.E. 2d 340; *S. v. Wyont,* 218 N.C. 505, 11 S.E. 2d 473; *S. v. Houpe,* 207 N.C. 377, 177 S.E. 20.

The defendant insists secondarily, however, that the testimony of the State tending to show his guilt was incredible in character, and that the trial court ought to have nonsuited the action on the ground that the witnesses giving it were unworthy of belief. This argument misconceives the office of the statutory motion for a judgment of nonsuit in a criminal action. In ruling on such motion, the court does not pass upon the credibility of the witnesses for the prosecution, or take into account any evidence contradicting them offered by the defense. The court merely considers the testimony favorable to the State, assumes it to be true, and determines its legal sufficiency to sustain the allegations of the indictment. Whether the testimony is true or false, and what it proves if it be true are matters for the jury. *S. v. McLeod,* 196 N.C. 542, 146 S.E. 409.

It necessarily follows that the ruling on the motion for judgment of nonsuit was correct.

None of the remaining assignments of error justify the award of a new trial. It was not competent for the defendant to impeach the veracity of the State's witness Leona Dodson by evidence tending to show specific acts of misconduct by her. Hence, the testimony of the defendant's

witnesses, C. T. Barber and Mrs. Syble Long, was properly excluded. *S. v. Shinn,* 209 N.C. 22, 182 S.E. 721. When the instructions to the jury are construed as a whole, they do not merit the criticism that the court gave undue prominence to the contentions of the State. *S. v. Wilcox,* 213 N.C. 665, 197 S.E. 156.

There is in law

No error.

STATE v. TROY ELLIOTT AND JOSEPH ELLIOTT.

(Filed 20 September, 1950.)

1. Criminal Law § 1b—

A person is presumed to intend the natural consequences of his act and therefore, where a specific intent is not an element of the crime, proof of the commission of the unlawful act is sufficient to support a verdict; but such presumption is not conclusive but merely establishes a *prima facie* case in respect to intent.

2. Intoxicating Liquor § 7—

A person cannot be guilty of transporting intoxicating liquor in his automobile unless he has knowledge of the presence of the liquor, since a general intent to commit the act is essential; and while such intent will be presumed from proof of the act and is sufficient to make out a *prima facie* case, such presumption is rebuttable.

3. Intoxicating Liquor § 9f—

Where, in a prosecution for unlawful possession and transportation of intoxicating liquor, defendant specifically pleads want of knowledge of the presence of liquor in his automobile and offers evidence in support of that plea, he raises an issue of fact for the determination of the jury, and it is error for the court to fail to instruct the jury that defendant would not be guilty in the absence of knowledge that the liquor was in his automobile, this being a part of the law of the case arising upon the evidence.

APPEAL by defendant Troy Elliott from *Morris, J.,* April Term, 1950, PERQUIMANS. New trial.

Criminal prosecution under two separate bills of indictment, consolidated for trial, in which defendants are charged with the violation of the prohibition statute in the following respects, to wit: unlawful possession for the purpose of sale, unlawful possession, and transportation of illicit intoxicating liquor.

On 12 April 1949, at about 11:00 p.m., the sheriff of the county saw the automobile of defendant Troy Elliott come to a stop on a back street of the town of Winfall. Troy and his brother, the defendant Joseph Elliott, were seated on the front seat. Joseph was at the wheel. One D'Autrey Riddick was on the back seat. The sheriff approached the car

and found a five-gallon jug containing about four gallons of nontax-paid liquor partially concealed in a grass bag in the back seat of the car.

Defendant testified that they passed Riddick about two miles out of town; that Riddick was then walking along the road with a box under his arm and a bag on his back; that Troy recognized him and told Joseph to stop and pick him up; that they did stop and Riddick got in the back seat; and that they knew nothing about the contents of the bag until the sheriff discovered it.

Riddick was tried and convicted on a charge of unlawful possession and transportation.

There was a verdict of guilty of unlawful possession and transportation. The court pronounced judgment on the verdict and defendant Troy Elliott appealed.

Attorney-General McMullan, Assistant Attorney-General Bruton, and John R. Jordan, Jr., Member of Staff, for the State.

Walter H. Oakey, Jr., for defendant appellant.

BARNHILL, J. The appellant excepts for that the court failed to charge the jury that in order to find the defendants guilty of possession or transportation of intoxicating liquors as charged, they must find defendants had guilty knowledge of the presence of the liquor in the automobile. This exception must be sustained.

A person is presumed to intend the natural consequences of his act. *S. v. Phifer,* 90 N.C. 721; *S. v. Barbee,* 92 N.C. 820; *S. v. Davis,* 214 N.C. 787, 1 S.E. 2d 104; *Warren v. Insurance Co.,* 217 N.C. 705, 9 S.E. 2d 479. Hence, ordinarily, where a specific intent is not an element of the crime, proof of the commission of the unlawful act is sufficient to support a verdict. *S. v. Davis, supra.* It follows that the State made out a *prima facie* case when it offered testimony tending to show that there was a jug containing four gallons of liquor on the automobile then in the possession of and being operated by defendants.

Nothing else appearing, it would not be necessary for the court, in the absence of a prayer, to make reference in its charge to guilty knowledge or intent. *Scienter* is presumed. "The presumption, however, is not conclusive; it is evidence only so far as to prove a *prima facie* case in respect to the intent." *S. v. Barbee, supra.*

Here the appellant specifically pleads want of knowledge of the presence of liquor on the automobile and offered evidence in support of that plea. He thereby raised a determinative issue of fact. Indeed, it was the only controverted issue in the trial. Thus, under the circumstances of this case, guilty knowledge on the part of the appellant is an essential element of the crimes charged, and the law in respect thereto becomes a

part of the law of the case which should be explained and applied by the court to the evidence in the cause. *S. v. Welch, ante,* 77.

The court, it is true, charged the jury that defendants contend the liquor belonged to Riddick and that they had no knowledge the liquor was in their automobile. It is now asserted that the full statement of these contentions, considered in connection with the instructions on the law, meets the objection interposed by the appellant. But the court charged the jury that if they were satisfied beyond a reasonable doubt that the defendant Troy Elliott, at the time and place in question, was transporting illicit liquor in the quantity of four gallons or thereabouts, they should return a verdict of guilty on that count. There was a similar instruction on the charge of unlawful possession.

The appellant admits that he owned the automobile which was being operated by his brother with his consent and in his presence, and that the sheriff found the liquor on his car. Thereby, he admits in effect that he was transporting liquor, though he says he was not aware of the fact at the time. Thus the instruction of the court on the law overlooks the contention of the defendant and the evidence in support thereof and cuts the ground from under him on his defense. *Non constat* he was transporting liquor, he is not guilty of the offense charged unless he had knowledge the liquor was on his automobile. A general intent to commit the act charged is essential. *S. v. Welch, supra.*

Under the circumstances of this case the court should have instructed the jury that the defendant is guilty only in the event he knew the liquor was on his automobile and that if he was ignorant of that fact, and the jury should so find, they should return a verdict of not guilty.

For the reasons stated there must be a

New trial.

WALKER W. HINSON v. J. LLOYD BRITT, LEO H. MANLEY, AND FRANK J. AUSTIN, COMPOSING THE CITY OF ASHEVILLE BOARD OF ALCOHOLIC CONTROL; ALFRED A. DOWTIN AND HARRY H. HORTON, AGENTS FOR THE CITY OF ASHEVILLE BOARD OF ALCOHOLIC CONTROL, AND ALFRED A. DOWTIN AND HARRY H. HORTON, INDIVIDUALLY.

(Filed 20 September, 1950.)

1. Public Officers § 4a—

The fact that law enforcement officers appointed by a board of alcoholic control have not given bond, G.S. 128-9, does not affect their capacity to execute a search warrant or other judicial process, since the giving of bond is not a condition precedent to the authority of a public officer to perform his duties but is solely for the protection and indemnification of

persons who may be damnified by his failure or neglect in the discharge of his duties.

2. Public Officers § 5a—

A duly appointed public officer is a *de facto* officer notwithstanding his failure to give bond required by statute, and his acts as such are valid in law in respect to the public, whom he represents, and to third persons, with whom he deals officially.

3. Appeal and Error § 40f—

The refusal of the trial court upon apt motion to strike irrelevant matter from a pleading will not be disturbed on appeal when the retention of the matter in the pleading will not cause harm or injury to the moving party, since movant's rights may be protected by objection to testimony offered to prove the irrelevant matter or by proper request for instructions as to the legal effect of such testimony.

APPEAL by defendants from *Rousseau, J.*, at the July Term, 1950, of BUNCOMBE.

Civil action to recover damages for an alleged wrongful search of the plaintiff's premises.

The amended complaint alleges, in substance, that the defendants J. Lloyd Britt, Leo H. Manley, and Frank J. Austin constitute the City of Asheville Board of Alcoholic Control under Chapter 1083 of the 1947 Session Laws of North Carolina; that prior to 13 January, 1950, the City of Asheville Board of Alcoholic Control appointed the defendants Alfred A. Dowtin and Harry H. Horton law enforcement officers under the provisions of G.S. 18-46; that thereafter Dowtin and Horton actually performed the duties of such law enforcement officers without giving the official bonds required of them by G.S. 128-9; that on 13 January, 1950, Dowtin and Horton, acting as law enforcement officers under the direction of the City of Asheville Board of Alcoholic Control, searched the home and adjacent premises of the plaintiff over his active protest without a search warrant with a view to the discovery of illicit intoxicating liquors; that the search was illegal and constituted a trespass upon the plaintiff's premises because Dowtin and Horton acted without a search warrant; that the search was wrongful and constituted a trespass upon the plaintiff's premises even if Dowtin and Horton had a search warrant for the additional reason that they had no authority to execute a search warrant or other judicial process because of their failure to give the official bonds required of them by G.S. 128-9; and that the plaintiff is entitled to recover substantial compensation of the defendants for injuries occasioned to his property, reputation, and feelings by the wrongful invasion of his premises.

Before answering, demurring, or obtaining an extension of time to plead, the defendants moved to strike out certain designated parts of the

amended complaint, including portions of paragraphs 3, 4, 5, and 6 containing the factual averment that Dowtin and Horton had failed to give the official bonds required of them by G.S. 128-9, and the legal conclusion that by reason thereof they lacked capacity in law to execute a search warrant or other judicial process. The court refused to strike these portions of paragraphs 3, 4, 5, and 6 from the amended complaint, and the defendants appealed, assigning such ruling as error.

No counsel for plaintiff, appellee.

Herschel S. Harkins for defendants, appellants.

ERVIN, J. Motions to strike out separate parts of pleadings are sanctioned by this provision of the Code of Civil Procedure: "If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted." G.S. 1-153.

The City of Asheville Board of Alcoholic Control is empowered by law to appoint one or more law enforcement officers having "the same powers and authorities . . . as other peace officers." 1947 Session Laws, C. 1083; G.S. 18-46. Any person so appointed is required by the statute codified as G.S. 128-9 to give a bond to the State for the faithful discharge of the duties of his office. *Jordan v. Harris,* 225 N.C. 763, 36 S.E. 2d 270.

Nevertheless, the omission of the defendants Dowtin and Horton to give the bonds required of them by G.S. 128-9 did not affect their capacity to execute a search warrant or other judicial process. The law exacts the statutory bond of the law enforcement officer for the protection and indemnification of persons who may be damnified by his failure or neglect in the discharge of the duties of his office, and not as a condition precedent to his authority to act in the performance of such duties. 46 C.J., Officers, section 89; 57 C.J., Sheriffs, section 14.

Besides, Dowtin and Horton were appointed law enforcement officers by the City of Asheville Board of Alcoholic Control under statutory authority, and exercised the duties of their offices pursuant to such appointment. This being true, each of them was a *de facto* officer under the rule that a person is a *de facto* officer where the duties of the office are exercised "under color of a known and valid appointment or election, but where the officer failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like." *S. v. Lewis,* 107 N.C. 967, 12 S.E. 457, 13 S.E. 247, 11 L.R.A. 105. The acts of a *de facto* officer are valid in law in respect to the public, whom he represents, and to third persons, with whom he deals officially. *In re Wingler,* 231 N.C. 560, 58 S.E. 2d 372.

For these reasons, the allegations that Dowtin and Horton failed to give the bonds required of them by G.S. 128-9 are irrelevant on the present pleading, and the court ought to have stricken from the amended complaint the parts of paragraphs 3, 4, 5, and 6 designated by the defendants.

Notwithstanding this conclusion, the refusal of the court to strike the allegations in question from the amended complaint must be affirmed on the record presently presented. This Court does not correct errors of the Superior Court unless such errors prejudicially affect the substantial rights of the party appealing. Hence, the denying or overruling of a motion to strike matter from a pleading under the provisions of G.S. 1-153 is not ground for reversal unless the record affirmatively reveals these two things: (1) That the matter is irrelevant or redundant; and (2) that its retention in the pleading will cause harm or injustice to the moving party. *Teasley v. Teasley,* 205 N.C. 604, 172 S.E. 197.

The record does not indicate that the defendants will suffer any harm or injustice by allowing the objectionable allegations to remain in the amended complaint. Indeed, it is manifest that the defendants can fully protect their rights in this connection by objecting to any testimony tending to show that Dowtin and Horton failed to give the bonds required of them by G.S. 128-9, or by requesting a proper instruction as to the legal effect of such testimony. *Scott v. Bryan,* 210 N.C. 478, 187 S.E. 756; *Pemberton v. Greensboro,* 205 N.C. 599, 172 S.E. 196; 5 C.J.S., Appeal and Error, section 1689.

Affirmed.

STATE v. FRANK RANDOLPH.

(Filed 20 September, 1950.)

1. Rape § 25—

In a prosecution for an assault with intent to commit rape, a repeated instruction defining the offense as an assault with an intent to have sexual intercourse with prosecutrix "without her conscious express permission" must be held for reversible error notwithstanding that in other portions of the charge the jury was instructed that the intent must be to accomplish the act "forcibly and against her will," and notwithstanding that the question of consent or permission was not mooted.

2. Rape § 24—

Assault with intent to commit rape is not the same as an attempt to commit rape, but is an assault with the requisite felonious attempt. G.S. 14-22.

APPEAL by defendant from *Moore, J.,* March Term, 1950, of CASWELL.

STATE *v.* RANDOLPH.

Criminal prosecution on indictment charging the defendant with an assault with intent to commit rape on one Margaret Shelton.

The scene of the alleged offense was near Lowrey's Sawmill about seven miles from Yanceyville, Caswell County. The time around 5:00 o'clock in the afternoon of 26 December, 1949. The testimony of the prosecuting witness, a female 32 years of age, and an inmate on probationary leave from Dix Hill, Raleigh, taken in its most favorable light for the prosecution, was sufficient to carry the case to the jury and, if believed, to warrant a conviction. The defendant, while admitting his presence in the neighborhood at the time, denied any knowledge of the offense and testified that he did not see the prosecuting witness on the afternoon in question.

Verdict: Guilty as charged in the bill of indictment.

Judgment: Imprisonment in the State's Prison at hard labor for a term of 15 years.

Defendant appeals, assigning errors.

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

D. Emerson Scarborough for defendant.

STACY, C. J. The case is here principally upon exceptions to the charge. Without undertaking to recapitulate the evidence, or to apply the law to the facts in the case, the court gave several definitions of an assault with intent to commit rape, including the following, to which exceptions are taken:

"An assault with intent to commit rape is an assault by a person intending to gratify his passions on the person of a woman notwithstanding any resistance on her part. . . . So an attempt to commit rape is an assault upon a woman with this intent to gratify his passion or to have carnal knowledge, simply expressed as sexual intercourse, at all hazards, and against her will, or without her conscious express permission." And further: "When a man assaults a woman, and when he does so with intent to have intercourse with her against her will, that is an assault with intent to commit rape."

The alternative expression in the second instruction, "or without her conscious express permission," appears twice in the charge. While its repeated use might be considered harmless on the facts of the present record, the question of consent or permission not being mooted, still as the jury was left to make its own application of the charge to the facts in the case we cannot say this was done without prejudice to the defendant, especially in view of the variant definitions given of an assault with intent to commit rape. Without the conscious express permission of the prosecutrix is not perforce the same as "forcibly and against her will,"

or without her consent which may be express or implied. *S. v. Overcash*, 226 N.C. 632, 39 S.E. 2d 810; *S. v. Jones*, 222 N.C. 37, 21 S.E. 2d 812; *S. v. Adams*, 214 N.C. 501, 199 S.E. 716; *S. v. Hewett*, 158 N.C. 627, 74 S.E. 356; *Hayes v. Lancaster*, 200 N.C. 293, 156 S.E. 530.

The crime charged is not an attempt to commit rape, but an assault with intent to commit rape. *S. v. Overcash, supra.* The assault with the requisite felonious intent is the gist of the offense. G.S. 14-22.

Another hearing seems necessary. It is so ordered.

New trial.

UNIVERSAL C. I. T. CREDIT CORPORATION v. BERTHA E. ROBERTS.

(Filed 20 September, 1950.)

Appeal and Error § 51a—

Where it is decided on a former appeal that defendant was not entitled to maintain a counterclaim on the facts alleged, the decision becomes the law of the case, and the trial court correctly strikes from a subsequently filed pleading an asserted counterclaim on the same facts.

APPEAL by defendant from *Bone, J.*, in Chambers at Nashville, 8 July, 1950. From NASH.

Civil action to recover deficiency judgment on conditional-sale contract and to obtain possession of mortgaged property under claim and delivery.

For convenience and to avoid repetition, reference is made to former appeal reported in 230 N.C. 654, 55 S.E. 2d 85, for statement of the case and for substance of the pleadings, also pertinent here.

Following the first appeal, the defendant filed an Amended Answer and Counterclaim, repeating in substance her original counterclaim. This was held to be bad, and she thereupon asked to be permitted to withdraw it and to substitute in lieu thereof a new answer, which was allowed. There was no appeal from this ruling.

The defendant then filed not a new answer but a second "Amended Answer and Counterclaim," again reiterating in substance the allegations of her original counterclaim which had previously been adjudged deficient on demurrer. On motion, the allegations of this thrice-repeated counterclaim were stricken out and the defendant again appeals.

James W. Keel, Jr., and L. L. Davenport for plaintiff, appellee.
Wilkinson & King for defendant, appellant.

STACY, C. J. We have here for the second time in the same case a question of pleading.

On the prior appeal, the judgment sustaining the demurrer to the counterclaim was left undisturbed, while the judgment on the pleadings was vacated because of alleged waiver of payments which seemed sufficient to defeat the plaintiff's present right to invoke the acceleration clause in the conditional-sale contract. However, as the chattel in question had been sold, the defendant apparently did not care to pursue the matter of prematurity. Her interest seemingly has shifted from the automobile to the recovery of damages for its seizure, as disclosed by the amended answer and counterclaim filed by her in which she set up substantially the same counterclaim as before. On motion to strike the counterclaim, as *res judicata,* the court ruled the motion to be good; whereupon the defendant asked leave to withdraw her amended answer and counterclaim and to file a new answer. This was allowed. No objection or exception was taken to the court's ruling in either respect. Thereafter, the defendant filed not merely a new answer, but a second amended answer and counterclaim, setting out for the third time substantially the same counterclaim which had twice been adjudged deficient or unavailing. On motion, this thrice-repeated counterclaim was again stricken out and the defendant appeals.

It is the position of the plaintiff, with which the trial court evidently agreed, that the previous judgments and orders entered in the cause had become the law of the case and that the question of counterclaim, on the facts alleged, was no longer debatable in this action. And further, that sufficient allegations are left in the answer to enable the defendant to present any matter which she may have in defense of plaintiff's suit. The record seems to support the position.

Affirmed.

STATE v. WAYLAND WHITE, JR.

(Filed 20 September, 1950.)

1. Larceny § 7—

Evidence in this prosecution for larceny of certain pigs *held* sufficient to overrule defendant's motion to nonsuit.

2. Criminal Law § 77c—

Where the charge as a whole is not contained in the record it will be presumed that the trial court correctly charged the jury, and an exception to an excerpt from the charge will not be sustained, even though it contained an apparent *lapsus linguæ* which might have been harmful if not corrected in other portions of the charge.

APPEAL by defendant from *Frizzelle, J.,* at April Term, 1950, of CHOWAN.

Criminal prosecution upon a bill of indictment containing two counts in which defendant is charged with (1) larceny of nine hogs, the property of one Dewey Stallings, and (2) receiving said hogs knowing them to have been stolen.

Verdict: Guilty of larceny as charged in the bill of indictment.

Judgment: Confinement in the county jail for a period of two years to be assigned to work the public roads under the supervision of the State Highway and Public Works Commission.

Defendant appeals to Supreme Court and assigns error.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

Walter H. Oakey, Jr., for defendant, appellant.

WINBORNE, J. Though there are set out in the record, and discussed in the brief of defendant filed in this Court other assignments of error, the "question presented" on this as stated in said brief relates only to the action of the court in denying the motion of defendant for judgment as of nonsuit on the count charging larceny.

As to this, a reading of the record discloses sufficient evidence of facts and circumstances bearing thereon to take the case to the jury, and to support a verdict of guilty so returned by the jury.

Moreover, the other assignments of error do not show error. While an excerpt from the charge of the court contains an apparent *lapsus linguæ*, which, if not corrected, might have been harmful to defendant. However, the charge as a whole is not contained in the record. Hence, it will be presumed that the trial judge correctly charged the jury. *S. v. Jones*, 182 N.C. 781, 108 S.E. 376; *S. v. Brooks*, 225 N.C. 662, 36 S.E. 2d 238; *S. v. Wooten*, 228 N.C. 628, 46 S.E. 2d 868.

In the judgment below, we find

No error.

STATE v. STANLEY H. SUMNER.

(Filed 20 September, 1950.)

1. Automobiles § 29b—

A warrant charging defendant with operating a motor vehicle upon a public highway in the State at a speed of 90 miles per hour is sufficient to sustain judgment upon conviction, since defendant must have understood the charge to be operating a motor vehicle in this State at an unlawful speed, and therefore the warrant informs the defendant of the charge he must answer, enables him to prepare his defense, and sustains the judgment.

2. Automobiles § 29a—

It is a misdemeanor to operate a motor vehicle upon a public highway in this State at a speed in excess of 55 miles per hour. G.S. 20-141 (b) (4); G.S. 20-141 (j); G.S. 20-180.

APPEAL by defendant from *Parker, J.*, March Term, 1950, CAMDEN. No error.

Criminal prosecution under a warrant charging reckless driving and operating a motor vehicle on a public highway at a speed of 90 miles per hour.

The record discloses in one place that the defendant was found guilty as charged in the warrant. Later it is stated, and counsel in the case on appeal agree, that defendant was found guilty of operating a motor vehicle upon a public highway at a speed of 90 miles per hour. The case is argued in the briefs on the assumption the verdict was as last stated. Judgment was pronounced on the verdict and defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Walter F. Brinkley, Member of Staff, for the State.

J. Henry LeRoy for defendant appellant.

BARNHILL, J. Defendant moved in this Court that the judgment pronounced be arrested. The motion must be denied. While the criminal charge contained in the warrant might have been more precisely stated, it is sufficient, as alleged, to sustain the judgment and bar another prosecution for the same offense. G.S. 15-153. It is sufficiently intelligible and explicit to (1) inform the defendant of the charge he must answer, (2) enable him to prepare his defense, and (3) sustain the judgment. This is all that is required. *S. v. Shade,* 115 N.C. 757; *S. v. Ratliff,* 170 N.C. 707, 86 S.E. 997; *S. v. Francis,* 157 N.C. 612, 72 S.E. 1041; *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166; 15 A.J. 98.

It is now unlawful to operate a motor vehicle upon a public highway in this State at a rate of speed in excess of 55 miles per hour. G.S. 20-141 (b) (4). To do so constitutes a misdemeanor. G.S. 20-141 (j); G.S. 20-180. That this was the charge against him was well understood by defendant.

The exceptive assignments of error discussed in defendant's brief are without substantial merit. They cannot be sustained.

In the trial below we find

No error.

STATE v. JOHN EDWARD McDAY.

(Filed 20 September, 1950.)

1. Bastards § 1—

A defendant's willful failure and refusal to support his illegitimate child means an intentional neglect or refusal. G.S. 49-2.

2. Bastards § 6½—

In a prosecution under G.S. 49-2 an instruction defining willfully as "wrongfully and unjustifiably, without valid and good excuse" instead of an intentional neglect or refusal, must be held for reversible error.

3. Criminal Law § 81c (2)—

Where an instruction is in error in defining an essential element of the crime charged, a new trial must be awarded regardless of speculation as to whether the instruction as given was favorable or harmful to defendant.

DEFENDANT'S appeal from *Pless, J.*, May 1950 Term of BUNCOMBE Superior Court.

Attorney-General McMullan, Assistant Attorney-General Rhodes, and John R. Jordan, Jr., Member of Staff, for the State.

George F. Meadows and Oscar Stanton for defendant, appellant.

SEAWELL, J. The defendant was originally tried in the Domestic Relations Court of Buncombe County where it was found that he is the father of an illegitimate child born to complainant, and that he willfully and unlawfully refuses to support and maintain the child. From the judgment in that court sentencing him to work on the roads for a period of six months, (suspended upon condition), the defendant appealed to the Superior Court, where upon a trial *de novo* and upon plea of not guilty he was found guilty as charged; was sentenced to a term of six months on the roads, suspended on payment of costs and the sum of $25.00 a month for the support and maintenance of his illegitimate child, plus the sum of $10.00 per month for a period of fifteen months as reimbursement for moneys expended at the time of the birth of the child and for support since that time. Defendant appealed.

A careful examination of the exceptions taken upon the trial discloses no serious challenge to the result except in connection with the instruction which his Honor gave the jury in one particular:

After charging that defendant must first be found to be the father of the illegitimate child, he further instructed the jury: "In addition thereto the state must satisfy you beyond a reasonable doubt that he has willfully, that is, wrongfully and unjustifiably, without valid and good excuse, failed to support the child."

His Honor was correct in conceiving that willfulness is an essential element in a crime of this sort; G.S. 49-2; *S. v. Cook,* 207 N.C. 261, 76 S.E. 757; *S. v. Spillman,* 210 N.C. 271, 272, 186 S.E. 322; *S. v. Johnson,* 212 N.C. 566, 94 S.E. 319. But he has fallen into error in attempting to define the term. The definition of willfully as "wrongfully and unjustifiably, without valid and good excuse," is not in accord with the use of the term in common parlance or with the dictionary of the law. Willful is defined in Webster's Unabridged Dictionary as "(2) self-determined; voluntary; intentional; (3) governed by will without yielding to reason; obstinate, perverse; stubborn;" and in Black's Law Dictionary as: "Proceeding from a conscious motion of the will; intending the result which actually comes to pass; designed; intentional; malicious."

The term is used here in the same connotation as in the older abandonment statute, now G.S. 14-322, (see annotations, G.S. 14-322 and G.S. 49-2).

Perusing the cited cases we are of the opinion that the simpler definition of the term, that is, as the *intentional* neglect or refusal to support the illegitimate child, answers the purpose of the statute.

Where the court below is in error as to the definition of an essential element of a crime, and one which completely diverts the attention of the jury into a different field of inquiry, there is little propriety in speculating whether the instruction given is more harmful, or on the other hand, more favorable to the defendant than the one which ought to have been given, since justice is not a gamble. The defendant is at least entitled to be tried for the identical crime with which he is charged, and convicted or acquitted of it as the case may be.

For the error pointed out the defendant is entitled to a new trial. It is so ordered.

New trial.

A. J. BRYANT v. G. R. STRICKLAND.

(Filed 20 September, 1950.)

Ejectment §§ 10, 14—

An action to establish a parol trust in lands and to have defendant render an accounting as mortgagee in possession, and for an order directing defendant to convey the lands to plaintiff upon payment of any amount found due upon the accounting, *is held* not strictly one in ejectment, and G.S. 1-111, requiring defendant in ejectment action to file bond, is inapplicable.

PLAINTIFF'S appeal from *Nimocks, J.,* June 1950 Term of NASH Superior Court.

O. B. Moss and L. L. Davenport for plaintiff, appellant.
Itimous T. Valentine for defendant, appellee.

SEAWELL, J. The plaintiff brought this action to have the defendant declared to hold the lands described in the complaint in trust for him, basing his claim partly on oral and partly on written agreements; asked that he be declared the owner and entitled to possession of the lands; that the defendant be compelled to render an accounting as mortgagee in possession; and that an order be made directing defendant to convey said lands to the plaintiff upon the payment to the defendant of any amount due upon the accounting.

The defendant answered, denying the material allegations of the complaint.

Thereupon the plaintiff moved to strike out the answer of the defendant for noncompliance with G.S. 1-111, which requires filing of a bond by a defendant before answering in ejectment, and asked for judgment by default. The motion was denied by the Clerk of the Superior Court and upon the hearing of the appeal by the Judge at Chambers, Judge Nimocks sustained the order of the Clerk of the Superior Court and denied the motion. Plaintiff appealed.

On examination of the complaint the Court is of the opinion that the action is not strictly one of ejectment but its gravamen is predominantly that of an action to impress upon the title to the lands a parol trust in favor of the plaintiff. The cited statute does not, therefore, apply. *Hodges v. Hodges,* 227 N.C. 335, 42 S.E. 2d 82.

The *raison d'etre* and purpose of the statute, (G.S. 1-111), lies in the nature and history of the possessory action of ejectment; 18 Am. Jur., p. 9; 28 C.J.S., pp. 848, 849; cp. *Freeman v. Ramsey,* 189 N.C. 790, 798, 128 S.E. 404. Despite statutory regulation it still savors of the trespass committed against John Doe, *ex dem.* Richard Roe,—the immediate wrongfulness of the possession, and the right to instant relief. The same exigency does not arise until after an accounting, and not even then if the plaintiff should have a further payment to make.

The order of Judge Nimocks is affirmed on the authority of *Hodges v. Hodges, supra.*

Affirmed.

MATTIE LOUISA WELLS SWEET v. LILLIAN BOMAR.

(Filed 20 September, 1950.)

APPEAL by plaintiff from *Pless, J.*, March Term, 1950, BUNCOMBE. No error.

Action in ejectment in which it is made to appear that while plaintiff has the superior paper title to the property in question, defendant and those under whom she claims have been in adverse possession thereof, under color of title, since February, 1941, more than seven years prior to the institution of this action.

The jury answered the issues submitted in favor of the defendant. The court entered judgment on the verdict and plaintiff appealed.

Herman L. Taylor for plaintiff appellant.

Chas. G. Lee, Jr., for defendant appellee.

PER CURIAM. The court instructed the jury that plaintiff had established a superior record title to the *locus* and made the rights of the parties turn on the question of adverse possession. The charge of the court, which is the subject of numerous exceptions, is in substantial accord with the former decisions of this Court. No prejudicial error is made to appear.

Furthermore, the evidence tending to show that defendant has been in adverse possession of the premises under color, within the meaning of the law, is uncontradicted. Indeed plaintiff's evidence tends to so show. Hence a new trial would serve no useful purpose.

No error.

JOHN L. WIGGINS, JR., ADMINISTRATOR OF THE ESTATE OF ANN WIGGINS BELOFF, v. HORACE FINCH AND BRANCH BANKING & TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF W. C. AYCOCK.

(Filed 27 September, 1950)

1. Venue § 3—

Where an action is brought in the wrong county, defendant is not entitled to abatement or dismissal, since venue is not jurisdictional, but is entitled only to removal to the proper county if motion therefor is made in apt time, since otherwise the question of venue is waived. G.S. 1-83.

2. Venue § 1b—

The proper venue of an action against an executor or administrator in his official capacity is the county wherein the executor or administrator

qualified and the letters were issued, G.S. 1-78, unless otherwise provided by statute.

3. Same—

An action on the official bond of an executor or administrator should be instituted in the county where the bond was given if he or any surety on his bond lives in that county, and if not, plaintiff may then institute such action in the county of plaintiff's residence.

4. Same—

The rule that the venue of an action against an executor or administrator in his official capacity is the county wherein the letters testamentary were issued is not affected by the fact that neither the personal representative nor any surety on his bond lives in such county, nor by the fact that the personal representative has not given bond because exempt from so doing by statute. G.S. 53-159.

5. Same—

The fact that the principal place of business of a corporate executor or administrator is a county other than the one in which the letters testamentary were issued does not affect the question of venue of an action against such executor or administrator in its official capacity. G.S. 1-79.

6. Same—

The fact that an individual is joined as a defendant with an executor or administrator, and that the individual defendant is a resident of the county in which the cause of action is brought, *held* not to affect the executor or administrator's right to removal to the county in which it qualified. G.S. 1-78.

7. Same—

G.S. 1-78 applies only to suits instituted against executors or administrators, and has no application to suits instituted by them.

8. Venue § 4b—

The fact that a motion for change of venue is allowed as a matter of right does not preclude plaintiff from thereafter moving that the cause be removed back to the original county or some other county for the convenience of witnesses and the promotion of the ends of justice. G.S. 1-83.

APPEAL by the defendant, Branch Banking & Trust Company, Administrator of the estate of W. C. Aycock, from *Nimocks, J.*, at June Term, 1950, of Wilson.

This is a civil action instituted in the Superior Court of Wilson County to recover damages for the alleged wrongful death of plaintiff's intestate.

1. Plaintiff alleges that the wrongful death of his intestate was caused by the joint and concurrent negligence of W. C. Aycock, the intestate of Branch Banking & Trust Company, and the defendant Horace Finch. Plaintiff's intestate, Ann Wiggins Beloff, and the late W. C. Aycock died,

1 January, 1950, as the result of an automobile collision in Wilson, North Carolina, between cars owned by the defendant Horace Finch, a resident of Wilson County, and the late W. C. Aycock.

2. Plaintiff's intestate was a resident of Wilson County at the time of her death; and the plaintiff, a resident of said county, is the duly qualified administrator of her estate.

3. The defendant, Branch Banking & Trust Company, is a banking corporation with its principal office in Wilson, North Carolina. This corporation maintains a trust department and is duly authorized by G.S. 53-159 to act in a fiduciary capacity as guardian, trustee, assignee, receiver, executor or administrator in this State without giving any bond.

4. The defendant corporation has a place of business, or branch office, in Fremont, Goldsboro and Pikeville, in Wayne County.

5. W. C. Aycock was a resident of Wayne County at the time of his death and Branch Banking & Trust Company, through its office at Fremont, North Carolina, qualified as administrator of his estate in Wayne County, North Carolina.

The defendant, Branch Banking & Trust Company, administrator of W. C. Aycock, in apt time, filed a motion in the cause asking, first, that the action be abated and dismissed as a matter of right, and if this should be denied, that the action be removed as a matter of right to the Superior Court of Wayne County. Both the plaintiff and defendant, Horace Finch, filed answers to the motion in which they denied the right of the defendant administrator to the abatement of the action and to the change of venue.

The motion was denied by the Clerk of the Superior Court and, upon appeal, by the Judge of the Superior Court. The defendant administrator thereupon appealed to the Supreme Court and assigns error.

Lucas & Rand and Z. Hardy Rose for John L. Wiggins, Jr., Administrator.

Connor, Gardner & Connor for Horace Finch.

Paul B. Edmundson, Dees & Dees, Fred P. Parker, Jr., and James N. Smith for Branch Banking & Trust Company.

DENNY, J. The appellant is not entitled to an abatement of this action, even though it be conceded it was instituted in the wrong county. It has been repeatedly held that our statutes relating to venue are not jurisdictional, and that if an action is instituted in the wrong county it should be removed to the proper county, and not dismissed, if the motion for removal is made in apt time, otherwise the question of venue will be waived. G.S. 1-83; *Davis v. Davis,* 179 N.C. 185, 102 S.E. 270; *Roberts v. Moore,* 185 N.C. 254, 116 S.E. 728; *Bohannon v. Wachovia Bank &*

Trust Co., 210 N.C. 679, 188 S.E. 390; *Shaffer v. Bank*, 201 N.C. 415, 160 S.E. 481; *Calcagno v. Overby*, 217 N.C. 323, 7 S.E. 2d 557; *Wynne v. Conrad*, 220 N.C. 355, 17 S.E. 2d 514.

The motion for change of venue presents a more serious question. The appellant is relying on the provisions of G.S. 1-78, in which it is provided that: "All actions against executors and administrators in their official capacity, except where otherwise provided by statute, and all actions upon official bonds must be instituted in the county where the bonds were given, if the principal or any surety on the bond is in the county; if not, then in the plaintiff's county."

The statute lacks completeness in its terms. Nevertheless, we are of the opinion that it was the intent of the Legislature to require all actions against executors and administrators in their official or representative capacity to be instituted in the county where the letters of administration were taken out, except where otherwise provided by statute. And that all actions against executors and administrators upon their official bonds must be instituted in the county where the bonds were given, if the maker or any surety thereon lives in the county, if not, then in the plaintiff's county.

In the case of *Stanley v. Mason, Admr.*, 69 N.C. 1, *Justice Reade*, in speaking for the Court, said: "The object of the statute was to have suits against these persons, whether upon their bonds or not, in the county where they took out letters, and where they make their returns and settlements, and transact all the business of the estates in their hands."

The statute has been similarly construed in *Foy, Admr., v. Morehead, et al., Admr.*, 69 N.C. 512; *Bidwell v. King*, 71 N.C. 287; *Wood v. Morgan*, 118 N.C. 749, 24 S.E. 522; *Farmers State Alliance v. Murrell*, 119 N.C. 124, 25 S.E. 785; *Thomas v. Ellington*, 162 N.C. 131, 78 S.E. 12; *Lumber Co. v. Currie*, 180 N.C. 391, 104 S.E. 654; *Montford v. Simmons*, 193 N.C. 323, 136 S.E. 875; *Thomasson v. Patterson*, 213 N.C. 138, 195 S.E. 389; *Godfrey v. Power Co.*, 224 N.C. 657, 32 S.E. 2d 27. *Cf. Latham v. Latham*, 178 N.C. 12, 100 S.E. 131.

The appellees are relying upon *Clark v. Peebles*, 100 N.C. 348, 6 S.E. 798; *Smith v. Patterson*, 159 N.C. 138, 74 S.E. 923, and the statement contained in the opinion in *Lumber Co. v. Currie, supra*, as follows: "It is well settled in this State that an administrator or executor must be sued in the county in which he took out letters of administration or letters testamentary, provided he, or any one of his sureties, lives in that county, whether he is sued on his bond or simply as administrator or executor." This statement is also quoted in *Montford v. Simmons, supra*. However, we do not think those opinions support the view that unless a bond is filed and the principal or one of his sureties lives in the county, a plaintiff can ignore the provisions of the statute and bring the suit in his own

county against an executor or administrator in his official capacity. For, in the opinion in *Lumber Co. v. Currie, supra,* there is nothing to indicate that the executor was required to file a bond before qualifying. Even so, the Court said "the action must be brought in the county where the executrix took out letters testamentary." If the action is on the official bond of an executor or administrator and neither the principal nor any of his sureties lives in the county where the letters of administration were taken out, the plaintiff may sue in his own county. McIntosh N. C. Practice & Procedure, p. 270. This was expressly held in *Clark v. Peebles, supra,* and in *Thomasson v. Patterson, supra.* In the latter case, *Barnhill, J.,* speaking for the Court, said: "We therefore hold that the provision of C.S. 465 (now G.S. 1-78), that an action upon an official bond shall be instituted in the county where the bond is filed, if the principal or any one of the sureties on said bond resides in said county, is controlling. Actions against executors and administrators in their official capacity, when not upon an official bond filed in some other county, must be instituted in the county where the executor or administrator qualified."

To hold that the statute is not applicable when an executor or administrator is sued in his official capacity, unless a bond is filed and the principal or one of his sureties lives in the county, is contrary to sound reasoning. Executors are not requried to file a bond before obtaining letters testamentary except in certain instances fixed by statute. And a banking institution that is authorized to qualify as an executor or administrator is not required to file any bond before obtaining letters of administration as an executor or administrator. G.S. 53-159. Furthermore, the mere fact that G.S. 1-79 fixes the residence of a domestic corporation for the purpose of suing and being sued at its principal place of business, does not in any way limit the authority of the defendant Branch Banking & Trust Company from qualifying as an executor or administrator in a county other than that in which its principal office is located.

The appellees strongly contend that since Horace Finch, a resident of Wilson County, is a defendant in this action the corporate administrator is not entitled to a removal of the case to Wayne County. In support of their contention they rely upon what was said by way of *dicta* in *Smith v. Patterson, supra.* That action was instituted in Mecklenburg County by the administrator of the estate of Joshua Gosnell, a resident of Henderson County. Gosnell, while an employee of the Southern Railway Company, was killed in Polk County, according to the complaint, as a result of the negligence of the Railway Company and its engineer, the defendant Patterson, a resident of Polk County. Smith qualified as administrator of Gosnell's estate in Henderson County. A motion for change of venue to Henderson County was made and denied. The defendant Railway Company relied on the proviso contained in Revisal

424 (now a separate statute, G.S. 1-81). The proviso in the statute was in the following language: "In all actions against railroads the action shall be tried either in the county where the cause of action arose, or in some county where the plaintiff resided at the time the cause of action arose, or in some county adjoining the county in which the cause of action arose, subject, however, to the power of the Court to change the place of trial in the cases provided by statute." The Court said: "Authoritative interpretations of this and legislation of similar import elsewhere would seem to favor the position that in respect to actions instituted by an administrator and coming within the effect of the proviso, the terms appearing therein, 'where plaintiff resided at the time the cause of action arose,' have reference to the residence of the individual holding the office and not to the official residence or place where he may have qualified." Therefore, Mecklenburg County being the residence of the plaintiff, administrator, at the time the action arose, the motion was denied. What was said about the additional defendant was not necessary to a decision in the case, and we do not consider it as controlling here.

It should be kept in mind that the statute under consideration on this appeal has no application to suits instituted by executors or administrators, but only as to suits instituted against them. *Whitford v. Insurance Co.*, 156 N.C. 42, 72 S.E. 85; *Hannon v. Power Co.*, 173 N.C. 520, 92 S.E. 353; *Lawson v. Langley*, 211 N.C. 526, 191 S.E. 229, 111 A.L.R. 163.

We think the motion for change of venue should have been allowed.

The fact, however, that the appellant is entitled to have this case moved to Wayne County, as a matter of right, does not preclude the court from changing the venue from Wayne County to another county, in the exercise of a sound discretion, for the convenience of witnesses and the promotion of the ends of justice, upon motion properly made under G.S. 1-83. *Pushman v. Dameron*, 208 N.C. 336, 180 S.E. 578. The time for such a motion has not arrived, and the order denying a change of venue in the court below is

Reversed.

ANNIE B. GODWIN AND H. WORTH JOHNSON, CO-ADMINISTRATORS OF THE ESTATE OF M. C. GODWIN, JR., DECEASED, v. THE BRANCH BANKING & TRUST COMPANY, A CORPORATION, ADMINISTRATOR OF THE ESTATE OF W. C. AYCOCK, DECEASED, AND HORACE FINCH.

(Filed 27 September, 1950.)

APPEAL by defendant, Branch Banking & Trust Company, administrator of the estate of W. C. Aycock, from *Nimocks, J.*, at June Term, 1950, of WILSON.

Sharpe & Pittman and Leggett & Fountain for plaintiffs, Admrs.

Paul B. Edmundson, Dees & Dees, Fred P. Parker, Jr., and James N. Smith for defendant Branch Banking & Trust Co., Admr.

Connor, Gardner & Connor for Horace Finch.

PER CURIAM. This is a civil action to recover for wrongful death. The questions involved in this appeal are identical with those in the case of *Wiggins, Jr., Administrator, v. Trust Co., et al., ante,* 391, and the ruling on the motion for change of venue is reversed for the reasons stated therein.

Reversed.

HUBERT PACK AND BESSIE C. PACK, HIS WIFE, v. CLARENCE NEWMAN AND TRYON FEDERAL SAVINGS & LOAN ASSOCIATION.

(Filed 27 September, 1950.)

1. Vendor and Purchaser § 7—

A "marketable title" is one free from reasonable doubt in law or fact as to its validity; an "indefeasible title" is one which cannot be defeated, set aside, or made void.

2. Descent and Distribution § 12: Escheat § 2: Judgments § 20—

The law presumes that every decedent leaves heirs or next of kin capable of inheriting his property, and where this presumption has not been rebutted in an action, the rights of the heirs may not be precluded therein unless they are brought in and made parties in some way sanctioned by law.

3. Trial § 11—

The consolidation of two independent actions for judgment does not constitute them a single action, but they remain separate suits.

4. Judgments § 18: Descent and Distribution § 12: Process § 5a—

The fact that a suit by the University against an administrator to declare an escheat, in which the unknown heirs at law are served by publication, is consolidated for judgment with an independent action by a claimant against the estate *held* not to constitute the heirs at law parties to the claimant's action, and a consent judgment entered in claimant's favor is not binding upon the heirs, since in respect to claimant's action they were not brought into court in any way sanctioned by law.

5. Descent and Distribution § 12: Executors and Administrators § 8: Judgments § 1—

An administrator has no inherent interest in, title to, or control over the realty of his intestate, and therefore has no authority to enter a consent judgment adjudicating that a claimant against the estate is the owner of the fee of the lands of the estate.

6. Descent and Distribution § 12: Judgments § 1—Consent judgment is contract of parties entered of record, and binds only those agreeing thereto.

A suit by the University against an administrator to declare an escheat, in which the heirs at law were served by publication, was consolidated for judgment with a suit brought by a claimant against the estate for a monetary judgment, and a consent judgment was entered therein that claimant was the owner in fee of all the real estate left by deceased and that the University was entitled to all the other property by escheat. *Held:* Even conceding that the heirs at law were parties to the action, they are not bound by the consent judgment, since they were not parties to the agreement between the University, the claimant, and the administrator, entered upon the records of the court with its approval.

APPEAL by defendant, Clarence Newman, from *Rudisill, J.*, at the August Term, 1950, of POLK.

Submission of controversy without action under G.S. 1-250 to determine the rights of the parties in the sum of $250.00 held by the defendant, Tryon Federal Savings and Loan Association, as depositary.

The case agreed reveals these salient facts:

1. Sarah C. Dailey, the absolute owner of both real and personal property, died intestate at her domicile in Polk County, North Carolina, on 18 November, 1947. Her realty consisted of approximately 39 acres situated on Warrior Mountain in Polk County.

2. Shortly thereafter W. Y. Wilkins, Jr., qualified as administrator of Sarah C. Dailey before the Superior Court of Polk County.

3. The University of North Carolina brought a civil action against W. Y. Wilkins, Jr., administrator of Sarah C. Dailey, and "the unknown heirs of Sarah C. Dailey" in the Superior Court of Polk County on 29 March, 1949, and filed an answer therein, alleging that Sarah C. Dailey died without heirs or next of kin to inherit her property, and praying a judgment that by reason thereof all of her property had escheated to the University. "The unknown heirs of Sarah C. Dailey were brought into and made parties to said action by affidavits and orders and service of summons by publication." No persons claiming to be heirs or next of kin of Sarah C. Dailey answered or otherwise appeared in the action. Personal service was had upon the administrator of Sarah C. Dailey, who filed an answer virtually admitting the complaint of the University.

4. Edith L. Stalker brought a civil action against W. Y. Wilkins, Jr., administrator of Sarah C. Dailey, in the Superior Court of Polk County on 3 August, 1949, and filed a complaint therein, alleging facts sufficient to entitle her to a monetary judgment against the administrator for $16,234.64 on account of debts created by Sarah C. Dailey during her lifetime. Personal service of process was had upon the administrator,

who filed answer denying the material allegations of the complaint and pleading certain statutes of limitation and a counterclaim. No heirs or next of kin of Sarah C. Dailey were made parties to this action, or served with process therein.

5. The actions described in the preceding paragraphs were never tried and determined on their merits. Acting at the instance of the University of North Carolina, Edith L. Stalker, and the administrator of Sarah C. Dailey, the court entered a consent judgment at the January Term, 1950, of the Superior Court of Polk County consolidating the two actions "for judgment" and making these adjudications: (1) That Edith L. Stalker is "the owner in fee of the real estate left by the deceased, Sarah C. Dailey"; and (2) that "all other property of the estate of Sarah C. Dailey, deceased, shall escheat to and be the property of the University of North Carolina."

6. The settlement embodied in the judgment mentioned in the preceding paragraph was effected by the University of North Carolina, Edith L. Stalker, and the administrator of Sarah C. Dailey without the assent of any heir or next of kin of Sarah C. Dailey. Furthermore, none of her heirs or next of kin consented to the entry of such judgment.

7. Subsequent to the entry of the consent judgment, to wit, on 6 July, 1950, Edith L. Stalker and her husband, John N. Stalker, executed a deed sufficient in form to vest the title to the lands whereof Sarah C. Dailey died seized and possessed in the plaintiffs, Hubert Pack and his wife, Bessie C. Pack, in fee simple.

8. Thereafter, to wit, on 22 July, 1950, the plaintiffs signed, sealed, and delivered to the defendant, Clarence Newman, a deed purporting to convey the same realty to such defendant in fee simple.

9. The deed from the plaintiffs to the defendant, Clarence Newman, was based upon a valuable consideration. Simultaneously with its execution, a part of the consideration, to wit, $250.00, was deposited with the defendant, Tryon Federal Savings and Loan Association, pending an agreement between the plaintiffs and the defendant, Clarence Newman, in respect to the title to the lands described in the deed. When the deposit was made, the parties to this action "agreed that said sum would be paid over to the plaintiffs if the deed vested a marketable and indefeasible title to said property in the grantee named therein, and . . . that in the event said deed did not convey such title, the said sum would be paid over to the grantee, Clarence Newman, to be used in doing such things as might be necessary in connection with clarifying the title."

10. The parties to this action have been unable to agree as to whether the deed in question vested "in the defendant, Clarence Newman, a marketable and indefeasible title . . . to the property therein described." In consequence, a real controversy has arisen between the plaintiffs and

the defendant, Clarence Newman, as to the ownership of the sum deposited with the defendant, the Tryon Federal Savings and Loan Association, which has refused to pay such sum to either the plaintiffs or the defendant, Clarence Newman, until the rights of the parties therein are established. For those reasons, this controversy without action is submitted to the court by the parties in good faith in order that such rights may be judicially determined.

The court below adjudged on the case agreed "that under the judgment and deeds above mentioned there is vested in Clarence Newman a marketable and indefeasible title in fee simple to the property described" in the deed in question, and ordered the defendant, the Tryon Federal Savings and Loan Association, to pay the sum deposited with it to the plaintiffs. The defendant, Clarence Newman, excepted to this judgment and appealed, assigning error.

M. R. McCown for the plaintiffs, appellees.

J. Clyde Going for the defendant, Clarence Newman, appellant.

ERVIN, J. Under the agreement of the parties, the judgment awarding the sum in controversy to the plaintiffs cannot be sustained on this appeal unless the deed from the plaintiffs to the defendant Clarence Newman vested in the latter "a marketable and indefeasible title" to the real property whereof Sarah C. Dailey died seized and possessed.

A "marketable title" is one free from reasonable doubt in law or fact as to its validity. *Winkler v. Neilinger,* 153 Fla. 288, 14 So. 2d 403. An "indefeasible title" is a title which cannot be defeated, set aside, or made void. *In re Van Cott's Estate,* 89 N.Y.S. 2d 425, 194 Misc. 984.

The law presumes that every decedent leaves heirs or next of kin capable of inheriting his property. *Warner v. R. R.,* 94 N.C. 250; *University v. Harrison,* 90 N.C. 385. This presumption has not been rebutted in the case at bar. Hence, it is to be assumed on the present record that Sarah C. Dailey was survived by heirs, who took title to her real property at her death. For these reasons, the parties correctly concede that the validity of the judgment in the present action hinges upon the question of whether or not the heirs of Sarah C. Dailey are precluded from asserting title to her realty by the judgment entered in the former actions at the January Term, 1950.

The complaint of the University of North Carolina in its action against W. Y. Wilkins, Jr., administrator of Sarah C. Dailey, and the unknown heirs of Sarah C. Dailey, set up one cause of action, and the complaint of Edith L. Stalker in her action against W. Y. Wilkins, Jr., administrator of Sarah C. Dailey, alleged a different cause of action. When the court consolidated the two independent actions for judgment at the instance

of the University of North Carolina, Edith L. Stalker, and W. Y. Wilkins, Jr., administrator of Sarah C. Dailey, the actions did not become one action. They remained separate suits. *Williams v. R. R.*, 144 N.C. 498, 57 S.E. 216, 12 L.R.A. (N.S.) 191, 12 Ann. Cas. 1000.

The adjudication that Edith L. Stalker owned the real property left by Sarah C. Dailey was necessarily made in her suit against the administrator, for she was not a party to the other action in which the University was suing the administrator and the heirs of the decedent. This being true, the adjudication as to the state of the title is not binding upon the heirs of Sarah C. Dailey, for they were not parties to the action between Edith L. Stalker and the administrator, and were not brought into court in that action in any of the ways sanctioned by law. *Monroe v. Niven*, 221 N.C. 362, 20 S.E. 2d 311; *Casey v. Barker*, 219 N.C. 465, 14 S.E. 2d 429; *Groce v. Groce*, 214 N.C. 398, 199 S.E. 388.

In reaching this conclusion, we have not overlooked the argument of the plaintiffs that the adjudication made in the action between Edith L. Stalker and the administrator binds the heirs of the decedent because that action was consolidated for judgment with the suit of the University against the administrator and the heirs in which the heirs were served with summons by publication. A similar contention was rightly rejected by the Supreme Court of Washington with these observations: "Neither this court nor any other court, so far as we are advised, has ever held that a judgment on a complaint, cross-complaint, or complaint in intervention setting up an independent cause of action may be rendered without service on any necessary party merely because the case in which it is filed was consolidated with an action by another party on a different cause of action, in which such service had been made. Such a holding would impinge the constitutional guaranty of due process of law." *City Sash & Door Co. v. Bunn*, 90 Wash. 669, 156 P. 854.

The court based the adjudication as to the title to the real property owned by Sarah C. Dailey at the time of her death upon the expressed consent of her administrator. Under the law, an administrator has no inherent interest in, title to, or control over the realty of his intestate. *Speed v. Perry*, 167 N.C. 122, 83 S.E. 176; *Floyd v. Herring*, 64 N.C. 409. This being so, the administrator of Sarah C. Dailey had no authority to consent to such adjudication, and such adjudication is a nullity.

The legal standing of the plaintiffs is not a whit bettered by an acceptance of the view that the adjudication as to the title to the land left by the decedent was made in the action brought by the University in which the heirs were served with summons by publication.

The judgment containing the adjudication is not a decree on the merits. It is simply a consent judgment embodying a compromise effected by the University, Edith L. Stalker, and the administrator without the assent

of the heirs of Sarah C. Dailey. The judgment is, therefore, merely a contract between the University, Edith L. Stalker, and the administrator entered upon the records of the court with its approval. *Lee v. Rhodes,* 227 N.C. 240, 41 S.E. 2d 747.

Since they were not parties to the contract and did not consent to the judgment, the heirs of Sarah C. Dailey are not bound by the judgment even if they were parties to the action in which it was entered. *Bath v. Norman,* 226 N.C. 502, 39 S.E. 2d 363; *King v. King,* 225 N.C. 639, 33 S.E. 2d 893; *Rodriguez v. Rodriguez,* 224 N.C. 275, 29 S.E. 2d 901; *Deitz v. Bolch,* 209 N.C. 202, 183 S.E. 384.

For the reasons given, the deed from the plaintiffs to the defendant Clarence Newman did not vest in the latter "a marketable and indefeasible title" to the land owned by Sarah C. Dailey at the time of her death. The judgment to the contrary is

Reversed.

STATE v. COVEY CONNOR LAMM.

(Filed 27 September, 1950)

1. Homicide § 3—

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. G.S. 14-17.

2. Homicide § 16—

The intentional killing of a human being with a deadly weapon implies malice and, if nothing else appears, constitutes murder in the second degree, and the State has the burden of proving beyond a reasonable doubt premeditation and deliberation in order to constitute the offense murder in the first degree.

3. Homicide § 4c—

Premeditation means thought beforehand for some length of time, however short.

4. Same—

Deliberation does not require brooding or reflection for any appreciable length of time, but imports the execution of an intent to kill in a cool state of blood without legal provocation in furtherance of a fixed design.

5. Homicide § 21—

All attending circumstances and the conduct of defendant before and after, as well as at the time of the homicide, are competent to be considered by the jury upon the question of premeditation and deliberation.

6. Homicide § 25—

Evidence tending to show that defendant intentionally killed deceased with a deadly weapon in a cool state of blood without legal provocation,

is held sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree.

7. Criminal Law § 5a—

The test of mental responsibility for crime is the capacity to distinguish between right and wrong at the time and in respect to the matter under investigation.

8. Criminal Law § 53g—

Even when conviction of less degree of the crime is permissible under the bill of indictment, the court is required to submit the question of defendant's guilt of such less degree only if there is evidence to support the milder verdict. G.S. 15-170.

9. Homicide § 27h—

Where the evidence tends to show that defendant intentionally killed deceased with a deadly weapon without just cause or legal provocation, and there is no evidence in mitigation, the court is not required to submit to the jury the question of defendant's guilt of manslaughter.

APPEAL by defendant from *Burgwyn, Special Judge,* at May Term, 1950, of WILSON.

Criminal prosecution upon a bill of indictment charging that defendant Covey Connor Lamm, with force and arms, at and in Wilson County, feloniously, willfully and of his malice aforethought, did kill and murder one Mettie Lamm against the form of the statute, etc.

Upon arraignment in Superior Court, defendant pleaded not guilty, and, for his defense, relies upon a plea of insanity.

And upon the trial in Superior Court the State offered evidence tending to show these facts: Mettie Lamm, a small woman, weighing about 100 to 105 pounds, 43 years of age, wife of defendant for 25 or 26 years, and suffering with palsy, and in feeble condition, hardly able to walk, came to her death about 7:30 o'clock on the evening of 27 February, 1950, in the kitchen of the house in which she and defendant were residing in Wilson, North Carolina, as the result of wounds inflicted by bullets shot from a pistol in the hands of defendant. There were three wounds of entrance, and three of exit in her chest,—any one of which in the opinion of medical expert would have caused her death. When officers called to the scene arrived, defendant was sitting by an oil heater with his head in his hands and his elbows on his knees. He changed position when officer Mercer knocked on the door. And on being asked by officer Johnston, "What seemed to be the trouble?", defendant replied, "If you will come back here in this room I will tell you all about it." Officer Johnston found the body of Mrs. Lamm, lying on the floor in the kitchen, dressed in "regular clothes," with a pillow under the head. The gun, a revolver, was found by the officers, and defendant identified it as the gun he used. The gun smelled of burned powder.

The defendant made these statements: (1) To officer Johnston, he first said: "It sure is a mess . . . I had my reasons but I can't tell you." And a day or two afterwards this officer asked defendant if he wanted to talk then, in reply to which he said: "Johnston, I had my reasons but I can't tell it." (2) Replying to question by Chief of Police Privette as to why did he kill his wife, defendant said: "I had my reasons but nobody will never know." And (3) To officer Mercer defendant said: "Mr. Mercer, I had a reason for doing it."

The State also offered this testimony of a brother of deceased: "I went with Lamm's son, Ronald, to see him the next day and his son asked him why he did it and he said he did not know. He said he had the gun and she said, 'Well, you've got it, have you?', and that she didn't say anything more, just smiled, and that he shot her then and went and put the pistol back. He said he put the pillow under her head; that he didn't know why he did it . . . Ronald asked him . . . if he knew what he had done, and he said 'Yes,' and he (Ronald) said 'What?', and he (Covey Lamm) said he had killed . . . Mettie. He . . . said he went to the chest of drawers and took the gun and come to the door, and . . . she said 'Well, you have got it, have you?', and . . . he shot her then. And after he shot, he took the empty cartridges out of the pistol and took them out in the back of the house and went back and put the pistol back in the drawer." Officer Johnston testified that defendant had been drinking, "but not in condition to warrant arrest for public drunkenness," and that defendant "was not crying, but at ease."

And defendant, as a witness in behalf of himself, testified in pertinent part: "I remember shooting my wife. I got home around 7; she was not at home; I put something on the table and swept the house; she come in and said she had been next door. She asked me how I was feeling, went to the dresser and was combing her hair and I do not remember anything else that was said. She was in the kitchen and I got my gun and walked to the door and went to shooting her. I was not mad at her. There were no ill words. I then got a pillow and put under her head and got down and kissed her. She said no more. I went next over next door and told Drivus Lamm and his wife what I had done. Annie asked 'What did you do it for?', and I said, 'I don't know.' I went back in the house and sat down and Mr. Mercer and Mr. Johnston came . . ." Defendant further testified that he had not planned or thought about killing his wife; that he did not know why he did it; that he had lapses of memory for three or four years; that he was a drinking man; that the day in question he drank a part of a pint of wine, about 11 or 12 o'clock, and took a drink about 45 minutes before he went home, but that he was not drunk.

Defendant offered the testimony of Mrs. Annie Lamm and her husband, Rives Lamm, in corroboration of his testimony that he went to their

house and told them what he had done, and as to his statement to them that he did not know why he did it.

Mrs. Lamm testified that defendant "was not upset or unnerved" . . . and that "he was normal but seemed to be kindly worried."

Rives Lamm testified, "He appeared normal except I took him to be drinking,—talked with reason . . . he appeared to be rational."

And defendant gave testimony, and offered testimony of other witnesses bearing upon his plea of insanity. Some gave it as their opinion that defendant "knew right from wrong." But one of them testified that in his opinion and belief defendant did not know "the difference in right and wrong."

Verdict: Guilty of murder in the first degree.

Judgment: Death by the inhalation of lethal gas in the way and manner prescribed by law.

Defendant appeals to Supreme Court and assigns error.

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

R. F. Mintz for defendant, appellant.

WINBORNE, J. The Attorney-General for the State moves in this Court to dismiss the appeal for the reason that defendant's brief does not comply with Rule 28 of the Rules of Practice in the Supreme Court,—221 N.C. 544. As to this, we are of opinion that the brief is adequate to present the points principally relied upon by defendant as error in the trial court. Hence the motion is not allowed. And, as the life of defendant is at stake in this case, we have given due consideration to each assignment of error shown in the record, and error is not made to appear.

Defendant earnestly contends that there is error in the refusal of the court to allow his motion for judgment as of nonsuit on the first degree murder charge in compliance with the statute—G.S. 15-173. The motion challenges the sufficiency of the evidence to show premeditation and deliberation beyond a reasonable doubt. *S. v. Bittings,* 206 N.C. 798, 175 S.E. 299, and cases cited. See also *S. v. Bowser,* 214 N.C. 249, 199 S.E. 31; *S. v. Hawkins,* 214 N.C. 326, 199 S.E. 284.

It is appropriate, therefore, to recur to the principles of law applicable to the case. Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. G.S. 14-17 *S. v. Hawkins, supra; S. v. Chavis,* 231 N.C. 307, 56 S.E. 2d 678.

The intentional killing of a human being with a deadly weapon implies malice and, if nothing else appears, constitutes murder in the second degree. *S. v. Payne,* 213 N.C. 719, 197 S.E. 573; *S. v. Chavis, supra.*

"The additional elements of premeditation and deliberation necessary to constitute murder in the first degree, are not presumed from a killing with a deadly weapon. They must be established beyond a reasonable doubt, and found by the jury, before a verdict of murder in the first degree can be rendered against the prisoner." *S. v. Miller,* 197 N.C. 445, 149 S.E. 590; *S. v. Payne, supra; S. v. Hawkins, supra; S. v. Chavis, supra.*

" 'Premeditation means thought of beforehand' for some length of time, however short." *S. v. Dowden,* 118 N.C. 1145, 24 S.E. 722; *S. v. Benson,* 183 N.C. 795, 111 S.E. 869; *S. v. Hawkins, supra; S. v. Chavis, supra.*

In the *Dowden case, supra, Avery, J.,* writing for the Court on the subject of premeditation had this to say: "The law does not lay down any rule as to the time which must elapse between the moment when a person premeditates or comes to the determination in his own mind to kill another person and the moment when he does the killing, as a test. It is not a question of time. It is merely a question of whether the accused formed in his own mind the determination to kill the deceased, and then at some subsequent period, either immediate or remote, does carry his previously formed determination into effect by killing the deceased."

And it has been said that "deliberation means that the act is done in a cool state of blood. It does not mean brooding over it or reflecting upon it a week, a day or an hour, or any other appreciable length of time; but it means an intention to kill, executed by defendant in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation." *S. v. Benson, supra; S. v. Steele,* 190 N.C. 506, 130 S.E. 308; *S. v. Hawkins, supra; S. v. Chavis, supra,* and cases cited.

And, "in determining the question of premeditation and deliberation it is proper for the jury to take into consideration the conduct of defendant, before and after, as well as at the time of the homicide, and all attending circumstances," *Stacy, C. J.,* in *S. v. Evans,* 198 N.C. 82, 150 S.E. 678; *S. v. Hawkins, supra,* and cases cited.

Applying these principles to the case in hand, the evidence is abundantly sufficient to be submitted to the jury on the first degree murder charge, and to support the verdict of guilty of murder in the first degree as found by the jury.

Defendant also assigns as error portions of the charge in respect of the law applicable to his plea of insanity. The test of responsibility of a person charged with a criminal offense in this State is the capacity to distinguish between right and wrong at the time and in respect of the matter under investigation. *S. v. Shackleford,* 232 N.C. 299, 59 S.E. 2d

825, and cases there cited. "He who knows the right and still the wrong pursues is amenable to the criminal law," *Stacy, C. J.*, in *S. v. Jenkins*, 208 N.C. 740, 182 S.E. 324, citing *S. v. Potts*, 100 N.C. 457, 6 S.E. 657.

Tested by this principle, the charge of the court fairly presents the issue to the jury. No prejudicial error is made to appear.

Defendant also assigns as error the failure of the court to submit to the jury the question of manslaughter.

In this State it is a well recognized rule of practice that where one is indicted for a crime and under the same bill it is permissible to convict the defendant of "a less degree of the same crime," G.S. 15-170, and there is evidence tending to support a milder verdict, the prisoner is entitled to have the different views presented to the jury, under a proper charge. *S. v. Robinson*, 188 N.C. 784, 125 S.E. 617; *S. v. Staton*, 227 N.C. 409, 42 S.E. 2d 401. But where there is no evidence to support such milder verdict, the court is not required to submit the question of such verdict to the jury. Applying this rule to the case in hand, the evidence does not admit of a verdict of guilty of manslaughter. Hence there is no error in failing to so charge.

Other assignments of error are without merit, and require no express consideration.

Hence, in the judgment from which appeal is taken, we find

No error.

FRIENDLY FINANCE CORPORATION v. ROYCE G. QUINN.

(Filed 27 September, 1950.)

1. Chattel Mortgages and Conditional Sales § 10c: Common Law—

The common law rule that the title of the mortgagee or the conditional vendor is good as against any person in possession has been altered by statute in this State only to the extent of protecting against an unregistered lien creditors and those purchasers who deraign title from the mortgagor or conditional vendee, and the statute does not extend its protection to purchasers who are strangers to the vendor's title. G.S. 47-20, G.S. 47-23, G.S. 4-1.

2. Same: Courts § 14—

Under the rule of comity, the lien of a chattel mortgage or conditional sale executed in another state will be enforced here in accordance with its laws except to the extent to which the common law has been modified by statute in this State.

3. Chattel Mortgages and Conditional Sales §§ 8b, 10c—

Where the resident purchaser of an automobile, which is subject to a conditional sale contract executed in another state, fails to show that his

title was acquired directly or by *mesne* conveyances from the conditional vendee, he is not entitled to the protection of our registration statutes, G.S. 47-20, G.S. 47-23, since he has the burden of showing that he is a purchaser within the protection of the statutes, and mere possession alone is insufficient for that purpose.

4. Same—

Only a purchaser for value directly or by *mesne* conveyances from the conditional vendee may show, in order to claim protection against the lien of an unregistered conditional sale contract executed in another state, that the property had acquired a *situs* here for the purpose of registration.

5. Chattel Mortgages and Conditional Sales § 10f—

The assertion that the vendor in a conditional sale contract executed in another state should not be permitted to assert his lien as against an innocent possessor of the property in this State because the vendor had put his vendee in position to cause loss, *held* feckless when it is not shown that the vendee willingly parted with title to or possession of the automobile.

6. Same—

The vendor in a conditional sale contract has no duty to third persons who are strangers to his title to exercise due diligence to protect them from loss occasioned by reason of his lien.

APPEAL by defendant from *Nimocks, J.*, June Term, 1950, WILSON. Affirmed.

Action in claim and delivery to recover the possession of an automobile.

At the trial, counsel for plaintiff and defendant waived trial by jury, stipulated facts they deemed material, and agreed that the court should find such other facts as it might deem essential and render judgment thereon.

It was agreed in substance that on 6 November 1947, John R. Stewart, Jr., a resident of Providence, Rhode Island, purchased from the Baker Auto Company, Inc. of said city and state a Chevrolet Club Convertible Coupe, it being the very automobile involved in this controversy; said purchase was under a conditional sale agreement wherein the title to the car was retained by the seller until the purchase price was paid; that the said automobile company assigned and transferred the conditional sale contract and the indebtedness thereby secured in due course and for value to plaintiff; that on 4 February 1948, on application of W. D. Pridgen of Elm City, N. C., the Department of Motor Vehicles of North Carolina issued a certificate of title for said automobile to said Pridgen; that on 1 March 1948, defendant, acting for Pridgen, sold the automobile to one Stallings of Wilson, N. C., and duly transferred the N. C. certificate of title therefor to him; that on 10 March 1948, the Commissioner of Motor Vehicles issued a certificate of title therefor to said Stallings; that said Stallings retained possession of said automobile, claiming the same

as his own, from 1 March 1948 to 27 January 1949, and the automobile was kept in Wilson and used by him; that on 27 January 1949, Stallings traded said automobile to defendant and assigned to him in blank the N. C. certificate of title therefor issued to Stallings; that at no time has there been any lien recorded in favor of Baker Auto Company or the plaintiff in Wilson County or elsewhere in this State; that the law of the State of Rhode Island does not require the registration of a conditional sale agreement; that said Quinn had been in possession of the automobile since 27 January 1949, and still retains the possession of the same.

On 17 March 1949, this action was instituted and the writ of claim and delivery was issued. The defendant gave replevy bond and retained possession of the automobile. It is agreed that the value thereof at the time of seizure was $1,000. Plaintiff had no knowledge of and did not consent to the removal of the automobile from the State of Rhode Island. Stewart, the conditional vendee, has defaulted on his agreement, never having made any payment thereon. The principal sum of $1031.10 is still due. Defendant at no time until the bringing of this action had any knowledge of the outstanding conditional sale agreement held by the plaintiff.

It was agreed that in the event the court was of the opinion that plaintiff is entitled to the possession of said automobile, it should, in lieu of a judgment of possession, enter judgment in the sum of $1,000 with interest and costs. The court, being of the opinion that under the agreed statement of facts plaintiff has the superior title to the automobile, rendered judgment against the defendant for $1,000, interest and costs as agreed in the stipulation in lieu of a judgment for the possession of the automobile. Defendant excepted and appealed.

Talmadge L. Narron for plaintiff appellee.
Lucas & Rand and Z. Hardy Rose for defendant appellant.

BARNHILL, J. At common law a conditional sale contract is valid and effective even as against creditors and *bona fide* purchasers for value from the conditional vendee. Under the reservation of title in the vendor, no assignable title vests in the conditional vendee. 47 A.J. 42, 43, 110. Instead, it vests absolute title in the vendor and he is entitled to recover in replevin or trover from any purchaser from the vendee or other person in possession, *Dunbar v. Rawles,* 28 Ind. 225, and, under the rule of comity recognized by most states, the contract is enforceable in any state in which the property may be found. Anno. Ann. Cas. 1913C 330, 12 L.R.A. 446.

In the absence of a registration statute or other modification of the common law rule, a person is bound at his peril to take notice of the imperfections of his grantor's title. 45 A.J. 506.

However, our Legislature has modified the common law rule in certain particulars. Under G.S. 47-20, an unrecorded mortgage is not valid as against "creditors or purchasers for a valuable consideration from the donor, bargainor, or mortgagor, but from the registration of such . . . mortgage in the county . . . where the donor, bargainor, or mortgagor resides; or in case the donor, bargainor, or mortgagor resides out of the state, then in the county where the said personal estate, or some part of the same, is situated." G.S. 47-23 makes the provisions of this section applicable to conditional sales contracts. Under the provisions of these statutes a conditional sale contract will not be enforced in this State as against a creditor or purchaser for value from the conditional vendee, *non constat* the rule of comity, unless the same is recorded as in said sections provided. *Credit Corp. v. Walters,* 230 N.C. 443, 53 S.E. 2d 520.

In appraising these registration statutes, it must be noted that "registration affects the rights only of purchasers for value from, or creditors of the mortgagor" or conditional vendee. As against them alone, the mortgage or conditional sale agreement is void until registered. *Harris v. R. R.,* 190 N.C. 480, 130 S.E. 319; *Montague Brothers v. Shepherd Co.,* 231 N.C. 551.

Except as thus modified, the common law is still in force in this State, G.S. 4-1; *Scholtens v. Scholtens,* 230 N.C. 149, and in proper cases we observe the rule of comity.

So then, the question here posed for decision is this: Is the unrecorded conditional sale contract in question valid and enforceable in this State as against the defendant under the common law or is it void as against him by reason of the provisions of G.S. 47-20, 23?

The judgment indicates the court below concluded that on the facts agreed the common law rule is controlling. In this conclusion we are constrained to concur. When the common law rule and our modifying statutes are considered together as one complete whole, it is made to appear that the law in this State is this: The conditional vendor in a conditional sale contract (when such contract is properly recorded in the State of its execution, if registration is required by the law of that state. G.S. 44-38.1) possesses a valid title to the property therein described, enforceable in this State without registration as against anyone in possession except "creditors or purchasers for a valuable consideration" from the conditional vendee; that is, the title is valid as against all except those who deraign their title from the conditional vendee. 45 A.J. 509. They alone are the beneficiaries of the statute.

Our statutes protect the title conveyed by the mortgagor, G.S. 47-20, or conditional vendee, G.S. 47-23, as against unrecorded liens and conditional sales contracts. They go no further in the modification of the common law rule. (See, however, G.S. 44-38.1, not applicable here.)

Mere possession without proof that title was acquired, either directly or by *mesne* conveyances, from the mortgagor or conditional vendee is not sufficient to bring a claim within the purview of the language used in the Acts. *Chandler v. Conabeer,* 198 N.C. 757, 153 S.E. 313; *Music Store v. Boone,* 197 N.C. 174, 148 S.E. 39.

The defendant here is relying on the provisions of these statutes. He must show that he comes within their protective provisions. This he has failed to do. On this record it does not appear that Stewart, the conditional vendee, has ever attempted to convey title to the automobile in question. Nor does it appear that he has been or is now a resident of this State.

When the mortgagor or conditional vendee is a nonresident of this State, the *situs* of the property in this State is material when, and only when, the person in possession or claiming title thereto adverse to the conditional sale agreement deraigns title from the mortgagor or conditional vendee. Otherwise the statute is inapplicable. The common law is controlling.

The defendant also seeks to invoke the principle declared in the line of cases represented by *Bank v. Liles,* 197 N.C. 413, 149 S.E. 377. But we are unable to perceive wherein the plaintiff has been guilty of such negligence as would invoke the application of that rule. Certainly it was not so stipulated or found by the court below.

It is not made to appear that Stewart, the conditional vendee, is a resident of this State or that he willingly parted with the title to or possession of the automobile. Even so, defendant asserts that if plaintiff had made diligent inquiry it would have ascertained the facts. Perhaps the same may be said of defendant. In any event, plaintiff owed no duty to third parties, volunteers, or strangers to its title, to exercise due diligence at the peril of forfeiting its rights.

In the final analysis the case presents one of those unfortunate transactions which are liable to happen in our complex commercial life. Both parties apparently have acted in good faith. Perhaps neither was as alert or careful as he might have been. One must lose. Who the victim is must be decided under the law as it now exists. Under the circumstances it is a hardship for either to suffer loss, but the law must prevail.

The judgment below is

Affirmed.

GEORGE W. SMITH v. McDOWELL FURNITURE COMPANY, A CORPORATION; WILLIAM E. STEVENS, TRUSTEE IN BANKRUPTCY OF McDOWELL FURNITURE COMPANY; AND J. H. L. MILLER AND FRED C. MORRIS, PARTNERS, TRADING AS BUILDERS SUPPLY COMPANY, A PARTNERSHIP.

(Filed 27 September, 1950.)

1. Appeal and Error § 6c (3)—

Where appellant excepts to the trial court's allowance of a motion to dismiss, but does not except to the findings upon which the court's ruling was based, only the correctness of the ruling upon the facts found is presented for review.

2. Judgments § 33a—

Where the trial court finds after examination and comparison of the records in a subsequent action between the same parties upon substantially identical allegations that the evidence in the second action is substantially identical with that of the first, and the record reveals sufficient basis for the findings, judgment dismissing the second action on the ground of *res judicata* will be affirmed on appeal.

APPEAL by plaintiff from *Rudisill, J.*, July Term, 1950, of McDOWELL. Affirmed.

This was an action to recover damages for injury to person and property growing out of a collision between motor vehicles, alleged to have resulted from the negligence of the defendants McDowell Furniture Company and the Builders Supply Company, a partnership.

This case was here at Fall Term, 1941, on the appeal of defendant Furniture Company from the denial of its motion for removal to U. S. District Court, and is reported in 220 N.C. 155. The case was here again at Spring Term, 1942, on plaintiff's appeal from a judgment of nonsuit as to both defendants, and the judgment below was affirmed, *Justice Schenck* not sitting and the remaining members of the Court being evenly divided in opinion. This result is reported in 221 N.C. 536. Subsequently petition to rehear was denied by *Justice Schenck,* and plaintiff's motion in the Superior Court for a new trial for newly discovered evidence was denied by Judge Sink 12 August, 1942.

Thereafter plaintiff instituted this action against the same defendants for the same cause of action. At the conclusion of the plaintiff's evidence defendants moved to dismiss the action for that the judgment and record in the former action constituted *res judicata,* and that plaintiff was thereby estopped from maintaining this action. The court made the following finding: "The court finds as a fact, from all the evidence before the court and from the evidence in the trial of this action at the present term, the same having been tried on its merits, that this action is between the identical parties plaintiff and defendants as the former action tried

at the December 1941 Special Term of the Superior Court of McDowell County, and that the present cause of action is the identical cause of action heretofore tried between the identical parties at said December 1941 Special Term; the court further finding as a fact, upon a careful consideration of all the evidence in this trial, that said evidence is substantially identical with the evidence in the trial of the former action between the same parties at the December 1941 Special Term of this court, and that the pleadings in this action are substantially identical with the pleadings in the said former action between the same parties, and that the merits in this action are idenical with the merits in the former trial between the same parties."

Thereupon the defendants' motion was allowed, and the plaintiff's action dismissed. Plaintiff excepted to the ruling of the court below and appealed to this Court.

Paul J. Story for plaintiff, appellant.

Smathers & Meekins for defendant McDowell Furniture Company, appellee.

Proctor & Dameron for defendant appellee, J. H. L. Miller and Fred C. Morris, Partners, Trading as Builders Supply Company.

DEVIN, J. It was admitted that the present action is between the same parties and for the same cause as that alleged in the former action which was terminated by judgment of nonsuit, affirmed on appeal. But it was contended that new and additional evidence had been offered in the present action which had not been offered in the former action, particularly as tending to repel the inference of contributory negligence on the part of the plaintiff, and that this action was not being prosecuted upon substantially the same evidence as that appearing of record in the previous action. *Hampton v. Spinning Co.*, 198 N.C. 235, 151 S.E. 266.

However, the trial judge has decided against the plaintiff on this point, and found, after examination of the testimony offered at the present trial in comparison with the record of the evidence offered at the former trial, that the evidence here "is substantially identical" with the evidence in the trial of the former action. The plaintiff excepted to the ruling of the court in dismissing his action, but did not except to the findings of fact upon which the court's judgment was based, leaving only the correctness of the ruling on the facts found as the question presented by the appeal. *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; *Manning v. Ins. Co.*, 227 N.C. 251 (258), 41 S.E. 2d 767; *Lea v. Bridgeman*, 228 N.C. 565, 46 S.E. 2d 555; *Burnsville v. Boone*, 231 N.C. 577, 58 S.E. 2d 351.

While ordinarily a party against whom a judgment of nonsuit has been rendered may commence a new action within one year (G.S. 1-25), this right is subject to the rule announced in *Hampton v. Spinning Co.*, 198 N.C. 235, 151 S.E. 266, that where a judgment of nonsuit has been entered, and a new suit has been commenced between the same parties based on substantially identical allegations and supported by substantially identical evidence, and these facts are found by the court, the judgment in the former action will be held *res judicata* and a bar to the maintenance of the second suit. This rule has been consistently adhered to by this Court. *Batson v. Laundry Co.*, 209 N.C. 223, 183 S.E. 413; *Chapman v. Tea Co.*, 210 N.C. 842, 188 S.E. 628; *Ingle v. Cassady*, 211 N.C. 287, 189 S.E. 776; *Smith v. Ins. Co.*, 216 N.C. 152, 4 S.E. 2d 321; *Cleve v. Adams*, 222 N.C. 211, 22 S.E. 2d 567; *Craver v. Spaugh*, 227 N.C. 129, 41 S.E. 2d 82; *Yancey v. Yancey*, 230 N.C. 719 (721), 55 S.E. 2d 468.

Here the court has found facts which bring the plaintiff's present action squarely within the rule laid down in *Hampton v. Spinning Co., supra,* and an examination of the record reveals sufficient basis for these findings. The judgment of dismissal logically follows.

Judgment affirmed.

STATE v. Z. T. BOWSER, PRINCIPAL, AND JOHN T. HALL, SURETY.

(Filed 27 September, 1950.)

1. Bastards § 7: Criminal Law § 62f—

Upon defendant's conviction of willful failure to support his illegitimate child, the trial court has plenary power to suspend execution on condition that defendant pay specified sums of money into court for support of his child. G.S. 49-7, G.S. 49-8.

2. Criminal Law § 62f—

A valid suspension of execution remains effective until revoked and the enforcement of sentence by commitment is ordered by the judge of the Superior Court for breach of condition duly established by pertinent testimony in an appropriate proceeding in open court, and neither the clerk nor his deputy has the power to ignore the valid order of suspension.

3. Same: Criminal Law § 85c—

Where defendant appeals notwithstanding the suspension of execution of the judgment, neither the clerk nor his deputy has authority to issue a *mittimus* upon receipt of certificate of opinion of the Supreme Court affirming the judgment. Manifestly G.S. 15-186 does not apply where there has been a valid suspension of execution.

4. Arrest and Bail § 6—

The clerk of the Superior Court has power to take bail in criminal cases only in those instances authorized by statute, and where he allows bail to prevent imprisonment upon the issuance of a *mittimus* after receipt of certificate of opinion of the Supreme Court affirming judgment of conviction, such bail bond is void.

5. Arrest and Bail § 8—

A bail bond which is void because taken without authority binds neither the principal nor his surety.

6. Same—

The fact that defendant has secured his release on bail will not estop him or his surety from asserting the invalidity of the bond when the threatened imprisonment was unlawful.

APPEAL by John T. Hall from *Burney, J.*, at the July Term, 1950, of WASHINGTON.

Proceeding by *scire facias* to enforce the forfeiture of a bail bond.

Z. T. Bowser was tried and convicted at the January Term, 1949, of the Superior Court of Washington County for willful neglect or refusal to support and maintain his illegitimate child. He was sentenced to imprisonment in the common jail of Washington County for six months, to be assigned to work under the State Highway and Public Works Commission. The court suspended the execution of the sentence upon the express condition that Bowser pay specified weekly sums into the office of the Clerk of the Superior Court of Washington County for the maintenance and support of his illegitimate child until the further order of the court, and directed him to give a bail bond in the penal sum of $300.00 for his appearance at the July and January Terms of the Superior Court of Washington County for a period of three years to show compliance with such condition.

Bowser forthwith gave such bond with Jack D. Frank as surety. Nevertheless, he appealed his conviction to the Supreme Court, which upheld the validity of his trial and sentence. *S. v. Bowser,* 230 N.C. 330, 53 S.E. 2d 282.

When the certificate of the opinion of the Supreme Court reached the Superior Court of Washington County, a deputy clerk of the last named tribunal issued a *mittimus* ordering that the judgment of imprisonment against Bowser be carried into immediate effect; and the Sheriff of Washington County forthwith took Bowser into his custody for the purpose of conveying him to a prison camp operated by the State Highway and Public Works Commission for service of the sentence. Counsel for Bowser having protested the legality of the acts of the deputy clerk and the Sheriff, the Clerk of the Superior Court of Washington County

directed that Bowser be released from custody on giving as additional bail bond in the penal sum of $500.00 conditioned on his making his personal appearance at the July Term, 1949, and the January Term, 1950, of the Superior Court of Washington County, and showing compliance with the condition suspending the execution of the sentence pronounced against him in January, 1949. Bowser thereupon gave such bail bond to the clerk with the appellant, John T. Hall, as surety, and thereby procured his discharge from custody.

Bowser was called and failed to appear at the January Term, 1950, of the Superior Court of Washington County, and judgment of forfeiture *nisi* was thereupon entered against him and his surety, John T. Hall, upon the $500.00 bail bond. A writ of *scire facias* issued commanding Bowser and Hall to appear at the July Term, 1950, of the Superior Court of Washington County, and show cause why the judgment of forfeiture should not be made final. This process was served on Hall, who appeared at that term and resisted the entry of a final judgment of forfeiture on the ground that the bail bond in question is void because taken by the clerk without authority of law.

The court overruled this objection, and rendered final judgment of forfeiture against Bowser, as principal, and Hall, as surety, for the full penal sum named in the bail bond. Hall excepted and appealed, assigning errors.

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

P. H. Bell for John T. Hall, appellant.

ERVIN, J. Courts having jurisdiction to try and determine prosecutions for nonsupport of illegitimate children are empowered by statute to suspend the imposition or execution of sentences upon condition that offending parents make fixed contributions of money for the maintenance of such children. G.S. 49-7, 49-8. Consequently the trial judge had plenary power to suspend the execution of the sentence of imprisonment upon the express condition that Bowser pay specified sums of money into the office of the clerk for the support of his child. This being true, the order of suspension remains effective until it is revoked and the enforcement of the sentence by commitment is ordered by the judge of the Superior Court of Washington County for breach by Bowser of the expressed condition duly established by pertinent testimony in an appropriate proceeding in open court. *S. v. Smith,* 196 N.C. 438, 146 S.E. 73; *S. v. Gooding,* 194 N.C. 271, 139 S.E. 436; *S. v. Phillips,* 185 N.C. 614, 115 S.E. 893; *S. v. Hardin,* 183 N.C. 815, 112 S.E. 593.

Neither the clerk nor his deputy had power to ignore the valid order of suspension made by the trial judge. It necessarily follows that the *mittimus* was invalid, and that the arrest and detention of Bowser thereunder was illegal.

This conclusion does not run counter to the statute embodied in G.S. 15-186, which prescribes that "the Clerk of the Superior Court, in all cases where the judgment has been affirmed (except where the conviction is a capital felony), shall forthwith on receipt of the certificate of the opinion of the Supreme Court notify the Sheriff, who shall proceed to execute the sentence which was appealed from." Manifestly, this statute applies to final judgments where nothing further is required to be done by the court, and not to orders suspending the execution of sentences on compliance with conditions imposed.

A clerk of court has no inherent power to allow or take bail in criminal cases. He can do so only by virtue of some statutory enactment. 8 C.J.S., Bail, section 40. The Clerk of the Superior Court of Washington County was not empowered by any statute to require or take the bail bond in suit. This being so, he acted without authority of law, and such bail bond is void. 6 Am. Jur., Bail and Recognizance, section 21; *San Francisco v. Hartnett,* 1 Cal. App. 652, 82 P. 1064; *Morrow v. State,* 5 Kan. 563; *Chinn v. Com.,* 28 Ky. 29; *Wallenweber v. Com.,* 66 Ky. 68; *Bunnell v. Commonwealth,* 192 Ky. 592, 234 S.W. 187; *State v. Caldwell,* 124 Mo. 509, 28 S.W. 4; *Terr. v. Reynolds,* 15 Okla. 185, 82 P. 574; *Terr. v. Woodring,* 15 Okl. 203, 82 P. 572, 6 Ann. Cas. 950, 1 L.R.A. (N.S.) 848. Hence, it falls under the condemnation of the well settled rule that a bail bond which is void because taken without authority binds neither the principal nor his surety. *S. v. Jones,* 100 N.C. 438, 6 S.E. 47; *S. v. Hill,* 25 N.C. 398; *S. v. Mills,* 13 N.C. 555; 6 Am. Jur., Bail and Recognizance, section 156.

We are unable to accept as valid the contention of the State that a surety is estopped to deny liability on a void bail bond exacted by a public official without warrant of law as a condition precedent to the discharge of the principal from unlawful imprisonment. Similar arguments have been rejected by the better considered decisions in other jurisdictions. *State v. Ricciardi,* 81 N.H. 223, 123 A. 606, 34 A.L.R. 609, and cases collected in the ensuing annotation.

Since the bail bond in suit was a nullity in law, the final judgment of forfeiture is

Reversed.

STATE v. BOYD MARTIN ROBINSON.

(Filed 27 September, 1950.)

Criminal Law § 62f—

Where upon conviction of abandonment, prayer for judgment is continued upon condition that defendant pay costs and "a sum equal to the amount he receives from the Veterans Administration pursuant to the G.I. Bill of Rights on account of his dependents," the failure of defendant to make further payments after his receipt of benefits from the Veterans Administration has terminated cannot be held a violation of the conditions of the suspension of judgment and cannot justify order of execution.

APPEAL by defendant from *Rudisill, J.*, August Term, 1950, of YANCEY.

This is a criminal action tried upon an indictment charging the defendant with the unlawful and willful abandonment of his wife and children without providing adequate support for them.

The defendant pleaded guilty as charged in the bill of indictment, at the March Term, 1948, of the Superior Court of Yancey County. Prayer for judgment was continued for a period of five years upon payment of the costs, and "on condition that the defendant contribute to the support of his wife and children at all times a sum equal to the amount he receives from the Veterans Administration pursuant to the G.I. Bill of Rights on account of his dependents."

At the March Term, 1950, of the Superior Court of Yancey County, the court found as a fact that the defendant paid the costs of the action and that he is not now drawing any benefits from the Veterans Administration under the G.I. Bill on account of his dependents; that he had received no such benefits since July, 1948, said payments having been terminated as of that date; and that the defendant did contribute to the support of his family as required by the conditions of the suspended judgment until such payments were terminated.

The court further found as a fact that the defendant had contributed nothing during the last five months to the support of his one year old child, now residing with its mother (the defendant and his wife have not lived together since February, 1950, and since that time their other child has lived with the defendant), and held such failure to be a violation of the terms of the suspended judgment. Whereupon the court sentenced defendant to serve six months in jail to be assigned to work under the supervision of the State Highway & Public Works Commission. The defendant appeals and assigns error.

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

Bill Atkins for defendant.

DENNY, J. The defendant contends he has complied with the terms and conditions upon which the original judgment was suspended, and that his contention is supported by the finding of the court to the effect that he paid the costs of the action and contributed to the support of his wife and children all sums received by him from the Veterans Administration since the suspension of the judgment.

Undoubtedly the court intended to require the defendant to contribute to the support of his wife and children each month, during the period of suspension, a sum equal to that he was then receiving from the Veterans Administration on account of his dependents, but unfortunately the conditions upon which the judgment was suspended were not so stipulated. We think the contention of the defendant must be upheld. This seems to be a case where the defendant wins in this particular round on a "technical knockout." *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143.

Let the judgment be vacated.

Judgment vacated.

ROBERTS & JOHNSON LUMBER CO., ET AL., v. W. W. HORTON, ET AL.

(Filed 27 September, 1950.)

1. Laborers' and Materialmen's Liens § 3—

Materialmen can have no lien where the owners pay the contractor in advance more than the contractor had earned up to the time he abandoned the job and the claim was asserted.

2. Same: Contracts § 5—

An asserted promise by the owners to pay materialmen the amount due them by the contractor is unenforceable for want of consideration.

3. Laborers' and Materialmen's Liens § 3: Frauds, Statute of, § 5—

A parol promise by the owners to pay materialmen the amount due them by the contractor cannot form the basis of a claim of lien because of the statute of frauds. G.S. 22-1.

APPEAL by plaintiffs from *Patton, Special Judge,* January Term, 1950, of HENDERSON.

Civil action to establish claim for materials furnished and used in construction of building and to enforce lien thereon.

The defendants, W. W. Horton and wife, Belva Horton, own a tract of land in Mills River Township, Henderson County. In January, 1947, they engaged John W. Sumner, a contractor, to build a dwelling-house thereon and agreed to pay him $5,573.75 for a turnkey job or "complete job," as designated in the contract.

The plaintiffs sold to the contractor certain building materials, doors, locks, etc., which the contractor used in his work on the building. The last of the materials furnished by plaintiffs was delivered 27 April, 1948.

The contractor was paid $2,000 in advance and abandoned the job before it was completed. He had been overpaid for the work he had done up to that time. He was then indebted to the plaintiffs in the sum of $537.94 for materials furnished and used by him in his work on the "Hotron job."

Plaintiffs filed notice of claim in the Clerk's office 22 October, 1948. This action is to enforce lien against the building which was completed by the owners at a cost in excess of what they had agreed to pay the contractor.

Plaintiffs also allege that after the contractor had abandoned the work, the Hortons promised to pay the plaintiffs for the materials which they had furnished. This is denied by the Hortons.

The contractor, John W. Sumner, though named as party defendant, has not been served with process or summons, nor has he appeared or filed answer herein. A jury trial was waived, and at the close of the evidence, judgment of nonsuit was entered in the cause.

Plaintiffs appeal, assigning errors.

W. E. Anglin for plaintiffs, appellants.
L. B. Prince for defendants, appellees.

STACY, C. J. The question for decision is whether the evidence suffices to overcome the demurrer. The trial court thought not, and we agree.

It is clear that under the decisions in *Rose v. Davis,* 188 N.C. 355, 124 S.E. 576, and *Payne v. Flack,* 152 N.C. 600, 68 S.E. 16, the plaintiffs can enforce no lien against the building for materials furnished the contractor. The owners paid in advance for more than what the contractor had earned up to the time he quit the job, and at no time thereafter was he entitled to further compensation under his agreement. This defeats the plaintiffs' lien. *Dixon v. Ipock,* 212 N.C. 363, 193 S.E. 392; *Brown v. Hotel Corp.,* 202 N.C. 82, 161 S.E. 735.

Additionally, however, the plaintiffs say the owners later promised to pay them for the materials which they had furnished the contractor. This, the owners deny, and the plaintiffs' evidence reveals no more than a mere verbal nude pact or a bare oral promise to pay. No consideration is shown for the promise, *Stonestreet v. Southern Oil Co.,* 226 N.C. 261, 37 S.E. 2d 676; and the statute of frauds, G.S. 22-1, is also in plaintiffs' way.

The record discloses no reversible error, hence the conclusion and judgment of the court below will be upheld.

Affirmed.

EARL BUCHANAN, JR., ADMINISTRATOR OF THE ESTATE OF LYNN BUCHANAN, DECEASED, v. DICKERSON, INCORPORATED.

(Filed 27 September, 1950.)

APPEAL by defendant from *Rousseau, J.*, 7 June, 1950. From RUTHERFORD. Affirmed.

This was an action to recover damages for the wrongful death of plaintiff's intestate alleged to have been caused by negligence on the part of the defendant while engaged in resurfacing a highway under contract with the State Highway and Public Works Commission. It was alleged that the death of plaintiff's intestate, who was a passenger in an automobile being driven over the highway, proximately resulted from defendant's negligence.

Defendant in apt time moved to strike certain portions of the complaint. The motion was allowed in part and in other particulars denied. Defendant excepted and appealed.

Hamrick & Hamrick and Sidney L. Truesdale for plaintiff, appellee.

Smathers & Meekins for defendant, appellant.

PER CURIAM. The defendant's exception to the ruling of the court below is without merit. *Hinson v. Britt, ante,* 379; *Hildebrand v. Tel. Co.,* 216 N.C. 235, 4 S.E. 2d 439; *Hardy v. Dahl,* 209 N.C. 746, 184 S.E. 480.

No new question is presented which requires elaboration. The judgment is

Affirmed.

HALIFAX PAPER COMPANY, INC., v. ROANOKE RAPIDS SANITARY DISTRICT, AND ROSEMARY MANUFACTURING COMPANY, A NORTH CAROLINA CORPORATION, APPEARING HEREIN FOR ITSELF AND ON BEHALF OF ITS ASSOCIATES, ROANOKE MILLS COMPANY AND PATTERSON MILLS COMPANY, INCORPORATED.

(Filed 11 October, 1950.)

1. Appeal and Error § 6c (2)—

A sole exception to the signing of the judgment presents for review only whether the facts found are sufficient to support the judgment.

2. Water Companies § 2: Utilities Commission § 1—

A sanitary district which, as a part of its functions, furnishes drinking water to the public and also filtered water for industrial consumers is a *quasi*-municipal corporation, G.S. 130-39, and is not under the control and

supervision of the North Carolina Utilities Commission as to services or rates, G.S. 62-30 (3).

3. Water Companies §§ 3, 4—

Defendant sanitary district was unable to raise funds for the construction of a filter plant and, in order to carry out the purposes for which it was created, leased a cotton mill's filter plant under an agreement that the mill should get its water at cost of filtering and should have priority over other industrial consumers. *Held:* The leased contract was in the public interest and the district had authority to execute it, G.S. 130-39 (7), G.S. 130-39 (9) (b), and the contract is valid since it does not impair the ability of the district to discharge its duties to the public nor unlawfully discriminate between commercial customers similarly circumstanced.

4. Administrative Law § 3—

Courts will not interfere with the exercise of discretionary powers conferred on local administrative boards for the public welfare except in cases of manifest abuse of discretion.

5. Water Companies § 4—Similar treatment of commercial customers similarly circumstanced cannot constitute unlawful discrimination.

Defendant sanitary district was unable to raise funds for the construction of a filter plant and, in order to carry out the purposes for which it was created, leased a cotton mill's filter plant under an agreement that the mill should get its water at cost of filtering and should have priority over other industrial consumers. Thereafter the district agreed with a paper mill to furnish it water from the surplus remaining after the needs of the district and lessor enterprise had been satisfied. *Held:* Upon increased demand by the lessor, resulting in a diminution of the surplus available for sale to other industrial consumers, the district had the power to reduce the amount of water furnished the paper mill proportionately, since the paper mill had no right to any water except out of surplus water remaining after the requirements of the district and the lessor enterprise had been satisfied, and since there was no discrimination in service to commercial users similarly circumstanced in regard to such surplus.

APPEAL by plaintiff from *Nimocks, J.*, at August Term, 1950, of HALIFAX.

A summary of the findings of fact in this case follows:

1. This is an action instituted by the plaintiff, Halifax Paper Company, Inc. (hereinafter referred to as Halifax), against Roanoke Rapids Sanitary District (hereinafter referred to as the District), to enjoin and restrain the District from diminishing the present supply of filtered water now being purchased from the District and used by Halifax in the prosecution of its business.

2. Halifax is a corporation with its principal office in Roanoke Rapids, N. C., and with its manufacturing plant within the District. It is engaged in the manufacture of paper, and requires in its manufacturing processes a large volume of filtered water.

3. The defendant District is a municipal corporation created by the North Carolina State Board of Health on 21 April, 1931, under the Public Laws of North Carolina, as codified and brought forward in G.S. 130-33, *et seq.*, and having the powers conferred by G.S. 130-39. Its boundaries embrace a large area within and contiguous to the Town of Roanoke Rapids. Said District was granted a franchise by Roanoke Rapids in 1932, giving it the right to lay its water and sewer lines and mains under and along the streets of said town.

4. The Rosemary Manufacturing Company (hereinafter referred to as Rosemary) is a corporation engaged in the cotton textile manufacturing business in North Carolina, with its principal place of business in Roanoke Rapids, N. C., and it, with its associates, Roanoke Mills Company and Patterson Mills Company, Inc. (hereinafter referred to as Textiles), are owned by the Simmons Company, manufacturers of mattresses and other domestic furnishings. After the Simmons Company obtained control of Textiles, Rosemary built the filter plant involved in this litigation, for the purpose of furnishing water to Textiles for industrial purposes only.

5. Rosemary intervened in this action on behalf of itself and its associates to protect its and their interest involved in this controversy.

6. At the time the District was created, it was unable to sell its bonds to the public, so as to construct a water and sewerage system in the District. However, in 1932, the District arranged to borrow $365,000.00 from the Reconstruction Finance Corporation, Washington, D. C., which amount was sufficient only to construct the water and sewerage system exclusive of a water filtering plant.

7. The District Board contacted Rosemary for the purpose of obtaining the surplus water of its plant for the District. Rosemary was willing to lease its filter plant to the District and did so under contracts, which are set out in full in the record and identified as Exhibits A and B. These contracts have been duly recorded in the office of the Register of Deeds in Halifax County.

8. The District being unable to sell sufficient bonds or otherwise obtain money sufficient to construct a filter plant to filter water for domestic, drinking, sanitary and fire-fighting purposes, the Board of said District, in good faith, and in the exercise of its discretion, entered into a written contract with the Intervener, Rosemary, to obtain the use of the surplus capacity of filtered water of Rosemary's existing filtration plant and then issued and sold to the Reconstruction Finance Corporation bonds sufficient to provide funds to construct the distribution and sewage disposal system for said District.

9. The original agreement, dated 1 August, 1932, between the District and Rosemary, provided for the lease of the filter plant to the District

for an annual rental of $2,700.00. The lease further provided that Rosemary and its associates should have priority to an uninterrupted supply of water sufficient for all their requirements for manufacturing and processing purposes on the following terms: "At cost to it computed on its overhead, cost of wages, power, chemicals, supplies, repairs, and all other costs incident thereto, exclusive of the amounts set forth in the first item hereof as rental, and which cost shall be prorated by the District and the Company on a basis of consumption, as shown by meters to be installed by the parties hereto, at the expense of each, and for which water supply the Company agrees to pay monthly for said water supply for the preceding month on or before the 10th day of the month succeeding the furnishing of said water. The District hereby agrees to and with the Company that it will, during the original and/or any renewal term of this lease enjoyed by the District, furnish to the Company and its associates, Roanoke Mills Company and Patterson Mills Company, Inc., at its connection and the connections of its associates at the plant said water for manufacturing and processing purposes for use of its plants at a cost not to exceed eight and one-fourth cents (8¼c) per one thousand (1,000) gallons."

10. The lease was for a period of three years, with an option on the part of the District to renew it for eleven terms of three years each. The District may cancel the lease by giving six (6) months' notice in advance of the expiration of any term of three years. The lease further provides that Rosemary shall not have the right to cancel the lease during the original term, or any renewal thereof, except upon nonpayment of rent by the District, or a breach of the District of any of the other terms, conditions and agreements agreed by, assumed and imposed upon it to be performed.

11. In the event the leased plant should prove to be insufficient to provide an adequate water supply to meet all the requirements of the District after supplying all the requisites of Rosemary and its associates, or should the cost of providing water of a quality and purity suitable and satisfactory for drinking purposes exceed 8¼c per 1,000 gallons then, in either of said events, the District has the right to cancel the lease by giving three months' written notice of its intention to do so.

12. The lease also provided for the plant to be operated by the personnel employed by Rosemary at the time the plant was taken over by the District, and it further provided that the District could not discharge an employee, employ additional personnel or change the salary of an employee without the consent of Rosemary.

13. In 1940, the filter plant became inadequate and upon advice of the engineers of the District and at the request of the District, Rosemary enlarged the filter plant at its own cost and expense to the capacity

recommended by said engineers as sufficient to take care of the needs and requirements of the District and Rosemary and its associates. The filter plant was enlarged to one and one-half times its then capacity.

14. After Rosemary enlarged the capacity of its filter plant in 1940, Rosemary and the District entered into a Supplemental Agreement modifying the original lease, in the following respects:

(a) The annual rental was reduced to one dollar.

(b) It was agreed to provide water first, to the District for drinking, household and fire-fighting purposes; second, to Rosemary and its associates, and third, to the other industrial consumers of the District out of the surplus of water.

(c) The personnel operating the plant was placed under the joint control of the District and Rosemary.

(d) It was agreed that the cost of filtering the water was to be prorated between Rosemary and the District on the basis of consumption. Otherwise the terms of the original lease remained in effect.

15. The filter plant in question has a capacity to filter a maximum of approximately 2,300,000 gallons of water per day, and at the time of the issuance of the injunction herein approximately 450,000 gallons was delivered from the filter plant daily to the District, approximately 1,500,000 gallons daily to Textiles, and approximately 350,000 gallons daily to Halifax.

16. The plaintiff has been taxed along with other property owners in the District, to pay principal and interest on the indebtedness of the District, but the plaintiff has contributed no sum whatsoever, as a taxpayer or otherwise, towards the construction of Rosemary's filter plant or the purchase of equipment used in connection with the same.

17. On 1 August, 1932, at the time the District entered into said agreement with Intervener, Rosemary, Halifax did not require any water from the District for industrial or manufacturing purposes, and did not ask for any water for such purpose until 6 July, 1937, at which time plaintiff requested the District to sell it water for industrial use not to exceed 85,000 gallons per day, and the District agreed to sell the plaintiff this amount of water from its surplus supply. Halifax, at the time of the institution of this action and for several months theretofore, had purchased approximately 350,000 gallons per day of filtered water from the District. Halifax has paid the District 12½c per 1,000 gallons of filtered water furnished to it since 1937. No other supply of filtered water is available to the plaintiff.

18. At the time the agreement was made between Rosemary and the District, 1 August, 1932, no industrial plant requested any filtered water from the District for industrial purposes. All manufacturing plants within the District had provided their own water supply for industrial purposes.

19. The District is not under any contract, except as set forth in finding of fact No. 17, to furnish the plaintiff with any supply of water for industrial purposes, nor has Halifax requested the District to enter into a contract to supply it with more than 85,000 gallons of water per day.

20. In the past, plaintiff has intimated that it would construct its own clear water facilities; however, the District has never declined to supply plaintiff with all filtered water available after first supplying the needs of the District and then the needs of Rosemary and associates, as per Supplemental Agreement of 1940 (Exhibit B).

21. Plaintiff knew Rosemary and associates were the sole owners of said filter plant, and in contemplation of constructing a filter plant of its own in 1944 negotiated with Rosemary for the purpose of purchasing 3.54 acres of land and later for the purchase of 7 acres of land adjoining the filter plant of Rosemary which Rosemary agreed to sell to plaintiff in 1945 for the sum of $100.00 per acre and to that end, on 16 August, prepared the necessary deed to convey said land, but plaintiff never requested said deed to be executed and delivered.

22. Prior to the institution of this action Rosemary notified the District that its water requirements for industrial purposes would be increased approximately 10% beginning 24 July, 1950. In turn the District notified Halifax that beginning with the above date it could not furnish it with water for industrial purposes in excess of 180,000 gallons per day.

23. It is stipulated in the record by counsel for the respective parties: If the contracts between the District and Rosemary are valid, then there is not sufficient filtered water available to supply the demands of the plaintiff in full after taking care first of the demands of the District, and second, the demands of Rosemary and associates.

24. The District has no source of water supply at this time other than from Rosemary's filter plant.

Upon the foregoing facts, his Honor concluded as a matter of law:

"I. The Roanoke Rapids Sanitary District was created pursuant to G.S. 130-33, *et seq.*, for the purpose of preserving and promoting the public health and sanitary welfare within the District.

"II. The Sanitary District Board was specifically authorized by statute to negotiate and enter into agreement with the owners of existing water supplies, sewerage systems or other such utilities as may be necessary to carry into effect the intent of the statute. G.S. 130-39 (5), (7).

"III. The Sanitary District was specifically authorized to contract with any person, firm or corporation, etc., to supply raw or filtered water to such person, firm or corporation, etc., where the service is available. G.S. 130-39 (9) (b).

"IV. Pursuant to statutory powers, the Board of the Sanitary District, in good faith and in the exercise of its sound judgment and discretion, executed the two contracts between the District and Rosemary Manufacturing Company appearing in the record, marked Exhibit A and Exhibit B. There is no evidence of abuse of discretion. The contract of 1 August, 1932, as amended, is reasonable and to the best interest and advantage of the Sanitary District, and is in aid of and consistent with the purposes for which the Sanitary District was created.

"V. The contract between the District and Rosemary Manufacturing Company, dated 1 August, 1932, as amended by the contract dated 30 September, 1940, is valid.

"VI. The plaintiff Halifax Paper Company has no contract with the District which would entitle the plaintiff to the supply of water for industrial use, as demanded in its complaint or to entitle the plaintiff to more than 85,000 gallons per day for industrial purposes out of such surplus of water as may be available.

"VII. The court having concluded that the 1932 contract between the District and Rosemary, as amended in 1940, is valid, it follows as a matter of law, under the stipulation of the parties hereto in the record, that there is not sufficient water available out of the surplus supply for industrial uses to supply the full demands for water for industrial purposes claimed and demanded by the plaintiff.

"VIII. The plaintiff is not entitled to a restraining order or a continuance of the injunction, as prayed for by the plaintiff.

"Wherefore, it is ordered that the restraining order and temporary injunction previously entered in this cause be, and it is hereby dissolved. This 4th day of September, 1950."

The plaintiff excepted to the signing of the judgment, and appealed.

George C. Green and Lucas & Rand for plaintiff.

Kelly Jenkins and Lassiter, Leager & Walker for the District.

Allsbrook & Benton and Gay & Midyette for Rosemary and its Associates.

DENNY, J. The only assignment of error is based on the exception to the signing of the judgment, dissolving the temporary restraining order, and denying the plaintiff's prayer that such order be made permanent. Therefore, the only question presented is whether error appears on the face of the record. *Parker v. Duke University,* 230 N.C. 656, 55 S.E. 2d 189, and cited cases. Such error appears where the facts found are insufficient to support the judgment, or where the conclusions of law are not supported by the facts. *Culbreth v. Britt Corp.,* 231 N.C. 76, 56 S.E. 2d 15; *Employment Security Com. v. Jarrell,* 231 N.C. 381, 57 S.E. 2d 403;

Roach v. Pritchett, 228 N.C. 747, 47 S.E. 2d 20; *Lea v. Bridgeman,* 228 N.C. 565, 46 S.E. 2d 555; *Smith v. Davis,* 228 N.C. 172, 45 S.E. 2d 51; *Redwine v. Clodfelter,* 226 N.C. 366, 38 S.E. 2d 203; *Rader v. Coach Co.,* 225 N.C. 537, 35 S.E. 2d 609.

The appellant contends the lease entered into between the District and Rosemary, 1 August, 1932, as amended in 1940, is void in so far as Rosemary and its associates are given priority over other customers of the District who purchase water for industrial purposes.

It is well to keep in mind that we are dealing with a contract between a private corporation and a *quasi*-municipal corporation, G.S. 130-39, which is not under the control or supervision of the North Carolina Utilities Commission as to services or rates. G.S. 62-30 (3). Therefore, the contention of the appellant is without merit unless the provisions in the lease of which it complains, constitute such unwarranted discrimination between customers of the District as to be against public policy. G.S. 130-39 (7).

A public utility, whether publicly or privately owned, "is under a legal obligation to serve the members of the public to whom its use extends, impartially and without unjust discrimination. . . . A public utility must serve alike all who are similarly circumstanced with reference to its system, and favor cannot be extended to one which is not offered to another, nor can a privilege given one be refused to another." 43 Am. Jur. 599; 51 C.J. 7. This is in accord with our decisions. *Public Service Co. v. Power Co.,* 179 N.C. 18, 101 S.E. 593; *Solomon v. Sewerage Co.,* 133 N.C. 144, 45 S.E. 536; *Griffin v. Water Co.,* 122 N.C. 206, 30 S.E. 319.

It is settled law with us that utility corporations under the jurisdiction and control of the North Carolina Public Utilities Commission must conform to the rates or charges established by the commission; and that a contract between such a utility corporation and a customer, fixing a lower rate for service than that established by the commission, is subject to the police power of the State, with respect to the rate to be charged under such contract. G.S. 62-123. *Corporation Commission v. Water Co.,* 190 N.C. 70, 128 S.E. 465; *Corporation Commission v. Mfg. Co.,* 185 N.C. 17, 116 S.E. 178; *Public Service Co. v. Power Co., supra.*

According to numerous authorities, however, a distinction is made between contracts for public utility services generally and a private contract where a rate or service has been fixed as a part of the consideration for the conveyance of property to the utility. 43 Am. Jur. 641; *Schiller Piano Co. v. Illinois Northern Utilities Co.,* 288 Ill. 580, 123 N.E. 631, 11 A.L.R. 454; *Cudahy Packing Co. v. City of Omaha,* 277 F. 49; *Sunset Shingle Co. v. Northwest Electric Water Works,* 118 Wash. 416, 203 Pac. 978; *Southern Pac. Co. v. Spring Valley Water Co.,*

173 Cal. 291, 159 Pac. 865; *Bond Bros. v. Louisville & Jefferson County Met. S. Dist.*, 307 Ky. 689, 211 S.E. 2d 867; *State v. Public Service Commission*, 83 Wash. 130, 145 P. 215; *Village of Long Beach v. Long Beach Power Co.*, 104 Misc. Rep. 337, 171 N.Y.S. 824. See also *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 75 L. Ed. 1112.

It is stated in 51 C.J., p. 8, Sec. (19) F., "The fact that a business or enterprise is, generally speaking, a public utility, does not make every service performed or rendered by it a public service, but it may act in a private capacity as distinguished from its public capacity, and in so doing is subject to the same rules as a private person." *Phoenix v. Kasun*, 54 Ariz. 470, 97 P. 2d 210, 127 A.L.R. 84; *Western Union Telegraph Co. v. Louisville & N. R. Co.*, 250 F. 199. And in 51 C.J., p. 6, Sec. (13) B., it is also said: "Public utilities have the right to enter into contracts between themselves or with others, free from the control or supervision of the State, so long as such contracts are not unconscionable or oppressive and do not impair the obligation of the utility to discharge its public duties." *Oklahoma Gas & Elec. Co. v. Wilson & Co.*, 146 Okla. 272, 288 Pac. 316; *Oklahoma Gas & Elec. Co. v. Oklahoma Natural Gas Co.*, 85 Okla. 25, 205 Pac. 768.

In our opinion the agreement between the District and Rosemary is a private contract and does not fall within the purview of rate making power, even if the District were under the control and supervision of the State as to services or rates.

In the case of *Sunset Shingle Co. v. Northwest Electric Water Works, supra*, the Supreme Court of Washington held that where an electric light company before the construction of its plant contracted with a lumber mill whereby it received the site for its plant and the waste from the lumber mill as fuel in exchange for furnishing steam heat and electricity for power and lighting, the dedication of the electric plant to public service was subject to the contract obligations, even though some of the services to be rendered thereunder were public services.

In the *Schiller case, supra*, the plaintiff company conveyed an interest in a power dam in consideration of the agreement by the purchaser to furnish it, its successors and assigns, a continuous supply of "72.4 kilowatts of electrical energy free of charge unless prevented by act of God or inevitable accident." It was contended by the defendant, a successor to the original purchaser, that since it was subject to the provisions of the Public Utilities Act of the State of Illinois, the contract was void. However, the court held the contract was valid and enforceable against the purchaser, its successors and assigns; and, among other things, the Court said: "Legislation in the exercise of the police power must have relation to and be appropriate for the protection, preservation, and promotion of the public health, safety, morals, or welfare. An act which has

no tendency to affect or endanger the public in any of those particulars, and which is entirely innocent in character, is not within the police power. . . . Under the police power, the state has authority to enact legislation to regulate the charges and business of a public utility corporation; but if such legislation operates as a confiscation of private property, or constitutes an arbitrary or unreasonable infringement on personal or property rights, it will be held void, as in violation of the constitutional guaranty that no person shall be deprived of his property without due process of law."

In the instant case, the District was utterly powerless to carry out the purposes for which it was created, unless it could obtain a supply of filtered water without being required to expend the amount necessary to construct a water filtering plant. And the terms and conditions upon which the lease was executed and amended are valid and binding on the District, unless they are discriminatory and impair the obligation of the District to discharge its public duties.

The officials of the District were expressly authorized by G.S. 130-39 (7) and G.S. 130-39 (9) (b) to negotiate and enter into an agreement with the owners of existing water supplies, sewerage systems or other such utilities as might be necessary to carry into effect the purposes for which the District was created. And it is the accepted principle with us "that courts may not interfere in a given case with the exercise of discretionary powers conferred on these local administrative boards for the public welfare, unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion." *Lee v. Waynesville,* 184 N.C. 565, 115 S.E. 51; *Mullen v. Louisburg,* 225 N.C. 53, 33 S.E. 2d 484; *Asbury v. Albemarle,* 162 N.C. 247, 78 S.E. 146.

Under the terms of the first lease, the District obligated itself to furnish at cost to Rosemary and associates, water sufficient for all their requirements, and the District was entitled only to such surplus water as the District might filter in the leased plant, over and above the requirements of Rosemary and associates.

The amendment to the lease in 1940, entered into after Rosemary, at its own expense, had increased the capacity of the filter plant to one and one-half times its previous capacity, provided for the plant personnel to be placed under the joint control of the District and Rosemary, the annual rental to be only one dollar, and for the cost of the operation of the plant to be prorated between the District and Rosemary on a basis of consumption. The District under the terms of the lease as amended was given priority on the water filtered in the leased plant, in so far as the consumers of the District required it "for drinking, household and fire-fighting purposes," but Rosemary agreed only that industrial users in the District should be furnished water out of any surplus supply that re-

mained after furnishing the District with water for the above enumerated purposes and Rosemary and its associates with sufficient water to meet all their requirements.

In our opinion the lease contract existing between the District and Rosemary is clearly in the public interest. The taxpayers of the District have contributed nothing towards the construction of the leased filter plant or for any equipment used in connection therewith. And yet, under the terms of the agreement as amended, the District is able to obtain sufficient filtered water to meet all the purposes for which it was created at the cost of filtering plus a nominal rent of one dollar per year, without making any investment in a filter plant. The taxpayers and consumers of the District are further protected, in that, in the event the cost of filtering water should exceed the maximum amount fixed in the agreement which Rosemary and associates may be required to pay for their pro rata part of the water filtered in the plant, the District may cancel the lease. On the other hand, if the District shall fail to pay the rent or breach any of the conditions assumed and imposed upon it to be performed, Rosemary may terminate the lease. We find nothing in the arrangement between the District and Rosemary that constitutes an unlawful discrimination between customers of the District who are in similar circumstances.

Under the terms of the contracts between Rosemary and the District, the District has never been given the right to any water filtered in the leased plant for industrial purposes, except out of surplus water after the requirements of Rosemary and associates have been supplied. Of course in the disposal of any water the District may have for sale for industrial purposes, it must serve alike its industrial users who are "similarly circumstanced." 43 Am. Jur. 599. But the plaintiff and Rosemary and associates, in our opinion, are not "similarly circumstanced."

It is a matter of common knowledge that large amounts of water for industrial purposes are not usually available from municipally owned water plants. Ordinarily water for industrial purposes is provided by the particular industry requiring it or by special contract with the municipality where such municipality has an adequate supply.

We think the contracts under consideration are valid and enforceable, and that his Honor's conclusions of law are supported by his findings of fact.

The ruling of the court below will be upheld.

Affirmed.

ERNEST VICTOR JOHNSON, JR., PATTIE RUTH JOHNSON FAULKNER, JOSH H. GROCE, ATTORNEY FOR STANDARD ACCIDENT INSURANCE COMPANY, AND STANDARD ACCIDENT INSURANCE COMPANY, v. P. L. SALSBURY, SR.

(Filed 11 October, 1950.)

1. Pleadings § 15—

A demurrer tests the sufficiency of the complaint to state a cause of action, admitting for this purpose the truth of its allegations of fact.

2. Wills § 31—

A will should not be construed so as to nullify the instrument or any part of it, and therefore the courts will adopt that construction which will uphold the will in all its parts if such course is consistent with established rules of law and the intention of testator.

3. Same: Wills § 33d—Bequest to grandchildren with direction that son be appointed guardian with power of sale held bequest to son as trustee.

Testatrix bequeathed certain property to her grandchildren with subsequent provisions that it was her will and desire that her son be appointed their guardian and that the guardian should hold and manage the property for the grandchildren with power to sell, convey or exchange the securities. *Held:* Since testatrix could not appoint a testamentary guardian for her grandchildren, G.S. 33-2, the provisions will be interpreted as bequeathing the property to testatrix' son as trustee for testatrix' grandchildren, in order that each provision of the instrument be given effect consistent with testatrix' intention.

4. Courts § 14: Trusts § 1—

The validity of a testamentary trust of personalty is governed by the law of the state of testator's domicile at the time of his death.

5. Courts § 14: Trusts § 14a—

A testamentary trust in personalty will be administered in accordance with the laws of the state of the testator's domicile at the time of his death unless the will affirmatively show an intention that the trust be administered elsewhere, even though the trustee and the beneficiary be residents of another state.

6. Trusts § 14a—

A trustee can properly sell trust property if power of sale is conferred upon him by the instrument creating the trust.

7. Same—

The execution of a power will be attributed to a valid authority even though the trustee profess to act under an authority which is defective, and therefore where the trust instrument gives the trustee valid power of sale, the trustee's sale of the trust property will be attributed to this authority, rendering it unnecessary to determine the validity of a decree authorizing the trustee to sell.

8. Evidence § 8—

Our courts will take judicial notice of the laws of another state, and therefore will judicially know the jurisdiction of a court of another state which has rendered a decree involved in the litigation here. G.S. 8-4.

9. Courts § 14: Trusts § 20b—

A decree entered in another state by a court therein having general equitable jurisdiction, terminating a trust and directing the trustee to divide the property among the beneficiaries, is effective here when the trustees and beneficiaries were parties to the suit in such other court, even though the trust is created by a North Carolina instrument, since equity acts *in personam* and its decree is binding upon all parties in interest.

APPEAL by plaintiffs from *Carr, J.*, at March Term, 1950, of HALIFAX.

This is an appeal from a decision upon a demurrer, and necessitates an analysis of the complaint.

The complaint covers 30 pages of the record. Stripped of nonfactual averments, it alleges these things:

1. Pattie T. Johnson, a resident of Halifax County, North Carolina, died testate 17 October, 1931, leaving two sons and a daughter, to wit, E. V. Johnson, Estelle J. Salsbury, and Hugh Johnson, all of whom were married and had minor children. E. V. Johnson had four children living at the death of his mother, and no other children were born to him thereafter. These children were as follows: (a) Estelle Johnson, who subsequently married George E. Bean and is sometimes designated herein as Estelle Johnson Bean or Estelle J. Bean; (b) Richard M. Johnson; (c) Ernest Victor Johnson, Jr., one of the plaintiffs, who is sometimes referred to herein as E. V. Johnson, Jr.; and (d) Pattie Ruth Johnson, one of the plaintiffs, who subsequently married one Faulkner and is sometimes designated herein as Pattie May Johnson or as Pattie Ruth Johnson Faulkner. The last two named children were infants of tender years at the death of Pattie T. Johnson.

2. Shortly after her death the will of Pattie T. Johnson was admitted to probate in the Superior Court of Halifax County, North Carolina, and P. L. Salsbury qualified as administrator with the will annexed.

3. Item seven of the will of Pattie T. Johnson was as follows: "I give, devise, and bequeath one-third of all the rest and residue of my estate, both real and personal wheresoever situate, to Estelle Johnson, Richard M. Johnson, E. V. Johnson, Jr., and Pattie May Johnson, children of my beloved son, E. V. Johnson, share and share alike; and if prior or subsequent to my death there should be born to E. V. Johnson and his wife, a child or other children, then such child or children hereafter born shall receive a child's part each of this one-third of the residue of my estate, just as if said child or children were now living and named in this

will, and this devise shall be equally divided among the children of E. V. Johnson."

4. Item ten of the will of Pattie T. Johnson was as follows: "It is my will and desire that E. V. Johnson, my beloved son, shall be appointed guardian of Estelle Johnson, Richard M. Johnson, E. V. Johnson, Jr., and Pattie May Johnson, and any other child or children that are born to E. V. Johnson and wife, should I die before they arrive at the age of twenty-one years, and the said E. V. Johnson is to act as guardian for said children in handling whatever estate I leave to them without bond." Items eleven and twelve contained similar provisions relative to Estelle J. Salsbury and Hugh Johnson and their respective children.

5. Item thirteen of the will of Pattie T. Johnson was as follows: "I hereby give to E. V. Johnson, Estelle J. Salsbury and Hugh Johnson, Guardians above named, power and authority, over any and all property coming into their hands as Guardians, to hold, manage, exchange, convert, sell, convey, lease, improve, invest, reinvest and keep the same invested in such stocks, bonds or other securities and properties as shall, from time to time, appear to them for the best interest of their respective wards, and to exercise any of the powers hereinbefore vested in them as Guardians without an order of Court."

6. On 3 September, 1934, E. V. Johnson, who resided with his immediate family in Brown County, Texas, qualified as guardian of the estate of his minor children, Ernest Victor Johnson, Jr., and Pattie Ruth Johnson before the County Court of Brown County, Texas. The plaintiff, Standard Accident Insurance Company, a Michigan corporation, was surety on his guardianship bonds.

7. On 15 October, 1934, P. L. Salsbury, Administrator with the will annexed of Pattie T. Johnson, filed his final account for settlement and brought a special proceeding in the Superior Court of Halifax County, North Carolina, in term time against all the devisees and legatees named in the will of Pattie T. Johnson under the provisions of the statute embodied in G.S. 28-165, setting forth the facts and praying for a final account and settlement of the estate committed to his charge. Final judgment was rendered in such proceeding by his Honor, William A. Devin, the presiding judge, at the March Term, 1935, of the Superior Court of Halifax County, North Carolina, directing the Administrator with the will annexed to transfer the share in the residuary estate described in item seven of the will "to E. V. Johnson, as Guardian and trustee without bond under the last will and testament of Pattie T. Johnson with all the rights and powers set forth in Items 10 and 13 of said will, for the use and benefit of Estelle J. Bean, Richard M. Johnson, E. V. Johnson, Jr., and Pattie Ruth Johnson, and any other child, or children that may be hereafter born to said E. V. Johnson."

8. The share of the residuary estate described in item seven of the will of Pattie T. Johnson included 134 shares of the common stock of the Carolina Telephone and Telegraph Company, a corporation doing business at Tarboro, North Carolina. On 4 April, 1935, P. L. Salsbury, as Administrator with the will annexed of Pattie T. Johnson, caused this common stock to be transferred on the books of the corporation to "E. V. Johnson, guardian and trustee under Item 10 of the last will and testament of Pattie T. Johnson, for the use and benefit of Estelle Johnson Bean, Richard M. Johnson, E. V. Johnson, Jr., Pattie Ruth Johnson, and any other child or children that may be hereafter born to said E. V. Johnson." He did not deliver the new stock certificates to E. V. Johnson, but deposited them with the Clerk of the Superior Court of Halifax County, North Carolina.

9. On or about 20 July, 1935, E. V. Johnson filed a petition before the Clerk of the Superior Court of Halifax County, North Carolina, under the provisions of the statutes codified as article 7 of chapter 33 of the General Statutes, showing duly authenticated copies of his appointment as guardian of the estates of his minor children, Ernest Victor Johnson, Jr., and Pattie Ruth Johnson, by the County Court of Brown County, Texas, and of his bond given such court as such guardian, and praying for the removal to Brown County, Texas, of the estates of his minor children in the 134 shares of common stock of the Carolina Telephone and Telegraph Company represented by the stock certificates deposited with the Clerk by the Administrator with the will annexed. The Clerk of the Superior Court of Halifax County, North Carolina, thereupon "ordered that the 134 shares of the common stock of the Carolina Telephone and Telegraph Company . . . now being held in this office be forwarded to E. V. Johnson, guardian and trustee, Item 10 of the last will and testament of Pattie T. Johnson" in Brown County, Texas. Shortly thereafter the certificates representing the 134 shares of stock were delivered to E. V. Johnson by mail.

10. On 29 May, 1936, a decree was entered in Case No. 7,154 in the District Court of Brown County, Texas, under which 68 of the shares of stock of the Carolina Telephone and Telegraph Company were "partitioned by the Court," and the remaining 66 shares "were set aside and vested in" E. V. Johnson "as trustee for the use and benefit of Estelle J. Bean, Richard M. Johnson, E. V. Johnson, Jr., and Pattie Ruth Johnson, and any other child or children that may be born to the said E. V. Johnson until the further order of the court." The "said shares were set aside to him as such trustee by reason of a provision in the will of Pattie T. Johnson."

11. On 2 November, 1939, "E. V. Johnson, guardian of the estates of E. V. Johnson, Jr., and Pattie Ruth Johnson, minors, and trustee for the

use and benefit of Estelle J. Bean, Richard M. Johnson, E. V. Johnson, Jr., and Pattie Ruth Johnson and any other child or children that may hereafter be born to the said E. V. Johnson," brought an action against Estelle J. Bean, and her husband, George E. Bean, and Richard M. Johnson in the District Court of Brown County, Texas, for the avowed purpose of obtaining a decree terminating the "trusteeship" and partitioning the remaining 66 shares of stock of the Carolina Telephone and Telegraph Company among Estelle J. Bean, Richard M. Johnson, E. V. Johnson, Jr., and Pattie Ruth Johnson in equal proportions. His complaint alleged that he held the 66 shares of stock "as trustee for the use and benefit of Estelle J. Bean, Richard M. Johnson, E. V. Johnson, Jr., and Pattie Ruth Johnson, and any other child or children that may be born to the said E. V. Johnson" under a provision in the will of Pattie T. Johnson, and under the decree entered by the District Court of Brown County, Texas, on 29 May, 1936, in case No. 7,154; that it had become a physical impossibility for any other child or children to be born to him or his wife; that in consequence there was no necessity for maintaining the trusteeship; and that his four children were entitled to the remaining stock in equal proportions. On the trial, the District Court of Brown County, Texas, made specific findings of fact sustaining the allegations of the complaint, and entered a judgment terminating the trust and ordering E. V. Johnson to transfer 16½ shares of the stock to each of his four children, or, in the alternative, to sell the stock and divide the proceeds equally among such children. The judgment expressly provided that "E. V. Johnson, as guardian of the estate of E. V. Johnson, Jr., and Pattie Ruth Johnson, retain in his possession, as such guardian, the shares or money herein allotted . . . to said minors."

12. On 11 December, 1939, E. V. Johnson filed with the Carolina Telephone and Telegraph Company certified copies of the complaint and decree mentioned in the preceding paragraph. At the same time he sold, and caused to be transferred to the defendant on the books of the company 30 shares of the 66 shares of stock held by him as "guardian and trustee under Item 10 of the last will and testament of Pattie T. Johnson, for the use and benefit of Estelle Johnson Bean, Richard M. Johnson, E. V. Johnson, Jr., Pattie Ruth Johnson, and any other child or children that may be hereafter born to said E. V. Johnson." On 27 May, 1940, E. V. Johnson transferred 18 of the 36 shares still retained by him in equal proportions to Estelle J. Bean and Richard M. Johnson, and on 3 December, 1940, he sold and caused to be transferred to the defendant on the books of the issuing corporation the remaining 18 shares.

13. When the defendant purchased the 48 shares of stock from E. V. Johnson, he knew that the plaintiffs, Ernest Victor Johnson, Jr., and Pattie Ruth Johnson Faulkner, were infants, and that the stock was

listed in the records of the company and the covering certificates as set out in the next preceding paragraph.

14. E. V. Johnson died in 1942 in a state of complete insolvency without having accounted to the court, or to the plaintiffs, Ernest Victor Johnson, Jr., and Pattie Ruth Johnson Faulkner, for any of the proceeds of the 48 shares of stock.

15. The plaintiffs, Ernest Victor Johnson, Jr., and Pattie Ruth Johnson Faulkner, attained their majorities subsequent to all the events set out above, discovered the loss which they had suffered, and repudiated the sale of the 48 shares of stock to the defendant. They thereupon made claim against the plaintiff, Standard Accident Insurance Company, as surety on the guardianship bonds given by E. V. Johnson, and on or about 14 December, 1946, such plaintiff settled the claim by paying $7,500.00 to them. They thereupon released the Standard Accident Insurance Company from any further liability to them on the guardianship bonds, and assigned to the plaintiff Josh H. Groce, attorney for the Standard Accident Insurance Company, a specified interest in all causes of action which they might have against the defendant on account of the handling of their "affairs by E. V. Johnson . . . as guardian, or in any other purported capacity." Shortly thereafter this action was brought. The stock was worth $200.00 per share at the time of its sale, and a like sum when the action was begun.

The plaintiffs concluded as a matter of law on the basis of the foregoing allegations of fact that the 48 shares of stock were sold to defendant by E. V. Johnson without lawful authority, and prayed judgment as follows:

1. That defendant be required to deliver to plaintiffs 33 shares of the common stock of Carolina Telephone and Telegraph Company, or

2. That in the alternative plaintiffs have and recover of defendant the value of said 33 shares of stock to be determined by the court.

3. That plaintiffs have and recover of defendant all dividends which have accrued on said 33 shares of stock since its transfer to defendant.

The defendant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. G.S. 1-127. The court entered a judgment sustaining the demurrer, and the plaintiffs excepted and appealed, assigning such judgment as error.

A. J. Fletcher and F. T. Dupree, Jr., for the plaintiffs, appellants.

Leggett & Fountain for the defendant, appellee.

ERVIN, J. The demurrer admits the facts alleged in the complaint to be true, and asserts as a legal proposition that the admitted facts do not reveal the commission of an actionable wrong by defendant against plain-

tiffs. It is self-evident that the defendant has done the plaintiffs no actionable injury by buying the stock if E. V. Johnson had authority to sell it to him. For this reason, the appeal presents this single query: When the factual averments of the complaint are accepted as true, do they show that E. V. Johnson had no lawful power to sell the stock to the defendant?

The plaintiffs contend that this question must be answered in the affirmative. They assert that the will of the testatrix did not vest any power of sale in E. V. Johnson for alternative reasons. They say primarily that this is so because items ten and thirteen were at most an unlawful attempt by a grandparent to appoint a testamentary guardian for grandchildren. They assert secondarily that item ten was the expression of a mere hope or request of the testatrix that E. V. Johnson would qualify as guardian for his children before a proper court in the event she died before such children arrived at the age of twenty-one years, and that such court would permit him to exercise the broad powers enumerated in item thirteen in his capacity as such guardian. They conclude that E. V. Johnson had no authority whatever to handle the stock of the plaintiffs, Ernest Victor Johnson, Jr., and Pattie Ruth Johnson Faulkner, except that derived from his appointment as guardian of their estate by the county court of Brown County, Texas; that in consequence he had no power to sell the shares of stock in controversy unless he was authorized so to do by a court of competent jurisdiction; and that the decree of the District Court of Brown County, Texas, purporting to sanction a sale of such stock, was void because the District Court had no power under Texas law to make such decree.

It appears, therefore, that the first task confronting us on the appeal is that of interpreting the will of the testatrix. In construing a will, courts do not search for a meaning which will nullify the instrument or any part of it. The converse is true. They adopt a construction which will uphold the will in all its parts, if such course is consistent with established rules of law and the intention of the testator. *Tillett v. Nixon,* 180 N.C. 195, 104 S.E. 352.

The statute codified as G.S. 33-2 does not empower a grandparent to appoint a testamentary guardian for a grandchild. *Williamson v. Jordan,* 45 N.C. 46. For this reason, items ten and thirteen of the will of Pattie T. Johnson are not to be interpreted as an ineffectual attempt by the testatrix to appoint a testamentary guardian for her grandchildren if her words are reasonably susceptible of a construction which will give effect to the provisions of the items. Moreover, item ten is not to be interpreted to express a mere hope or request on the part of the testatrix that her son, E. V. Johnson, should qualify as guardian of her grandchildren before an appropriate court, unless her language will admit of no

other reasonable construction. This is true because such interpretation would render item thirteen wholly meaningless.

A technical draftsman would undoubtedly have used apter words to express the purpose of the testatrix. Nevertheless, we think that the language employed in items seven, ten and thirteen can be reasonably interpreted to express an intention on the part of the testatrix to invest her son, E. V. Johnson, with the legal title to one-third of her residuary estate in trust for the use and benefit of his children. Manifestly, this construction must be adopted, for it gives effect to every word and phrase of the testatrix without offending any rule of law. Besides, it is sanctioned by a pertinent precedent. *Camp v. Pittman,* 90 N.C. 615.

The validity of a testamentary trust of personalty is governed by the law of the state of the testator's domicile at the time of his death. *Cross v. United States Trust Co.,* 131 N.Y. 330, 30 N.E. 125, 15 L.R.A. 606, 27 Am. St. Rep. 597; 15 C.J.S., Conflict of Laws, section 18. Furthermore, a trust of personal property created by will is administered by the trustee according to the law of the state of the testator's domicile at the time of his death unless the will affirmatively shows an intention that the trust should be administered elsewhere. Am. Law Inst. Restatement, Conflict of Laws, section 298. See, also, in this connection: *Hoglan v. Moore,* 219 Ala. 497, 122 So. 824; *Fernald v. First Church of Christ,* 77 N.H. 108, 88 A. 705; *Rosenbaum v. Garrett,* 57 N. J. Eq. 186, 41 A. 252; Beale: The Conflict of Laws, section 102-2. This is so even though the trustee (*Smith v. Central Trust Co.,* 154 N.Y. 333, 48 N.E. 553; *Lozier v. Lozier,* 99 Ohio St. 254, 124 N.E. 167), or the beneficiary is a resident of another state. *Merritt v. Corties,* 24 N.Y.S. 561.

The will of Pattie T. Johnson does not manifest any intention that the trust created thereby should be administered outside of North Carolina, where the testatrix was domiciled at the time of her death. When this will of a resident of North Carolina was admitted to probate in North Carolina, it became a North Carolina instrument, creating a North Carolina trust, to be administered according to North Carolina law.

It cannot be gainsaid that the language of item thirteen was sufficient in form to vest in E. V. Johnson as testamentary trustee an unrestricted power to sell the trust property. This being true, he had lawful authority under the will to sell the shares of stock in suit to the defendant, for it is established in this jurisdiction that a trustee can properly sell trust property if a power of sale is conferred upon him by the instrument creating the trust. *Ripley v. Armstrong,* 159 N.C. 158, 74 S.E. 961.

Since the sale was authorized by the will creating the trust, its validity was not impaired in any degree by the fact that the trustee professed to make it under the authority of the decree of the District Court of Brown

County, Texas, even if it be taken for granted that such decree was void because the District Court had no jurisdiction under Texas law to render it. The rule governing this aspect of the case was rightly applied by the Maryland Court of Appeals in *Preston v. Safe Deposit and Trust Company,* 116 Md. 211, 81 A. 523, Ann. Cas. 1913 C, 975, and is accurately stated in this headnote to that decision: "Where one having various capacities executes a delegated authority in one of them, the law will attribute the act to the proper authority, though he does not profess to exercise that authority in doing the particular act, so that the fact that a testamentary trustee sold the trust property under a decree of court based upon statutory authority, which was erroneous because the statute did not authorize sales made in the future as it appeared advantageous, did not prevent the trustee from making good title, where he in fact had an implied power of sale under the will, but did not purport to act thereunder."

These conclusions necessitate an affirmance of the judgment. Nevertheless, we deem it not amiss to make certain observations concerning the contention of the plaintiffs that the decree of the District Court was void.

The plaintiffs advance these arguments to support their position in this respect: (1) That E. V. Johnson was merely the guardian of the estates of the plaintiffs, Ernest Victor Johnson, Jr., and Pattie Ruth Johnson Faulkner, under appointment of the County Court of Brown County, Texas; (2) that the decree of the District Court of Brown County, Texas, was entered in a suit instituted in such court by E. V. Johnson as guardian to sell the property of his wards; and (3) that the District Court had no power to render its decree because Texas law confers exclusive original jurisdiction of suits by guardians to sell the property of their wards upon county courts.

It has been pointed out that E. V. Johnson took title to the shares of stock of the Carolina Telephone and Telegraph Company as trustee under the will of Pattie T. Johnson. The facts that the Administrator with the will annexed deposited the certificates representing such stock with the Clerk of the Superior Court of Halifax County instead of mailing them to E. V. Johnson, and that such Clerk required E. V. Johnson to qualify as guardian of the estates of his two minor children in Texas as a condition precedent to obtaining such certificates did not alter the expressed intention of the testatrix, or deprive E. V. Johnson of his character and powers as trustee under the will. Subsequent to the removal of the stock certificates to Texas, E. V. Johnson professed to manage the stock as trustee under the will, and the District Court of Brown County, Texas, adjudged that he held it in that capacity. In the light of these circumstances, the assertion of the plaintiffs that E. V. Johnson handled the stock as a mere guardian is clearly insupportable.

The second and third arguments of the plaintiffs on this aspect of the litigation are equally as untenable. The decree under consideration was rendered by the District Court sitting as a court of equity in a suit to terminate the trust and divide the trust property among the beneficiaries. It was well devised to effect those purposes. See in this connection: 54 Am. Jur., Trusts, section 78.

The statute codified as G.S. 8-4 prescribes that "when any question shall arise as to the law of the United States, or of any other state or territory of the United States, or of the District of Columbia, or of any foreign country, the court shall take notice of such law in the same manner as if the question arose under the law of this State." In consequence of this enactment, we judicially know that the District Court of Brown County, Texas, is a court of general jurisdiction and that it has power under Article V, Section 8, of the Constitution of Texas and the statutes embodied in Chapter 3 of Title 40 of Vernon's Texas Statutes to entertain and determine a suit to terminate a trust and divide the trust property among the beneficiaries of the trust.

The trustee and the beneficiaries of the trust created by the will of Pattie T. Johnson resided in Texas, and were parties to the suit in the District Court of Brown County. Since equity acts *in personam*, the decree terminating the trust and directing E. V. Johnson to partition the trust property among the beneficiaries in kind or by sale was binding upon all parties in interest. 15 C.J., Courts, sections 129, 130; 30 C.J.S., Equity, section 81; 65 C.J., Trusts, sections 790, 939. Hence, the sale of the stock was authorized by the decree as well as by the will.

The judgment sustaining the demurrer must be

Affirmed.

W. C. BOSTIC, SR. AND WIFE MRS. W. C. BOSTIC, SR., DR. W. C. BOSTIC, JR., AND WIFE, MRS. W. C. BOSTIC, JR., MRS. MARGARET BOSTIC MORRIS AND HUSBAND W. L. MORRIS v. COWAN BLANTON AND WIFE MRS. COWAN BLANTON.

(Filed 11 October, 1950.)

1. Boundaries § 5h—

Where the owner of land sells successively a part thereof to separate parties, the calls in the secondly executed deed cannot be used to locate a call in the deed first executed.

2. Boundaries § 3b—

A call in a deed specified the course, with additional direction that it ran with the center of a wall 115.5 feet to a stake. The wall exists only for the last 50 feet of the distance. The wall is not plumb with the course

specified, so that while its end on the corner coincides with the corner, its other end encroaches on the course about a foot. *Held:* The course as specified controls until reaching the wall, at which point the artificial object controls, resulting in a one foot offset in the line.

3. Adverse Possession §§ 8, 9b—

Where there is a lappage in deeds to contiguous tracts from a common source, the grantee in the deed first executed by the common grantor has the better title, and the constructive possession of the lappage is in him and those claiming under him by *mesne* conveyances, there being no question of actual adverse possession of the lappage by either party.

4. Boundaries § 3c—

The rule permitting the reversal of a call in a deed for the purpose of ascertaining a corner can have no application, even in regard to the senior title of one of two contiguous tracts derived from a common grantor, when the lines and corners may be ascertained by following the calls in their regular order as set forth in the senior deed.

APPEAL by defendants from *Rousseau, J.*, February Term, 1950, RUTHERFORD. Affirmed.

Civil action to restrain a trespass and compel the removal of a wall being built by defendants on the land of the plaintiffs.

A restraining order was issued and later dissolved by Moore, J. When the cause came on for hearing in the court below, counsel waived trial by jury and agreed that the court should find the facts and render judgment thereon.

The court, after hearing the evidence, found the facts which are in substance as follows:

Susan Biggerstaff owned a tract of land in Forest City on the west side of Depot Street which included the lot now owned by plaintiffs and the contiguous lot to the south now owned by defendants. These lots faced on Depot Street. Each supposedly had a frontage of twenty feet and extended back between parallel lines to the property line of Margaret Young. However, there was a brick store on the front end of each lot with a common or party wall in the center. This wall, instead of being built along the dividing line, as it was supposed to be, angled to the north so that the rear end of the wall (50 feet from Depot Street) was about one foot over on the lot now owned by plaintiffs. If the wall was extended in a direct line to the Young property, it would, at that point, be 3½ feet over on the Bostic property according to the calls of plaintiffs' deeds. The northern lot, now owned by plaintiffs, is referred to as the first building and the southern lot, now owned by defendants, as the second building.

Susan Biggerstaff died in 1900. Sometime after her death her surviving husband and heirs at law conveyed the first building lot by deed

to P. N. Long. Thereafter, after the death of the surviving husband, said heirs conveyed the second building lot to J. F. Weathers. Plaintiffs, by *mesne* conveyances, acquired and now own the first building lot and the defendants, by *mesne* conveyances, acquired and now own the second building lot. The description contained in the several deeds in the chain of title of plaintiffs contains a call starting at a corner in the Margaret Young line 20 feet from the southern line of the public alley, point "C" on the map, as follows: "Thence south 74 east running with center of wall of the first and second building 115.5 feet to a stake in edge of sidewalk." There is no building wall at the beginning of this call.

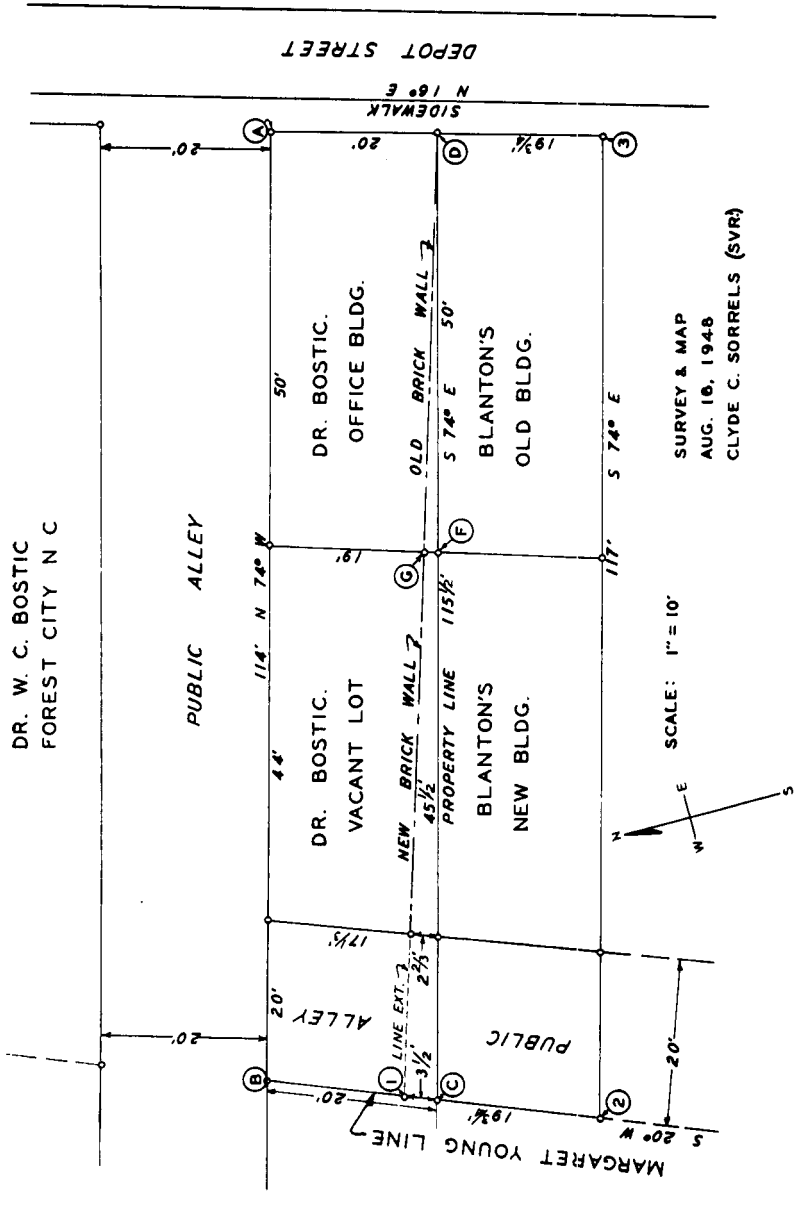
It also contains the following stipulation: "It is understood and agreed between the parties to these presents that the said wall between the first and second building described above shall be a party wall and owned jointly between the owners of the first and second building."

The deeds in the chain of title of defendants contain the following call: "Beginning in the edge of a sidewalk on Depot Street, P. N. Long's corner, and runs North 74 deg. West with P. N. Long's line with the middle of the wall of the first and second building, 115.5 feet to Margaret Young's line." They also contain a party wall stipulation similar to that in deed to plaintiffs.

In 1948 the defendants undertook to extend the party wall in a direct line to the eastern boundary of the public alley across the rear end of the two lots. This new wall is within the bounds of the calls and distances contained in the deeds of the plaintiffs and plaintiffs allege that it is actually located on their property. They notified defendants to cease construction of said wall. Defendants temporarily stopped work thereon but after some negotiations resumed the construction of the wall. Plaintiffs thereupon applied for and obtained the restraining order issued in this cause.

There is no evidence of actual physical occupancy of the disputed land other than such as is presumed by the possession and occupancy of a part of the land embraced in the respective deeds.

The court, having found the facts in more detail than here stated, concluded that plaintiffs are the owners of the land described in their deeds as set out in finding of fact number one; and that the new building being constructed by the defendants encroaches upon the lands of the plaintiffs. It thereupon adjudged that plaintiffs are the owners of the lands described in the deeds to them, but that they are estopped to claim any part of the property embraced therein south of the old wall which was on the premises at the time the Biggerstaffs conveyed the same. The defendants excepted and appealed.


DEPOT STREET
SIDEWALK
N 16° E
DR. W. C. BOSTIC
FOREST CITY N C
PUBLIC ALLEY
N 74° W
114'
20'
50'
DR. BOSTIC.
OFFICE BLDG.
OLD BRICK WALL
S 74° E
50'
BLANTON'S
OLD BLDG.
S 74° E
117'
SURVEY & MAP
AUG. 16, 1948
CLYDE C. SORRELS (SVR.)
SCALE: 1" = 10'
44'
DR. BOSTIC.
VACANT LOT
NEW BRICK WALL
45½'
PROPERTY LINE
115½'
BLANTON'S
NEW BLDG.
17½'
2½'
ALLEY
20'
LINE EXT.
3½'
PUBLIC
19¾'
20'
S 20° W
MARGARET YOUNG LINE

Hamrick & Jones for plaintiff appellees.

Oscar J. Mooneyham and J. S. Dockery for defendant appellants.

BARNHILL, J. The decisive question here involved is this: What is the true dividing line between the property of the plaintiffs and the property of the defendants?

It is apparent from the judgment entered the court below concluded that this dividing line as now constituted begins at a stake in the Young line 20 feet south 20 degrees west of the point of intersection of the Young line and the southern line of a public alley (point C on the map) and runs thence south 74 degrees east approximately 45½ feet to a point exactly opposite the rear end of the party wall (point F on the map), thence northerly about one foot to the center of the party wall (point G), thence in a southeasterly direction with the center of said wall to a stake on Depot Street (point D), an admitted common corner. We are inclined to the view that this is the correct conclusion and that the judgment based thereon should be sustained.

The parties claim through a common source and the plaintiffs possess the superior record or paper title. These are determinative facts which must be kept in mind in the solution of the question posed.

Resort may not be had to a junior conveyance for the purpose of locating a call in a senior deed. *Cornelison v. Hammond,* 224 N.C. 757, 32 S.E. 2d 326; *Thomas v. Hipp,* 223 N.C. 515, 27 S.E. 2d 528; *Belhaven v. Hodges,* 226 N.C. 485, 39 S.E. 2d 366. We must direct our attention solely to the deeds in the Bostic chain of title to ascertain the lines in his deeds and the property embraced therein.

The description as therein contained does not begin at the common corner. It begins at the intersection of the western line of Depot Street and the southern line of the public alley (point A). It runs thence north 74 west 114 feet to the Young line (point B), thence south 20 degrees west 20 feet to a stake (point C), thence south 74 east. So far there is no call for a natural or artificial object that would alter or vary these calls. They must be accepted as the proper bounds of plaintiffs' property to the point where the last call—south 74 east—comes in conflict with the call for the center of the brick wall. The "artificial object" call, the brick wall, is controlling to the extent of its length.

There is no evidence of actual adverse possession by defendants of the disputed land between the points G-1-C-F. Therefore, the plaintiffs and those under whom they claim have in law been in possession of this property since the unity of possession was severed by the Biggerstaffs more than 20 years ago.

Constructive possession follows the superior title. *Ownbey v. Parkway Properties, Inc.,* 222 N.C. 54, 21 S.E. 2d 900. He who has the better

title has constructive possession of all land within the bounds of his deed which is not in the actual adverse possession of another. *Wallin v. Rice, ante,* p. 371. This rule applies even when both parties claim under color of title. *Whiteheart v. Grubbs, ante,* 236.

Defendants contend, however, that their line begins at the common corner on Depot Street, Long's—now plaintiffs'—corner (point D) and runs thence with Long's line with the middle of the wall of the first and second buildings 115.5 feet to Margaret Young's line; that under this call, when the rear end of the brick wall is reached, the call should be extended in a direct line to the Young property at point 1 on the map; and that thus the common corner in the Young property is established.

If the calls in the deeds of defendants alone were involved, this might be true. We may, therefore, concede without deciding, that the dividing-line call in the defendants' deeds runs from point D on Depot Street to point 1 in the Young line as contended by them. Even so, this merely creates a lappage, and where the title deeds of two rival claimants to land lap upon each other, and neither is in the actual exclusive possession of any of the land covered by both deeds—that is, the lappage—the law adjudges the possession of the lappage to be in the one who has the better title. *Whiteheart v. Grubbs, supra.* Furthermore, to follow this procedure would constitute a reversal of the call in plaintiffs' deeds for the purpose of ascertaining their corner in the Young line. The rule prohibits such procedure even when following the lines of the senior title so long as the lines and corners may be ascertained by following the calls in the senior deed in their regular order. *Belhaven v. Hodges, supra; Cornelison v. Hammond, supra.*

There is no need to reverse any call in plaintiffs' deeds in order to fix their corner in the Young line. The beginning corner at the intersection of Depot Street and the public alley (point A) and the next corner at the intersection of the alley and the Young line (point B) are not in dispute. They may easily be ascertained by following the calls of the deeds. Then the common corner in the Young line is ascertained and fixed by continuing along the Young line south 20 west 20 feet (point C).

Neither a resort to a reversal of lines nor to a junior conveyance will be permitted to vary this result.

It is asserted, however, that the judgment of the court below breaks the course of the dividing-line call and creates an offset therein, whether the line be run by beginning at point D or point C. This is quite true. But the offset is created by operation of law as a result of the peculiar circumstances of this case. There is no brick wall from C to F. Under the law, plaintiffs have been in possession of the land described in their deeds up to this line since the unity of possession was severed more than

20 years ago. The brick wall is an artificial boundary at all times recognized by plaintiffs. They have never claimed title to and have never possessed the land to the south of this wall. Their right of entry thereon, if any, is forever barred. Thus the line from F to G is closed and the offset is created.

For the reasons stated the judgment below is

Affirmed.

STATE v. CARRIE GREEN HENDRICK.

(Filed 11 October, 1950.)

1. Homicide § 3—

A murder which is perpetrated by means of poison is murder in the first degree. G.S. 14-17.

2. Homicide § 16—

In a prosecution for murder by means of poison, the burden is on the State to prove beyond a reasonable doubt that the deceased died from poison and that defendant administered the poison with criminal intent.

3. Criminal Law § 52a (1)—

Upon motion to nonsuit, the evidence is to be taken in the light most favorable to the State. G.S. 15-173.

4. Criminal Law § 52a (3)—

Circumstantial evidence must be so connected or related as to point unerringly to defendant's guilt and to exclude any other reasonable hypothesis in order to be sufficient to sustain conviction, and such evidence which is merely conjectural and speculative and which, though true, is consistent with innocence of the defendant, is insufficient to be submitted to the jury.

5. Same: Homicide §§ 20, 25—

While evidence of motive is competent to be considered by the jury as a circumstance tending to identify the accused as the perpetrator of the offense, such evidence alone is insufficient to sustain a conviction.

6. Homicide § 20—

Solicitude of deceased's widow immediately after his death as to insurance on his life of which she was beneficiary *is held* not a circumstance tending to show that she poisoned him under the facts of this case, it appearing that the policies were in a small amount, that the widow selected a casket for her husband, and that her interest in the insurance may have been a natural concern about funeral expenses and in entire harmony with the hypothesis of her innocence.

7. Same—

In order for a marriage certificate to be competent as a circumstance tending to show that defendant killed her husband in order to remarry, it must be shown that defendant and the person named in the certificate are the same.

8. Homicide § 25—

Evidence that defendant had an opportunity to commit the offense is a circumstance to be considered by the jury along with other evidence of guilt, but is insufficient standing alone to show that the act was done by defendant.

9. Criminal Law § 34e—

In order for defendant's silence in the face of an accusation of guilt to be competent as an implied admission, the record must show what the defendant said or did at the time.

10. Same—

Testimony not objected to tending to show that while suffering from arsenic poisoning, defendant's husband made a statement late at night some three hours prior to his death in the presence of his wife to the effect that she was the cause of his suffering, and that his wife made no reply but turned around and went downstairs, while a circumstance to be considered by the jury for what it is worth, *it is held* doubtful whether the attending circumstances called for a denial, and *held further*, its weight as an implied admission that she administered poison to him is rendered attenuate by the fact that at the time of the accusation there had been no suggestion that the husband was suffering from poisoning.

11. Criminal Law § 42f—

Where the State introduces testimony of a statement of the defendant to the sheriff, it thereby presents it as worthy of belief, and defendant is entitled to the benefit of any exculpatory statements contained therein, although the State is at liberty to show that the facts were otherwise.

12. Criminal Law § 33: Homicide § 25—

Testimony of a statement made by defendant to the sheriff which is entirely consistent with defendant's contention that she did not administer poison to her husband is not a confession of guilt and is insufficient evidence to overrule defendant's motion to nonsuit.

APPEAL by defendant from *Burgwyn, Special Judge,* at May Term, 1950, of WARREN.

Criminal prosecution upon a bill of indictment charging that defendant, with force and arms at and in Warren County, unlawfully, willfully and feloniously and of malice aforethought, did kill and murder one Henry Green against the form of the statute in such case made and provided, etc.

Upon arraignment, defendant pleaded not guilty.

Upon trial in Superior Court the State offered evidence tending to show substantially these facts: Henry Green, the deceased, and his wife, the defendant, Negroes, lived at his home about seven miles from Warrenton, N. C. He was taken sick on Monday, and died there at 3:15 a.m., on the next Saturday, 18 March, 1950.

The body of deceased was taken first to a funeral home and then to Duke Hospital at Durham, N. C., where an autopsy was performed, and toxicological examination made. Arsenic was found in the hair, urine, gastric or stomach content, and liver. From these findings there is expert opinion evidence that the death of deceased was caused by arsenic poisoning.

Dr. Taylor, the toxicologist, who made the examination, testified in substance that arsenic, found in the hair, indicates that deceased had arsenic in his system, maybe a large dose at some previous time, or maybe in small doses over a period of time; that arsenic in the hair is in inactive form; but that arsenic found in the urine, or gastric content, or liver, or kidneys is in active form.

Dr. Taylor also testified that "arsenic is a metal, and from it you get various types of preparations containing arsenic, which preparations are used commercially and medicinally"; that "arsenic compounds are used in various chemical preparations as medicine, to be prescribed for certain diseases"; and that "people can acquire arsenic poisoning in various and sundry ways: Through absorption in dealing with chemicals that contain arsenic; through food adulteration provided the food contains arsenic"; that "numerous persons die as a result of being accidentally poisoned by eating substances that contain arsenic."

The State offered testimony of other witnesses. Joe Green testified in pertinent part: "I live in Warrenton. Henry Green was my brother. He died . . . at his home . . . Nobody lived there with him but his wife, Carrie Lee Green, the defendant here in court in this case. I know what they say her name is now . . . I was with my brother in his last sickness from the time he got sick until the time he died. He was taken sick on a Monday and I went to his house on the following Wednesday. His wife was there. She went to the bed where he was and he said to her in my presence, 'Go back, my brother will do what is to be done; I don't want you to do anything else for you are the cause of my suffering like this.' He said that on Wednesday morning between 9 and 10 o'clock when I first got there . . . He asked would I take him to the doctor and I said 'Yes.' His wife said, 'You are not going to take him out of here'; he said that in the day of Thursday and I took him to the doctor that day. I stayed there until 1 o'clock on Thursday night . . . I went back on Friday and when I got there he was laying there on the bed suffering right bad, and he told me to do what I could for him. His wife was

present when he told me that. He said in her presence he did not want her to do anything else because she was the reason he was suffering in that shape, and he did not eat anything else she fixed. When he said that his wife did not say anything, just turned around and went downstairs. My brother lived about three or three and a half hours after he made that statement in her presence. After that Carrie Green did not come back in the room where my brother was at any time. As near as I can recall the next time I saw Carrie Green was at 2:15 on Friday night . . . At that time she was downstairs laying down on the daybed, and I . . . asked would she loan me the car, or let one of the boys take the car and go for my brother who lives at Hicks' Grove five miles from there, and she said, 'No, I will go,' and she went . . . My brother died at 3:15 and she come in about three minutes after that. I met Carrie in the door as she come in and told her he was dead. She said 'You don't tell me he is dead.' She commenced looking for her insurance papers, and that is all she said. She just said, 'Where are my insurance papers. I had them here looking at them yesterday.' That is all she said . . . when she asked about the insurance papers she was standing in the house looking in the drawer. I saw her when she found the papers. She put them in her pocketbook, and after the undertaker came, me and her came to town. She said she could not stay there, and brought the insurance policies with her—and we left about 8 o'clock for Henderson. Carrie Green had the insurance papers at that time. She said she was going to her sister's house."

The witness continued on cross-examination: ". . . On Thursday before my brother died . . . Carrie Green and I went with my brother to Dr. Peate's office here in Warrenton, and he was examined by Dr. Peate in his office. His wife was present at the time. The doctor said he had a bad stomach and gave him some medicine. On that same day, Thursday, Carrie Green had absolutely told me she was not going to take my brother to a doctor. I did not take my brother in an automobile to South Hill, Va., to see a root doctor on Friday. Carrie Green is the one that carried him and asked me to go to South Hill with her, but did not go to a root doctor. He asked me would I go with him, that he knew a fellow he thought would do him some good if he had a bad stomach . . . I don't know whether the person my brother went to see in South Hill on Friday was a doctor or not, but he just asked me to go with him. I know Carrie Green did come in the house on Saturday morning and start to looking for insurance papers when I told her Henry was dead. She did not faint and did not shed a tear, but just asked for the insurance policies."

Then under examination by the court, the witness continued: "That day after my brother died I went to Henderson with his wife; she said

she wanted me to go with her to see about his insurance. She went to see some insurance man . . . He just said the premium on the policy was due on Monday after he died and she thought my brother was behind in his premiums but it was not due until the following Monday."

Then on re-direct examination the witness testified: "I do not know who paid the premium just before my brother died. I paid the one that Saturday morning after he died . . . Carrie, a brother of mine and myself were present when I paid it."

Sheriff Roy V. Shearin testified: That in response to a message which he received, he went to the jail to see Carrie Green, and had a conversation with her, as follows: ". . . I asked her what did she send for me for and she said she wanted to talk to me and wanted to get a lawyer. I said 'What have you got to tell me?' She said, 'Henry Green brought some powder out to her house and put it on her icebox and told her not to bother it.' She said, 'I did not know what it was so I put it in the stove and burned it up.' That on Wednesday morning before Henry died on Saturday he brought something there in a bottle that looked like a vanilla bottle and said, 'Here is some soup flavoring to make soup taste better.' She said he started to pour some of it in her soup and she took it away from him and poured a teaspoon of it in his soup. I asked her if she did not know what she poured in his soup and she said she did not know what it was. I said, 'You are the only one who was cooking for Henry, don't you know you should not put anything in his soup you did not know what it was.' I asked Carrie why she did not put some of it in hers, and she said, 'If I had put it in mine I would have been where he is.' I told her, 'Then you would have been dead like he is.' I said to her, 'Don't you know you have told enough to convict you?' She said, 'I know I have and I am going to ask the mercy of the court.' "

The sheriff further testified, that defendant told him that she threw the bottle out in the yard; that possibly a week after the death of deceased, he took defendant to her home, where she searched for the bottle she had thrown in the yard; that Solicitor Tyler was with him; that she found a lot of medicine bottles, and one with "Poison" on it; that he, the sheriff, found some of the bottles, and Mr. Tyler found some; that she said that at the time of the death of her husband the bottles were in her home,—that she stood in her door and threw all the medicine in bottles out in the yard one at a time,—said after Henry died she took all of these bottles to the back door, stood in the back door or on the step, and threw them in the back yard, one at a time; and that he, the sheriff, put all the bottles in a bucket and brought them to jail.

Then on cross-examination the sheriff testified in pertinent part: "Q. You did testify Carrie Green told you her husband brought the bottles home? A. Yes, and it looked like a vanilla bottle. Q. And that he put

some of it in her soup? A. No, that he started to put some of it in her soup and she took it and put it in his. Q. And he drank the soup? A. Yes. . . . Q. She has told every time you discussed the case with her that she did not poison her husband? A. Yes, she told me that."

Following the testimony of the sheriff and of the jailer, as to the custody of them, bottles in a bucket were offered in evidence.

The assistant undertaker testified that he accompanied John Robinson to get the body; that Carrie Green was at the house where they got the body on Saturday morning at 4:30; that she told them the name of the deceased was Henry Green, her husband; that they brought the body away from there and brought it to Green Funeral Home; that later the same day he went to Dr. Peate to get a death certificate; that he signed it and he, the witness, took it to the Registrar in the county for the township; that he went to Dr. Peate because Carrie Green said he was his doctor, his last attending physician; and that he was at the funeral home when the defendant selected the casket for her husband.

The State also offered in evidence two policies of insurance on the life of Henry Green, one in the amount of $315.00 and the other in the amount of $180.00, in both of which Carrie Green is named as the beneficiary.

And J. S. Wrenn of Emporia, Va., testified that he is clerk of court, and keeper of records of marriage certificates, and performs marriage ceremonies; that he has the original marriage certificate, and a duplicate of it, issued to one Joe Hendrick and Carol Williams Green; and also the original, and an exact duplicate of the application for the marriage license; and that he performed the marriage ceremony on 31 March, 1950.

Defendant offered no evidence, but in apt time made, and renewed motions for judgment as of nonsuit, and for a directed verdict of not guilty as to the charge of murder in the first degree, or any other charge in the bill of indictment. The motions were overruled, and defendant in apt time excepted.

Verdict: Guilty of murder in the first degree with recommendation of life imprisonment.

Judgment: Confinement in the State Prison for the term of her natural life.

Defendant appeals therefrom to Supreme Court, and assigns error.

Attorney-General McMullan and Assistant Attorney-General Rhodes for the State.

Carl E. Gaddy, Jr., and Ray B. Brady for defendant, appellant.

WINBORNE, J. While the record on this appeal presents numerous assignments of error based on exceptions to the admission of evidence,

the one based upon the denial of defendant's motion for judgment as of nonsuit under G.S. 15-173 is considered determinative of the appeal. Hence, others will not be considered and treated.

A murder which is perpetrated by means of poison is deemed to be murder in the first degree. G.S. 14-17. And when the State undertakes to prosecute for such a murder, it has the burden of producing sufficient evidence to prove beyond a reasonable doubt (1) that the deceased died by virtue of a criminal act, and (2) that such criminal act was committed by the accused. *S. v. Palmer,* 230 N.C. 205, 52 S.E. 2d 908, and cases cited. In other words, the State, in such case, and in this case, has the burden of producing sufficient evidence to prove beyond a reasonable doubt that the deceased died from poison, administered with criminal intent by the person charged.

When the sufficiency of the evidence offered on the trial in Superior Court is challenged by motion for judgment as of nonsuit under G.S. 15-173, the evidence is to be taken in the light most favorable to the State.

Applying this rule to the evidence in the case in hand, it may be conceded that there is sufficient competent evidence to show, and from which the jury may find beyond a reasonable doubt that the deceased died of arsenic poisoning. But 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 it is insufficient to support a finding beyond a reasonable doubt that the deceased died from criminal act, or that the poison was administered by defendant with criminal intent, or to support a verdict against her on the charge contained in the bill of indictment. The evidence offered is conjectural and speculative. All that is shown may be true, and the defendant be innocent of the crime. Hence the motions of defendant for judgment as of nonsuit should have been sustained. *S. v. Coffey,* 228 N.C. 119, 44 S.E. 2d 886. Nevertheless, consideration of the various contentions of the State follows:

In passing upon the legal sufficiency of the evidence, when the State relies upon circumstantial evidence for a conviction of a felony, as in the present 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 to exclude any other reasonable hypothesis." *S. v. Stiwinter,* 211 N.C. 278, 189 S.E. 868; *S. v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472; *S. v. Coffey, supra; S. v. Minton,* 228 N.C. 518, 46 S.E. 2d 296; *S. v. Frye,* 229 N.C. 581, 50 S.E. 2d 895; *S. v. Fulk, ante,* 118, 59 S.E. 2d 617.

The State contends that defendant had two motives for killing her husband: (1) To obtain the proceeds of two policies of insurance on his

life in which she was named beneficiary, and (2) to be free to marry one Hendrick.

"Evidence of motive is relevant as a circumstance to identify the accused as the perpetrator of an offense, . . . but such evidence, standing alone, is not sufficient to carry a case to the jury, or to sustain a conviction," *Ervin, J.*, in *S. v. Palmer, supra.*

As to the first alleged motive: The State points to the testimony tending to show her early solicitude as to the insurance after the death of her husband. This, however, is in entire harmony with her innocence. The evidence tends to show that there was some uncertainty as to whether the premium was paid. Indeed, the brothers of deceased manifested some interest, even to the extent of going with her to see the insurance agent in Henderson, N. C., and of one of them paying a premium that did not become due until two days after the death of the insured. Moreover, the evidence shows that defendant selected the casket for her husband. And it is entirely reasonable that her interest in the insurance was a natural concern about funeral expenses.

And as to the second: While the record shows the testimony of the witness J. S. Wrenn, of Emporia, Virginia, that he performed a marriage ceremony between one Joe Hendrick and Carol Williams Green on 31 March, 1950, the record is void of any evidence that the Carol Williams Green who participated in that marriage ceremony is the defendant, who is referred to in the evidence as Carrie Green or Carrie Lee Green.

The State also contends that defendant only had an opportunity to administer the poison to her husband. Evidence of opportunity standing alone will not justify a finding that the act was done by defendant. It is only a circumstance to be considered along with other evidence in the case. Stansbury on North Carolina Law of Evidence, Sec. 84, page 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 857; and *S. v. Coffey, supra.*

Also it is contended by the State that the silence and conduct of defendant when her husband stated to her "You are the cause of my suffering like this," and later repeated, constitute an admission by adoption that she administered the poison from which he later died. In this connection the record discloses that the clause quoted is a part of a statement attributed to the husband on Wednesday morning after his brother arrived; but the record fails to show what his wife said or did at the time. The second statement, the record discloses, was made Friday night three or three and a half hours prior to the time of the husband's death at 3:15 Saturday morning. It must, therefore, have been near midnight. At that time the testimony is that the husband "said in her presence he did not want her to do anything else because she was the reason he was

suffering in that shape," and that "when he said that his wife did not say anything, just turned around and went downstairs." All this testimony was received in evidence without objection, and may be considered as a circumstance for what it is worth. *S. v. Hawkins,* 214 N.C. 326, 199 S.E. 284. Nevertheless, under decisions of this Court, it may be fairly doubted that the attending circumstances were such as to call for a denial by her if what her husband said were not true. *S. v. Jackson,* 150 N.C. 831, 64 S.E. 376; *S. v. Wilson,* 205 N.C. 376, 171 S.E. 338; *S. v. Hawkins, supra; S. v. Gentry,* 228 N.C. 643, 46 S.E. 2d 863; *S. v. Rich,* 231 N.C. 696, 58 S.E. 2d 717.

In *S. v. Wilson, supra,* it is said: "When a statement is made, either to a person or within his hearing, implicating him in the commission of a crime to which he makes no reply, the natural inference is that the implication is perhaps well founded, or he would have repelled it. *S. v. Suggs,* 89 N.C. 527. But the occasion must be such as to call for a reply. 'It is not sufficient that the statement was made in the presence of the defendant against whom it is sought to be used, even though he remain silent; but it is further necessary that the circumstances should have been such as to call for a denial on his part, and to afford him an opportunity to make it.' 16 C.J. 659.

"Silence alone, in the face or hearing of an accusation, is not what makes it evidence of probative value, but the occasion, colored by the conduct of the accused or some circumstance in connection with the charge, is what gives the statement evidentiary weight. *S. v. Burton,* 94 N.C. 947; *S. v. Bowman,* 80 N.C. 432."

"The general rule is that statements made to or in the presence and hearing of a person, accusing him of the commission of or complicity in a crime, are, when not denied, admissible in evidence against him as warranting an inference of the truth of such statements." *S. v. Hawkins, supra.*

The cases of *S. v. Spencer,* 176 N.C. 709, 97 S.E. 155; *S. v. Walton,* 172 N.C. 931, 90 S.E. 518, and *Reid v. Barnhart,* 54 N.C. 142, cited and relied upon by the Attorney-General, are not in conflict with the above.

In the light of these principles, it is noted that in the case in hand, there had been no suggestion that the husband was suffering from poison, —rather he had been told on Thursday by his physician that he had "a bad stomach." And on Friday he had gone to South Hill, Va., to see a man there "he thought would do him some good if he had a bad stomach." Moreover, the record fails to show any intimation that at that time defendant was charged with any criminal act.

The State contends that the element of the offense, criminal administration of poison, is borne out by the statement made by defendant to

the sheriff, which in the brief of the Attorney-General is characterized as "defendant's confession" that she "poured a teaspoon of it in his soup." This contention overlooks two salient factors: In the first place, there is no evidence that poison was in the bottle. While the evidence shows that medicine bottles, one of which was marked 'Poison,' were found in the yard, where defendant says she threw "all the medicine in bottles," there is no evidence that any of these bottles contained poison, or showed any trace of poison.

In the second place, the State offered in evidence the statement of defendant to the sheriff, and thereby presents it 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; *S. v. Coffey, supra; S. v. Robinson,* 229 N.C. 647, 50 S.E. 2d 740.

And the statement exculpates defendant of any knowledge that the bottle from which she poured a teaspoon of its contents into the soup of her husband contained poison. Her statement is that her husband obtained the bottle, and she did not know what it contained. In *S. v. Robinson, supra, Barnhill, J.,* writing for the Court, said: "When the State offers evidence which tends to exculpate the defendant, he is entitled to whatever advantage the testimony affords, and so, when it is wholly exculpatory, he is entitled to his acquittal."

This principle, however, does not preclude the State from showing that the facts were different. *S. v. Todd, supra; S. v. Fulcher, supra; S. v. Cohoon, supra; S. v. Baker, supra; S. v. Boyd, supra; S. v. Watts, supra; S. v. Coffey, supra; S. v. Robinson, supra.* But in the present case the State has failed to show the facts to be different.

The portion of the dialogue between the sheriff and defendant attributed to defendant, "If I had put it in mine I would have been where he is," in retrospect, is entirely consistent with innocence. Poison had been found in the internal organs of her husband, and it is reasonable that she may have presumed that the bottle he had obtained contained poison.

Furthermore, what defendant said in response to the suggestion of the sheriff that she had told enough to convict her,—when considered with her entire statement to the sheriff, is far from an admission that she was guilty of the criminal administration of poison to her husband.

At most it may be said that the evidence shown in the record may point a finger of suspicion against defendant. Yet it lacks sufficient probative value to support the verdict against her. It is entirely consistent with her innocence. "It is better that ten guilty persons escape than that one innocent suffer."

Hence, judgment from which this appeal is taken, is Reversed.

C. J. FLEMING AND CAPITAL FIRE INSURANCE COMPANY, CITIZENS INSURANCE COMPANY OF NEW JERSEY, CONTINENTAL INSURANCE COMPANY, HOME INSURANCE COMPANY AND AMERICAN NATIONAL FIRE INSURANCE COMPANY, v. CAROLINA POWER & LIGHT COMPANY.

(Filed 11 October, 1950.)

1. Negligence § 16—

Mere characterization of an act or course of conduct as negligent is insufficient, but plaintiff must allege the facts constituting negligence in order that the court may see whether there has been a breach of duty.

2. Electricity §§ 8, 12—

Mere allegation that defendant electric company permitted current to pass through its wires in such volume as to set fire to plaintiff's property is insufficient to allege negligence on the part of the power company in this respect, since an electric company necessarily permits current to flow through its wires in sufficient volume to cause fires under some conditions.

3. Same—

Where the case is tried upon the allegations and evidence on the theory that defendant power company was negligent in failing to cut off the electricity after notice of dangerous conditions at the *locus*, and there is no allegation that the fire resulted from an excessive or unusual flow of electric current under defendant's control through the wires into plaintiff's property, the trial court's submission of the case to the jury upon the theory of negligence alleged in the complaint, without the submission of the question of defendant's liability under the doctrine of *res ipsa loquitur*, will not be held for error.

4. Appeal and Error § 8—

Appellant's exceptions will be considered in the light of the theory of trial in the lower court.

5. Appeal and Error § 39e—

The exclusion of testimony that defendant's employee was heard to "grunt" upon observing the conditions existing at the *locus* cannot be held for error when it is not made to appear what meaning or significance, if any, was to be attribtued to this gutteral noise.

6. Same—

The admission of testimony over objection cannot be held prejudicial when the same testimony has theretofore been admitted without objection.

APPEAL by plaintiffs from *Carr, J.*, June Term, 1950, of VANCE. No error.

This was an action to recover for the loss by fire of plaintiff Fleming's tobacco warehouse. It was alleged the fire was caused by the negligence of the defendant Power & Light Company. To this action the above named fire insurance companies, which had paid insurance on the building, were made parties plaintiff.

The procedural questions discussed when this case was here at Fall Term, 1948, reported in 229 N.C. 397, and on rehearing, reported in 230 N.C. 65, are not now pertinent to the consideration of plaintiffs' appeal from an adverse judgment on the merits.

On and before 22 February, 1947, plaintiff Fleming was the owner of a warehouse for the auction sale of leaf tobacco, known as the "High Price Warehouse." This warehouse was located in the business district of the City of Henderson on the north side of Montgomery Street, adjoining on the west the Vance Hotel and a theater building, and was separated from the hotel by an alley. The warehouse covered more than 52,000 square feet of floor space, and was constructed in the main of upright wooden timbers on a brick foundation, covered on the outside by corrugated sheet iron. The roof was of tin, the floor of wood, and the driveway of cement. The lighting fixtures and wiring inside the building were installed and maintained by plaintiff Fleming, and the electric current was furnished under contract by defendant Light Company, and delivered from defendant's service wires into a conduit attached to the outside of the west wall of the warehouse. Thence the current passed through the wall, into and through an electric meter inside the warehouse and to the plaintiff's electric fixtures which consisted of droplights and an icebox. The warehouse was not at this time in use for the sale or storage of tobacco but was being used as an office. In the warehouse, fronting on Montgomery Street 70 feet, was a storeroom extending back 48 feet. This belonged to plaintiff Fleming, and was heated by an oil stove with an oil reservoir inside the building on the wall.

The defendant maintained an electric power sub-station two miles south, whence the primary wires transmitted the electric current to two transformers attached to a pole on the south side of Montgomery Street. Thence the electric current now stepped down to service voltage was carried by service wires to a pole on the north side of the street near the warehouse entrance, thence to a pole in the rear of the hotel in the alley. From this last pole leads or service drops were taken from the service wires to the west wall of the warehouse, a distance of 15 or 20 feet, where connection was made with plaintiff's wires leading into the warehouse. The service wires from which these leads were taken continued on by other poles through the alley between the Hotel and the theater building to Williams Street, which ran north and south, and from these poles wires went off to serve numerous other buildings, including the Vance

Hotel. On the 21st of February the weather was cold and sleet was on the ground, the trees, the wires. This condition continued into the night and early morning of the 22nd.

The plaintiffs' complaint contained the following allegations of negligence:

"12. That on February 22, 1947, about 4:00 o'clock A.M., electric current transmitted by defendant through its wires set fire to said High Price Tobacco Warehouse.

"13. That for some time immediately prior to the said fire defendant had notice of an unusual and dangerous condition in the electric current passing through its wires which extended from the transformer on the west side of South Montgomery Street to the High Price Tobacco Warehouse.

"14. That the transformer was so constructed that the flow of electricity through the wires to the High Price Tobacco Warehouse could be cut off at the said transformer.

"15. That the distance from said transformer to the pole on the property of Vance Hotel was about 290 feet and the distance from the transformer to the High Price Tobacco Warehouse was about 317 feet.

"16. That, at the time of said fire, the defendant's system in the City of Henderson was so constructed that the flow of current through the wires extending from the transformer to the High Price Tobacco Warehouse could be cut off at defendant's sub-station.

"17. That at the time of said fire there existed telephone connection in working order and capable of being used between Vance Hotel and defendant's sub-station.

"18. That plaintiff is informed, believes and alleges that defendant had other means, unknown to plaintiff, by which it could have stopped the flow of electricity through the wires from its transformer to the High Price Tobacco Warehouse.

"19. That the defendant negligently failed to stop the flow of electricity through its wires to the High Price Tobacco Warehouse, which it could have done in time to have avoided the fire which destroyed the said warehouse building and equipment therein owned by plaintiff.

"20. That defendant negligently permitted electric current in such volume as to set fire to plaintiff's warehouse to pass through its wires.

"21. That the negligence of the defendant was the proximate cause of the fire which destroyed plaintiff's property."

The plaintiffs' evidence tended to show that about 3:00 a.m. 22 February a humming noise was heard from the transformer on Montgomery Street and lights were arcing from the wires. Some wires were lying on the ground or dangling on the street near the warehouse, with light flashing from them. Fire was coming out of the transformer and fol-

lowing the wires. A heavy limb had fallen from a tree near the hotel and carried entangled wires to the ground where they gave off flashes of light. The wires from the transformer as they passed up the alley in the rear of the hotel and to the point of entrance to the warehouse were red-hot. The Fire Department was called and employees of the defendant Light Company were notified. The "trouble man" of the defendant was summoned, and he looked at the situation and did nothing. The District Manager of the defendant was in the hotel and saw the situation. He called the Line Foreman. The sub-station was called by the hotel clerk with request that current be cut off. The only response from the sub-station was a call to the trouble man. There was one sectionalized point at Gholson Street which could have been opened and the current supplying this area cut off. This was some three or four blocks away. There was heavy ice on the wires and the wind was blowing. These conditions continued until about 4:00 a.m. when the dull sound of an explosion in the warehouse was heard and shortly afterwards flames burst from the roof, and the building was consumed.

The plaintiffs contended that the dangerous conditions caused by the defendant's broken and tangled electric power wires, evidenced by the flashing and arcing within a few feet of the warehouse, and the red-hot appearance of the wires transmitting the electric current to the warehouse, were discovered and made known to defendant's agents and employees some time before the warehouse caught on fire, in ample time for the defendant to have cut off the current and removed the danger; and that the defendant's negligent failure so to do was the proximate cause of the loss of which plaintiffs complain.

The defendant's evidence tended to show that the fire could not have been set out in plaintiff's warehouse by means of defendant's electric wires, and that the fire was not caused by electricity; or, if so, the fire was caused by some defect or short circuit within the warehouse; that the conditions described by the witnesses were due to the sudden breaking of a large limb from a tree near the hotel, caused by heavy sleet, and that the heated wires resulted from a short circuit thereby caused; that the appearance of the transformers indicated fuses had blown and the current cut off in the transformers; that cutting off current at power sub-station would have been useless; that the sound of an explosion and the sudden envelopment of the warehouse in flames did not indicate combustion from a heated wire; that no other building served by the same wires was injured; only the lights went out in the hotel, due to a short circuit. Defendant offered as a witness an expert in electrical engineering who testified as to the probable action of electricity under the circumstances described and the causes and effects of the condition observed, and expressed the opinion that the heating of the service wires leading into the

warehouse was caused by a short circuit or ground inside the warehouse which would have had the effect of drawing enough current to heat the drop red.

Issues were submitted to the jury and answered as follows:

"1. Was the warehouse of C. J. Fleming destroyed by the negligence of the defendant, Carolina Power & Light Company, as alleged in the complaint? Answer: No.

"2. If so, did C. J. Fleming, by his own negligence, contribute to the destruction of said warehouse, as alleged in the First Further Answer and Defense contained in the Answer of the defendant, Carolina Power & Light Company? Answer: .....

"3. What was the difference in the value of the real estate of C. J. Fleming described in the complaint, immediately before and immediately after the fire? Answer: .....

"4. Was the fire which destroyed said warehouse caused by defective construction, wiring, or appliances on C. J. Fleming's side of the point of delivery of said electricity so supplied to said warehouse? Answer: No."

From judgment on the verdict in favor of the defendant the plaintiffs appealed.

Gholson & Gholson and Joyner & Howison for plaintiff, appellant, C. J. Fleming.

Murray Allen for plaintiffs, appellants, Insurance Companies.

A. A. Bunn, Kittrell & Kittrell, Perry & Kittrell, Eric Norfleet, Charles F. Rouse, and A. Y. Arledge for defendant Carolina Power & Light Company, appellee.

DEVIN, J. The verdict on the first issue in the trial below defeated the plaintiffs' action, and the finding on the fourth issue is presently immaterial.

The assignment of error chiefly relied on by the plaintiffs as ground for a new trial was the following instruction given by the court on the first issue: "In respect to that (first) issue the court instructs you that if the plaintiff has satisfied you by the greater weight of the evidence that the employees of the defendant Power Company, or any of them, whose duties required them to act in emergencies, had notice that the secondary wires leading from the transformers on Montgomery Street west, and serving the plaintiff's warehouse, were arcing and flashing light and giving other indications that they were over-charged with electricity, and has further satisfied you by the greater weight of the evidence that such condition was a dangerous one, and was such as to call for quick action on the part of said employees, or any of them, and was of such character

as to demand that the said employees, or any of them, in the exercise of the degree of care which the circumstances required should cut off, or caused to be cut off, the current flowing through said wires, and that said employees, or any of them, failed to cut off or caused to be cut off the said current, and that their failure so to do was the proximate cause of the fire that destroyed plaintiff's warehouse, it would be your duty to answer the first issue yes. If the plaintiff has failed to so satisfy you of those facts, by the greater weight of the evidence, then it would be your duty to answer that issue no."

Plaintiffs contend this instruction should be held for error for that it eliminated from the jury's consideration one of the grounds upon which they sought to recover, to wit, the negligence of the defendant in permitting electric current to pass through its service wires in such volume as to set fire to plaintiff Fleming's warehouse.

It is argued that when the evidence offered is considered in the light most favorable to the plaintiffs, it should be found sufficient to raise the reasonable inference that the warehouse was set on fire by the electric current furnished by the defendant, and that this dangerous element under the control of the defendant was negligently permitted to flow into the building in such volume as to cause the fire complained of. The plaintiffs present the view that the evidence here was such as to invoke the application of the doctrine of *res ipsa loquitur* (*Turner v. Power Co.*, 154 N.C. 131, 69 S.E. 767), and that this principle in connection with other facts in evidence, was sufficient to have required the submission of this phase of the case to the jury as another ground upon which the first issue might be answered in plaintiffs' favor; and that when the court in effect instructed the jury, if they failed to find the defendant was negligent in respect to cutting off the electric current, after notice of the dangerous conditions then existing, to answer the first issue no, plaintiffs were deprived of the benefit of a substantial ground for a finding by the jury of actionable negligence. Furthermore, it is contended that in paragraph 20 of the complaint negligence of the defendant in this respect had been alleged.

We cannot follow the plaintiffs on this argument. The complaint does not specifically or sufficiently set forth allegations of negligence in the respect now claimed. Paragraph 20 is in these words: "That the defendant negligently permitted electric current in such volume as to set fire to plaintiff's warehouse to pass through its wires." It does not specify wherein the negligence consisted. Necessarily the defendant Carolina Power & Light Company permits the flow of electric current through its wires in volume sufficient to cause fire under some conditions, and in the prosecution of the business for which it was created it may lawfully do so without incurring liability, unless it be in some respect negligent in so

doing, being under the duty of exercising the degree of care commensurate with the dangers involved. *Calhoun v. Light Co.*, 216 N.C. 256, 4 S.E. 2d 858. To characterize an act or course of conduct as negligent without more is insufficient. As stated in McIntosh on Prac. & Pro., sec. 388, "In negligence cases, a general allegation of negligence is insufficient and the facts constituting negligence must be given and that it was the cause of plaintiff's injury." *Conley v. R. R.*, 109 N.C. 692, 14 S.E. 303; *Gillis v. Transit Corp.*, 193 N.C. 346 (348), 137 S.E. 153; *Whitehead v. Tel. Co.*, 190 N.C. 197, 129 S.E. 602; McIntosh, sec. 359.

It is necessary "that the negligent acts or omissions be specifically stated in order that the court may see whether there has been a breach of duty." *Charlotte v. Cole*, 223 N.C. 106, 25 S.E. 2d 407; *Thomason v. R. R.*, 142 N.C. 318 (324), 55 S.E. 205.

An examination of the plaintiffs' complaint and the record of the testimony offered leads us to the conclusion that the gravamen of the allegations of negligence in the complaint and of the evidence offered was the defendant's failure, after notice of dangerous conditions then existing, to stop by means available the flow of electricity to plaintiff's warehouse. The case seems to have been fought out before the jury in the trial below on this ground, the plaintiffs contending the condition of sleet, broken and dangling wires, and the heated appearance of the wires leading into the warehouse imposed upon the defendant the duty, after notice, of cutting off the current, and that the defendant's failure so to do was the proximate cause of plaintiffs' loss. The defendant countered with evidence *contra*, contending the fire was not of electric origin, was not caused by defendant's negligence, but was caused by plaintiffs' fault, or by the unforeseen breaking of a limb from a tree.

This was the ground on which the battle was won and lost in the court below. The instruction given by the court on this issue, now assigned as error, presented the case concisely and correctly to the jury. The rule, as stated by *Chief Justice Stacy* in *Gorham v. Ins. Co.*, 214 N.C. 526, 200 S.E. 5, is that "An appeal *ex necessitate* follows the theory of the trial." Or, as expressed by *Justice Brogden* in *Potts v. Ins. Co.*, 206 N.C. 257, 174 S.E. 123, "The theory upon which a cause is tried must prevail in considering the appeal, and in interpreting a record and in determining the validity of exceptions." *Webb v. Rosemond*, 172 N.C. 848, 90 S.E. 306; *Walker v. Burt*, 182 N.C. 325, 109 S.E. 43; *Shipp v. Stage Lines*, 192 N.C. 475, 135 S.E. 339; *Holland v. Dulin*, 206 N.C. 211, 173 S.E. 310; *Weil v. Herring*, 207 N.C. 6 (10), 175 S.E. 836; *Keith v. Gregg*, 210 N.C. 802, 188 S.E. 849; *Jernigan v. Jernigan*, 226 N.C. 204, 37 S.E. 2d 493.

Plaintiffs in their assignments of error also brought forward certain exceptions noted to the ruling of the court in the admission or rejection

of testimony. They excepted to the striking out of the testimony of a witness that when defendant's employee Lewis arrived on the scene before the fire and observed the condition of the transformer he was heard to "grunt," but it does not appear what meaning or significance, if any, was to be attributed to this gutteral noise, or its materiality to the issue.

Plaintiffs excepted to the admission of testimony from a nonexpert witness, who was defendant's District Manager, to the effect that electricity does not flow where not wanted, and that there must be an appliance or short circuit to complete the path from transformer back to transformer before it would flow. However, this witness had already testified at length without objection as to the behavior of electric current through transformers, and there was other evidence to same effect from an expert witness. We do not perceive that plaintiffs' cause was hurt by the testimony to which this exception was noted.

Plaintiffs also noted numerous exceptions to the testimony of N. E. Cannady, who was admitted to be an expert in electrical engineering. But an examination of this testimony in the light of plaintiffs' objections leaves us with the impression that the examination of this witness and the opinion evidence elicited in response to hypothetical questions were well within the bounds of competent testimony from an expert witness under the circumstances of this case.

There was no error in admitting the insurance policies which had been issued by the plaintiff insurance companies on this warehouse. The plaintiff Fleming had testified without objection as to these policies and the amounts covered in each. It was on account of payment of these policies that these plaintiffs derived their interest and had been made parties to the action. *Fleming v. Light Co.*, 230 N.C. 65, 51 S.E. 2d 898. The exception to the exclusion of a question to the witness Wood does not seem to involve a matter of serious import.

We have examined plaintiffs' other exceptions to the charge but do not find prejudicial error therein. The trial judge's charge to the jury seems to have been full and fair and presented the determinative issues to the jury in substantial accord with the requirements of the statute, G.S. 1-180, and the decisions of this Court.

Unfortunately for the plaintiffs, the jury found the facts on the first issue against them, and we discover no sufficient ground in law upon which to disturb the result.

No error.

RETA R. BULLMAN v. E. R. EDNEY, TRADING AND DOING BUSINESS AS VALLEY SPRINGS MOTOR COMPANY.

(Filed 11 October, 1950.)

1. Property § 2b—

Ownership of personalty is a mixed question of law and fact, and it is only when the facts are not in dispute that the question of title is one of law for the court.

2. Tenants in Common § 2: Husband and Wife § 13a—

Where husband and wife purchase an automobile, each paying a part of the purchase price or promising to pay such part, they become tenants in common therein in the proportion which the amount paid, or agreed to be paid, by each bears to the entire purchase price.

3. Tenants in Common § 10—

Where one tenant in common in personalty sells the chattel, he can convey only his interest therein in the absence of estoppel, and his purchaser becomes a tenant in common with the one who has not sold his interest.

4. Trusts § 4b—

Where each of two parties supplies a part of the purchase price and title is taken solely in the name of one of them, a resulting trust arises in favor of the other, and this rule applies to personalty as well as realty.

5. Tenants in Common § 10—

While one tenant in common may not maintain an action in the nature of trover against his co-tenant, where one tenant exercises dominion over the property in direct denial of or inconsistent with the rights of the other, or consumes or sells the personalty, the other tenant may maintain an action for conversion.

APPEAL by plaintiff from *Hatch, Special Judge,* at July "A" Term, 1950, of BUNCOMBE.

Civil action to have plaintiff declared the owner, and entitled to the possession of a certain automobile allegedly purchased by plaintiff and her husband from defendant, etc., and in possession of defendant at time of the institution of the action.

Plaintiff alleges in her complaint, briefly stated, these facts: That on or about 7 May, 1949, her father and her husband looked at a certain Ford automobile owned by and in possession of defendant and purchased same from defendant, with the understanding that title would be placed in the name of plaintiff as she was paying $500.00 of the purchase price; that plaintiff and her husband purchased said automobile from defendant for cash consideration of $800.00, and defendant was then and there notified that plaintiff was paying $500.00 in cash and that her husband agreed to pay the balance, and that defendant was instructed by plain-

tiff's father, and he agreed to place title to said automobile in the name of plaintiff; that defendant to the contrary thereof placed title to said Ford automobile in the name of plaintiff's husband, and for reasons unknown to the plaintiff now has said automobile in his possession; and "that by reason of said contract and agreement made between the plaintiff and defendant to place the title to said Ford automobile in the name of the plaintiff, and the breach of said contract by the defendant, the plaintiff is entitled to immediate possession of and/or lien on and against said Ford automobile in the sum of $500.00 and the cost of this action; and in the event that said automobile does not bring a sufficient sum to satisfy said lien the plaintiff is entitled to judgment against the defendant for any deficit."

Plaintiff prays judgment against defendant, briefly stated: That the court hold and declare plaintiff the owner, and entitled to possession of the Ford automobile; that defendant be required to make and deliver title to plaintiff; that the Ford be sold to satisfy the $500; that plaintiff have judgment against defendant for any deficit; and "for such other and further relief as said plaintiff may be entitled in said cause."

Defendant, answering, denies the material allegations of the complaint, and avers that Donald L. Bullman purchased the Ford automobile, and that he, the defendant, sold and delivered same to him at the selling price of $800.00.

Upon the trial in Superior Court plaintiff offered evidence tending to support the allegations of her complaint. On the other hand, defendant offered evidence tending to contradict the allegations of plaintiff's complaint, and the evidence offered by plaintiff, and to show: That defendant, Donald Bullman, plaintiff's husband, purchased the Ford automobile in question, and paid $500 cash, as down payment, on 7 May, 1949, and financed the balance of $300 at an Industrial Bank on 9 May, 1949,—giving a chattel mortgage on the Ford as security therefor; that he, the defendant, put the title in Donald Bullman's name; that he endorsed the papers; that Donald Bullman failed to make payments to the Bank, and he, the defendant, paid off the Bank, and swapped Bullman a motorcycle for his equity in the car.

The record shows that when plaintiff first rested her case, defendant moved for judgment as of nonsuit; that the motion was denied; and that motion of defendant made at the close of all the evidence for judgment as of nonsuit was allowed, and plaintiff excepted.

The parties stipulated that summons in this action was regularly issued on 18 July, 1949; "that the clerk issued claim and delivery proceedings for said 1939 Ford automobile and defendant posted bond and has since sold said automobile"; and that the summons and claim and delivery proceedings need not be printed or made a part of this record on appeal.

Judgment as of nonsuit was signed by the court, and plaintiff appeals to Supreme Court and assigns error.

Cecil C. Jackson for plaintiff, appellant.
Geo. F. Meadows for defendant, appellee.

WINBORNE, J. Ownership of personal property, when challenged, is always a mixed question of law and fact. If the facts are not in dispute it becomes a question of law for the court. But if they be in dispute, the question is left to the jury under proper instructions by the court upon the law. 42 Am. Jur. 218, Personal Property 41. Applying these rules to the evidence offered on the trial of present action, in Superior Court as shown in the record on this appeal, the facts being in dispute, the question of ownership of the automobile involved should have been submitted to the jury under proper instruction by the court upon the applicable principles of law.

In this connection it must be borne in mind that plaintiff alleges that she and her husband purchased the automobile in question from defendant for the consideration of $800.00, of which she paid $500.00 in cash and her husband agreed to pay the balance. If this allegation be true, as plaintiff's evidence tends to show, plaintiff and her husband became co-owners of, or tenants in common in the ownership of, the automobile, nothing else appearing, in the proportion the amount each paid, or agreed to pay, bears to the whole purchase price. And while "one who owns an undivided interest in a chattel may sell such interest and thereby render the buyer a tenant in common with the other co-owners, . . . one co-tenant cannot convey any greater title or interest than he has, except where the conduct of the co-tenant estops him from asserting title against the innocent buyer." See 46 Am. Jur. 217—Sales 22.

And it is a well settled principle that where, on the purchase of property, the conveyance of the legal estate is taken in the name of one person, but the purchase money is paid by another at the same time or previously, and as a part of one transaction, a trust results in favor of him who supplies the purchase money. *Beam v. Bridgers,* 108 N.C. 276, 13 S.E. 112.

This principle has been frequently applied where land is purchased with funds arising from the separate estate of the wife. *Lyon v. Aiken,* 78 N.C. 258; *Cunningham v. Bell,* 83 N.C. 328; *Hackett v. Shuford,* 86 N.C. 144; *Beam v. Bridgers, supra.* See also Annotation 113 A.L.R. 339; 54 Am. Jur. 158, Trusts 203; 28 Am. Jur. 730, Husband and Wife 104. Compare *Bass v. Bass,* 229 N.C. 171, 48 S.E. 2d 48.

In *Lyon v. Aiken, supra,* the opinion is epitomized by this headnote: "Where land is purchased by a husband with his wife's money . . . and

title is taken to the husband alone, a resulting trust is created in favor of the wife, and a purchaser from the husband with notice stands effected by the same trust."

The principle of resulting trusts applies alike to transactions relating to both real and personal property. 54 Am. Jur. 158, Trusts 203.

Moreover, if a tenancy in common in the automobile was created, and existed between plaintiff and her husband, and defendant "stands in the shoes" of the husband, and the automobile be available therefor, there is provision by statute, G.S. 46-44, as amended by Chapter 719, Section 2 of 1949 Session Laws of North Carolina, for a sale of it for partition among the parties interested. Ordinarily a tenant in common in personalty is entitled to partition of the property. *Chadwick v. Blades,* 210 N.C. 609, 188 S.E. 198. But since the matters to which the stipulation of the parties relate are not set out in the record, what would be the rights of the parties in respect of partition of the property, if plaintiff be a tenant in common therein, is not determinable on the record as it now appears. However, if plaintiff prevail in establishing an interest in the automobile, and if, as stipulated by the parties, the automobile be not available for sale for partition, and the rights of the parties be not otherwise provided for in the "bond posted" by defendant, the evidence contained in the record tends to show facts which would support a claim for conversion.

In this connection, the principle is clearly stated in *Waller v. Bowling,* 108 N.C. 289, 12 S.E. 990, in opinion by *Avery, J.,* in this manner: "A tenant in common of a chattel cannot maintain an action of, or in the nature of trover against his co-tenant upon the ground merely that his demand for possession of the common property has been refused by the latter, unless he can show that the co-tenant has subsequently consumed or placed it beyond recovery by means of legal process (citing cases). But where the tenant in possession of personal chattels withholds the common property from his co-tenant, or wrests it from him and exercises a dominion over it, either in direct denial of or inconsistent with the rights of the latter, an action will lie for conversion," citing cases. See also *Doyle v. Bush,* 171 N.C. 10, 86 S.E. 165; *Barham v. Perry,* 205 N.C. 428, 171 S.E. 614.

In the light of these principles, it is appropriate that plaintiff amend her complaint to conform to the evidence.

The judgment below is

Reversed.

OWEN H. TEAGUE AND HIS WIFE, HELEN TEAGUE, v. SILER CITY OIL COMPANY AND AMERICAN OIL COMPANY.

(Filed 11 October, 1950.)

1. Pleadings § 20½—

Where there is a misjoinder of causes of action, the cause will not be dismissed upon demurrer but the court will merely sever the causes and divide the actions. G.S. 1-132.

2. Same—

Where the complaint fails to state a cause of action, order sustaining demurrer on this ground does not effect a dismissal but merely strikes the complaint, and the cause remains on the docket and should be dismissed only if plaintiff fails to amend or file a new complaint as permitted to do by statute. G.S. 1-131, G.S. 1-162.

3. Same—

Where there is a misjoinder of parties and causes of action an order sustaining demurrer thereto on this ground necessitates a dismissal of the action.

4. Pleadings § 22b—

Where there is a misjoinder of parties and causes of action, plaintiff may move to file a substituted or amended pleading at any time before judgment is entered sustaining the demurrer, but after such judgment is entered the court has no authority to entertain a motion for leave to file a new or amended complaint for the reason that there is no action pending in which the court has jurisdiction to entertain a motion. G.S. 1-161.

5. Appeal and Error § 51a—

Decision of the Supreme Court holding that the trial court was in error in overruling a demurrer for misjoinder of parties and causes of action does not have the effect of sustaining the demurrer or of entering judgment dismissing the action, but is merely a direction to the court below to reverse its ruling.

6. Pleadings § 23—

Where the Supreme Court decides that the trial court was in error in overruling demurrer for misjoinder of parties and causes of action, the cause remains on the docket until entry of judgment in accordance with the opinion of the Supreme Court, and at any time prior to the entry of such judgment the trial court has authority to hear plaintiff's motion for leave to file a substitute or amended pleading.

APPEAL by plaintiffs from *Williams, J.*, in Chambers, 29 June 1950, CHATHAM. Error.

Civil action to recover damages for the wrongful destruction of property by fire, heard on motion by plaintiffs for leave to file a new amended complaint.

This cause was here on a former appeal, *Teague v. Oil Co., ante,* p. 65. On that appeal this Court held that the court below erred in overruling a demurrer for misjoinder of parties and causes of action interposed by defendants. After the opinion of this Court was certified down, but before final judgment thereon in the Superior Court, plaintiffs appeared before the clerk and, after due notice to defendants, moved for leave to file a "new amended complaint," which proposed pleading was attached to the written motion.

The clerk, without objection, transferred the motion for hearing before the resident judge.

When the motion came on to be heard before the resident judge, he concluded "that the legal effect of such demurrer operates as a dismissal of this action and that this court is without authority to allow an amendment to the pleadings," and thereupon entered an order denying the motion "for want of authority." Plaintiffs excepted and appealed.

Bell & Horton, Thos. C. Carter, and Long & Ross for plaintiff appellants.

Smith, Wharton, Sapp & Moore for defendant appellee American Oil Company.

J. L. Moody, L. P. Dixon, and Barber & Thompson for defendant appellee Siler City Oil Company.

BARNHILL, J. Does a Superior Court judge have authority to permit the filing of a new complaint after the opinion of this Court, reversing judgment overruling a demurrer for misjoinder of parties and causes of action, has been certified down but before final judgment in the Superior Court? This is the one specific question presented for decision. The court below said no. We are constrained to reverse.

Where the ground of demurrer is the misjoinder of causes of action, the cause will not be dismissed. The court will merely sever the causes and divide the actions. G.S. 1-132; *S. v. McCanless,* 193 N.C. 200, 136 S.E. 371; *Pressley v. Tea Co.,* 226 N.C. 518, 39 S.E. 2d 382.

A demurrer for that the complaint fails to state a cause of action tests the sufficiency of the pleading. *Insurance Co. v. Stadiem,* 223 N.C. 49, 25 S.E. 2d 202; *Leonard v. Maxwell, Comr. of Revenue,* 216 N.C. 89, 3 S.E. 2d 316; *Gentry v. Hot Springs,* 227 N.C. 668, 44 S.E. 2d 87. It in no wise challenges the validity of the action. An order sustaining the demurrer in effect merely strikes the complaint. The action remains on the docket *sans* a pleading and will be dismissed only in the event the plaintiff fails to amend or file a new complaint as he is by statute permitted to do. G.S. 1-131; G.S. 1-162; *Shore v. Holt,* 185 N.C. 312,

117 S.E. 165; *Pressley v. Tea Co., supra; R. R. v. Hardware Co.,* 135 N.C. 73.

On the other hand, a demurrer for that there is a misjoinder of parties and causes of action strikes at the heart of the case. The right of two or more persons to sue on separate and distinct causes of action where neither plaintiff has an interest in the claim of the other does not exist under our system of procedure. Separate and distinct causes of action set up by different plaintiffs or against different defendants may not be incorporated in the same pleading. *Holland v. Whittington,* 215 N.C. 330, 1 S.E. 2d 813. Such a misjoinder of parties and causes constitutes a defect which, if not cured in apt time, necessitates a dismissal of the action. *Moore County v. Burns,* 224 N.C. 700, 32 S.E. 2d 225, and cases cited; *Davis v. Whitehurst,* 229 N.C. 226, 49 S.E. 2d 394; *Burleson v. Burleson,* 217 N.C. 336, 7 S.E. 2d 706.

There can be no division of the action under G.S. 1-132. The whole must fall. *Moore County v. Burns, supra.*

After a judgment sustaining a demurrer on this ground is entered, the court is without authority to entertain a motion for leave to file a new or amended complaint for the reason there is no action pending in which the court has jurisdiction to entertain the motion. *Grady v. Warren,* 202 N.C. 638, 163 S.E. 679. If the plaintiff stands his ground and risks an adverse judgment on a demurrer for misjoinder of parties and causes, and judgment is entered sustaining the demurrer and dismissing the action, he must suffer the consequences.

It may be that this Court in the beginning might have held that the provisions of G.S. 1-131 serve to retain the cause on the docket after final judgment sustaining a demurrer for misjoinder of parties and causes, for the purpose of entertaining a motion for leave to amend. The fact remains it did not do so. Instead, it concluded that such judgment ends the action for all purposes save the right of appeal. With some slight wavering in the beginning, the Court has consistently followed this view. We now see no good reason why we should depart from the long line of cases to that effect.

But this does not mean that plaintiff is cut off and deprived of his right to move for leave to amend his pleadings immediately upon the filing of the demurrer or at any time prior to an adverse ruling on the demurrer. G.S. 1-161; *Walker v. Oil Co.,* 222 N.C. 607, 24 S.E. 2d 254; *Sparks v. Sparks,* 230 N.C. 715, 55 S.E. 2d 477. Until the demurrer is heard and sustained the cause is open for motion to file a substituted or amended pleading, and the court has full authority to hear the motion and permit the plaintiff to replead.

This brings us to the force and effect of our opinion on the former appeal. We did not sustain the demurrer or enter judgment dismissing

the action. We merely held that the court below erred in its refusal to do so. In effect we directed the court below to reverse its ruling. Even so, the cause remained on the docket open to motion at any time prior to the entry of judgment in accord with the opinion of this Court. *Morris v. Gentry,* 89 N.C. 248. The cause is not terminated and the action is not dismissed until such judgment is entered.

It must be noted in this connection that the court below overruled the demurrer. Hence it did not dismiss the action. Whether the decision of this Court affirming a judgment which sustains a demurrer for misjoinder of parties and causes cuts off the right of plaintiff to apply for leave to amend is a question which is not presented on this record. While our decisions seem to answer in the affirmative, we leave the question without *obiter* comment. See, however, *Grady v. Warren, supra.*

The conclusion here reached is not at variance with our decision in *Wingler v. Miller,* 221 N.C. 137, 19 S.E. 2d 247. There the court undertook to sustain the demurrer to the cross action for misjoinder of parties and causes and at the same time, apparently *ex mero motu,* retain the cross action for amendment. Under our decisions the judgment sustaining the demurrer worked a dismissal of the cross action. The court could not dismiss and, at the same time, retain it for amendment. Furthermore, the asserted cross actions were not pleadable in that action so that an amendment could not serve to remedy the defect.

The cause is remanded to the end the court below may hear and decide the motion of plaintiffs for leave to file a new or substitute complaint. *Morris v. Gentry, supra.* In the event the motion is denied, the court should enter judgment dismissing the action in accord with our opinion on the former appeal.

Error.

MELVIN B. PARKER v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 11 October, 1950.)

Railroads § 4—

Where the evidence discloses that plaintiff was entirely familiar with the railroad crossing in question, that he stopped and looked when within eight or ten feet of the nearest rail where his view of the approaching train was obstructed by a bank, and then drove upon the crossing without again looking in that direction, although he could have stopped in safety beyond the bank where his view of the approaching train was unobstructed for a distance of one-half to two miles, *is held* to disclose contributory negligence barring recovery as a matter of law.

APPEAL by defendant from *Morris, J.*, June Term, 1950, WAYNE. Reversed.

Civil action to recover compensation for personal injuries and property damage resulting from a truck-train collision.

The defendant's track extends from Dudley to Mount Olive in a north-south direction and the road or pathway on which plaintiff was traveling extends in an east-west direction. Plaintiff's land, which lies on both sides of the railroad, slopes to the east. The railroad track is built along this slope, creating a bank on the east beyond the ditch. This "bank" is approximately level with the adjoining land to the east but is several feet above the railroad tracks. The top portion of a train may be seen as it approaches from the north.

The road is not a public road. It is in the nature of a neighborhood road across plaintiff's land from one highway to another. The public does not maintain it, and it is not on the highway map. "I maintain it just as small as I can"—"two ruts."

Plaintiff's testimony tends to show that along the right of way to the north there are plum bushes and other undergrowth and weeds and dog fennels which tend to obstruct the view to the north, from which direction the train approached, up until a traveler gets beyond the "bank" or side of the cut. The ridge of the bank is about 15 feet from the rail.

On the morning of 28 May 1948, plaintiff approached the crossing on his truck, going west. When the front of his truck was within 8 or 10 feet of the east rail, he stopped, looked to the north and then to the south. He neither saw nor heard an approaching train. He then put his car in low gear and proceeded. The front of the truck collided with the front side of the pilot or engine, resulting in injury to plaintiff and damage to the truck.

After looking to the north when he stopped, plaintiff did not again look in that direction. At that time he could see 75 or 80 yards up the track to the north but he did not actually see the train until it was within 25 or 30 feet of him. The train was traveling at about 50 miles per hour.

This is the substance of plaintiff's testimony which constitutes the evidence most favorable to him. His other testimony and the photographs present a less favorable picture for him, and defendant's testimony tends to show that he did not stop before entering upon the track and did not heed defendant's timely signals.

There was a verdict for the plaintiff. From judgment on the verdict, defendant appealed.

Dees & Dees for plaintiff appellee.

Bland & Bland and W. B. R. Guion for defendant appellant.

BARNHILL, J. Plaintiff was thoroughly familiar with the crossing at which the accident occurred. The road was a pathway across his farm which extended across the railroad tracks to the west. He used the crossing frequently in going to and from town and from one part of his farm to another. On the day of the accident he was on his way to that part of his farm which lies to the west of the railroad. He stopped at a point near the track where he could see to the north for a distance of 75 or 80 yards, yet he did not see the train until it was within 25 or 30 feet of him. When he stopped, he first looked to the north and then to the south and then proceeded toward the track without again looking north. Had he proceeded to a point just beyond the bank as he could have done in safety, he would have had an unobstructed vision to the north for a distance variously estimated from one-half to two miles. In this connection his wife testified: "I go across the crossing where this accident occurred. I passed there that very day . . . If I get right down near the track I can look down and see but I couldn't see if I were with the embankment back there. I have to be almost on the track to see down it because I have to stop there every time to get across."

Thus, the plaintiff having looked one time, looked no more. He could have stopped in safety at a point which would have afforded him a clear vision. Though he could have seen the train 80 yards or 240 feet away, he did not see it until it was right on him—25 or 30 feet away. While he was traversing 8 or 10 feet, the train, traveling at about 50 miles per hour, went a distance of 240 feet—or so he testified.

On these facts decision is controlled by the line of cases represented by *Harrison v. R. R.*, 194 N.C. 656, 140 S.E. 598; *Godwin v. R. R.*, 220 N.C. 281, 17 S.E. 2d 137; *Miller v. R. R.*, 220 N.C. 562, 18 S.E. 2d 232; *Eller v. R. R.*, 200 N.C. 527, 157 S.E. 800; and *McCrimmon v. Powell*, 221 N.C. 216, 19 S.E. 2d 880. Plaintiff knew he was approaching a zone of danger. He had timely opportunity to see the approaching train and avoid the collision. His failure to do so constitutes contributory negligence as a matter of law.

It does not suffice to say that plaintiff stopped, looked, and listened. His looking and listening must be timely, *McCrimmon v. Powell, supra,* so that his precaution will be effective. *Godwin v. R. R., supra.* It was his duty to "look attentively, up and down the track," in time to save himself, if opportunity to do so was available to him. *Harrison v. R. R., supra; Godwin v. R. R., supra.* Here the conditions were such that by diligent use of his senses he could have avoided the collision. His failure to do so bars his right to recover. *Godwin v. R. R., supra.*

"The courts give slight heed to the testimony of a witness who is willing to say that he cannot see or hear when there is nothing to keep him from seeing and hearing." "To say that he did not see or hear it is

a challenge to universal experience." *Adams, J.*, in *Tart v. R. R.*, 202 N.C. 52, 161 S.E. 720.

Since we conclude that plaintiff was guilty of contributory negligence as a matter of law, we need not discuss or decide just what duties defendant owed plaintiff at this nonpublic crossing. Whether it was held to the same degree of care imposed upon it in respect to persons using a public highway we need not say.

The court erred in denying defendant's motion to dismiss as in case of nonsuit. Hence the judgment below must be

Reversed.

J. D. HODGES v. THE HOME INSURANCE COMPANY OF NEW YORK.

J. D. HODGES v. GRANITE STATE FIRE INSURANCE COMPANY, PORTSMOUTH, NEW HAMPSHIRE.

J. D. HODGES v. THE CONNECTICUT FIRE INSURANCE COMPANY, HARTFORD, CONN.

J. D. HODGES v. NEW HAMPSHIRE FIRE INSURANCE COMPANY OF MANCHESTER, NEW HAMPSHIRE.

(Filed 11 October, 1950.)

1. Process § 8c—

The statutes authorizing substituted service, being in derogation of the common law, must be strictly construed, and compliance with the statutory requirements must appear of record.

2. Same—

The insurance commissioner is not authorized to accept service for foreign insurance companies under the provisions of G.S. 58-150 as amended by Chap. 348, Sec. 2, Session Laws of 1945, the passive agency under the statute being solely for the purpose of constituting him an agent upon whom service on foreign insurance companies may be made in the statutory manner. G.S. 1-89.

APPEALS by plaintiff and by defendants from *Burney, J.*, at February Term, 1950, of BEAUFORT.

Four civil actions consolidated for hearing, and heard in Superior Court upon motion of each of the defendants, respectively, made upon special appearance "to dismiss the action as against it for that there has been no valid service of process herein upon it so as to bring it within the jurisdiction of this court," and upon motions of plaintiff to amend acceptance of service of summonses.

The record shows that the original summons in the first case bears a rubber stamp endorsement as follows: "Service accepted. This 6 day

of May, 1949. For the Home Insurance Company, William P. Hodges, Insurance Commissioner." And the summons in each of the other three cases bears identical endorsement, except as to the name of the defendant.

The court, having heard the evidence offered by plaintiff and the argument of counsel, found these facts:

"1. On May 3, 1949, a summons was issued out of the Superior Court of Beaufort County in each of the above entitled causes directed to the Sheriff of Beaufort County.

"2. Said summons together with copies and copies of the complaint in each action were mailed by attorneys for plaintiff to William P. Hodges, at that time Insurance Commissioner of the State of North Carolina. Check for $4.00 was likewise mailed to said Insurance Commissioner to cover his fees as described by statute.

"3. The Court further finds as facts the facts set forth in the affidavits of William P. Hodges, Miss Lillie E. Lucas, and L. E. Covington, which are referred to and by such reference incorporated herein.

"4. That each of said defendants received the copy of the summons and complaint in each case in the regular course of the mails. That each of said copies so mailed to the defendants as above set out was stamped with said rubber stamp and contained an exact copy of the acceptance of service appearing on the original summons in each case.

"Upon the foregoing facts the Court being of the opinion that the acceptance of service of each of said summons by William P. Hodges, Insurance Commissioner of the State of North Carolina, followed by the mailing of the copies of the summonses and the copies of the complaint by registered mail to each of the defendants at its home office is valid service of the process in each cause."

Thereupon the court denied all motions. Defendants and each of them excepted and gave notice of appeal to Supreme Court. Plaintiff also excepted and appealed to Supreme Court.

Carter & Carter and D. D. Topping for plaintiff.

Rodman & Rodman for defendants.

WINBORNE, J. *On Defendants' Appeal:* The question here is whether the commissioner of insurance of North Carolina is authorized to accept or waive service of summons in an action against a foreign insurance company doing business in this State. The statute, Article 17 of Chapter 58 of the General Statutes, indicates a negative answer.

Substituted service of process was unknown to common law, but depends upon statutory authorization. And a strict compliance with the provisions of such statute must be shown in order to support a judgment based on such substituted service. The inquiry must be as to whether the

requisites of the statute have been complied with, and such compliance must appear on the record. 42 Am. Jur. 55, Process, Section 66. Indeed, in *Propst v. Trucking Co.*, 223 N.C. 490, 27 S.E. 2d 152, this Court in treating the subject of substituted service of process on nonresident operators of motor vehicles on the public highways of this State, G.S. 1-105, applied the rule of strict compliance.

The statute provides that foreign insurance companies, upon complying with the conditions set forth therein, applicable to them, may be admitted to transact business in this State, etc. G.S. 58-149, as amended by 1945 Session Laws of North Carolina, Chapter 384.

The statute also provides that such insurance company may be admitted and authorized when it, among other things, "3. By a duly executed instrument filed in his office, constitutes and appoints the commissioner and his successor its true and lawful attorney, upon whom all lawful processes in any action or legal proceeding against it may be served, and therein agrees that any lawful process against it which may be served upon such attorney shall be of the same force and validity as if served on the company . . ." G.S. 58-150, as amended by 1945 Session Laws of N. C., Chapter 384, Sec. 2.

And the statute requires that "The service of legal process upon any insurance . . . company, admitted and authorized to do business in this State under the provisions of this chapter, shall be made by leaving the same in the hands or office of the commissioner of insurance, and no service upon a company that is licensed to do business in this State is valid unless made upon the commissioner of insurance, the general agent for service, or some officer of the company," and that "as a condition precedent to a valid service of process and of the duty of the commissioner in the premises, the plaintiff shall pay to the commissioner of insurance at the time of service the sum of one dollar, which the plaintiff shall recover as taxable costs if he prevails in his action . . ." G.S. 58-153.

And the statute also requires that "When legal process is served upon the commissioner of insurance as attorney for an insurance company under the provisions of this chapter, he shall immediately notify the company of such service by registered letter directed to its secretary and shall state whether or not complaint was served with the process, etc." G.S. 58-154.

Thus it appears that the commissioner of insurance is constituted and appointed the true and lawful attorney only upon whom lawful processes "may be served." The purpose is limited to this, and it is observed that no authority is given the commissioner to accept service of summons. The agency created in compliance with the provisions of the act is, quoting the Supreme Court of the State of Washington, "a passive

agency." See *Bennett v. Supreme Tent KM,* 40 Wash. 431, 82 P. 744, 2 L.R.A. (N.S.) 389, a case similar to the one in hand.

The wording of the statute clearly indicates that the Legislature intended that process should be served in the manner other summonses are served. And, in this connection, it is noted that our statute prescribing procedure for the commencement of civil actions requires that "summons must . . . be directed to the sheriff or other proper officers of the county" in which the defendant resides or may be found, and "must be served by the sheriff to whom it is addressed." G.S. 1-89.

Thus there is error in the ruling of the trial court in denying defendants' motion to dismiss the action on the grounds stated.

On Plaintiff's Appeal: The holding on the question presented on defendants' appeal, as above set forth, removes the basis for the question presented on this, the plaintiff's appeal.

Hence, the ruling here is:

On defendants' appeal—Reversed.

On plaintiff's appeal—Affirmed.

MRS. RICHARD CALL, ADMINISTRATRIX OF GENIE LOUISE CALL, v. PHILLIP S. STROUD AND WIFE, MRS. PHILLIP STROUD.

(Filed 11 October, 1950.)

1. Appeal and Error § 38—

The burden is upon appellant to show error of law or legal inference and also that such error was prejudicial, which imports a reasonable probability that the result of the trial would have been materially more favorable to him if the error had not occurred.

2. Automobiles § 17—

The charge of the court in this case as to the duty of a motorist to avoid injuring children whom he sees, or by the exercise of reasonable care should see, on or near the highway, *held* without error.

3. Appeal and Error § 39b—

The submission to the jury of an issue of fact not warranted by both the pleadings and the evidence, even though error, will not entitle appellant to a new trial when it appears that the answer to a previous issue determined the rights of the parties and that the jury did not answer the issue objected to because the answer to the previous issue had rendered it immaterial.

4. Appeal and Error § 39l—

On the issues submitted to the jury the court inadvertently left notations made by it which the court had placed thereon to guide it in its

charge, the words noted being "burden," "negligence," "proximate cause," "contributory negligence," and the like. Upon poll, each juror asserted that the notations did not affect his determination of the issues. *Held:* The matter did not constitute prejudicial error.

5. Trial § 6—

The trial court should not express opinion upon matters before jurors whom it proposes to poll in regard to such matters.

APPEAL by plaintiff from *Crisp, Special Judge,* and a jury, at the June Term, 1950, of WILKES.

Civil action for damages for death by wrongful act. G.S. 28-173.

The plaintiff, Mrs. Richard Call, Administratrix of Genie Louise Call, alleged that her intestate, a child of the age of six years, was killed on a public highway in Wilkes County by the actionable negligence of the defendants, Phillip S. Stroud and his wife, Mrs. Phillip Stroud, in the operation of a motor truck. The defendants answered, denying actionable negligence on their part, and pleading contributory negligence on the part of Richard Call and Mrs. Richard Call, the parents of the decedent. The parties offered evidence at the trial for the avowed purpose of sustaining their respective allegations. The action was dismissed upon a compulsory nonsuit as to the *feme* defendant without objection by the plaintiff, but proceeded to a jury verdict as to the male defendant. The court submitted these three issues to the jury: (1) Was Genie Louise Call killed by the negligence of the defendant, as alleged in the complaint? (2) Did Richard Call and Mrs. Richard Call, by their own negligence, contribute to the death of the said Genie Louise Call? (3) What amount, if any, is the plaintiff entitled to recover of the defendant? The jury answered the first issue "No," and left the second and third issues unanswered. The court rendered judgment on the verdict exonerating the male defendant from liability to the plaintiff, and the plaintiff appealed, assigning the matters hereinafter mentioned as error.

Hayes & Hayes and Larry S. Moore for plaintiff, appellant.

Trivette, Holshouser & Mitchell for defendant, Phillip S. Stroud, appellee.

ERVIN, J. A party who comes into the Supreme Court seeking relief from a judgment of the Superior Court must allege and show these two things: (1) That the judge of the Superior Court committed an error in a matter of law or legal inference; and (2) that such error affected prejudicially a substantial right belonging to him. An error cannot be regarded as prejudicial to a substantial right of a litigant unless there is a reasonable probability that the result of the trial might have been mate-

rially more favorable to him if the error had not occurred. *Stewart v. Dixon,* 229 N.C. 737, 51 S.E. 2d 182; *Shelly v. Grainger,* 204 N.C. 488, 168 S.E. 736; *Thigpen v. Trust Co.,* 203 N.C. 291, 165 S.E. 720; *Rudd v. Casualty Co.,* 202 N.C. 779, 164 S.E. 345; *Butner v. Whitlow,* 201 N.C. 749, 161 S.E. 389; *Carstarphen v. Carstarphen,* 193 N.C. 541, 137 S.E. 658; *Perry v. Surety Co.,* 190 N.C. 284, 129 S.E. 721; *McNinch v. Trust Co.,* 183 N.C. 33, 110 S.E. 663; *In re Edens,* 182 N.C. 398, 109 S.E. 269; *Quelch v. Futch,* 175 N.C. 694, 94 S.E. 713; *Bailey v. Justice,* 174 N.C. 753, 94 S.E. 518.

When the exceptions reserved by the plaintiff are laid alongside this practical and sensible rule of appellate procedure, it becomes clear that the judgment of the trial court cannot be disturbed.

The exceptions to portions of the charge on the first issue are untenable; for it does not appear that the judge erred in them. The instructions on this feature of the case do not merit the criticism voiced by plaintiff that the court failed to charge the jury in respect to the duty of a motorist to exercise due care to avoid injuring children whom he sees, or by the exertion of reasonable care could see, on or near the highway. *Hughes v. Thayer,* 229 N.C. 773, 51 S.E. 2d 488.

We will consider together the exception to the submission of the second issue, and the exceptions to the portions of the charge thereon. It is an undoubted rule of appellate practice in this jurisdiction that the submission to the jury of an issue of fact not warranted by both the pleadings and the testimony constitutes reversible error if prejudice results to the objecting party. *Fortesque v. Crawford,* 105 N.C. 29, 10 S.E. 910. For the purpose of this particular appeal, we assume, without so deciding, that there was no evidence at the trial justifying the submission of the second issue, and that the instructions of the court to the jury on that issue were erroneous. Nevertheless, the present record compels the conclusion that the errors of the court in submitting the second issue and in giving the jury incorrect instructions thereon did not affect prejudicially any substantial right of the plaintiff. The jury did not consider the issue improperly submitted, or make any finding thereon. The verdict on the first issue, *i.e.,* that the male defendant was not guilty of any actionable negligence, necessarily required that judgment be entered against the plaintiff, and rendered the issue of contributory negligence and the instructions thereon immaterial. *Wyatt v. Raleigh,* 172 N.C. 847, 90 S.E. 213; *Bank v. Wilson,* 168 N.C. 557, 84 S.E. 557; *Cannady v. Durham,* 137 N.C. 72, 49 S.E. 50.

The trial judge made dim memorandums in pencil on the paper containing the issues to facilitate the delivery of his charge to the jury. He noted the words "burden," "negligence," and "proximate cause" on the margin beside the first issue; the words "burden," "contributory negli-

gence," and "opinion" on the margin beside the second issue; and the words "burden" and "measure of damages" on the margin beside the third issue. The notation "opinion" was designed to remind the judge to read to the jury at the appropriate time a pertinent excerpt from a reported judicial decision.

When he completed his charge and handed the paper containing the issues to the jury, the judge inadvertently failed to erase the memorandums. In consequence, the jury necessarily took the notations with it to the jury room. Upon the return of the jury to the courtroom with the first issue answered in the negative, counsel for the plaintiff observed the memorandums on the paper containing the issues, and objected to the receipt of the verdict on that ground. The judge then made this statement to counsel for plaintiff in the presence of the jury: "I don't think they had anything to do with the verdict of the jury. We can poll the jury, if you desire, to see whether that had any effect upon the verdict." Pursuant to the order of the judge, the clerk asked each juror whether the notations appearing on the paper containing the issues had anything to do with his verdict, and each juror assured the court that they did not. The court thereupon received and recorded the verdict, and the plaintiff noted two exceptions, one to the receipt of the verdict and the other "to the polling of the jury in the foregoing manner."

These exceptions are insupportable; for the record affirmatively shows that the presence of the memorandums on the paper containing the issues did not influence the jury in arriving at its verdict. Indeed, the indifferent character of the notations negatives the possibility of any prejudice to any party to the litigation. See in this connection: *Gooding v. Pope,* 194 N.C. 403, 140 S.E. 21; *Posey v. Patton,* 109 N.C. 455, 14 S.E. 64.

The statement of the judge that he did not think that the memorandums "had anything to do with the verdict of the jury" is not the subject of an exception, and does not fall under the ban of the statute embodied in G.S. 1-180 forbidding a judge to express an opinion whether a fact in issue is fully or sufficiently proven. Nevertheless, we deem it not amiss to recommend that judges refrain from expressing opinions upon matters before jurors whom they propose to poll in regard to such matters.

The exception to the denial of the motion for a new trial and the exception to the judgment are formal in nature and require no discussion.

For the reasons given, we find that there is in a legal sense

No error.

SHUFORD DULL, EARLY DULL, NEWTON DULL, CLYDE DULL, PAUL DULL, HAROLD DULL, ETHEL YARBOROUGH, ERLINE BROWN, AND EMILY BELL DULL, WIDOW OF ELI DULL, DECEASED, v. W. H. DULL AND WIFE, GRACIE MAE DULL.

(Filed 11 October, 1950.)

1. Deeds § 11—

In the interpretation of a deed, the intention of the grantor must be gathered from the four corners of the instrument and every part thereof given effect, unless it contains conflicting provisions which are irreconcilable, or a provision which is contrary to public policy or runs counter to some rule of law.

2. Deeds § 13a—

The granting clause in a deed ordinarily controls whenever it is repugnant to the proceeding or succeeding recitals.

3. Same—

A conveyance to a man and his wife by name for life or during the widowhood of the named wife, then to their bodily heirs equally "including the two illegitimate children as above named" in the premises, *is held* to convey the estate to the husband and the wife named and the children of that marriage, to the exclusion of a subsequent wife and children of the second marriage of the husband.

APPEAL by defendants from *Rudisill, J.*, at February Term, 1950, of YADKIN.

This is a civil action instituted for the purpose of obtaining an interpretation of a deed, the pertinent parts of which are as follows:

"This Indenture made the 24th day of December, 1869, between Giles Joyner of the first part and William I. Dull and wife, Nancy M. and their bodily heirs including two illegitimate, Wm. R. & Nancy M. born of Nancy M. before marage of the second part all of the County of Yadkin & State of North Carolina.

"Witnesseth that the said party of the first part for and in consideration of the sum of Eleven dollars & 50 cents to him in hand paid by the said Wm. I. Dull and Receipt is hereby fully acknowledged and the Love and affection he hath for his grand son W. I. Dull and wife, N. M. and their children Including the two illegitimate W. R. & N. M. all of which is hereby fully acknowledged by the party of the first part and hath Deeded granted, bargained & sold & given unto the said partys of the second part as follow to wit to the said William I. Dull & wife, Nancy M. during their natural life or Nancy M. widowhood then to their bodily heirs equally Including the two Illegitimate children as above named, all that tract, piece or parcel of land lying and being in the County of Yadkin," (*sic*) etc.

It was agreed that his Honor should hear and determine this matter upon the pleadings, orders and stipulations.

1. It is stipulated that Nancy M. Dull died, leaving surviving her, her husband, William I. Dull, and eight children.

2. That thereafter William I. Dull married Amanda Dull, to which union there were born eight children.

3. That William I. Dull died 8 January, 1929, and left surviving him his widow, Amanda Dull, and his sixteen children by his first and second wives.

4. That the eight children of William I. Dull and Nancy M. Dull conveyed all their right, title and interest in and to the lands in controversy to their step-mother, Amanda Dull.

5. That Amanda Dull has conveyed the land in question to the defendants, reserving to herself a life interest.

6. That the defendant, W. H. Dull, is a child of the second marriage and has obtained deeds from three of his sisters of said marriage, purporting to convey their interest in the premises.

It is the contention of the plaintiffs that the children of the second marriage took an interest, as tenants in common, with the children of the first marriage, in the land acquired under the Joyner deed and owned by William I. Dull at the time of his death, and that the plaintiffs Shuford Dull, Early Dull and Newton Dull, children of the second marriage, each own a one-sixteenth undivided interest in said lands, and that Eli Dull, a child of the second marriage, having died in 1948 leaving surviving him his widow, Emily Bell Dull, and five children, to wit, Clyde Dull, Paul Dull, Harold Dull, Ethel Yarborough and Erline Brown; that his children own a one-sixteenth interest therein, subject to the dower right of their mother, Emily Bell Dull.

The court below entered judgment in favor of the plaintiffs. The defendants excepted and appealed.

Hall & Zachary for plaintiffs.

Allen & Henderson and F. D. B. Harding for defendants.

DENNY, J. In the interpretation of a deed, the intention of the grantor must be gathered from the four corners of the instrument and every part thereof given effect, unless it contains conflicting provisions which are irreconcilable, or a provision which is contrary to public policy or runs counter to some rule of law. *Ellis v. Barnes,* 231 N.C. 543, 57 S.E. 2d 772; *Edgerton v. Harrison,* 230 N.C. 158, 52 S.E. 2d 357; *Boyd v. Campbell,* 192 N.C. 398, 135 S.E. 121; *Willis v. Trust Co.,* 183 N.C. 267, 111 S.E. 163; *Springs v. Hopkins,* 171 N.C. 486, 88 S.E. 774.

The plaintiffs are relying upon the case of *Roberson v. Griffin,* 185 N.C. 38, 115 S.E. 824, for an affirmance of the judgment entered below. While the defendants are relying upon *Turner v. Turner,* 195 N.C. 371, 142 S.E. 224, and *Williams v. Williams,* 175 N.C. 160, 95 S.E. 157, for a reversal.

We think the grantor, in using the words "bodily heirs" in the premises in connection with the description of the grantees, had in mind the children of William I. Dull and his wife Nancy M. Dull. The granting clause in a deed, however, and not the premises, ordinarily controls whenever it is repugnant to preceding or succeeding recitals. *Ingram v. Easley,* 227 N.C. 442, 42 S.E. 2d 624; *Maberry v. Grimsley,* 208 N.C. 64, 179 S.E. 7; 16 Am. Jur. 575.

In the instant case, the granting clause conveys the property described to William I. Dull and wife Nancy M. Dull, during their natural lives or during the widowhood of Nancy M. Dull, then to their bodily heirs equally, including the two illegitimate children theretofore named.

In our opinion the grantor, in using the words "bodily heirs" in the granting clause, did so as a *"descriptio personarum,"* and that the estate granted was for the natural lives of William I. Dull and wife, Nancy M. Dull, or during the widowhood of Nancy M. Dull, and then to the children born of the first marriage, including the two named illegitimate children.

In this connection it should be noted that Nancy M. Dull was conveyed only an estate for life or during her widowhood. Therefore, it would seem the words "their children" were used in an exclusive sense, meaning the children of William I. Dull and his then present wife, Nancy M. Dull, including the two illegitimate children born to them before marriage.

This view is supported by the decisions in *Turner v. Turner, supra,* and *Williams v. Williams, supra.* And, as stated in the *Turner case,* the principles announced in *Roberson v. Griffin, supra,* are likewise not applicable to the facts in this case.

The judgment below is

Reversed.

THE BRANCH BANKING & TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF W. C. AYCOCK, DECEASED, v. HORACE FINCH.

(Filed 11 October, 1950.)

1. Venue § 1b—

G.S. 1-82 governs the venue of actions instituted by an executor or administrator in his official capacity.

2. Venue §§ 1a, 1b—

The residence of a corporate executor or administrator for the purpose of determining venue of an action instituted by it, like that of other domestic corporations, is the county in which it maintains its principal office, G.S. 1-79, and not the county of its qualification.

3. Same—

A corporate administrator instituted suit in the county of its qualification and in which it maintained a branch office, against a defendant who was a resident of another county in which the corporate administrator maintained its principal office. *Held:* The action was properly removed upon motion to the county in which the corporate administrator maintained its principal office and in which defendant resides. G.S. 1-79.

APPEAL by plaintiff from *Halstead, Special Judge,* at March Term, 1950, of WAYNE.

Civil action instituted in the Superior Court of Wayne County to recover damages for the wrongful death of plaintiff's intestate.

The plaintiff, Branch Banking & Trust Company, is a banking corporation, duly authorized to act in a fiduciary capacity, with its principal office in Wilson County, North Carolina.

Plaintiff's intestate was killed in the City of Wilson, on 1 January, 1950, in a collision between his car and the car of the defendant.

W. C. Aycock was a resident of Wayne County at the time of his death, and Branch Banking & Trust Company qualified as administrator of his estate in said county.

The defendant is a resident of Wilson County.

In apt time the defendant filed a motion requesting that the action be removed as a matter of right to Wilson County. The motion was denied by the Clerk of the Superior Court, but granted upon appeal to the Judge of the Superior Court. Thereupon the plaintiff appealed to the Supreme Court and assigns error.

Paul B. Edmundson, Fred P. Parker, James N. Smith, and Dees & Dees for plaintiff.

Connor, Gardner & Connor for defendant.

DENNY, J. This Court held in *Whitford v. Ins. Co.,* 156 N.C. 42, 72 S.E. 85, that since no provision had been made elsewhere designating the place of trials of actions instituted by administrators, the proper place for the trial of such actions was governed by the provisions contained in Section 424 of the Revisal (now G.S. 1-82), the pertinent part of which reads as follows: "In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any one of them reside, at its commencement . . ."

Since the plaintiff and the defendant are residents of Wilson County, such county is the proper venue for the trial of this case. *Rankin v. Allison,* 64 N.C. 673; *Biggs v. Bowen,* 170 N.C. 34, 86 S.E. 692; *Smith-Douglass Co. v. Honeycutt,* 204 N.C. 219, 167 S.E. 810; *Lawson v. Langley,* 211 N.C. 526, 191 S.E. 229, 111 A.L.R. 163.

In an action brought by a fiduciary, the personal residence of the fiduciary determines the place of venue, and not the county where he qualified. *Smith v. Patterson,* 159 N.C. 138, 74 S.E. 923; *Biggs v. Bowen, supra; Indemnity Co. v. Hood, Comr.,* 225 N.C. 361, 34 S.E. 2d 204. While an executor or administrator must be sued in his official capacity in the county where he qualified, *Wiggins, Admr., v. Trust Co., ante,* 391, he may bring an action in the county where he resides, or in the county where the defendant resides, although neither may reside in the county in which he qualified. McIntosh, N. C. Practice & Procedure, Section 288, p. 271.

The residence of a domestic corporation for the purpose of suing and being sued is in the county in which it maintains its principal office. G.S. 1-79; *Roberson v. Lumber Co.,* 153 N.C. 120, 68 S.E. 1064; *Oil Co. v. Fertilizer Co.,* 204 N.C. 362, 168 S.E. 411. And the contention of the appellant that it has the right to select as the forum for the trial of this action the county where it qualified, and in which it maintains a branch office, will not be upheld. The maintenance of a branch office in Wayne County does not make the Branch Banking & Trust Company a resident of that county for the purpose of suing and being sued. G.S. 1-79.

The judgment of the court below is

Affirmed.

H. T. CAMP v. SOUTHERN RAILWAY COMPANY.

(Filed 11 October, 1950.)

1. Master and Servant § 26—

Evidence disclosing that the boxcar in question was a standardized one, fully equipped with all appliances required by law, does not support plaintiff employee's allegation that defendant was negligent in failing to equip the car with sill steps, ladders, grab-irons or hand-holds, for use in entering and leaving the car, since such additional appliances might have resulted in a more hazardous instrumentality instead of a safer one.

2. Same—

Plaintiff employee, in attempting to enter a boxcar, extended his hand to a fellow employee, who caught it and endeavored to help him up. Plaintiff lost his balance, and another fellow employee grabbed him to prevent his falling, causing plaintiff's foot to slip and plaintiff to fall against the outer edge of the boxcar floor, to his serious injury. *Held:* The acts of the fellow employees cannot be imputed to defendant railroad company as negligence, since the injury could not have been foreseen or anticipated as the result thereof, and the injury was purely accidental or misadventurous.

3. Same—

In an action against a railroad company under the Federal Employers' Liability Act, plaintiff is required to show negligence proximately producing injury, and when the evidence shows nothing but a fortuitous injury a directed verdict for defendant is correct.

BARNHILL, J., dissents.

APPEAL by plaintiff from *Rousseau, J.*, January-February Term, 1950, of POLK.

Civil action under Federal Employers' Liability Act to recover damages for personal injury alleged to have been caused by the negligence of the defendant.

On 20 May, 1946, the plaintiff, a section foreman in the employ of the defendant, was engaged in the construction or extension of a sidetrack at Mascot, S. C. He was injured while attempting to enter a boxcar for the purpose of inspecting some crossties therein, and/or to get out of a shower of rain. The floor of the boxcar was five feet above the ground. As plaintiff approached the car, Ed Jones and Lee Mack, two of plaintiff's crew, were standing at the doorway in the middle of the car. The plaintiff placed one foot against a piece of iron under the car and reached one of his hands towards Ed Jones who caught it and endeavored to help him up. Jones lost his balance and was leaning forward when Lee Mack grabbed him to prevent his falling and jerked him around sidewise. This

caused the plaintiff's foot to slip and he fell against the outer edge of the floor of the boxcar with such force as to cause him serious injury.

The car in question was a standardized boxcar of the Chicago and Northwestern Railway, equipped with all safety appliances and attachments required by the orders and directions of the Interstate Commerce Commission. The plaintiff was familiar with this type of car, having gone in and out of standardized boxcars over a period of many years.

The allegations of negligence are that the defendant omitted, in the exercise of due care, to furnish the plaintiff a reasonably safe place to work, specifying that the boxcar in question was not properly equipped with sill steps, ladders, grabirons or handholds, for use in entering and leaving the car; and further, that both Ed Jones and Lee Mack were negligent in the manner in which they undertook to assist the plaintiff into the car.

From a directed verdict for defendant on the issue of negligence, the plaintiff appeals, assigning errors.

Hamrick & Jones and W. Y. Wilkins, Jr., for plaintiff, appellant.
Joyner & Howison and Jones & Ward for defendant, appellee.

STACY, C. J. The appeal poses the question whether there is sufficient evidence to sustain a finding of actionable negligence on the part of the defendant. The trial court answered in the negative, and we approve.

There is no suggestion that the type of boxcar here used was inappropriate for hauling crossties. The opposite is intimated. And while it is contended the defendant was negligent in failing to equip the car with proper appliances for use in entering or leaving it, there is no evidence to support the contention. Plaintiff's own testimony points the other way. The car in question was a standardized boxcar, fully equipped with all appliances required by law. Indeed, to have added others, or those which the plaintiff now says should have been added, might have resulted in a more hazardous instrumentality. At least, the question is subject to opposite contentions.

Nor is the conduct of Ed Jones and Lee Mack, or either of them, to be imputed to the defendant for negligence. What they did was natural and spontaneous, kindly and gratuitously offered, and so received. Neither they nor the defendant could have foreseen or anticipated any injurious effects or the consequences which followed. They were purely accidental or misadventurous. Plaintiff's action is one in tort, and he may not recover for an accidental injury. *A. C. L. R. R. Co. v. Davis,* 279 U.S. 34, 73 L. Ed. 601; *A. C. L. R. R. Co. v. Driggers,* 279 U.S. 787, 73 L. Ed. 957.

Plaintiff relies principally on the cases of *Hill v. R. R.*, 229 N.C. 236, 49 S.E. 2d 481, 336 U.S. 911, 231 N.C. 499, 57 S.E. 2d 781, and *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 87 L. Ed. 1444, but these cases are readily distinguishable from the one at bar. The factual situations are quite different. In the cases cited, there were duties resting on the defendants which they omitted to perform, to the plaintiffs' hurt. Here, no such omission is made to appear. Plaintiff shows no default on the part of the defendant which resulted in injury to him. Hence his action fails, and the court properly directed a verdict for the defendant. *Galloway v. U. S.*, 319 U.S. 372, 87 L. Ed. 1458; *Atchison T. & S. F. R. R. Co. v. Toops*, 281 U.S. 351, 74 L. Ed. 896. The basis of liability under the Federal Employers' Liability Act is negligence proximately producing injury. The plaintiff must show something more than a fortuitous injury. *Tiller v. A. C. L. R. R.*, 318 U.S. 54, 87 L. Ed. 610, 143 A.L.R. 967; *Brady v. Southern Ry. Co.*, 222 N.C. 367, 23 S.E. 2d 334, 320 U.S. 476, 88 L. Ed. 239; *Ellis v. Union Pacific R. Co.*, 329 U.S. 649.

Of course, it is easy to be wise in retrospect, and the plaintiff now perceives exactly how the injury could have been avoided. He tells us so. But when pressed to say just wherein the defendant was negligent, he answers, "That is a matter for the jury." The courts are not at liberty to attribute the plaintiff's misfortune to somebody else's negligence in the absence of sufficient evidence to support the attribution. *New York Central R. R. Co. v. Ambrose*, 280 U.S. 486, 74 L. Ed. 562; *Patton v. Texas & P. R. R. Co.*, 179 U.S. 685, 45 L. Ed. 361.

The conclusion is an affirmance of the judgment below.

No error.

BARNHILL, J., dissents.

THE TEXAS CO. v. J. W. STONE, JR., ET AL.

(Filed 11 October, 1950.)

1. Landlord and Tenant § 15—

Where a sublease provides for a term of one year but also that it should terminate *eo instanti* the termination of the main lease, the sublessee, upon termination of the main lease according to its terms, cannot maintain that there was a breach of the sublease for its termination prior to the expiration of the year.

2. Principal and Agent § 7f—

One dealing with an agent or representative with known limited authority can acquire no rights against the principal when the agent or representative acts beyond his authority or exceeds the apparent scope thereof.

8. Fraud § 5—

Where sublessees are advised that their term automatically terminates upon termination of the main lease and are kept fully advised as to the negotiations for the renewal of the main lease, they may not maintain a counterclaim against their lessor for fraud based upon representations of their lessor's agents with known limited authority, since knowledge forestalls deception.

APPEAL by defendants from *Morris, J.*, June Term, 1950, of WAYNE.

Civil action to recover for petroleum products sold and delivered by plaintiff and received by the defendants.

On 19 May, 1947, the plaintiff, as lessee of the premises on East Ash Street, Goldsboro, N. C., where "Stone's Owl Service Center" is located, sublet the same to the defendants for a period of one year beginning 19 May, 1947, and ending 18 May, 1948, subject, however, to the terms and conditions of the lease under which the plaintiff acquired the right of possession.

The plaintiff's lease from the owner of the land, duly registered in Wayne County registry, was due to expire 1 June, 1947, and thereafter the tenancy thereunder was to be from month to month, subject to termination on seven days' notice. It was actually terminated on 1 August, 1947.

The petroleum products in question were delivered to defendants from 16 June, 1947, through 14 July, 1947, and amounted in value to $1,581.12.

The plaintiff's claim is admitted by the defendants, but they aver and set up by way of counterclaim that at the time of the execution of their lease, plaintiff's agents, A. T. Hawkins and J. Y. Ellington, assured them that the lease under which the plaintiff held from the owners had been extended; that said assurances were false to the knowledge of plaintiff's agents, and that the defendants relied upon them to their hurt. Wherefore, they demanded damages in the amount of $5,000.00.

At the close of defendants' evidence, the court inquired of counsel for the defendants whether they were relying on breach of contract or on tort in their counterclaim. Counsel replied that they "relied upon the pleadings as supported by the evidence." In their brief here they rely on breach of contract.

The court being of opinion that the evidence was insufficient to support the counterclaim dismissed the same and entered judgment for the plaintiff.

Defendants appeal, assigning errors.

Langston, Allen & Taylor for plaintiff, appellee.

J. Faison Thomson for defendants, appellants.

STACY, C. J. The defendants have made out no case against the plaintiff for breach of their lease, since this lease provides for its own termination *eo instanti* upon the termination of plaintiff's lease with the owner of the premises.

There is no evidence that plaintiff's alleged agents and representatives, Hawkins and Ellington, had any authority to make any assurances or representations which would be binding on the plaintiff, or that what assurances or representations they did make, if any, were made falsely with intent to mislead or to deceive the defendants. The defendants knew they were dealing with agents and representatives of limited authority.

One dealing with an agent or representative with known limited authority can acquire no rights against the principal when the agent or representative acts beyond his authority or exceeds the apparent scope thereof. *Norfolk Southern Ry. Co. v. Smitherman,* 178 N.C. 595, 101 S.E. 208; *Savings Bank v. Drug Co.,* 152 N.C. 142, 67 S.E. 253; 2 Am. Jur. 75 and 85.

Moreover, the plaintiff's alleged agents and representatives did have a renewal lease signed by the owner which was sent to the Norfolk office of the Texas Company for approval. It was approved tentatively by the Norfolk office, with two or three changes, and returned for the owner's acceptance of the changes. The owner declined to accept the changes, declared the old lease at an end, and proceeded to rent the premises to other parties. This automatically terminated the lease between plaintiff and defendants. The defendants were at all times advised of their rights and also of the negotiations between plaintiff and the owner in respect of a renewal of plaintiff's lease on the premises. They could not have been deceived by that which they knew. Knowledge forestalls deception. *Harrison v. Ry.,* 229 N.C. 92, 47 S.E. 2d 698; *Cox v. Johnson,* 227 N.C. 69, 40 S.E. 2d 418.

No harm has come to the defendants from the dismissal of their counterclaim. At least, none is manifest on the record. The ruling and judgment will be upheld.

Affirmed.

THOMAS J. SPARKS v. GRADY SPARKS AND WIFE, THELMA SPARKS; BELL HENLINE AND HUSBAND, NELSON HENLINE.

(Filed 11 October, 1950.)

Constitutional Law § 22: Trial § 18—

It is error for the trial court to determine issues of fact raised by the pleadings in the absence of waiver of the constitutional and statutory right to a trial by jury, N. C. Constitution, Art. I, Sec. 19; Art. IV, Sec. 13; G.S. 1-172, G.S. 1-184.

APPEAL by defendants from *Rudisill, J.*, at the April Term, 1950, of MITCHELL.

Civil action involving title to real property.

This is the second appeal in this case. *Sparks v. Sparks,* 230 N.C. 715, 55 S.E. 2d 477.

The complaint alleges that the plaintiff owns certain land in Mitchell County in fee simple; that he is in the actual possession of the land; that the defendants wrongfully claim some interest in the land adversely to him; and that he is entitled to a judgment establishing his absolute ownership of the land and removing the adverse claim of the defendants as a cloud on his true title. The answer concedes that the plaintiff holds title to an undivided one-third interest in the land, and avers that the defendants are the fee simple owners of the other undivided two-thirds interest therein.

The cause came on for trial before a jury at the April Term, 1950, of the Superior Court of Mitchell County, and the plaintiff and the defendants undertook to support their respective allegations by testimony. After all the evidence on both sides was in, the court announced its adoption of the following issues: (1) Is the plaintiff the owner in fee simple of the lands described in the complaint? (2) Has the plaintiff been in the adverse possession under color of title to the lands described in the complaint for more than seven years?

Although the parties had not waived trial by jury, the presiding judge concluded "as a matter of law . . . after considering all of the evidence" that it was the duty of the court "to answer the issues." He thereupon answered both issues "yes," and rendered judgment on such answers declaring the plaintiff "to be the owner of the lands described in the complaint in fee simple." The defendants excepted and appealed, assigning these and other rulings of the court as error.

Hall & Zachary for plaintiff, appellee.

Fouts & Watson for defendants, appellants.

ERVIN, J. The Constitution of North Carolina guarantees to every litigant the "sacred and inviolable" right to demand a trial by jury of the issues of fact arising "in all controversies respecting property," and he cannot be deprived of this right except by his own consent. N. C. Const., Art. I, Sec. 19. The Code of Civil Procedure provides that issues of fact must be tried by a jury, unless a trial by jury is waived or a reference ordered. G.S. 1-172.

The defendants did not waive their constitutional and statutory right to have the issues of fact joined on the pleadings in this case tried by a jury. N. C. Const., Art. IV, Sec. 13; G.S. 1-184. This being true, the presiding judge had no authority to answer the issues, and to enter judgment in favor of the plaintiff upon his answers to the issues. In consequence, the judgment is set aside, and the cause is remanded for a new trial to the end that the determinative issues of fact raised by the pleadings may be submitted to a jury for decision. *Crews v. Crews,* 175 N.C. 168, 95 S.E. 149; *Cozad v. Johnson,* 171 N.C. 637; *Hockoday v. Lawrence,* 156 N.C. 319, 72 S.E. 387; *Hahn v. Brinson,* 133 N.C. 7, 45 S.E. 359; *Wilson v. Bynum,* 92 N.C. 718; *Chasteen v. Martin,* 81 N.C. 51; *Hyatt v. Myers,* 73 N.C. 232; *Andrews v. Pritchett,* 66 N.C. 387.

Error.

STATE v. MARVIN WORRELL.

(Filed 11 October, 1950.)

1. Criminal Law § 81c (2)—

Objection to excerpts from the charge cannot be sustained when the charge, construed contextually, is without prejudicial error.

2. Criminal Law § 53i—

An instruction to the effect that the State's evidence of defendant's bad character should not be considered as substantive evidence but only as bearing upon the credibility of defendant as a witness in his own behalf, *is held* without prejudicial error.

3. Same—

An instruction to the effect that testimony of defendant should be taken with some allowance but that the law does not reject or impeach his testimony, with further instruction that if the jury should believe defendant has sworn to the truth and find him worthy of belief, it should give his testimony as full credit as that of any other witness notwithstanding his interest, *is held* without prejudicial error.

APPEAL by defendant from *Morris, J.,* May Term, 1950, of WAYNE. No error.

The defendant was charged with receiving stolen goods knowing them to have been stolen. There was verdict of guilty, and from judgment imposing sentence, the defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Moody, and Walter F. Brinkley, Member of Staff, for the State.

J. Faison Thomson and N. W. Outlaw for defendant, appellant.

DEVIN, J. The only exceptions brought forward in defendant's assignments of error relate to the court's charge to the jury.

Several excerpts from the charge to which exception was noted, when taken out of context, might appear to have some substance, but when the charge is considered in its entirety and contextually we discover no prejudicial error. *S. v. Bridges,* 231 N.C. 163, 56 S.E. 2d 397; *S. v. Truelove,* 224 N.C. 147, 29 S.E. 2d 460; *S. v. Lee,* 192 N.C. 225, 134 S.E. 458.

The court charged the jury as follows: "In this case the State of North Carolina has offered certain evidence of the bad character of the defendant. He having testified in his own behalf, it becomes my duty to instruct you how you will consider that evidence. I instruct you that you will not consider that as substantive evidence but will consider it only as it bears upon the credibility of the witness Marvin Worrell by testifying in his own behalf, and it is only in that light you will consider that testimony." Objection to this instruction when considered in the connection in which it was given cannot be sustained.

Also, the court instructed the jury that the testimony of interested parties, near relatives and accomplices should be taken with some degree of allowance, "but the rule does not reject or necessarily impeach such evidence." To this the court added, "I instruct you where a defendant in the trial of a criminal action testifies in his own behalf, if you believe he has sworn to the truth, and find him worthy of belief, you should give as full credit to his testimony as you would to any other witness, notwithstanding his interest in your verdict." We perceive no substantial harm to the defendant from this instruction. *S. v. Davis,* 209 N.C. 242, 183 S.E. 420. Considered in its entirety we think the defendant has no cause for complaint. Error was assigned in no other respect. The evidence supported the verdict.

In the trial we find

No error.

EDNA MAE BARKER v. JAMES G. BARKER.

(Filed 11 October, 1950.)

Divorce and Alimony § 5d—

In an action for alimony without divorce, G.S. 50-16, on the ground of mistreatment constituting constructive abandonment, the absence of an allegation that defendant's misconduct was without adequate provocation, is fatal, and judgment in plaintiff's favor will be set aside on appeal, and the cause remanded for dismissal unless plaintiff moves in apt time to amend. G.S. 1-131.

APPEAL by defendant from *Crisp, Special Judge,* June Term, 1950, of WILKES.

Whicker & Whicker and Trivette, Holshouser & Mitchell for plaintiff, appellee.

Bowie & Bowie and W. H. McElwee for defendant, appellant.

DEVIN, J. This was a suit for alimony without divorce under G.S. 50-16. The plaintiff alleged as the basis of her suit that the defendant had neglected and mistreated her, and had abused and assaulted her, had threatened her life and driven her from home, and "by his conduct has made her burdens unbearable and life intolerable." In this Court the defendant demurred *ore tenus* on the ground that the complaint did not state facts sufficient to constitute a cause of action for that nowhere in the complaint did the plaintiff allege that the indignities offered to her person or his conduct in causing her to leave home were without adequate provocation on her part.

An examination of the complaint shows that this material averment was not incorporated in the complaint. It has been repeatedly held by this Court that this averment, in connection with allegations such as are contained in the plaintiff's complaint as ground for relief, is essential and its omission fatal to the plaintiff's cause of action. *Best v. Best,* 228 N.C. 9, 44 S.E. 2d 214; *Lawrence v. Lawrence,* 226 N.C. 624, 39 S.E. 2d 807; *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; *Garsed v. Garsed,* 170 N.C. 672, 87 S.E. 45.

In accord with the established rule and on authority of the cases cited the demurrer to the complaint is sustained. The judgment below predicated upon the complaint must be held for error (*Tucker v. Baker,* 86 N.C. 1). The action is remanded to the Superior Court of Wilkes County with instruction that same be dismissed unless within apt time

the plaintiff moves for leave to amend under G.S. 1-131. *White v. Charlotte,* 207 N.C. 721, 178 S.E. 219; *Watson v. Lee County,* 224 N.C. 508 (513), 31 S.E. 2d 535.

Reversed.

STATE v. JOE RAY.

(Filed 11 October, 1950.)

Criminal Law § 78e (1)—

Where the evidence upon which the charge is based does not appear of record, excerpts from the charge cannot be held for prejudicial or reversible error unless inherently and patently so.

APPEAL by defendant from *Burgwyn, Special Judge,* February Term, 1950, of JOHNSTON.

Criminal prosecution on indictment charging the defendant with the murder of one Haywood Williams.

Verdict: Guilty of manslaughter with recommendation of mercy.

Judgment: Imprisonment in the State's Prison for a term of not less than 8 nor more than 17 years.

The defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

Canaday & Canaday for defendant.

STACY, C. J. All that appears in this case is the record proper, the Judge's charge and the defendant's assignments of error. The transcript is devoid of any evidence offered at the trial or taken on the hearing. The exceptions are addressed exclusively to portions of the charge.

Even if some of the instructions, standing alone, should be regarded as erroneous, they could not be declared prejudicial or hurtful, unless inherently and patently so, in the absence of the evidence upon which they were based or to which they speak. 24 C.J.S. 733; *Pickett v. Pickett,* 14 N.C. 6; *S. v. Wilson,* 121 N.C. 650, 28 S.E. 416.

In *Pickett v. Pickett, supra*—First Syllabus—it is said: "In an appeal to the Supreme Court, if the case stated does not contain *the facts* to which the charge of the judge was applied, however erroneous the charge itself may be, as an abstract proposition, still the judgment must be affirmed. A judgment is not reversed because it does not appear to be right; it must be affirmed unless it appear to be wrong."

We find no sufficient cause to disturb the result of the trial. The verdict and judgment will be upheld.

No error.

A. F. HOLT, JR., v. NERUS C. HOLT, MRS. GULIE HOLT, WIDOW OF CLIFTON G. HOLT; RUTH ARLINE HOLT, UNMARRIED; NORWOOD GRAHAM HOLT, AND MRS. GULIE HOLT, ADMINISTRATRIX OF CLIFTON G. HOLT,

and

WILLIAM P. HOLT v. NERUS C. HOLT, MRS. GULIE HOLT, WIDOW OF CLIFTON G. HOLT; RUTH ARLINE HOLT, UNMARRIED; NORWOOD GRAHAM HOLT, AND MRS. GULIE HOLT, ADMINISTRATRIX OF CLIFTON G. HOLT.

(Filed 18 October, 1950.)

1. Conspiracy § 1—

To create civil liability for conspiracy there must be a tort committed by one or more of the conspirators pursuant to the common scheme and in furtherance of the common object.

2. Descent and Distribution § 3b—

A child possesses no interest whatever in the property of his parent during the lifetime of the latter, and therefore has no ground to attack any conveyance made by the parent for want of consideration or as being in deprivation of his right of inheritance, since the right to inherit arises only on the parent's death and entitles the child to take as heir or distributee only the property owned by the parent at death which the parent does not dispose of by testamentary provision.

3. Cancellation and Rescission of Instruments § 8—

The right to attack a conveyance on the ground that its execution was procured by fraud or undue influence rests in the grantor and, upon his death with the cause of action still extant, in his heirs in case of intestacy and in his devisees in case the grantor leaves a will or, if the property be personalty, in his personal representative or, if the personal representative refuses to sue, in his legatees or distributees.

4. Same—

Where heirs at law, seeking to set aside conveyances executed by their ancestor on the ground of fraud and undue influence, introduce in evidence a paper writing probated in common form as the last will and testament of their ancestor, which is sufficient in form to vest in the grantees in the conveyances attacked all the interest of the ancestor, *held* compulsory nonsuit is proper, since plaintiffs may not collaterally attack the paper writing probated in common form, and the will precludes any interest in plaintiffs entitling them to maintain the action as heirs or next of kin of the grantor.

5. Wills § 16—

The probate of a paper writing in common form conclusively establishes it as the valid will of the decedent until it is declared void by a competent tribunal on an issue of *devisavit vel non* in a caveat proceeding. G.S. 31-19.

APPEAL by plaintiffs from *Burney, J.*, at the April Term, 1950, of JOHNSTON.

Civil actions, consolidated for trial and heard together, in which plaintiffs, as heirs and next of kin of a decedent, seek to recover damages of defendants for allegedly inducing decedent by fraud or undue influence to convey and will his property to them pursuant to a conspiracy on the part of the defendants and another to defraud plaintiffs of their rights of inheritance.

The plaintiffs undertook to sustain their allegations by the evidence summarized below.

1. A. F. Holt, Sr., and his four sons, Clifton G. Holt, Nerus C. Holt, William P. Holt, and A. F. Holt, Jr., resided in Johnston County, North Carolina, where A. F. Holt, Sr., owned a substantial landed estate, and conducted a merchandising business known as A. F. Holt and Sons in partnership with his sons, Clifton G. Holt and Nerus C. Holt.

2. Upon the death of his wife on 4 September, 1935, A. F. Holt, Sr., removed to the home of his son, Nerus C. Holt, where he spent the remainder of his days. Clifton G. Holt and Nerus C. Holt had virtually complete management of the mercantile business known as A. F. Holt and Sons subsequent to 1934.

3. On 23 October, 1936, and 3 December, 1937, A. F. Holt, Sr., executed in due form of law certain conveyances, which were forthwith registered in the office of the Register of Deeds of Johnston County, transferring all of his real and personal property, except that specified in the next sentence, to his sons, Clifton G. Holt and Nerus C. Holt. At about the same time, A. F. Holt, Sr., gave his son, William P. Holt, various sums of money totaling $22,112.14, and conveyed to his son A. F. Holt, Jr., by way of gift, several parcels of land worth about $15,000.00.

4. The real and personal property transferred to Clifton G. Holt and Nerus C. Holt by the conveyances of 23 October, 1936, and 3 December, 1937, was worth $185,000.00, and Clifton G. Holt and Nerus C. Holt paid A. F. Holt, Sr., nothing therefor. A. F. Holt, Sr., did not exercise dominion over the property subsequent to 3 December, 1937.

5. On 3 December, 1937, A. F. Holt, Sr., signed the paper writing afterwards probated as his last will before attesting witnesses in the law office of Abell and Shepard in Smithfield, North Carolina. His son, Clifton G. Holt, was present on that occasion.

6. Clifton G. Holt and Nerus C. Holt operated the mercantile business known as A. F. Holt and Sons until 1942, when Clifton G. Holt died

intestate survived by his widow, Mrs. Gulie Holt, and two children, Ruth Arline Holt and Norwood Graham Holt. Thereupon the realty described in the conveyances of 23 October, 1936, and 3 December, 1937, was "divided between Clifton G. Holt's heirs and Nerus C. Holt," and Nerus C. Holt, as surviving partner, bought the "one-half interest" of the deceased partner, Clifton G. Holt, in the mercantile business known as A. F. Holt and Sons.

7. Except for some sickness in 1934, A. F. Holt, Sr., "was strong mentally and physically for a man of his age until a year or two before he died." He "was a man of firm convictions."

8. A. F. Holt, Sr., died on or about 1 October, 1947, aged 85 years and 5 months.

9. Soon thereafter, the Clerk of the Superior Court of Johnston County admitted the paper writing mentioned in paragraph 5 of this statement to probate in common form as the last will of A. F. Holt, Sr. Such paper writing contained the following relevant items:

"Second: I have heretofore divided my property among my children as I considered just and fair and my sons W. P. Holt and A. F. Holt, Jr. have been duly advanced and should have no part of my estate.

"Third: I give, devise, and bequeath to my sons C. G. Holt and N. C. Holt, share and share alike, all the residue of my estate, of every kind and character, both real and personal, in fee simple absolute forever. If the said C. G. Holt, or the said N. C. Holt, predecease me, then it is my will and desire that one-half of my entire estate shall go to the heirs-at-law of such deceased child.

"Fourth: I hereby constitute and appoint my said sons C. G. Holt and N. C. Holt, or the survivor of either of them, my lawful executors to all intents and purposes, to execute this my last will and testament according to the true intent and meaning of the same and every part and clause thereof, hereby revoking and declaring utterly void all other wills and testaments by me heretofore made."

10. The plaintiffs had no notice of the existence of the paper writing mentioned in paragraphs 5 and 9 of this statement until some days subsequent to its admission to probate, and the plaintiff, A. F. Holt, Jr., did not learn of the conveyances of 3 December, 1937, during his father's lifetime.

11. The actions were commenced on 13 September, 1948.

The trial court dismissed the actions upon compulsory nonsuits at the close of the evidence for the plaintiffs, and the plaintiffs appealed, assigning these rulings as error.

Wellons, Martin & Wellons, Levinson & Batton, and McLean & Stacy for plaintiffs, appellants.

Abell, Shepard & Wood for defendants, appellees.

ERVIN, J. The answers deny the material allegations of the complaints, plead various statutes of limitation, and assert a want of capacity in plaintiffs to prosecute the suits. In consequence, the establishment of three distinct propositions is indispensable to the causes of action alleged by plaintiffs. These are: (1) That the decedent, A. F. Holt, Sr., was induced to execute the conveyances in controversy by fraud or undue influence of the defendants and their alleged co-conspirator, Clifton G. Holt; (2) that the cause of action arising out of this wrong existed in A. F. Holt, Sr., at the time of his death; and (3) that such cause of action thereupon passed to the plaintiffs in their capacities as heirs and next of kin of A. F. Holt, Sr.

The soundness of this observation becomes manifest when due heed is paid to relevant things. To create civil liability for conspiracy, a wrongful act resulting in injury to another must be done by one or more of the conspirators pursuant to the common scheme and in furtherance of the common object. The gravamen of the action is the resultant wrong, and not the conspiracy itself. Ordinarily the conspiracy is important only because of its bearing upon rules of evidence, or the persons liable. 11 Am. Jur., Conspiracy, section 45.

In the last analysis, the wrong charged in the instant cases is that of procuring property from the decedent, A. F. Holt, Sr., by fraud or undue influence. As we shall see, this was a wrong against the decedent, and not a wrong against the plaintiffs. Hence the plaintiffs are asserting alleged rights which are essentially derivatives from their ancestor. The significance of this fact must not be obscured in any degree by the allegations of the complaints that the alleged conspirators procured the conveyances from A. F. Holt, Sr., to deprive the plaintiffs of their rights of inheritance as prospective heirs and distributees of their then living ancestor.

A child possesses no interest whatever in the property of a living parent. He has a mere intangible hope of succession. *Allen v. Allen,* 213 N.C. 264, 195 S.E. 801. His right to inherit the property of his parent does not even exist during the lifetime of the latter. *Whitley v. Arenson,* 219 N.C. 121, 12 S.E. 2d 906; *Bemis v. Waters,* 170 S.C. 432, 170 S.E. 475. Such right arises on the parent's death, and entitles the child to take as heir or distributee nothing except the undevised property left by the deceased parent. *Chinnis v. Cobb,* 210 N.C. 104, 185 S.E. 638; *Gosney v. McCullers,* 202 N.C. 326, 162 S.E. 746.

In so far as his children are concerned, a parent has an absolute right to dispose of his property by gift or otherwise as he pleases. He may make an unequal distribution of his property among his children with or without reason. These things being true, a child has no standing at law or in equity either before or after the death of his parent to attack a

conveyance by the parent as being without consideration, or in deprivation of his right of inheritance. *Wootton v. Keaton,* 168 Ark. 981, 272 S.W. 869; *Ehrlich v. Tritt,* 316 Ill. 221, 147 N.E. 40; *Childress v. Childress,* 298 Ill. 185, 131 N.E. 586; *Rhodes v. Meredith,* 260 Ill. 138, 102 N.E. 1063, Ann. Cas. 1914D, 416; *McLaughlin v. McLaughlin,* 241 Ill. 366, 89 N.E. 645; *Jones v. Jones,* 213 Ill. 228, 72 N.E. 695; *Thorne v. Cosand,* 160 Ind. 566, 67 N.E. 257; *Lefebure v. Lefebure,* 143 Iowa, 293, 121 N.W. 1025; *Clester v. Clester,* 90 Kan. 638, 135 P. 996; *Doty v. Dickey,* 29 Ky. Law Rep. 900, 96 S.W. 544; *Ross v. Davis,* 345 Mo. 362, 133 S.W. 2d 363, 125 A.L.R. 1111; *Brashears v. State ex rel. Oklahoma Public Welfare Commission,* 194 Okla. 66, 156 P. 2d 101; *Mandel v. Bron,* 270 Pa. 566, 113 A. 834; *Hanes v. Hanes* (Tex. Com. App.), 239 S.W. 190, overruling motion for rehearing 234 S.W. 1078; *In re Eckert's Estate,* 14 Wash. 2d 477, 128 P. 2d 656; *In re Peterson's Estate,* 12 Wash. 2d 685, 123 P. 2d 733; *Roy v. Roy,* 113 Wash. 609, 194 P. 590; *Schumacher v. Draego,* 137 Wis. 618, 119 N.W. 305.

When a person is induced by fraud or undue influence to make a conveyance of his property, a cause of action arises in his favor, entitling him, at his election, either to sue to have the conveyance set aside, or to sue to recover the damages for the pecuniary injury inflicted upon him by the wrong. *Van Gilder v. Bullen,* 159 N.C. 291, 74 S.E. 1059; *Modlin v. Railroad,* 145 N.C. 218, 58 S.E. 1075. But no cause of action arises in such case in favor of the child of the person making the conveyance for the very simple reason that the child has no interest in the property conveyed and consequently suffers no legal wrong as a result of the conveyance. *Carter v. McNeal,* 86 Ark. 150, 110 S.W. 222; *Moss v. Edwards,* 146 Ga. 686, 92 S.E. 213; *Pidcock v. Reid,* 145 Ga. 103, 88 S.E. 564; *Huffman v. Beamer,* 191 Iowa 893, 179 N.W. 543; *Seager v. Thulens,* 182 App. Div. 317, 170 N.Y.S. 482; *Dodson v. Kuykendall* (Tex. Civ. App.), 127 S.W. 2d 348.

The person making the conveyance may put an end to his cause of action during his lifetime by reducing it to judgment, or by ratifying the conveyance after the fraud has been discovered or the undue influence has ceased to operate. 26 C.J.S., Deeds, section 67. Besides, the cause of action may become barred by an applicable statute of limitation. G.S. 1-52, subsection 9; *Little v. Bank,* 187 N.C. 1, 121 S.E. 185; *Muse v. Hathaway,* 193 N.C. 227, 136 S.E. 633. But if the cause of action still exists in the person making the conveyance at the time of his death, it passes to those who then succeed to his rights. 18 C.J., Deeds, section 180; 26 C.J.S., Descent and Distribution, section 85. See, also, in this connection: *Ellis v. Barnes,* 181 N.C. 476, 106 S.E. 29; *Plemmons v. Murphey,* 176 N.C. 671, 97 S.E. 648; *Brown v. Brown,* 171 N.C. 649, 88 S.E. 870.

The persons succeeding to the unimpaired right of a decedent to ratify or repudiate a conveyance for fraud or undue influence vary, depending upon whether the decedent died testate or intestate, and whether the property involved is real or personal. When the property is realty, the right passes to the heirs in case of intestacy (*Pritchard v. Smith,* 160 N.C. 79, 75 S.E. 803), and to the devisees in case the grantor leaves a will. *Flythe v. Lassiter,* 199 N.C. 804, 153 S.E. 844; *Speed v. Perry,* 167 N.C. 122, 83 S.E. 176. As a rule, actions to impeach transfers of personalty made by a decedent in his lifetime must be brought by his personal representative, and not by his legatees or distributees. *Re Acken,* 144 Iowa 519, 123 N.W. 187, Ann. Cas. 1912A, 1166; 21 Am. Jur., Executors and Administrators, section 908. The legatees or distributees may sue, however, to recover personal assets of an estate when fraud, collusion, or a refusal to sue on the part of the personal representative renders such action necessary for the protection of ultimate rights accruing to them under a will or the statute of distribution. 26 C.J.S., Descent and Distribution, section 85; 34 C.J.S., Executors and Administrators, section 739.

The plaintiffs claim succession to the right to prosecute these actions as heirs and next of kin of their ancestor, A. F. Holt, Sr. Their testimony reveals, however, that the Clerk of the Superior Court of Johnston County has admitted to probate in common form as the last will of A. F. Holt, Sr., a certain paper writing, which is sufficient in form and substance to vest in the defendants all rights existing in A. F. Holt, Sr., at the time of his death. To be sure, the plaintiffs offered the record of such paper writing in evidence "for the purpose of attack," and undertake to avoid its legal effect as a testamentary conveyance of the rights of their ancestor to the defendants by asserting that its execution was induced by fraud or undue influence perpetrated on their ancestor by the defendants and their fellow conspirator, Clifton G. Holt. But the law does not permit the plaintiffs to assail the probated paper writing in this collateral fashion. Under the statute now codified as G.S. 31-19, the order of the Clerk admitting the paper writing to probate constitutes conclusive evidence that the paper writing is the valid will of the decedent until it is declared void by a competent tribunal on an issue of *devisavit vel non* in a caveat proceeding. *Whitehurst v. Hinton,* 209 N.C. 392, 184 S.E. 66; *Wells v. Odum,* 205 N.C. 110, 170 S.E. 145; *Crowell v. Bradsher,* 203 N.C. 492, 166 S.E. 731; *In re Will of Rowland,* 202 N.C. 373, 162 S.E. 897; *Moore v. Moore,* 198 N.C. 510, 152 S.E. 391; *In re Will of Cooper,* 196 N.C. 418, 145 S.E. 782; *Mills v. Mills,* 195 N.C. 595, 143 S.E. 130; *Bank v. Dustowe,* 188 N.C. 777, 125 S.E. 546; *Edwards v. White,* 180 N.C. 55, 103 S.E. 901; *Starnes v. Thompson,*

173 N.C. 466, 92 S.E. 259; *Holt v. Ziglar,* 163 N.C. 390, 79 S.E. 805; *McClure v. Spivey,* 123 N.C. 678, 31 S.E. 857.

This being true, the plaintiffs have no standing to maintain these suits until the probated paper writing is declared invalid as a testamentary instrument by a competent tribunal in a caveat proceeding; for such paper writing wills all rights existing in A. F. Holt, Sr., at the time of his death to the defendants, with the result that nothing descends to the heirs or next of kin. *Varner v. Johnston,* 112 N.C. 570, 17 S.E. 483; *Kashouty v. Deep,* 126 F. 2d 233; *Anglin v. Hooper,* 153 Ga. 734, 113 S.E. 195; *Murray v. McGuire,* 129 Ga. 269, 58 S.E. 841; *Reed v. Reed,* 225 Iowa 773, 281 N.W. 444; *Altfather v. Bloom,* 218 Mich. 582, 188 N.W. 428; *Green v. Sumby,* 230 Pa. 500, 79 A. 712; *Gilkerson v. Thompson,* 210 Pa. 355, 59 A. 1114.

This conclusion requires an affirmance of the compulsory nonsuits, and renders unnecessary any consideration of the questions whether the evidence adduced at the trial is sufficient to establish the facts constituting the causes of action alleged by plaintiffs, and whether such causes of action are barred by the statutes of limitation pleaded by defendants.

The judgments of involuntary nonsuit are

Affirmed.

STATE v. GRANT (SKINNY) HOLBROOK.

(Filed 18 October, 1950.)

1. Criminal Law § 50f—

During his argument to the jury, the action of the solicitor in throwing defendant's gun to the floor several times to demonstrate that it would not fire accidentally, even if amounting to the introduction of experimental evidence upon dissimilar conditions, *held* an incident of the trial to be dealt with by the trial court in its sound discretion, and an exception thereto cannot be sustained when no abuse of discretion appears of record.

2. Homicide § 27b—

An instruction that the burden of showing want of malice was upon defendant is not erroneous when, construing the charge contextually, the instruction relates solely to the burden resting upon defendant to rebut the presumptions arising when the State has shown beyond a reasonable doubt an intentional killing with a deadly weapon.

3. Criminal Law § 81c (2)—

An inadvertence in the charge cannot be held for reversible error on defendant's appeal when such inadvertence is favorable to defendant.

4. Homicide § 27f—

An erroneous charge on the right of self-defense by a person when on his own premises cannot be held prejudicial when the error in the instruction is favorable to defendant in stating too broadly the right to use force to repel an assault, especially where the evidence discloses that defendant had followed his adversary off the premises and shot him some distance away.

5. Homicide § 27b—

An instruction to the effect that defendant must have satisfied the jury from his own testimony or the testimony of his witnesses of the want of malice to rebut the presumption arising from a showing of an intentional killing with a deadly weapon, will not be held for reversible error as excluding from the jury's consideration on the point any exculpatory testimony given by or elicited from the State's witnesses when the *lapsus linguae* is corrected in other portions of the charge.

6. Same—

The singular omission of the word "intentional" in the charge upon presumptions arising from an intentional killing with a deadly weapon, will not be held for prejudicial error when in other portions of the charge the court has repeatedly instructed the jury that the shooting had to be intentional in order for the presumptions to obtain.

7. Criminal Law § 53b—

While reasonable doubt may arise from lack of evidence or want of it or its deficiency, as well as "out of the evidence," the court's instruction on this point *is held* not prejudicial upon the facts and circumstances of this case.

8. Same—

The failure of the court to repeat the *quantum* of proof resting upon the State each time a finding is to be made from the evidence will not be held for error when the *quantum* of proof is repeatedly and correctly stated and the jury could not have been misled.

APPEAL by defendant from *Rudisill, J.*, March Term, 1950, of WILKES.

Criminal prosecution on indictment charging the defendant with the murder of Paul Hemric.

The State's evidence discloses that on Saturday afternoon, 17 December, 1949, Paul Hemric went to the store of the defendant, situate on a public highway between Elkin and Ronda in Wilkes County, and got into an argument with him over the sale of some liquor. This started in the store. Hemric walked out the front door and the defendant followed him. A fight ensued, Hemric striking at the defendant with an open knife. The defendant ordered Hemric away from his premises, ran back into his store and returned with a rifle. Hemric started running up the road, followed by the defendant, and was about 108 feet from the store when a shot from defendant's rifle struck him in the left temple,

or the left ear, and killed him instantly. The defendant hid his rifle after the shooting. It was found about 125 yards from defendant's store, beside a pine log on a little pine ridge.

The defendant's version of the matter is that he struck at Hemric with the rifle, using it only as a club, in order to ward off Hemric's assault on him with a knife, and as the rifle struck Hemric's body, it was accidentally discharged. "I hit him with the gun because he swung at me with a knife." The defendant contends that all he did was in self-defense and that the shooting was fortuitous. An open knife was found on the ground near the body of the deceased.

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in the State's Prison for a term of not less than 18 nor more than 24 years.

The defendant appeals, assigning errors.

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

Trivette, Holshouser & Mitchell and W. H. McElwee for defendant.

STACY, C. J. When the defendant returned to his store, after the shooting, he remarked that "it was an accident," but added significantly, "I can't make nobody believe it was." The jury took him at his word. They did not believe it was an accident or a misadventurous shooting.

The defendant has abandoned all of his exceptions, except those addressed to the argument of the solicitor and the court's charge to the jury.

1. *The Argument of the Solicitor:* During his argument to the jury the solicitor threw the defendant's rifle on the floor three different times to demonstrate that it would not fire when jarred, as contended by the defendant. The defendant says this was an experiment conducted by the solicitor under circumstances entirely different from those existing at the time of the fatal shooting and amounted to the introduction before the jury of an experiment, not in evidence, and would not have been competent as evidence, had it been offered as such. *S. v. Phillips,* 228 N.C. 595, 46 S.E. 2d 720; *S. v. Hedgepeth,* 230 N.C. 33, 51 S.E. 2d 914. The rifle was not loaded in the court room and the jar which the solicitor gave it was totally dissimilar to the one the defendant says he gave at the time of the shooting.

In reply, it is pointed out that the defendant, while on the witness stand, undertook to show the jury how the rifle, which was in evidence, would fire without being cocked, "when it was down out of safety," and he demonstrated to the jury what he meant by the rifle being "down out of safety." Hence, it is contended that the demonstration of the solici-

tor was in answer to the defendant's use of the gun before the jury, and that such demonstration was permissible under the circumstances. In no event, however, could it have prejudiced the defendant's case.

Without pursuing the arguments pro and con any further, we think the complete answer to the exception is, that it seems to be "much ado about nothing." The demonstration of the solicitor was entirely futile; it proved nothing and it answered nothing. At any rate, it was only an incident occurring on the hearing, and must be left to the sound discretion of the trial court, to be dealt with as seemed best to him at the time. No abuse of his discretion is discernible or manifest on the record. *S. v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466, and cases there cited. The exception appears feckless and is not sustained.

The Charge of the Court: The court's charge to the jury was a lengthy one; it covers thirty pages of the record and evidently consumed a bit of time in its delivery. Its chief cause for criticism is, that it recites a number of legal expressions or propositions not entirely germane to the case. However, they are regarded as harmless or non-prejudicial to the defendant.

In all, the defendant assigns error in thirty-six portions of the charge. At the last, however, he concedes they may be regarded as cured or harmless under the rule of contextual construction, unless they are too numerous and weighty and call for too many indulgencies. Obviously, they cannot be considered *seriatim* in an opinion without extending it to a burdensome and intolerable length. We select only a few.

Exception No. 113: The defendant complains at the following expression in the charge: "To create manslaughter the prisoner and not the State has the burden of showing that there was no malice, in which event it is reduced to manslaughter," etc.

Standing alone, of course, this instruction would be erroneous. Taken in its setting, however, it assumes a different hue. The court had just instructed the jury in respect of the presumptions arising from an intentional killing with a deadly weapon, to wit, unlawfulness and malice, which, nothing else appearing, would make out a case of murder in the second degree. Then, starting from this point, the instruction was, that the State must show something more, to wit, premeditation and deliberation, to establish the capital offense of murder in the first degree. And the defendant, if he would escape a verdict of murder in the second degree, was required to show to the satisfaction of the jury, there was no malice, which would reduce the offense to manslaughter, and to absolve himself entirely, the defendant had the burden of satisfying the jury of the misadventurousness of the homicide, or that it was committed in self-defense. Viewed in the light of the whole charge, the instruction is unexceptionable. *S. v. Creech,* 229 N.C. 662, 51 S.E. 2d 348; *S. v. Phillips, supra.*

Exception No. 120: The defendant assigns as error the following excerpt from the charge: "Now, as I have told you, gentlemen of the jury, the burden of establishing, not beyond a reasonable doubt, but simply satisfying the jury, that the killing was done without malice, if he would reduce it from murder in the second degree to manslaughter, and if he does not establish that to your satisfaction, and goes no further, it would then become manslaughter," etc.

There seems to be an injudicious use of the word "not" in the latter part of this instruction—probably an error in reporting—but, however this may be, it was favorable to the defendant and cannot be held for reversible error.

Exception No. 131: The following portion of the charge is challenged on the dual ground of irrelevancy and as stating an erroneous proposition of law: "In expelling or putting a person off of the defendant's premises, the defendant has the right under the law of North Carolina to use such force as is necessary to remove this person from the premises, even to the point of taking the other's life."

Whatever the merits of this exception—and they are quite sufficient to arrest the Court's attention—the defendant is in no position to complain, for the instruction leans heavily in his direction. The deceased was not on the premises of the defendant at the time of the shooting. Nor was he moving in that direction. He was 108 feet away. The exception does reveal, however, the difficulty experienced in construing the charge contextually or as a whole.

Exception No. 143: Here the court instructed the jury that if the State had failed to make out the capital case, "but has satisfied you beyond a reasonable doubt . . . that the deceased came to his death as a result of a gunshot fired intentionally by the prisoner, then you would return a verdict of murder in the second degree, unless the prisoner himself, through his evidence or the evidence of his witnesses, has satisfied you . . . there was no malice . . . or that the killing was done in self-defense, or that the killing was accidental."

It is the contention of the defendant that this instruction took from him the benefit of any exculpatory evidence given by, or elicited on cross-examination from, the State's witnesses. There would be merit in the contention if the *lapsus linguae* were not corrected in other portions of the charge, which it was.

Exception No. 145: In this paragraph of the charge, to which exception is taken, the court instructed the jury that if "the killing was with a deadly weapon, the burden falls upon the defendant to satisfy you that there was no malice on his part" to reduce the offense to manslaughter, etc.

The complaint here is, that the court shifted the burden of proof to the defendant upon the showing of a killing with a deadly weapon, irrespective of its character, whether intentional or accidental. *S. v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733; *S. v. Childress,* 228 N.C. 208, 45 S.E. 2d 42; *S. v. Debnam,* 222 N.C. 266, 22 S.E. 2d 562. The court, however, had repeatedly instructed the jury in respect of the presumptions arising from an intentional killing, and the omission of the word "intentional" here was cured in other portions of the charge. *S. v. Burrage,* 223 N.C. 129, 25 S.E. 2d 393.

Yet, again, we have the oft-repeated definition of a reasonable doubt as "one growing out of the evidence in the case." Of course, it may arise from the lack of evidence or want of it or its deficiency, as well as "out of the evidence" given in the case. *S. v. Bryant,* 231 N.C. 106, 55 S.E. 2d 922; *S. v. Wood,* 230 N.C. 740, 55 S.E. 2d 491.

Finally, complaint is made of the failure of the judge to repeat the instruction of proof "beyond a reasonable doubt," required of the State to establish an intentional killing with a deadly weapon in order to raise the presumptions of unlawfulness and malice. *S. v. Childress, supra; S. v. Harris,* 223 N.C. 697, 28 S.E. 2d 232. However, as this was given at the beginning of the charge and repeated several times thereafter, the jury could hardly have been misled by the court's failure to repeat it each time a finding from the evidence was to be made. *S. v. Tyndall,* 230 N.C. 174, 52 S.E. 2d 272; *S. v. Suddreth,* 230 N.C. 239, 52 S.E. 2d 924.

There are other expressions in the charge, some brought forward in defendant's brief and some not, which appear equally as difficult, if not more troublesome, to reconcile than the five selected, but as they seem surmountable or have been abandoned, we also pretermit them.

We are unable to sustain any of the exceptions debated on brief.

No Error.

E. L. JOHNSON AND WIFE, REVIS JOHNSON, v. R. E. BARHAM AND WIFE, MAUDIE C. BARHAM.

(Filed 18 October, 1950.)

1. Appeal and Error § 6c (2)—

A sole assignment of error to the signing of the judgment presents only whether the facts found support the conclusions of law.

2. Deeds § 11—

Ordinarily the premises and granting clauses designate the grantee and the thing granted, while the *habendum* relates solely to the *quantum* of the estate, and the granting clause is the very essence of the contract and controls when in conflict with the *habendum.*

3. Deeds § 13a—Deed held to convey as matter of law interest of tenant by curtesy in entire tract notwithstanding that heir, joining in deed, conveyed only her undivided interest in the locus.

A deed was executed by a tenant by the curtesy and one heir and her spouse. Following the granting clause and the description, the deed stated that the heir and her husband were conveying a one-third undivided interest "in the above described tract" followed by another paragraph in which it stated the widower conveyed his curtesy "in the above described tract." *Held:* The granting clause, *habendum*, and warranty all relating to a conveyance in fee simple, the tenant by the curtesy conveyed his interest in the entire tract described and not his curtesy in a one-third undivided interest therein, and *held further* the only interlocking relationship in the paragraphs is in the description of the land, and therefore there is no latent ambiguity arising from the two paragraphs immediately following the description so as to permit the introduction of evidence *aliunde*.

APPEAL by plaintiffs from *Morris, J.*, at February Term, 1950, of JOHNSTON.

Special proceeding for partition of land, which, upon denial of petitioners' title in part, was transferred to and heard in Superior Court at term time.

The appeal involves the construction of a certain deed, dated 31 October, 1949, from H. M. Richardson, widower, and Rosa Lee Richardson Rigsbee and husband, Lunsford Allen Rigsbee, to R. E. Barham, which in pertinent part reads as follows: "That said H. M. Richardson, widower, and Rosa Lee Richardson Rigsbee and husband, Lunsford Allen Rigsbee, . . . have bargained and sold, and by these presents do grant, bargain, sell and convey to said R. E. Barham, his heirs and assigns, a certain tract or parcel of land in Johnston County, State of North Carolina, . . . and bounded as follows, *viz.:* (Specific description here) and containing 75.25 acres, more or less, and being the same property conveyed by G. E. Robertson to Bertha Hinnant Richardson by deed dated December 3, 1932, and recorded in Book 301, page 35 of the Registry of Johnston County.

"The grantors, Rosa Lee Richardson Rigsbee and husband, Lunsford Allen Rigsbee, do hereby convey to the grantee, R. E. Barham, their one-third undivided interest in and to the above described tract of land subject to their one-third part of the debts of the estate of Bertha Hinnant Richardson, deceased.

"The grantor, H. M. Richardson, widower, does by this instrument convey to the grantee, R. E. Barham, his curtesy and lifetime right in and to the above described tract of land.

"To Have And To Hold the aforesaid tract or parcel of land, and all privileges and appurtenances thereto belonging, to the said R. E. Barham, his heirs and assigns, to their only use and behoof forever.

"And the said H. M. Richardson, widower, and Rosa Lee Richardson Rigsbee and husband, Lunsford Allen Rigsbee, for themselves and their heirs, executors and administrators, covenant with said R. E. Barham, his heirs and assigns, that they are seized of said premises in fee and have right to convey in fee simple; that the same are free and clear from all encumbrances, and that they do hereby forever warrant and will forever defend the said title to the same against the claims of all persons whomsoever."

Petitioners contend that under this deed H. M. Richardson, who owned an estate by curtesy in the whole tract of land described in the deed, conveyed only his curtesy in the "one-third undivided interest" of Rosa Lee Richardson Rigsbee referred to in the first paragraph following the description. And defendants contend that the deed conveys the estate by curtesy in the whole tract.

The presiding judge, upon hearing the matter, being of opinion that the construction of the deed is a matter of law to be determined from the instrument itself, held that, upon the face of the instrument itself, R. E. Barham is the owner of the curtesy interest of H. M. Richardson, widower, and as such owner is entitled to the immediate possession of the whole tract of land during the existence of the said curtesy. And the court refused to allow petitioners to offer any evidence as to attending and surrounding circumstances and agreement of the parties to show the intention of the parties as to the quantity of land conveyed to R. E. Barham by the said deed.

Plaintiffs appeal to Supreme Court and assign error.

Leon G. Stevens, Elmer J. Wellons for plaintiffs, appellants.

Wellons, Martin & Wellons for defendants, appellees.

WINBORNE, J. The sole assignment of error on this appeal is based upon exception to the signing of the judgment. Such exception challenges only the conclusions of law upon facts found by the court. *Smith v. Davis,* 228 N.C. 172, 45 S.E. 2d 51, and cases there cited directly and by reference. See also *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351.

Accordingly two questions of law, on which the correctness of the judgment depends, are presented by appellant for decision.

First: Did the court err in holding that, by the terms of the deed in question, H. M. Richardson conveyed his curtesy interest in the whole tract of land therein described?

A reading of the deed, in the light of applicable principles of law, lead to a negative answer to this question. *Artis v. Artis,* 228 N.C. 754, 47 S.E. 2d 21, and cases cited.

The words used in the granting clause (1) "to said R. E. Barham, his heirs and assigns," (2) in the *habendum* "to the said R. E. Barham, his heirs and assigns, to their only use and behoof forever," and (3) in the warranty "said R. E. Barham, his heirs and assigns" clearly and unqualifiedly convey, and relate to a conveyance of a fee simple estate. Standing alone, the operative clauses of the deed constitute an unrestricted conveyance of the land described, that of 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,* 220 N.C. 628, 18 S.E. 2d 157. And the *habendum,* in the present case, is in harmony with the granting clause.

Thus the granting clause and the *habendum* are sufficient in wording to convey whatever interest the grantors had in the land conveyed. Moreover, the paragraph reading, "The grantor, H. M. Richardson, does by this instrument convey to the grantee, R. E. Barham, his curtesy and lifetime right in and to the above described tract of land," if given effect, clearly covers the estate by curtesy in the "whole tract of land." The only tract of land "above described" in the deed is the whole tract. But if the paragraph were sufficient in wording to limit the quantity of the curtesy which had been included, as a matter of law, in the estate conveyed in the granting clause, it would be repugnant to both the granting clause and the *habendum.* Hence the granting clause prevails, and the repugnant clause is rejected. *Artis v. Artis, supra,* and cases cited.

Appellants state this as the second question: "If so, is there a latent ambiguity arising from the two paragraphs immediately following the description so as to make vague, uncertain or indefinite the interest of the grantor, H. M. Richardson, conveyed by the deed?"

Apparently this question is predicated upon the assumption that the first question would be answered in the affirmative. Since that is not the case, it would seem that discussion of this question is beside the point. But in any event, a reading of the two paragraphs fails to show any interdependent relationship. In the first place the grantors undertake to describe and limit the interest they are conveying "in and to the above described tract of land," and in the second paragraph the grantor also undertakes to describe and limit the interest he is conveying "in and to the above described tract of land." So, after all, the only interlocking relationship is the description of the land.

Therefore, the judgment below is

Affirmed.

FIRST-CITIZENS BANK & TRUST COMPANY, SUCCESSOR TO C. G. GRADY, GUARDIAN OF HENRY A. HODGES, INCOMPETENT, v. JAMES D. PARKER, THE DETROIT FIDELITY & SURETY CO., AND LLOYD'S INSURANCE CO. OF AMERICA.

FIRST-CITIZENS BANK & TRUST COMPANY, SUCCESSOR TO C. G. GRADY, GUARDIAN OF HENRY A. HODGES, INCOMPETENT, v. JAMES D. PARKER AND WIFE, AGNES A. PARKER, ET ALS.

(Filed 18 October, 1950.)

1. Judgments § 23—

The period during which the judgment debtor is in the bankrupt court and his property in *custodia legis* should be deducted from the ten year period as provided in G.S. 1-234.

2. Bankruptcy § 10—

A discharge in bankruptcy, while not constituting payment, bars all civil remedies for the collection of a dischargeable debt as a personal obligation of the debtor.

3. Same—

The character of a debt as one dischargeable in bankruptcy is not affected by the fact that it may have been reduced to judgment, since the rendition of judgment does not change the character of the indebtedness.

4. Same—

A judgment *in personam* upon the debtor's liability upon an unsecured note, no fraud being alleged and no specific lien being created by the judgment, is a dischargeable debt, and the debtor's discharge in bankruptcy proceedings in which the judgment is listed as a provable debt, bars all civil remedies for the collection of the judgment as a personal obligation of the debtor.

5. Execution § 23—

A successor guardian is entitled to the entire proceeds of sale of the lands of the original guardian under a judgment of defalcation to the exclusion of those claiming under a judgment which, although rendered prior to the successor guardian's judgment, has been barred by the discharge of the judgment debtor in bankruptcy.

APPEAL by First-Citizens Bank & Trust Company, successor guardian of Henry A. Hodges, incompetent, from *Morris, J.*, February Term, 1950, of JOHNSTON. Reversed.

Lyon & Lyon for First-Citizens Bank & Trust Company, Guardian, appellant.

E. A. Parker and Jane A. Parker for Petitioners (interveners), appellees.

DEVIN, J. This is another appeal brought to this Court in the course of the litigation by successive guardians of Henry A. Hodges, incompetent, veteran of World War I, to recover the funds of this estate from a former guardian James D. Parker.

The progress of this litigation, originally instituted in 1935, appears from the decisions of this Court in *Trust Co. v. Parker,* 225 N.C. 480, 35 S.E. 2d 489, and *Grady v. Parker,* 230 N.C. 166, 52 S.E. 2d 273. The material facts involved are set out in the opinions in those cases.

In 1935 judgment was obtained by C. G. Grady, former guardian of Henry A. Hodges, against James D. Parker for $8,023.81. Subsequently in the proceedings instituted by First-Citizens Bank & Trust Company, successor guardian, to enforce this judgment, James D. Parker pleaded his discharge in bankruptcy as a bar. But it was determined in *Trust Co. v. Parker, supra,* decided at Fall Term 1945, that this judgment was not affected by the discharge in bankruptcy of James D. Parker in 1944, for the reason that the debt evidenced by the judgment was created by the defalcation of the bankrupt while acting in a fiduciary capacity. Thereafter execution was issued on this judgment 13 November, 1945, the homestead allotted and certain land in excess sold by the sheriff 31 May, 1946. At the sale the land was bid off for $5,250 by Phyllis A. Parker and her bid was assigned to Daniel L. Parker who paid the price to the sheriff who paid the fund into the hands of the clerk. Phyllis A. Parker and Daniel L. Parker then filed petition and interplea in this case, claiming the fund as assignees of a judgment in favor of W. R. Denning and against James D. Parker rendered in 1934. These claimants will hereinafter be referred to as interveners.

The record shows that the Denning judgment was rendered 2 January, 1934, in favor of W. R. Denning and against James D. Parker and others on a note on which it was alleged James D. Parker was personally liable as an endorser. This allegation was not denied. Thereafter James D. Parker filed petition in bankruptcy and was so adjudicated 18 July, 1941. Decree of discharge in bankruptcy was entered 1 June, 1944. The record further shows that on 21 January, 1946, execution on the Denning judgment was issued and placed in the hands of the sheriff. The petition of the interveners, filed 5 August, 1946, alleged the Denning judgment had been assigned to them 25 March, 1946, and that by virtue thereof they were entitled to have that judgment first satisfied out of the fund in the hands of the clerk derived from the sale of the land.

The First-Citizens Bank & Trust Company, successor guardian, answered denying the validity of the Denning judgment, or that it was now enforceable since the discharge in bankruptcy of James D. Parker, the judgment debtor, and pleading the ten-year statute of limitations.

Plaintiff guardian also demurred *ore tenus* to the interveners' right to maintain their claim on the ground alleged.

On the trial evidence was offered showing the facts herein outlined. The court instructed the jury if they found the facts to be as the evidence tended to show to answer the issues in favor of the interveners, to the effect that the judgment under which the interveners claimed was valid and enforceable, and not barred by the statute of limitations, and that interveners were entitled to prior claim on the fund.

Plaintiff, First-Citizens Bank & Trust Company, guardian, assigns error in the ruling of the court below principally on the ground that further legal proceedings to enforce the Denning judgment were barred by the discharge in bankruptcy of the debtor, and further that this judgment was barred by the statute of limitations. G.S. 1-234.

While it would seem that the period during which the judgment debtor was in the bankruptcy court and his property in *custodia legis* should be deducted from the ten-year period as provided in G.S. 1-234, and that the statute of limitations pleaded by plaintiff would not bar the interveners' claim, we think the position taken by the plaintiff guardian that the legal proceedings now undertaken to enforce the Denning judgment are barred by the discharge in bankruptcy of James D. Parker must be sustained. The bankrupt in 1941 scheduled the Denning judgment as a provable debt. A judgment such as we are here considering is a debt of record, an indebtedness which has been fixed and determined by a court. The original character of the debt is not lost by its reduction to judgment. *Simpson v. Simpson,* 80 N.C. 332; *Trust Co. v. Parker, supra; Pepper v. Litton,* 308 U.S. 295; *American Surety Co, v. McKiernan,* 304 Mass. 322, 145 A.L.R. 1235. "The debt on which this judgment was rendered is the same debt that it was before." *Boynton v. Ball,* 121 U.S. 457. "The rendition of a judgment on an obligation does not change the character of the indebtedness." *Fidelity & C. Co. v. Golombosky,* 133 Conn. 317, 170 A.L.R. 361. In the recent case of *Gathany v. Bishopp,* 177 F. (2) 567, a suit to enjoin a judgment creditor from prosecuting his claim against the executor of a deceased bankrupt was dismissed, on the ground that "the right to plead the discharge in bankruptcy as a defense furnishes to the bankrupt an adequate remedy."

The Denning judgment in the case at bar was a judgment *in personam,* determining only the debtor's liability on an unsecured note. No fraud was alleged. It decreed no specific lien. The title to the land was not involved except in so far as the law gave the judgment creditor the right within the statutory period to enforce payment of the debt by levying on debtor's property. The discharge in bankruptcy received by James D. Parker in 1944 constituted a bar thereafter to the enforcement of payment of this debt by legal proceedings. True, it was not a satis-

faction of the judgment against the bankrupt, but it had the effect of barring civil remedies for the collection of the judgment as a personal obligation of the debtor. 6 A.J. 987. "The effect of a discharge upon a claim that is dischargeable is to afford a valid defense to the prosecution of the claim to judgment, or the satisfaction of the judgment if the claim has gone to judgment; the discharge is not a payment or extinguishment of the debt; it is simply a bar to all future legal proceedings for the enforcement of the discharged debt." 1 Collier on Bankruptcy 1654.

The pertinent facts were almost entirely matters of record and were not disputed. The peremptory instructions given by the court to the jury must be held for error, and the judgment

Reversed.

D. L. TURNAGE v. R. F. McLAWHON.

(Filed 18 October, 1950.)

1. Trial § 36—

The issues should embrace all material questions in controversy and afford each party opportunity to fairly and fully present his contentions of law and fact, and where the issue submitted fails to do so, judgment on the verdict will be set aside and a new trial granted.

2. Brokers § 11—

Where the vendor contends upon supporting evidence that he was at all times ready and willing to execute deed, but that his wife would not join in its execution and that the purchaser would not accept deed without her joinder, and further, that plaintiff broker knew these circumstances at the time he procured the purchaser, *held* the submission of the single issue as to whether plaintiff procured a purchaser ready, able, and willing to pay the stipulated amount for the land is insufficient to afford vendor opportunity to present his contentions to the jury, and judgment on the verdict in the broker's favor must be set aside.

APPEAL by defendant from *Morris, J.*, August Term, 1950, of PITT. New trial.

This was an action to recover compensation alleged to be due plaintiff for services in procuring a purchaser for defendant's land.

A single issue was submitted to the jury and answered as follows: "Did the plaintiff secure purchasers for the real estate described in the complaint and contract, who were ready, able and willing to pay for the same the sum of $35,000 as alleged in the complaint? Answer: Yes."

Judgment was rendered on the verdict that plaintiff recover of the defendant $3,000, and defendant excepted and appealed.

Harding & Lee for plaintiff, appellee.
Albion Dunn for defendant, appellant.

DEVIN, J. It was admitted that the defendant signed a contract empowering plaintiff to sell his farm of 242 acres for the net price of $32,000, plus $10,000 for certain personal property thereon, plaintiff to have for his services in procuring a purchaser all that should be obtained over the stated price. The contract signed by defendant contained no warranty of title or against encumbrances.

The defendant was and is a married man living with his wife, and this fact was known to the plaintiff. Defendant's wife did not sign the contract. Thereafter plaintiff procured a purchaser for the land at the price of $35,000, and defendant without the joinder of his wife signed a letter to the prospective purchaser confirming the sale. The defendant's wife refused to sign the deed, and the purchaser, in view of the wife's inchoate right of dower in the land remaining unimpaired, declined to accept the deed without her signature.

The defendant testified he stood ready, able and willing to execute deed to the land to the plaintiff or to the purchaser for the price agreed, and had so advised the plaintiff; that the plaintiff knew at the time he obtained the agreement of the purchaser to buy that defendant's wife would not sign the deed, and he also offered to show plaintiff knew that purchaser would not accept deed without her signature.

It is apparent that the single issue submitted to the jury was not determinative of the case. It did not afford defendant opportunity to present his contentions based upon the evidence offered. It is essential in the trial of civil action by jury that the issues submitted shall embrace all material questions in controversy, and that each party have opportunity to present fairly and fully his contentions of law and fact. *Hatcher v. Dabbs,* 133 N.C. 239, 45 S.E. 562; *Potato Co. v. Jeanette,* 174 N.C. 236, 93 S.E. 795; *Colt Co. v. Barber,* 205 N.C. 170, 86 S.E. 1036; *Lewis v. Hunter,* 212 N.C. 504, 193 S.E. 814; *Griffin v. Ins. Co.,* 225 N.C. 684, 36 S.E. 2d 225; *Whiteman v. Transportation Co.,* 231 N.C. 701, 58 S.E. 2d 752. The issues submitted, together with the answers thereto, must be sufficient to support a judgment disposing of the whole case. *Griffin v. Ins. Co., supra.*

There was error in entering judgment on a verdict which did not determine all the material facts, and a new trial is in order.

As there must be a trial *de novo* it is unnecessary to consider the other exceptions noted by defendant and brought forward in his assignments of error.

New trial.

BEULAH LAWING, AS GUARDIAN FOR HER TWO MINOR CHILDREN, VIZ.: JOHN LAWING AND DAN LAWING, AND ALSO IN HER INDIVIDUAL RIGHT, AND KARL LANDER LAWING AND AGNES LANDER LAWING, IN THEIR INDIVIDUAL RIGHTS, v. A. C. WHEELER AND WIFE, VIRGINIA WHEELER.

(Filed 18 October, 1950.)

1. Pleadings § 10—

One defendant may not set up a cross action for alleged injury suffered by her codefendant.

2. Same—

In an action in ejectment and to recover damages for breach of lease contract, defendant may not set up a cross action for slander of his title, since such cross action is based upon a separate, independent tort.

APPEAL by defendants from *Bobbitt, J.*, July Term, 1950, LINCOLN.

Civil action in ejectment and to recover damages for breach of lease contract, heard on demurrers to the separate cross actions pleaded by defendants.

Plaintiffs allege a lease to defendant A. C. Wheeler of certain hotel property and breach thereof by said defendant in three respects: (1) failure to pay the stipulated rent; (2) failure to paint and repair the buildings; and (3) the subletting of portions of the building to defendant Virginia Wheeler and others, in violation of the terms of the agreement. They join Mrs. Wheeler as codefendant on the allegation that she has subleased and is now in possession of a part of the property. They pray possession of the buildings and damages for the breach of the contract.

Defendant Virginia Wheeler denies that she is a sublessee and pleads an alleged cross action for slander of the title of defendant A. C. Wheeler "with reckless disregard of the co-defendant, A. C. Wheeler's rights."

Defendant A. C. Wheeler likewise pleads the same cross action in substantially identical language.

Plaintiffs filed a demurrer to each cross action for that (1) such cross action fails to state a cause of action; and (2) even if a cause of action is stated, it is not germane to the plaintiffs' cause of action and is not pleadable in this action. Each demurrer was sustained and defendants appealed.

A. L. Quickel and M. T. Leatherman for plaintiff appellees.

Childs & Childs for defendant appellants.

BARNHILL, J. An inspection of the record renders it quite apparent that the further answer of defendant Virginia Wheeler fails to state a

cause of action. She denies that she claims any rights under the lease contract. She does not assert the falsity of the statements alleged to have been made by plaintiffs or that they adversely affected any rights she possesses, but that they were uttered in derogation of the rights and to the hurt of defendant A. C. Wheeler. She may not recover for any injury suffered by her codefendant.

While the cross action of defendant A. C. Wheeler is likewise materially defective, we may concede, without deciding, that it is sufficient to state a cause of action. Even so, it is bottomed on a separate, independent tort. It may not be pleaded as a counterclaim in this action. *Hancammon v. Carr,* 229 N.C. 52, 47 S.E. 2d 614, and cases cited; *Wingler v. Miller,* 221 N.C. 137, 19 S.E. 2d 247.

The subject is fully discussed in the *Hancammon case.* What is said there is pertinent here. Mere repetition of the same principles of law will serve no useful purpose. Suffice it to say that the tort this defendant attempts to allege does not constitute a cause of action pleadable by way of cross action to plaintiffs' action founded on alleged breach of contract.

The judgment is

Affirmed.

W. J. JONES AND WIFE KATIE JONES, CORA ABERNETHY AND HUSBAND M. L. ABERNETHY, ET AL. v. JOHN JONES AND WIFE CORA JONES, RICHARD JONES, ET AL.

(Filed 18 October, 1950.)

1. Appeal and Error § 10b—

Where the trial court fixes case on appeal at the time judgment is entered, service of case on appeal is not required.

2. Appeal and Error § 16—

Where judgment is entered in the trial court prior to the beginning of the Spring Term of the Supreme Court, the appeal must be brought to the Spring Term and docketed fourteen days before the call of the docket of the district to which the case belongs. Rule of Practice in the Supreme Court No. 5.

3. Same: Appeal and Error § 31c—

The rule regulating the time appeals must be docketed in the Supreme Court is mandatory and cannot be abrogated by consent or otherwise, and failure to docket as required by the rule requires dismissal of the appeal.

APPEAL by defendants from *Crisp, Special Judge,* January Term, 1950, CATAWBA.

Petition for partition in which the defendants plead sole seizin. The court below concluded that the defendants' plea of sole seizin was not well founded and signed judgment for plaintiffs. Defendants appealed.

Russell W. Whitener for plaintiff appellees.

Fred D. Caldwell and Childs & Childs for John Jones and wife, Cora Jones, appellants.

BARNHILL, J. This cause was heard at the January Term, 1950, Catawba Superior Court, and the judge entered judgment on 27 January 1950. At the same time, the cause having been disposed of on the record, the court fixed the case on appeal and also allowed time in which to serve the same. The appeal reached the office of the Clerk of this Court 30 March 1950, after the Spring Term call of cases from the Sixteenth District. The Clerk of this Court was authorized or directed to docket the appeal for the Fall Term 1950. Appellants' brief was filed 29 September 1950. On this showing, the appeal must be dismissed.

The judge fixed the case on appeal at the time judgment was entered. Service thereof was not required. *Privette v. Allen,* 227 N.C. 164, 41 S.E. 2d 364.

It was the duty of appellants to docket their appeal at the Spring Term 1950 of this Court, fourteen days before the call of the docket of the Sixteenth District to which this case belongs. Rule 5, Rules of Practice in the Supreme Court, 221 N.C. 546.

This rule is mandatory and cannot be abrogated by consent or otherwise. *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126. Failure to docket as thus required results in the loss of the right of appeal and necessitates dismissal. *Pruitt v. Wood, supra; S. v. Watson,* 208 N.C. 70; 179 S.E. 455; *S. v. Presnell,* 226 N.C. 160, 36 S.E. 2d 927.

This disposition of the appeal is not due to arbitrariness on our part but is in the enforcement of a rule essential to the prompt administration of justice. *Pruitt v. Wood, supra.* We may note, however, that, on this record, the dismissal of the appeal works no injury to any of the parties. Whatever the procedure which might be adopted in the trial of this cause in the court below, the final result would be the same.

Appeal dismissed.

STATE v. JAMES EDWARD HICKS.

(Filed 18 October, 1950.)

Criminal Law § 67c—

Where defendant appellant merely requests that the judgment against him be modified solely on the ground that it was harsh, unreasonable, and excessive, the appeal presents no legal question for decision and will be dismissed.

APPEAL by defendant from *Bone, J.*, June Term, 1950, of CRAVEN.

Criminal prosecution on indictment charging the defendant with a felonious assault upon Ed Henry Sheppard with a deadly weapon with intent to kill, inflicting serious injury, not resulting in death.

The State's evidence is to the effect that on Sunday afternoon, 11 September 1949, the defendant went to the store of Virginia Latham in James City, Craven County, discovered Ed Henry Sheppard therein, accused him of having broken into the defendant's house and stolen some money and demanded that he turn over to the defendant the sum of $40.00. Upon denial of the accusation, the defendant whipped out a pistol, shot him in the chest and inflicted a serious injury, requiring hospitalization for two weeks.

The defendant tendered a plea of *nolo contendere* to the lesser offense of an assault with a deadly weapon, which was accepted by the solicitor.

Judgment: Two years on the roads.

The defendant appeals from the judgment as being harsh, unreasonable and excessive.

Attorney-General McMullan and Assistant Attorney-General Rhodes for the State.

L. T. Grantham and H. P. Whitehurst for the defendant.

STACY, C. J. In the defendant's brief he asks simply that the judgment be "modified," not that it be declared void or vacated, and this is the whole of his brief. No authority is cited and no reason is given for the request. The brief presents no legal question for decision and hardly suffices to retain the appeal on our docket.

Appeal dismissed.

GLADYS HUNTER WILSON v. A. K. ANDERSON AND ZOE ANDERSON STRAWN, INDIVIDUALLY AND AS ADMINISTRATORS OF THE ESTATE OF HARRY P. HUNTER; HENRY LEE ANDERSON, WILLIAM T. ANDERSON, JR., RUTH S. A. GREENWALD, AND JANE BROOKE ANDERSON.

(Filed 18 October, 1950.)

Descent and Distribution § 6—

The right of an adopted child to inherit vests as of the death of her adoptive parent, and therefore where the parent dies prior to the effective date of the Act of 1947 creating a new rule of descent and of distribution, the Act is not applicable. G.S. 29-1 (14), G.S. 28-149 (10).

PETITION by plaintiff to rehear this case, reported *ante*, 212, 59 S.E. 2d 836, where the facts as shown in the record on appeal are fully stated. Since the filing of the petition to rehear the parties, through their respective attorneys, have stipulated in writing that Malcolm Hunter, the adoptive parent of plaintiff, died 23 March, 1943.

John H. Small for plaintiff, appellant.

Francis H. Fairley for defendants, appellees.

WINBORNE, J. When the points raised in the petition as grounds upon which plaintiff bases her petition for a rehearing are considered in the light of the facts appearing in the record on appeal and of the further fact covered by the stipulation of the parties as above stated, it appears that in any event the provisions of the Acts of 1947 creating the new rule of descent, G.S. 29-1 (14), and of distribution, G.S. 28-149 (10), relative to rights of an adopted child are not available to plaintiff. Whatever rights of succession she acquired by her adoption became vested upon the death of her adoptive parent. And, at that time the statute pertaining to adoption of minors, P.L. 1941, Chapter 281, giving to an adopted child the right to succession through the adoptive parent, applied only to adoption made after 15 March, 1941. See Sections 4 and 8, Chapter 281, P.L. 1941. See also *Phillips v. Phillips*, 227 N.C. 438, 42 S.E. 2d 604.

Hence the petition to rehear is

Dismissed.

BOYD SAMUELS v. D. W. BOWERS, T/A D. W. BOWERS LUMBER COMPANY.

(Filed 18 October, 1950.)

Appeal and Error § 43—

A petition to rehear will be dismissed where the members of the Supreme Court are equally divided in opinion, one Justice having died since the petition was filed.

PETITION by defendant Bowers to rehear this case, reported *ante,* 149.

Hubert E. Olive and W. H. Steed for respondent.

Don A. Walser for petitioner.

PER CURIAM. *Justice Seawell* having died since the petition to rehear was filed, and the remaining members of the Court being equally divided in opinion, the petition to rehear is dismissed. The case as reported will remain the law of the case but does not constitute a precedent.

Petition dismissed.

NAOMI McMILLAN LEDFORD v. HOLLY LEDFORD; J. FLAY LEDFORD AND WIFE, MARGARET W. LEDFORD; LOUISE LEDFORD WYATT AND HUSBAND, GUY E. WYATT; MARY GRACE LEDFORD HEMBY AND HUSBAND, FRANK H. HEMBY; HELEN BRUCE LEDFORD GRUBB AND HUSBAND, JACK GRUBB; SAM M. LEDFORD AND WIFE, CAROL LEDFORD; SARA BESS LEDFORD ORMAND AND HUSBAND, JACK ORMAND; A. B. LEDFORD AND WIFE, LOUISE CLARY LEDFORD.

(Filed 18 October, 1950.)

APPEAL by plaintiff from *Bobbitt, J.,* at the March-April Term, 1950, of CLEVELAND.

This is a civil action to set aside a consent judgment and a deed of release signed by the plaintiff on the ground of mutual mistake on the part of the plaintiff and the defendants.

It appears from the record that J. F. Ledford, the late husband of the plaintiff, died on 20 March, 1947, leaving a last will and testament, from which the plaintiff dissented. She thereafter filed in the Superior Court of Cleveland County a petition for the allotment of dower.

The parties thereto compromised their differences and a consent judgment was entered and the plaintiff, in consideration of the sum of $15,000, paid to her by the defendants, executed a quitclaim deed to

the defendants, on 27 October, 1947, as provided in the consent judgment.

The plaintiff thereafter made a motion in the cause to set aside the judgment entered in the proceeding signed by consent of her attorney. The motion was denied and the plaintiff appealed to this Court and the ruling of the lower court was upheld. See *Ledford v. Ledford*, 229 N.C. 373, 49 S.E. 2d 794.

After the decision was rendered in the above case, this action was instituted.

Upon the hearing below, at the close of all the evidence, the defendants renewed their motion for judgment as of nonsuit interposed at the close of plaintiff's evidence, and the motion was allowed. Plaintiff appeals and assigns error.

Naomi McMillan Ledford in propria persona.

Falls & Falls for defendants.

PER CURIAM: The evidence as revealed by the record herein is insufficient to warrant the submission of the case to the jury on the question of mutual mistake.

The judgment of nonsuit is

Affirmed.

IRENE B. BAKER, ADMINISTRATRIX OF THE ESTATE OF WALTER GLENN BAKER, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 1 November, 1950.)

1. Negligence § 1—

Negligence is the failure to exercise proper care in the performance of some legal duty which defendant owes plaintiff under the circumstances in which they are placed.

2. Negligence § 5—

Proximate cause is that cause which produces the result in continuous sequence and without which it would not have occurred, and one from which a man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed.

3. Negligence § 17—

Plaintiff has the burden of showing not only negligence but that such negligence was the proximate cause of the injury.

4. Negligence § 19a—

Negligence and proximate cause are questions of law, and when the facts are admitted or established are for the determination of the court.

5. Master and Servant § 14a—

The employer is not an insurer of the safety of his employee but is required only to exercise the care which a man of ordinary prudence would exercise under like circumstances for his own safety to provide a reasonably safe place in which to work and such machinery, implements and appliances as are approved and in general use in places of like character.

6. Master and Servant § 26—

Where plaintiff fails to allege or prove that the workmen's rail motor car of the kind furnished by defendant employer was not approved and in general use under the conditions of work, he may not maintain that the employer was negligent in failing to equip it with hand-holds in addition to the standard hand-holds.

7. Same—

Where plaintiff's evidence is to the effect that the workmen's motor rail car in question was equipped with a solid canvas windbreaker over which the occupants could easily look and see anything on the track, such evidence negates the allegation of negligence of the employer in providing a motor car equipped with a canvas windshield containing a small plexiglass opening which was covered with dust, dirt and other foreign substances so as to prevent the occupants of the car from having a clear vision ahead.

8. Same—

A railroad employee was killed when the motor rail car on which he was riding struck a dog on the track. *Held:* No presumption of negligence arises from the mere fact of hitting the dog, and since an operator of the car has the right to assume up to the moment of impact that a dog would leave the track in time to avoid a collision unless it was apparently helpless on the track or totally oblivious of its surroundings, there is no showing of negligence in the absence of evidence as to how long the dog had been on the track or as to its condition.

9. Master and Servant § 25a—

The basis of liability under the Federal Employers' Liability Act is negligence proximately producing injury.

APPEAL by plaintiff from *Morris, J.*, at February Civil Term, 1950, of JOHNSTON.

Civil action to recover for alleged wrongful death.

Plaintiff alleges in her complaint, *inter alia,* and defendant admits in its answer, substantially these pertinent facts, and same were offered in evidence by plaintiff upon the trial in Superior Court, to wit: That defendant, a common carrier of passengers and freight in and through the State of North Carolina, owned and operated main lines of railway running generally north and south, a portion of which extends from the town of Enfield to and through the town of Weldon, North Carolina; that, in connection with the operation of said railway system, defendant

maintains the railroad right of way, tracks, roadbed and electric signal system, for which purposes defendant owns and operates a large number of motor cars; that on 22 December, 1948, and for many years prior thereto, plaintiff's intestate was in the employment of defendant in connection with the construction, maintenance, and repair of said signal system and in the performance of such other duties as the defendant might lawfully require; that at about 2:30 o'clock on 22 December, 1948, plaintiff's intestate and his assistant, E. G. McGriff, both employees of defendant, acting in the course and scope of their employment, were riding upon a motor car owned by defendant and assigned to the use of plaintiff's intestate in the performance of his duties; that they were traveling in a northern direction on the defendant's railroad about four and a half miles north of the town of Enfield; that said motor car was designed for the transportation of four employees or less, propelled by a 4-horsepower motor, and the same, in bad weather, was equipped with a canvas windshield, containing an isinglass opening for clear vision near the top; and that at said time no trains were in sight approaching from either north or south and that the roadbed was about straight and level.

Plaintiff also alleges in her complaint that at the said time and place the said motor car was being operated by E. G. McGriff, a fellow servant of plaintiff's intestate; that McGriff was sitting on the rear of the platform of said motor car, having sole and exclusive control of the operation thereof; and that said motor car suddenly and without warning came in contact with a dog or other object or obstruction upon said railway line, which collision caused said motor car to jump the track and hurl plaintiff's intestate beneath it,—resulting in his almost instant death.

Defendants, answering these allegations, just stated above, aver the motor car was under the exclusive control and direction of plaintiff's intestate; that he delegated to his assistant, McGriff, the duty of operating the motor car, and assigned him to a rear seat on the left side of the motor car and selected the right front seat for himself in order that he might maintain a proper lookout and direct McGriff in the operation of the motor car; that said right front seat commanded a clear view of the track and it was the duty of plaintiff's intestate to keep a proper lookout and direct the operation of the motor car for the safety of himself and his assistant; that plaintiff's intestate failed to keep a proper lookout and failed to warn his assistant that a dog was about to leap upon the railroad track, or, said dog suddenly and without warning, leaped in front of the motor car under such circumstances that neither plaintiff's intestate nor his assistant had an opportunity to stop the motor car,—the resulting collision causing it to jump the track and fatally injure the

plaintiff. Except as admitted, the other of said allegations are denied by defendant.

And by way of further answer thereto defendant avers that the motor car was of standard type and design, and in general and approved use on Atlantic Coast Line and other standard railroads; that same was being operated by McGriff in a careful and prudent manner; and that the collision with the dog was due to negligence of plaintiff's intestate, or was an unforeseeable and unavoidable accident for which defendant is in no wise responsible.

And plaintiff further alleges in her complaint, substantially these acts of negligence as the proximate cause of the death of her intestate: (a) That defendant failed and neglected to provide him a safe place at which to work and safe tools and appliances with which to work, for that the motor car was not equipped with a hand-hold or otherwise so as to enable him to protect himself in the event the motor car should come in contact with objects or obstructions upon defendant's right of way; which facts were well known to defendant, or in the exercise of ordinary care should have been discovered by it.

(b) That defendant negligently equipped the motor car with a canvas windshield containing a small plexiglass opening which was covered with dust, dirt and other foreign substances so as to prevent (1) the operator of the motor car having a clear and unobstructed view and vision of objects or obstructions upon defendant's railroad tracks, (2) the operator of the motor car, E. G. McGriff, having a clear vision of obstructions, and (3) plaintiff's intestate observing the existence of obstructions or other hazard on said railway tracks which caused a derailment of the motor car and injury to its occupants.

(c) That the operator of the motor car, E. G. McGriff, was, at the time of the collision, and for some time prior thereto, carelessly and negligently looking in a southerly direction, and failed and neglected (1) to keep a lookout ahead for obstructions in the pathway of the motor car, and (2) to take reasonable precaution for the safe operation of the motor car when he saw or by the exercise of ordinary care, should have seen a large dog, either upon, or approaching the railroad track, and neglected to apply any brakes or sound any warning to his fellow servant with respect to his rapid approach to the obstruction then upon, or approaching the tracks so as to create a dangerous hazard to plaintiff's intestate.

Defendant, in answer thereto, denies each of the allegations of negligence, and avers otherwise.

Upon the trial in Superior Court E. G. McGriff, as the only witness for plaintiff, testified in pertinent part: "On December 22, 1948, . . . the weather was cloudy and it was cold. Mr. Baker and I were riding

on a motor car . . . I was sitting on the left hand rear. Mr. Baker was in charge of the car and me but I was actually operating the motor car. Mr. Baker was sitting on the right hand front. . . . The motor car struck a dog on the track and turned sideways and skidded down the track. Mr. Baker fell off the car between the rails and the car passed over him. I was not thrown from the car . . . He was killed. Just prior to the motor car coming in contact with the dog, I was looking back to see if there was anyone coming behind us. The roadbed was straight and level in back for about one-half mile and you could see a train in front . . . a mile. It was not raining at the time of the accident . . . Mr. Baker was sitting . . . in a sideways position . . . facing east, and the car was going north. The windshield in front of the motor car was made of canvas and Mr. Baker was sitting up side of the windshield; it was a windbreaker; it was as wide as the motor car at the bottom and went straight up like a wall; it was around 20 or 22 inches across the top. The car and windshield was in same condition it was when it was furnished to me on this particular day for work; . . . The windshield was made of a solid piece of canvas; you could not see through it. I could see around 20 feet in front but could raise up a little bit and see right in front of the car. I could see better to the left front than to the right front. I was operating the car with my right hand. The controls of the car are more or less in the center of the car. The man who operates them is in the rear . . . at all times. Mr. Baker was not operating the car; he could have pulled the brakes and knocked the gas lever back; the controls were about an equal distance from both of us . . . There was no rail in front of where Mr. Baker was sitting; there was one in front of the motor car; it runs in front . . . kind of fastens around the bottom and comes down on each side. Mr. Baker was sitting in a normal position and the usual position when riding on the car . . . on a board up on top of the motor. It is built up in a cone shape about 24 inches to 26 inches across the top and he was sitting on the front of it. That is a box to sit on and also to cover the motor . . . There is no rail, handbar, nor safety strap from the rear of the car to the front . . . I would say we were traveling about 20 miles an hour . . . I did not see the dog before the collision and the first time I saw him was when I was going back for help. The dog . . . was still alive. From the position which Mr. Baker was sitting he would have to turn and look to see in front of the car; he would have to look over the windshield,—about a 90-degree angle to the left; he would not have to raise up."

Then under cross-examination the witness continued: "The car was assigned to Mr. Baker and I was working under him and the foreman. Mr. Baker was in charge of the motor car. He could elect to operate it or to ride on it. The position at which he was sitting was the forward

observation side of the car. He was sitting sideways and you could look out in any direction from the position which he was sitting by twisting your body or your head. It was part of my duty to look to the back for the approach of trains. It was Mr. Baker's duty to look at the front and see what he could see. He had an unobstructed view of the track on the east side, that is on his right-hand side of the right of way. He could look over this canvas . . . easily . . . and see anything on the track. He could look to the right-hand side of the track and the embankment . . . Mr. Baker made no outcry of any sign of warning or say one word. He was in easy reach of the brake lever and gas lever, just as accessible as I was. He did not attempt to stop the car or halt its progress in any way . . . I have been riding on motor cars since November 1947. I was familiar with this motor car. It is equipped with standard handholds, the same as all other motor cars I have seen. It is in general use by the Coast Line; its brakes were in good condition . . . I did not examine this motor car after the accident but I was there when it was examined. The dog hit on the right-hand front side of the motor car. It was the side Mr. Baker was sitting on and immediately in front of him. There was nothing to obstruct Mr. Baker's view of the dog."

And, on re-direct examination, the witness testified: "I have never worked with any other railroad company other than the Coast Line. I am not familiar with cars, equipment and general type on other railroads. It was just an ordinary hound dog."

At the close of plaintiff's evidence, motion of defendant for judgment as of nonsuit was allowed, and signed by the court.

Plaintiff appeals therefrom and assigns error.

C. G. Grady and Levinson & Batton for plaintiff, appellant.

Abell, Shepard & Wood, Frank G. Kurka, and M. V. Barnhill, Jr., for defendant, appellee.

WINBORNE, J. This appeal challenges only the judgment as of nonsuit entered in the trial court. As to this, the evidence shown in the case on appeal taken in the light most favorable to plaintiff, as is done in such case, fails to make out a case of actionable negligence,—indeed fails to show any negligence on the part of defendant. *Murray v. R. R.*, 218 N.C. 392, 11 S.E. 2d 326, and cases there cited.

In an action for the recovery of damages for injuries allegedly resulting from actionable negligence, "The plaintiff must show: First, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff, under the circumstances in which they were placed; and, second, that such negligent breach of duty was the proximate cause of the injury—a cause that pro-

duced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed." *Whitt v. Rand,* 187 N.C. 805, 123 S.E. 84; *Evans v. Construction Co.,* 194 N.C. 31, 138 S.E. 411; *Hurt v. Power Co.,* 194 N.C. 696, 140 S.E. 730; *Thompson v. R. R.,* 195 N.C. 663, 143 S.E. 186; *Templeton v. Kelley,* 215 N.C. 577, 2 S.E. 2d 696; *Gold v. Kiker,* 216 N.C. 511, 5 S.E. 2d 548; *Murray v. R. R., supra,* and numerous other cases.

The principle prevails in this State that what is negligence is a question of law, and, when the facts are admitted or established, the court must say whether it does or does not exist. This rule extends and applies not only to the question of the negligent breach of duty, but also to the feature of proximate cause. *Hicks v. Mfg. Co.,* 138 N.C. 319, 50 S.E. 703; *Russell v. R. R.,* 118 N.C. 1098, 24 S.E. 512; *Lineberry v. R. R.,* 187 N.C. 786, 123 S.E. 1.

In the case in hand the relationship between the defendant and the plaintiff's intestate is that of master and servant, or employer and employee. When such relationship exists, the accepted and well settled rule of law is that the master owes to the servant the duty to exercise ordinary care to provide a reasonably safe place in which to do his work and reasonably safe machinery, implements and appliances with which to work. The master is not an insurer, however. Nor is it the absolute duty of the master to provide a reasonably safe place for the servant to work, or to furnish reasonably safe machinery, implements and appliances with which to work. He meets the requirements of the law in the discharge of his duty if he exercises or uses ordinary care to provide for the servant such a place, or to furnish such machinery, implements and appliances as are approved and in general use in places of like kind, that is, that degree of care which a man of ordinary prudence would exercise or use under like circumstances, having regard to his own safety, if he were providing for himself a place to work, or if he were furnishing for himself machinery, implements and appliances with which to work. This rule of conduct of "the ordinarily prudent man" measures accurately the duty of the master and fixes the limit of his responsibility to his servant. *Murray v. R. R., supra,* and cases there cited. See also *Helms v. Waste Co.,* 151 N.C. 370, 66 S.E. 312; *Eplee v. Ry. Co.,* 155 N.C. 293, 71 S.E. 325.

In the light of these principles, while plaintiff alleges as an act of negligence on the part of defendant a failure to equip the motor car with a hand-hold, the evidence offered by plaintiff is that the motor car in question was equipped with standard hand-holds, and that it was in general use by the defendant. And there is neither allegation nor proof that the motor car, so equipped, was not approved and in general use. See *Grubbs v. Lewis,* 196 N.C. 391, 145 S.E. 769.

And while plaintiff also alleges as an act of negligence the equipment of the motor car with a canvas windshield containing a small plexiglass opening which was covered with dust, dirt and other foreign substances so as to prevent plaintiff's intestate and the operator of the motor car having a clear vision ahead,—the evidence offered by plaintiff is that the windshield was of solid canvas, but that the operator could see over it around 20 feet in front, and by raising up "a little bit" could see right in front of the car,—and that plaintiff's intestate "sitting up side of the windshield," "in a normal . . . and the usual position," "could look over this canvas . . . easily . . . and see anything on the track."

Now we come to the last acts of negligence alleged by plaintiff, the failure of the operator of the motor car to keep lookout ahead for obstructions in its pathway, and to take reasonable precaution for its safe operation when he saw, or by the exercise of ordinary care should have seen, a large dog, either upon or approaching the railroad track.

In reference thereto, this Court has dealt with the subject of a street railway company's liability in tort for the killing of a dog. *Moore v. Electric Co.*, 136 N.C. 554, 48 S.E. 822.

In the *Moore case* the Court laid down these principles: The dog is not included in the category of cattle or livestock, but is a species or subject of property recognized as such by the law, and for an injury to which an action at law may be sustained. But no presumption of negligence on the part of the railway arises from the mere fact of killing of, or injury to a dog by a train being shown. On the other hand, on account of the superior intelligence and traits of character of the dog, an engineer in charge of a moving locomotive is not compelled to keep either as vigilant lookout for the dog, or as great care in the management of his engine or train so as to prevent their injury as he is for cattle or livestock, and is warranted in acting on the belief that a dog on the track apparently in possession of his faculties will avoid danger; that is, the engineer has the right to assume, and to act upon the assumption, that the dog will leave the track, and escape the impending peril of the oncoming train. There is, however, an exception to the principle, that is, when the dog on the track is apparently helpless, or totally oblivious of his surroundings.

Applying these principles to the case in hand, the operator of the motor car was not charged with the duty of anticipating the presence of a dog upon the track; but in the absence of a showing that the dog upon the track was apparently helpless, or totally oblivious of his surroundings, the operator had the right to assume, and to act upon the assumption, even to the moment of impact, that the dog would leave the track. Hence, the failure to stop the motor car would not be an act of negligence. Therefore, since there is no evidence tending to show how long the dog had been on the track, or what he was doing, or what his condition was,

there is a failure of proof of negligence on the part of the operator of the motor car. Compare *Cummings v. R. R.*, 217 N.C. 127, 6 S.E. 2d 837; *Justice v. R. R.*, 219 N.C. 273, 13 S.E. 2d 553; *Mitchell v. Melts*, 220 N.C. 793, 18 S.E. 2d 406. And the evidence is that the impact between the motor car and the dog was the cause of the derailment of the motor car and the resultant death of plaintiff's intestate.

Appellant states in her brief that this action is brought under the Federal Employers' Liability Act. The complaint fails to so expressly declare. But even so, the basis of liability under this act is negligence proximately producing injury. Plaintiff must show something more than a fortuitous injury. *Camp v. Ry. Co., ante*, 487, citing *Tiller v. A. C. L. R. R.*, 318 U.S. 54, 87 L. Ed. 610, 143 A.L.R. 967; *Brady v. Southern Ry.*, 222 N.C. 367, 23 S.E. 2d 334, 320 U.S. 476, 88 L. Ed. 239; *Ellis v. Union Pacific R. R. Co.*, 329 U.S. 649.

For reasons stated, the judgment as of nonsuit is

Affirmed.

W. G. AREY, EARL D. HONEYCUTT, AND ROBERT J. AREY, PARTNERS, TRADING UNDER THE FIRM NAME OF AREY OIL COMPANY OF SHELBY, NORTH CAROLINA, v. RADFORD W. LEMONS AND WIFE, NANCY LEE LEMONS; CRAWFORD HARDWARE & IMPLEMENT COMPANY, INC., AND M. M. MAUNEY.

(Filed 1 November, 1950.)

1. Appeal and Error § 40c—

Upon an appeal from an order granting or refusing an interlocutory injunction, the Supreme Court may review both the findings of fact and the conclusions of law.

2. Injunctions § 6—

The purpose of an interlocutory injunction is to preserve the *status quo* of the subject matter of the suit until a trial can be had on the merits, and therefore when defendants' are in the actual and peaceable possession and enjoyment of the property in dispute, an interlocutory order will not lie to enjoin them from using same in order to coerce them to transfer the property to plaintiff, the consumption or destruction of the property not being involved.

3. Injunctions § 2—

Equity will not undertake by injunction to protect the property rights of a party who has an adequate remedy at law.

4. Injunctions § 6—

A plaintiff lessor claiming ownership of tanks, pumps and other equipment used at a filling station, and maintaining that defendant lessee had

forfeited his term for breach of lease provision that the station should sell only petroleum products of plaintiff lessor, *held* not entitled to the issuance of a preliminary injunction, since plaintiff fails to show inadequacy of the legal remedies available to it.

5. Same—

In order to be entitled to a preliminary restraining order, plaintiff must make out at least a *prima facie* showing of right to the final relief demanded by him.

6. Monopolies § 2: Contracts § 7a: Landlord and Tenant § 2—

A single instrument whereby the owner of lands leases same to an oil company rent free, and the oil company subleases the property back to the owner rent free, upon agreement that only the petroleum products of the oil company should be sold at the filling station, *is held* void, since the only consideration is the promise of the oil company to sell its products to the owner and the promise of the owner to handle such products to the exclusion of similar merchandise of competitors, which agreement is in contravention of G.S. 75-5, and this result is not affected by a recital in the writing that the owner signed same as a part of consideration for a deed to the property executed by a third person.

APPEAL by defendants from *Rudisill, J.*, at Chambers, 15 April, 1950, in action in the Superior Court of CLEVELAND.

Application for an interlocutory injunction.

For convenience of narration, the plaintiffs, W. G. Arey, Earl D. Honeycutt, and Robert J. Arey, are called the Arey Oil Company; the defendants, Radford W. Lemons and wife, Nancy Lee Lemons, are designated as Lemons and wife; and the defendant, Crawford Hardware & Implement Company, Inc., is referred to as the Hardware Company.

The affidavit and verified complaint of the plaintiffs allege these things:

1. The Arey Oil Company is a commercial partnership which has been wholesaling petroleum products in Cleveland County since 19 November, 1945. The partners are W. G. Arey, Earl D. Honeycutt, and Robert J. Arey. The last named was admitted into the firm subsequent to 1945. Lemons and wife own a filling station at Patterson Springs in Cleveland County.

2. On 19 November, 1945, the Arey Oil Company and Lemons and wife executed a single instrument in writing whereby Lemons and wife leased the filling station to the Arey Oil Company for the ensuing ten years, and whereby the Arey Oil Company sublet such filling station to Lemons and wife for the same period upon these terms: "That . . . the said parties of the first part (Lemons and wife) do hereby agree to operate, or have operated, a filling station located on said property, for a period of 10 years from the date hereof; and it is further understood and agreed that all gasoline, lubricants, oils, kerosene, and all other

petroleum products purchased and sold by said filling station . . . on the aforesaid property shall be purchased from the Arey Oil Company . . ., and the said Arey Oil Company shall deliver and sell the aforesaid products at wholesale tank-wagon prices, current at the time of delivery of same. Upon failure of the parties of the first part (Lemons and wife) to operate or have operated a filling station on the aforesaid premises, or upon their failure to buy all their petroleum products from the Arey Oil Company . . ., as provided above, then the said Arey Oil Company shall have the privilege to take over the said filling station and other buildings on the aforesaid premises and have same operated for the purpose of selling their petroleum products on said premises." The instrument, which was immediately registered in the office of the Register of Deeds of Cleveland County, does not obligate any party to pay any rent, but recites that its execution by Lemons and wife is "a part of the consideration for the deed executed to them by Robert J. Arey" for the filling station.

3. The Arey Oil Company has always performed the obligation devolving upon it "under the said lease" by furnishing Lemons and wife "sufficient petroleum products to be used in the operation of their filling station," and Lemons and wife used their filling station for the retail sale of petroleum products obtained by them from the Arey Oil Company "in compliance with the terms of the lease until . . . January 10, 1950." In so doing, Lemons and wife used certain tanks, pumps, and other equipment belonging to the Arey Oil Company.

4. On 10 January, 1950, Lemons and wife entered into an attempted agreement with the Hardware Company and M. M. Mauney, purporting to lease to them the filling station "for the sale of petroleum products furnished by the . . . Hardware . . . Company and M. M. Mauney." Notwithstanding they had knowledge of the writing of 19 November, 1945, and of the ownership by the Arey Oil Company of certain tanks, pumps, and other equipment theretofore used by Lemons and wife, the Hardware Company and Mauney forthwith took possession of the filling station and of such tanks, pumps, and other equipment, and ever since have been using the filling station of Lemons and wife and the equipment of the Arey Oil Company in retailing their own petroleum products.

5. The Arey Oil Company has suffered substantial pecuniary damage as the proximate consequence of the acts of the defendants in depriving it of the use of its tanks, pumps, and other equipment, and in preventing the employment of the service station of Lemons and wife as an outlet for its petroleum products. Besides, the Arey Oil Company is entitled to the possession of the filling station under the writing of 19 November, 1945, because Lemons and wife have failed "to have petroleum products furnished by the Arey Oil Company" sold at such station. The Arey

Oil Company sues to recover monetary damages, and the possession of the tanks, pumps, and other equipment claimed by it, and to eject the defendants from the filling station premises for the remainder of the period designated in the writing of 19 November, 1945.

The answers of the defendants, which are verified, deny all of the material allegations of the complaint, except the allegation that the male defendant, Radford W. Lemons, and the plaintiffs, W. G. Arey and Earl D. Honeycutt, doing business as the Arey Oil Company, executed the writing of 19 November, 1945. The answers expressly aver that Lemons and his wife are the absolute owners of the filling station at Patterson Springs and of all property employed in its operation, including the tanks, pumps, and other equipment claimed by the Arey Oil Company; that the male defendant, Radford W. Lemons, has had sole charge of the operation of the filling station ever since 19 November, 1945, and that he is now purchasing petroleum products from the Hardware Company and Mauney, business competitors of the Arey Oil Company, for retail sale at the filling station; that the male defendant, Radford W. Lemons, does not wrong the Arey Oil Company in patronizing its competitors because the writing of 19 November, 1945, has no binding force; that the Arey Oil Company had no interest in the sale of the filling station to Lemons and wife "and no lease or rental contract, or contract to sell petroleum products entered into or became a part of the consideration for the purchase" of the filling station by them, and by reason thereof the writing of 19 November, 1945, is not based on any valuable consideration as to them; and that such writing is in reality a sales agreement, and is void for that it contravenes the anti-monopoly or anti-trust statute embodied in subsection 2 of G.S. 75-5.

After notice to defendants, the Arey Oil Company applied to Judge Rudisill for an interlocutory injunction pending a trial on the merits. The Judge heard the application upon the pleadings and supporting affidavits, and found these facts: (1) That the Arey Oil Company owned the tanks, pumps, and other equipment in controversy, and consequently was entitled to immediate possession thereof; (2) that the Arey Oil Company is also entitled to the immediate possession of the filling station under the writing of 19 November, 1945; and (3) that the continued use of the tanks, pumps, and other equipment in dispute by the defendants, and their continued possession of the filling station will entail a serious loss to the Arey Oil Company. The Judge thereupon granted an interlocutory injunction enjoining the defendants until the further order of the court from using the tanks, pumps, and other equipment in controversy in any way, and from using the filling station for the sale of petroleum products or for any other business purpose. The defendants excepted and appealed, assigning errors.

C. C. Horn and Joseph C. Whisnant for plaintiffs, appellees.
Falls & Falls for defendants, appellants.

ERVIN, J. Upon an appeal from an order granting or refusing an interlocutory injunction, the Supreme Court may review both the findings of fact and the conclusions of law. *Finger v. Spinning Co.,* 190 N.C. 74, 128 S.E. 467; *Coates v. Wilkes,* 92 N.C. 376.

The purpose of an interlocutory injunction is to preserve the *status quo* of the subject matter of the suit until a trial can be had on the merits. *Boone v. Boone,* 217 N.C. 722, 9 S.E. 2d 383; *S. v. Scott,* 182 N.C. 865, 109 S.E. 789; *Harrison v. Bray,* 92 N.C. 488. For this reason, an interlocutory injunction does not lie to take property out of the possession of one party and place it in the possession of another. *Jackson v. Jernigan,* 216 N.C. 401, 5 S.E. 2d 143; *Stevens v. Myers* (Mo. App.), 73 S.W. 2d 334; *Spoor-Thompson Mach. Co. v. Bennett Film Laboratories,* 105 N. J. Eq. 108, 147 A. 202; *Eastern Farms Products v. Wampsville Dairymen's Corporation,* 17 N.Y.S. 2d 954, 173 Misc. 413. Besides, equity will not undertake by injunction to protect the property rights of a party who has an adequate remedy at law. *Oil Co. v. Mecklenburg County,* 212 N.C. 642, 194 S.E. 114. When these rules are applied to the case at bar, it is manifest that the court below erred in awarding injunctive relief to the Arey Oil Company.

The defendants are in the actual and peaceable possession and enjoyment of the property in dispute under claim of right. Yet, the order of the court enjoins them from making further use of such property so as to coerce them to transfer its possession to the Arey Oil Company. Hence, the order disturbs rather than preserves the *status quo* of the subject matter of the suit.

Moreover, the evidence does not indicate any inadequacy in the legal remedies available to the Arey Oil Company. *Whitford v. Bank,* 207 N.C. 229, 176 S.E. 740; *Kistler v. Weaver,* 135 N.C. 388, 47 S.E. 478; *Wilson v. Respass,* 86 N.C. 112; *Hettrick v. Page,* 82 N.C. 65; *Baxter v. Baxter,* 77 N.C. 118; *Jordan v. Lanier,* 73 N.C. 90; *Howell v. Howell,* 40 N.C. 258.

The provision of the injunction relating to the filling station is improper for another reason. To obtain an interlocutory injunction, a plaintiff must make out at least a *prima facie* showing of a right to the final relief demanded by him. *Plott v. Comrs.,* 187 N.C. 125, 121 S.E. 190; *Gray v. Warehouse Co.,* 181 N.C. 166, 106 S.E. 657; *Jones v. Lassiter,* 169 N.C. 750, 86 S.E. 710; *Newton v. Brown,* 134 N.C. 439, 46 S.E. 994.

The Arey Oil Company predicates its demand for a final judgment for the possession of the filling station during the remainder of its supposed

term upon the premise that Lemons and wife have forfeited their right of occupancy under their purported sublease through breach of the condition of the writing of 19 November, 1945, requiring them to handle the petroleum products of the Arey Oil Company to the exclusion of similar merchandise marketed by any other person, firm, or corporation.

The writing of 19 November, 1945, is a somewhat startling document. According to its language, the parties to it entered into a single transaction whereby Lemons and wife, as owners of the fee, leased the filling station rent-free to the Arey Oil Company for a term of ten years, and the Arey Oil Company, as lessee, subleased the same property rent-free to Lemons and wife for the same term. This being the case, it may be argued with much persuasiveness that any rights which the Arey Oil Company hoped to acquire in the filling station by the transaction died a-borning through the merger of the lease and sublease in the fee. See: 51 C.J.S., Landlord and Tenant, section 96. We by-pass this intriguing question without decision, for its determination is not necessary to the solution of our present problem.

It is clear that the various provisions of the writing of 19 November, 1945, are indivisible, and that there is no consideration to support them unless it can be found in the mutual promises embodied in the agreement therein contained whereby the Arey Oil Company promises to sell its petroleum products to Lemons and wife, and whereby Lemons and wife promise to handle such products to the exclusion of similar merchandise marketed by any other person, firm, or corporation. But any consideration inherent in these mutual promises is necessarily illegal; for the agreement has as its object the violation of the anti-monopoly or anti-trust statute making it unlawful for any person, firm, corporation, or association to make a sale, or to contract to make a sale "of any goods, wares, merchandise, articles or things of value whatsoever in North Carolina, whether directly or indirectly, or through any agent or employee, upon the condition that the purchaser thereof shall not deal in the goods, wares, merchandise, articles or things of value of a competitor or rival in the business of the person, firm, corporation or association making such sales." G.S. 75-5, subsection 2; *Shoe Co. v. Department Store,* 212 N.C. 75, 193 S.E. 9. The validity of this conclusion is not impaired in any wise by the recital that the writing in suit was signed by Lemons and wife as a part of the consideration for the deed for the filling station executed to them by Robert J. Arey, who was not then a member of the Arey Oil Company. An agreement prohibited by positive law does not cast off its unlawful character, and put on legal holiness because it is entered into by some of the parties in consequence of a promise made by them to a third person in an independent contract.

For these reasons, the writing of 19 November, 1945, is void in its entirety, and the Arey Oil Company has no right to the final relief demanded by it in respect to the filling station.

It is noted, in closing, that this case is distinguishable from *Oil Co. v. Garner,* 230 N.C. 499, 53 S.E. 2d 441, where it appeared that the oil company had a valid leasehold estate in the filling station by virtue of its obligation to pay rent, and where it did not appear that the occupants of the filling station had agreed to purchase petroleum products from the oil company on the condition denounced by the statute.

The order granting the interlocutory injunction is

Reversed.

MABEL FLORENCE JONES BROWN, TOM D. JONES AND CARRIE E. JONES, v. C. G. HODGES AND WIFE, CARRIE HODGES, AND CHARLES M. HODGES.

(Filed 1 November, 1950.)

1. Boundaries § 1—

The boundary called for in a deed is a question of law for the court, and the location of the boundary on the land is a question of fact for the jury upon conflicting evidence, but when the location is admitted or the evidence in regard thereto is not conflicting, the location of the boundary is also a question for the court.

2. Boundaries § 3a—

The courses and distances set out in a deed control unless the deed contain a more certain description.

3. Boundaries § 3b—

A stake is not a monument, and therefore oral evidence of the erection of a stake as a corner, or oral evidence that a line is surveyed along a line of stakes, cotemporaneously with the execution of the deed, is not admissible to control the course and distance or a natural boundary called for in the deed.

4. Same—

A highway is of such permanent character as to become a monument of boundary, and when called for in a deed, the highway as it existed at the time of the execution of the deed controls course and distance as set out in the instrument.

5. Boundaries § 5a—

Where there is no dispute as to the location of the highway as it existed at the time of the execution of the deeds in question, calls in the deeds to the highway control, and parol evidence that the courses and distances as set out in the deeds ran along a line of stakes where the parties anticipated the highway would be located, is incompetent.

6. Boundaries § 10—

Where the location of a highway as it existed at the time of execution of the deeds is not in dispute, and the deeds call for the highway as the dividing line between the contiguous tracts, the location of the dividing line is the center of the highway as it then existed, as a matter of law, and the court should direct a verdict to this effect in a processioning proceeding.

APPEAL by defendants from *Crisp, Special Judge,* at June Term, 1950, of WATAUGA.

A processioning proceeding to determine the true boundary line between the lands of the plaintiffs and of the defendants.

The proceeding was here on a former appeal,—the opinion rendered then being reported in 230 N.C. 746, 55 S.E. 2d 498. That appeal challenged the correctness of judgment as in case of nonsuit. The facts essential to presentation of the question then before the Court are there stated. It is said there that "a reading of the averments in the answer of defendants in connection with the stipulation of parties, entered upon the call of the case for trial in Superior Court, reveals that defendants do not question plaintiffs' title, and that the only matter in controversy is the location of the dividing line between the lands of plaintiffs and the lands of defendants, that is, the location of the State highway admittedly called for in deeds under which both parties claim," and that, therefore, the cause should not be dismissed as in case of nonsuit, citing *Cornelison v. Hammond,* 225 N.C. 535, 35 S.E. 2d 633. And it was held that there must be another trial when the issue may be submitted to and answered by the jury.

Upon the retrial these facts appear from stipulation of the parties: Plaintiffs and defendants, owning adjoining lands, derive their respective titles from a common source, Edward Hodges. The lands were formerly parts of the dower land of the widow of Edward Hodges. Subsequent to her death, the land was partitioned among the heirs at law of her deceased husband by the execution of cross partition deeds on 3 June, 1927.

One of these partition deeds is from H. C. Hodges, *et al.,* to D. E. Lookabill and other heirs at law of Susan Lookabill, a deceased daughter of Edward Hodges. Plaintiffs derive their title by *mesne* conveyances in this deed. The specific description appearing in it reads as follows: "Beginning on a stake, G. E. Hayes' corner, running south with the old road 40 poles to a stake in Hayes' line; thence south 34 deg. east with the old road, 10 poles to a stake; thence east 23 poles to a stake in the highway; thence north 15 deg. east with the highway 50 poles to a stake in Greene's line; thence west with Greene's line 37 poles to the Beginning, containing 9 acres more or less."

Another of these partition deeds is from D. E. Lookabill, *et als.*, to C. G. Hodges. This is the deed under which defendants claim. The specific description in it reads in pertinent part as follows: "Beginning on a locust on the north bank of the old Boone and Jefferson road, H. C. Hodges' corner, running north with said H. C. Hodges' line 46 poles to a stake in Greene's line; thence west with Greene's line 52 poles to a stake at the highway, Lookabill heirs' corner; thence south 15 deg. west with the highway 50 poles to a stake at the highway," thence various courses and distances "to the Beginning,—containing 18 acres, more or less."

There does not appear to be any controversy (1) as to the location of the points of beginning of the two tracts, and (2) as to the location of the Greene line. And it appears that both the deed, under which plaintiffs claim, and the deed under which defendants claim, call for the highway and run with it,—the plaintiffs "north 15 deg. east . . . 50 poles," and the defendants "south 15 deg. west . . . 50 poles," one the reverse of the other but being identical."

The plaintiffs allege and contend in their petition that the true line between their lands and the lands of the defendants is and should be located and established as follows: "Beginning at a stake at the highway and running thence north 15 east with the highway 40 poles to a stake in L. A. Greene's line, now W. H. Greene's line"; but they further allege and contend that said line runs with the original survey of the highway, as said survey existed at the time the lands were originally "sold off by the heirs of Louisa Ingram," and before the new highway, as now located, was established and constructed.

Defendants deny the location of the true line between their lands and the lands of the plaintiffs as plaintiffs contend it to be. And they contend that their deed, bearing date 3 June, 1927, calls for the highway as then and as now located.

Upon the trial in Superior Court the surveyor, appointed by the court, reported on the contentions of both of the parties. The location of the true dividing line as contended for by plaintiffs is represented on the court map by the line from K to L. And the location of the true dividing line as contended for by defendants is represented on the court map by the line from X to Y, the center line of the present highway.

And upon the trial all the evidence tends to show that at the time the partition deeds were executed there was a highway known as the Boone-Todd Highway, or Highway #69, which passed through the property, and that the new highway #221 follows substantially the location of that highway—the old highway being crooked, and the new one straight. All the evidence tends to show that there never has been a highway along the line as contended for by plaintiffs. But plaintiffs, over objection by defendants, were permitted to show by parol evidence that when Surveyor

Norris, in surveying the lines for the land of the Lookabill heirs, plaintiffs' predecessors in title, reached the end of the call "east 23 poles to a stake in the highway" he ran "north 11 poles," and then "north 15 deg. east" where he found "stakes for a road." But there is no evidence that the surveyor marked the line, or marked a corner at the end of the line as run by him. Then he was asked, over objection, "What did you find along the line 'thence north 15 deg. east with the highway 50 poles to a stake in Greene's line?' ", to which he replied, "The stakes I spoke of is all. I don't remember what kind of crop, if any, was growing. There was no constructed highway there at that time."

This surveyor was also permitted to testify, over objection by defendants, that in surveying the lines for the deed under which defendants claim, he ran the second call "west 52 poles" where he found stakes for a highway, and then ran south 15 west with those stakes. But there is no evidence that a corner was marked at the end of the 52 poles.

Plaintiffs were permitted, over objection by defendants, to introduce oral evidence as to the general reputation in the community that the survey stakes indicated the place the new highway was to be. But, quoting the surveyor, "There never was any road built at the survey I am speaking of and wasn't any road there, only stakes. . . . There never was any road built over where I stopped . . . To go from the second corner to the Hodges tract to a road you have to go to the point marked "X" on the map. To go along a road and highway to go down the next call, there is no highway to go along except the one that is there now."

During the trial plaintiffs and defendants stipulated in open court that since plaintiffs' contention as to the dividing line was the highway survey shown on the court surveyor's plat, and that defendants' contention as to the dividing line was the present Highway #221 shown on said plat, that if the plaintiffs should prevail in this suit, the dividing line would be the center line of said highway survey,—in other words, the line from K to L; and if the defendants should prevail, the dividing line would be the center of the present Highway #221, in other words, the line from X to Y.

The court submitted this issue to the jury: "Where is the true location of the dividing line between the lands of the plaintiffs and those of the defendants?"

Defendants requested peremptory instruction that the jury answer the issue as they contend. The request was denied, and defendants excepted.

The jury answered the issue "K to L."

From judgment on the verdict in favor of plaintiffs, defendants appeal to Supreme Court and assign error.

Trivette, Holshouser & Mitchell and Burke & Burke for plaintiffs, appellees.

Bowie & Bowie and Higgins & McMichael for defendants, appellants.

WINBORNE, J. The defendants, appellants on this appeal, in the first instance, assign as error, and properly so, the rulings of the trial court in permitting plaintiffs to offer, and the jury to consider, parol evidence tending to vary the calls for, and with the highway as contained in the description of the land conveyed in the deeds under which both the plaintiffs and the defendants claim. And, too, upon the competent evidence and stipulation of parties shown in the record on this appeal error is made to appear in the denial of defendants' request for peremptory instruction as prayed.

"A deed is construed by the court, not by the jury. What land by its terms it was intended to cover is just as much a matter of law as what estate it conveys,"—*Ruffin, J.*, in concurring opinion in *Reed v. Shenck*, 14 N.C. 65. And it is settled law in this State that, in processioning proceedings to establish a boundary line, which is in dispute, what constitutes the dividing line is a question of law for the court, but a controversy as to where the line is must be settled by the jury under correct instructions based upon pertinent evidence. *Huffman v. Pearson*, 222 N.C. 193, 22 S.E. 2d 440, and cases there cited, and others.

But if the court declares what the boundary is, and the location of this boundary is admitted, the whole resolves itself into a question of law. *Miller v. Johnston*, 173 N.C. 62, 91 S.E. 593.

The same principle would apply when the location of the declared boundary is uncontroverted by evidence.

It is also a well settled rule in questions of boundary that course and distance govern unless there be in the deed some more certain description by which one or both may be controlled. The terminus of a line must be either the distance called for in the deed, or some permanent monument which will endure for years, the erection of which was cotemporaneous with the execution of the deed. *Reed v. Shenck, supra; Gause v. Perkins*, 47 N.C. 222; *Hill v. Dalton*, 140 N.C. 9, 52 S.E. 273. A stake is not such monument. A stake called for in a deed to indicate a corner is too lacking in stability and fixedness to serve as monument for that purpose. *Clark v. Moore*, 126 N.C. 1, 35 S.E. 125. Stakes, as aptly stated by *Hall, J.*, in concurring opinion in *Reed v. Shenck, supra*, "speak more of locality, to be sure, than floating feathers on the water, but they are as unfit to be boundaries of land."

Hence, oral evidence of the erection of a stake as a corner, or oral evidence that a line is surveyed along a line of stakes, cotemporaneously with the execution of a deed, is not admissible to control the course and distance or the natural boundary called for in the deed. *Reed v. Shenck, supra; Gause v. Perkins, supra.*

Moreover, "whenever a natural boundary is called for in a patent or deed the line is to terminate at it, however wide of the course called for

it may be, or however short or beyond the distance specified." *Cherry v. Slade,* 7 N.C. 82; *Hill v. Dalton, supra; Bowen v. Lumber Co.,* 153 N.C. 366, 69 S.E. 258.

A highway, though artificial, is of such permanent character as to become a monument of boundary within the principle stated as to a natural boundary, by which course and distance called for in a deed are controlled. *Hough v. Horne,* 20 N.C. 369.

In the light of these principles, the terminus of the line "thence east 23 poles to a stake in the highway," appearing in the deed to Lookabill, under which plaintiffs claim, is the highway as it existed at the time of the execution of the deed,—regardless of the distance. And the next call "thence north 15 deg. east with the highway 50 poles to a stake in Greene's line," appearing in the said deed, runs with the course of the highway, and terminates at Greene's line as each existed at the time of the execution of the deed, irrespective of the course and distance set out.

Likewise, the terminus of the line "thence west with Greene's line 52 poles to a stake at the highway, Lookabill heirs' corner," appearing as the second call in the deed under which defendants claim is at the highway in Greene's line, as each existed at the time of the execution of the deed. The point reached is the Lookabill heirs' corner, that is, plaintiffs' corner above described, irrespective of the distance specified in the call. And the next call "thence south 15 deg. west with the highway 50 poles to a stake at the highway," appearing in defendants' deed, runs with the highway, and terminates at the highway, as it existed at the time of the execution of said deed, irrespective of the course set out in the call.

Hence the highway, as it existed at the time the said deeds were executed, is the true dividing line between the lands of the plaintiffs and the lands of the defendants. Defendants were entitled to have the trial court so declare. The location of the highway, as it then existed, according to evidence, is not disputed. Hence the location of it becomes a matter of law. Defendants were entitled to have the court so declare.

New trial.

ROSA P. MADDOX, ADMINISTRATRIX OF THE ESTATE OF FELIX L. MADDOX, DECEASED, v. GEORGE W. BROWN AND QUEEN CITY COACH COMPANY, A CORPORATION.

(Filed 1 November, 1950.)

1. Automobiles § 14—

Where a motorist follows a motorcyclist on the inside or passing lane of a four lane highway, the motorist is under duty to refrain from any effort to pass the motorcycle so long as it continues to travel in the passing lane, notwithstanding the cyclist may refuse to yield the right of way.

2. Same—

Where a cyclist is traveling on the right or slow traffic lane of a four lane highway, and a motorist traveling on the inside or passing lane signals by horn his intention to pass, the act of the cyclist in suddenly cutting his vehicle to the left and colliding with the right front portion of the motorist's vehicle, is negligence constituting at least a proximate cause of the collision.

3. Automobiles §§ 18h (2), 18h (3)—

Conflicting evidence as to whether a cyclist was traveling on the inside or passing lane of a four lane highway, or was traveling on the right or slow traffic lane, and turned to his left and collided with a vehicle traveling on the inside or passing lane, which had given signal by horn of intention to pass, *is held* to require the submission of appropriate issues to the jury.

4. Automobiles § 8a—

Where all the evidence shows that a motorist saw plaintiff's intestate who was riding a motorcycle in front of him traveling in the same direction, and gave repeated warnings by sounding his horn of his approach to the cyclist, the evidence fails to sustain an allegation that the motorist failed to keep a proper lookout as an element of negligence in plaintiff's action to recover for the death of the cyclist, killed in a collision with the motorist's vehicle.

5. Automobiles § 8i—

Where the evidence tends to show that some 700 to 900 feet before reaching an intersection, a motorist began signaling by horn a motorcycle traveling in the same direction in front of him on the highway, and that the collision occurred some 150 feet before reaching the intersection, *held* the evidence fails to show an intersection accident case, and the law as to speed at highway intersections is inapplicable.

6. Automobiles § 8c—

The mere fact that a motorcyclist traveling on the right side of the passing lane of a four lane highway veers to the left of such lane, without any signal whatever, is insufficient to indicate or give notice of his assumed intention to make a left turn.

7. Trial § 31b—

Allegata and *probata* must correspond to each other to be effective, and it is error for the court to charge upon proof which is not supported by allegation.

8. Automobiles § 18i—

Where the court charges the duty of a motorist to maintain a safe distance behind another traveling in the same direction, G.S. 20-152, it is error for the court to fail to charge also as to the right of a motorist in overtaking and passing another as authorized by G.S. 20-149 or the right of a motorist traveling in the inside or passing lane of a four lane highway to overtake and pass a vehicle traveling in the right or slow lane traffic, when such qualifications of the general rule are made pertinent by the evidence adduced.

9. Same—

Where there is no evidence that a motorist intended or gave any notice of intention to make a left turn, it is error for the court to charge the law as to the duties of a motorist following in the same direction who has been given the statutory left turn signal by the preceding motorist.

10. Trial § 31b—

It is error for the court to charge the law on an aspect of the case entirely unsupported by the evidence.

ON rehearing.

The facts appear in the original opinion, *Maddox v. Brown, ante,* 244. While there are some inaccuracies in the facts as there stated, and some come from the briefs rather than the record, the general setting of the case is there made to appear.

Smathers & Carpenter for plaintiff appellee.
Robinson & Jones for defendant appellants.

BARNHILL, J. There is testimony in the record from which a jury may find that the deceased and Brown, the bus driver, were both traveling in the passing lane, going west; that Brown signaled his desire to pass deceased who was on a motorcycle ahead; that deceased did not immediately yield the right of way but continued on in the passing lane; that Brown did not slow up, but, instead, continued on and attempted to cut around the motorcycle while it was still in the same lane; that in so doing, he struck the motorcycle; and that the deceased was thrown to the pavement, receiving injuries in his fall which caused his death.

So long as the deceased remained in the passing lane, if in fact he was in that lane, it was the duty of Brown to refrain from any effort to pass him. The mere fact deceased would not yield the right of way did not relieve Brown of the duty to exercise due care in that respect. *Ward v. Bowles,* 228 N.C. 273, 45 S.E. 2d 354.

On the other hand, there is testimony coming from witnesses for plaintiff as well as witnesses for defendant tending to show that the deceased was traveling on a motorcycle in the outer or slow traffic lane and the bus was in the inner or passing lane; that Brown blew his horn several times to give notice of his intention to pass; that just as the bus came almost abreast of the motorcycle, the deceased suddenly cut his vehicle to the left and collided with the right front portion of the bus near the door, and that Brown, in an attempt to avoid the collision, drove across the center line of the highway and proceeded on and parked on the left-hand side of the road.

If this be the case, and the jury so finds, then the negligence of deceased was at least a proximate cause of the collision and resulting death. *Van*

Dyke v. Atlantic Greyhound Corp., 218 N.C. 283, 10 S.E. 2d 727; *Miller v. Motor Freight Corp.*, 218 N.C. 464, 11 S.E. 2d 300.

This conflicting testimony requires the submission of appropriate issues to a jury. For that reason the former opinion, in so far as it sustains the court below in its rulings on the motion to dismiss as in case of nonsuit, is approved and the petition to rehear on that phase of the case is denied.

The petition for rehearing on the exceptive assignments of error directed to alleged error in the charge presents more serious questions which require, in the first place, a careful examination of plaintiff's allegations of negligence.

She alleges (1) that Brown failed to keep a proper lookout for persons on the highway, (2) that he operated the bus at a high, reckless, and unlawful rate of speed, (3) that he attempted to pass deceased at or in an intersection in violation of G.S. 20-149, and (4) that he attempted to pass the motorcycle while deceased was in the act of making a left turn from the highway.

There is no evidence in the record tending to support any one of these allegations. It is apparent from all the evidence that Brown was keeping a lookout, saw deceased, and gave ample warning of his approach. One witness for plaintiff went so far as to testify that the bus horn was blowing so continuously he thought it was "hung up."

The bus was being operated well within the maximum limit permitted by law under the circumstances, and the judge so charged the jury. And the plaintiff alleges no fact or circumstance which made it the duty of Brown to drive at a slower rate of speed. In this connection we must note that none of the conditions surrounding the collision are alleged.

This is not an intersection accident case. Brown began to signal deceased some 700 to 900 feet east of the intersection, and the collision occurred 150 feet or more before the vehicle reached the intersection.

There is not a particle of evidence in the record tending to show deceased intended to make a left-hand turn or that he gave any signal of his intention to do so. The mere fact that in traveling along the highway on a motorcycle the deceased veered from the right to the left-hand portion of the passing lane, without any signal whatever, was not sufficient to indicate or give notice of his assumed intention to make a left turn.

This leaves only two other allegations of negligence upon which plaintiff must rely. She alleges that the "motorbike was struck from the rear by the . . . bus of the . . . defendant, which at the time was being operated in an unlawful, reckless and negligent manner and in reckless disregard of the safety of the plaintiff's intestate and other persons lawfully traveling upon said highway." She further alleges that "the oper-

ator of said large passenger bus failed to slow, stop, pull aside or otherwise avoid striking, injuring and killing the plaintiff's intestate."

None of the circumstances which rendered Brown's manner of operation of the bus "in disregard of the safety" of deceased or which required him, in the exercise of due care, "to slow, stop, pull aside" are alleged. Even so, the sufficiency of the allegations is not challenged. We must, however, bear in mind their limited nature in considering the exceptions to the charge.

There must be *allegata* and *probata,* and the two must correspond to each other. The plaintiff must make out her case *secundum allegata,* and the court cannot take notice of any proof unless there is a corresponding allegation. *Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14.

The court instructed the jury that it was the duty of defendant's bus driver to remain such a distance behind the motorcycle as was reasonable and prudent, taking into consideration the highway, the traffic, etc. G.S. 20-152. This rule of the road does not apply where one motorist is overtaking and passing another, as authorized by G.S. 20-149, or where there are two lanes available to the motorist, as here, and the forward vehicle is in the outer lane and the overtaking vehicle is in the passing lane. But the court inadvertently failed to so qualify the rule in its charge.

The court then instructed the jury that if the deceased was in the center lane "intending to turn to the left," "was in the act of turning," "with the intention of turning," "in the act of making a left turn," it was not the duty of the deceased to yield the right of way but that, instead, it was the duty of the bus driver to decrease his speed to such an extent as to prevent a collision with the motorcycle *"or to turn his vehicle into the right-hand or outside lane and pass upon that side,"* and that if he did not decrease his speed or turn to the right and pass the motorcycle on its right, he was guilty of a breach of duty imposed by law.

Inadvertently this erroneous view of the law is brought forward in the former opinion where it is said: "The conclusion may be drawn from this evidence . . . that the tragedy might have been avoided if he had decreased his speed and passed him on the right."

The vice of this instruction is threefold: (1) The rights and liabilities of the parties are made to depend on the mere intention of the deceased; (2) there is no testimony tending to show that the deceased intended to make a left-hand turn or that if he did so intend, he gave any notice of this intention to the driver of the vehicle to the rear; and (3) it tends to place a duty on defendants in conflict with the express provisions of the statute.

The operator of "a slow-moving vehicle" must drive his machine "as closely as possible to the right-hand edge or curb of such highway . . ." G.S. 20-146, and a motorist overtaking another vehicle proceeding in the

same direction shall pass at least two feet to the left thereof. G.S. 20-149.

Had Brown turned his bus to the right in front of the milk truck in the outer lane to the rear, and the deceased had, at the same time, decided to yield the right of way, a collision would have been almost inevitable. At least, the situation that would have been created demonstrates the wisdom of the rule.

We may concede that, notwithstanding the provisions of this statute, a motorist may, in the exercise of ordinary care, pass another vehicle, going in the same direction, on the right of the overtaken vehicle when the driver of that vehicle has given a clear signal of his intention to make a left turn and has left sufficient space to the right to permit the overtaking vehicle to pass in safety. Even so, that situation is not here presented, for there is no evidence the deceased gave any notice of an intention to make a left turn.

Other assignments of error are not without merit. Even so, the questions they seek to present may not again arise. Hence we need not discuss them here.

To the end that defendants may have a new trial, the petition to rehear is allowed.

Petition allowed.

E. R. RHODES, JR., v. JOHN PAUL JONES AND LUCILLE C. JONES.

(Filed 1 November, 1950.)

1. Trusts § 5c—Competency of allegations in action to have defendant declared a trustee ex maleficio.

In an action to have defendant declared a trustee *ex maleficio* on the ground that he first acquired plaintiff's trust and confidence to such extent as to occupy a confidential or fiduciary relationship and then took advantage of his position of trust to plaintiff's hurt, *held* mere allegation that defendant had won plaintiff's trust and confidence and obtained the deed in question by fraud and undue influence would not be sufficient, but plaintiff was entitled to allege the facts and circumstances which created the relationship of trust and those which led up to and surrounded the consummation of the transaction attacked, including allegations as to plaintiff's youth and inexperience, the series of transactions between them by which defendant won plaintiff's confidence, the duration and character of their friendship, as well as the fact that plaintiff was possessed of a substantial estate, but not as to its method of accumulation.

2. Pleadings § 31—

Allegations should be stricken only when they are clearly improper, impertinent, irrelevant, immaterial, or unduly repetitious, but defendant is not entitled to have stricken allegations of material fact even though they may not be stated in the most concise manner and even though containing scenery and stage decorations.

3. Pleadings § 3a—

The complaint should set forth the essential facts without alleging evidential facts better left for proof at the time of trial. G.S. 1-122.

APPEAL by plaintiff from *Bobbitt, J.*, September Term, 1950, CATAWBA. Modified and affirmed.

Civil action to have defendant John Paul Jones declared trustee *ex maleficio*, heard on motion to strike allegations in the complaint.

Defendants move to strike paragraphs 3 to 9, both inclusive, paragraphs 12 and 14, and parts of paragraphs 11 and 15 of plaintiff's complaint. When the motion came on for hearing, the court entered judgment striking all of paragraphs 3 to 9, both inclusive, and parts of paragraphs 11, 14, and 15. Plaintiff excepted and appealed.

Louis A. Whitener, Jonas & Jonas, and David Clark for plaintiff appellant.

L. B. Beam and Tillett, Campbell, Craighill & Rendleman for defendant appellees.

BARNHILL, J. Plaintiff bottoms his cause of action on the assertion that John Paul Jones, the real defendant to whom alone reference is hereinafter made, first won and then abused his trust and confidence. That is, he relies, in part at least, upon the presumption of fraud which arises upon the breach of a confidential or fiduciary relationship. He alleges that the defendant, having first won his confidence, induced him, the plaintiff, to convey to defendant a 304-acre farm, upon which was located a filling station, upon the representation that he, the defendant, could and would arrange a loan on the property to relieve plaintiff of his financial difficulties caused by advancements made by him to defendant and then reconvey the property to plaintiff; that the deed was executed and that defendant obtained a loan, sold the filling station and lot, repaid the loan and now refuses to reconvey the premises as he was in duty bound to do.

"Constructive fraud often exists where the parties to a transaction have a special confidential or fiduciary relation which affords the power and means to one to take undue advantage of, or exercise undue influence over the other. A course of dealing between persons so situated is watched with extreme jealousy and solicitude; and if there is found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party." 23 A.J. 764; *McNeill v. McNeill*, 223 N.C. 178, 25 S.E. 2d 615. It is upon this principle plaintiff relies.

In stating his cause of action under this principle of law, it is not sufficient for plaintiff to allege merely that defendant had won his trust

and confidence and occupied a position of dominant influence over him. Nor does it suffice for him to allege that the deed in question was obtained by fraud and undue influence. *Privette v. Morgan,* 227 N.C. 264, 41 S.E. 2d 845; *Nash v. Hospital Co.,* 180 N.C. 59, 104 S.E. 33; McIntosh, Practice and Pleading, 352, sec. 351. Essential fullness of statement must not be sacrificed to conciseness. *Hartsfield v. Bryan,* 177 N.C. 166, 98 S.E. 379.

It is necessary for plaintiff to allege the facts and circumstances (1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.

This, *ex necessitate,* includes plaintiff's youth and inexperience, that is, his susceptibility to influence; and the numerous transactions between the two in which defendant won plaintiff's confidence and assumed the position of counsel to him and manager of his estate, as well as the particular representations made at the time the transaction complained of was consummated. *Development Co. v. Bearden,* 227 N.C. 124, 41 S.E. 2d 85; *Cotton Mills v. Manufacturing Co.,* 218 N.C. 560, 11 S.E. 2d 550; *Hartsfield v. Bryan, supra.* The plaintiff has undertaken to allege these facts and circumstances with some profuseness. Certainly the material facts might be stated in a more concise manner, but this alone is not sufficient cause for striking them from the complaint. *Barron v. Cain,* 216 N.C. 282, 4 S.E. 2d 618.

Allegations should be stricken only when they are clearly improper, impertinent, irrelevant, immaterial, or unduly repetitious. *Poovey v. Hickory,* 210 N.C. 630, 188 S.E. 78; *Hill v. Stansbury,* 221 N.C. 339, 20 S.E. 2d 308. Mere scenery and stage decoration contained in a pleading do not warrant the conclusion that such may form the basis for the introduction of incompetent evidence at the trial.

While the plaintiff here may have devoted too much attention to such scenic decoration of his cause of action, it does not follow as a matter of law that the allegations in his complaint purporting to disclose the course of dealing between him and the defendant which led up to the final transaction about which he complains are wholly irrelevant and immaterial. *McDonald v. Zimmerman,* 206 N.C. 746, 175 S.E. 92.

The court properly struck the allegations in paragraph 3. That plaintiff was possessed of a substantial estate, and not the method of its accumulation, is the essential fact. On the other hand, the allegations in paragraph 5 to the effect that plaintiff and defendant became acquainted in 1924, that defendant employed plaintiff and that defendant gave plaintiff flying lessons are not improper or irrelevant. They form a part of the story of their friendship which plaintiff alleges grew to the point

where defendant had a commanding influence over him. Likewise, paragraphs 6 to 9 inclusive detail some of the means employed by defendant to acquire such an influence over plaintiff, and, except for the last clause in paragraph 7, should not be stricken.

Nor may we concur in the view that any part of paragraph 11 should be stricken. The large amounts advanced by plaintiff to defendant, without security, as well as their other transactions, tend to show the relations between the parties and the abiding confidence plaintiff had in defendant.

The plaintiff's characterization of defendant's alleged scheming conduct in paragraph 14 seems harsh and offensive to defendant. Yet, if plaintiff has correctly alleged the facts, it is not entirely inappropriate. At least the plaintiff has the right to place his label upon it.

The portion stricken from paragraph 15 is not improper. It serves to connect the former allegations with what is there asserted. While of little importance either way, it certainly does defendant no injustice.

The statute, G.S. 1-122, prescribes an ideal pattern for the drafting of a complaint. Counsel should undertake to comply with its requirements without alleging evidential facts better left for proof at the time of the trial. They should set forth the essential facts and then buttress them with the more minute details at the hearing.

We will not undertake to particularize as to what is essential and what is mere detail. We do, however, suggest that plaintiff's counsel redraft their pleadings, having in mind what is here said. They make a clear and concise, though abbreviated, statement of plaintiff's cause of action in their brief. We are quite sure they can state his cause of action with equal clarity and succinctness and without undue elaboration in a redrafted pleadings.

The judgment entered must be modified in conformity with this opinion.

Modified and affirmed.

J. H. HARRIS v. A. B. FAIRLEY, STATE WAREHOUSE SUPERINTENDENT, FARMVILLE BONDED WAREHOUSE COMPANY, HENRY CLARK BRIDGERS, HARTFORD ACCIDENT AND INDEMNITY COMPANY, NATIONAL SURETY CORPORATION, THE INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, NORTH CAROLINA COTTON GROWERS COOPERATIVE ASSOCIATION, W. T. LAMM, TRADING AS W. T. LAMM AND COMPANY, AND WILLIAM J. WILLIAMS, ADMINISTRATOR OF GEORGE W. WILLIAMS.

(Filed 1 November, 1950.)

1. Warehousemen § 3c—

Official warehouse receipts are negotiable by written assignment and delivery, and negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation if the person to whom the receipt was negotiated took same for value, in good faith, and without notice of the breach of duty. G.S. 27-51, G.S. 106-442.

2. Warehousemen § 3b—

A warehouse and its manager, sued for conversion of cotton, may not maintain a cross-action against the transferees of the warehouse receipts when it is alleged they obtained the receipts from the owner and had the cotton delivered to persons designated by them upon surrender of the duly endorsed receipts, nor may the allegations of conversion contained in the complaint aid the allegations in such cross-action when the answer denies the conversion.

3. Same—

The fact that the owner fails to take up his warehouse receipts when he delivers his cotton to the warehouse is not alone sufficient to relieve the warehouseman of liability if the removal of the cotton from the warehouse is contrived by the fraud of the manager.

APPEAL by defendants, Farmville Bonded Warehouse Company, Henry Clark Bridgers and National Surety Company, from *Bone, J.*, May Term, 1950, of PITT. Affirmed.

This was an action to recover of the State Warehouse Superintendent in his official capacity for the loss of 127 bales of lint cotton stored in the Farmville Bonded Warehouse under the provisions of Chapter 106 of the General Statutes of North Carolina.

The plaintiff alleged that defendant Fairley as the duly appointed State Warehouse Superintendent had leased the Farmville Bonded Warehouse Company's warehouse for use by him as agent of the State for the warehousing of cotton, and that the defendant appointed Henry Clark Bridgers to manage and operate the warehouse for the State of North Carolina, and that G. S. Williams was appointed as local manager in charge of the warehouse; that plaintiff stored 127 bales of cotton in the

Farmville Bonded Warehouse, and G. S. Williams issued official warehouse receipts therefor in the name of plaintiff and some in name of the North Carolina Cotton Growers Cooperative Association for the plaintiff; that thereafter plaintiff made repeated efforts to obtain his cotton or to have same sold for his benefit; that Williams repeatedly promised to deliver and assured plaintiff the cotton was in the warehouse, which was not true, and plaintiff has received nothing; that plaintiff has learned that Williams fraudulently contriving approached farmers in that section and induced them to permit him to sell cotton under their contract numbers through the Association and to turn the money over to him, and plaintiff's information is that plaintiff's cotton was in this manner removed from the warehouse and sold. Plaintiff asks that he recover of defendant State Warehouse Superintendent the value of his cotton, $19,376.86, to be paid out of the indemnifying fund created by G.S. 106-435.

The defendant Fairley, State Warehouse Superintendent, answered denying liability for plaintiff's loss and alleging that under G.S. 106-439 he supervised the operations of the warehouse of the Farmville Bonded Warehouse but denied that he operated the warehouse or that either Bridgers or Williams was his agent; that plaintiff not having demanded or received official warehouse receipts when he delivered the cotton, no liability was incurred as against the indemnity fund created by G.S. 106-435; that the warehouse receipts which had been issued for the cotton stored by plaintiff were endorsed to the Cotton Growers Cooperative Association and were thereafter surrendered to the Farmville Bonded Warehouse by said Association and cancelled, and the cotton delivered to those designated by the Association.

On motion of defendant Fairley, the Farmville Bonded Warehouse Company, Henry Clark Bridgers and the sureties on his bond were made parties defendant. And subsequently, on motion of defendant Bonded Warehouse Company, the North Carolina Cotton Growers Cooperative Association, W. T. Lamm, and the administrator of G. S. Williams were also made parties.

The defendant Bonded Warehouse Company, Henry Clark Bridgers and the National Surety Company filed answer admitting the employment of G. S. Williams as local manager, and that plaintiff stored 127 bales of cotton in defendant's warehouse, and that warehouse receipts were duly issued for each bale either in name of J. H. Harris or in the name of the Cotton Association as directed by plaintiff; that the warehouse receipts were by the plaintiff delivered to the Association, and that 127 bales of cotton were delivered by the defendant Bonded Warehouse Company to those designated by the Association upon surrender and cancellation of receipts duly and properly endorsed, therefor; that under

the statute these warehouse receipts were made negotiable, and the warehouse was required to deliver the cotton upon surrender and cancellation of the receipts; that G. S. Williams was local agent of the Warehouse Company, and also receiving agent at Farmville for the Cotton Association; that warehouse receipts for 7 bales of the cotton stored by plaintiff were turned over by the Association to W. T. Lamm, who in turn surrendered them to the defendant Warehouse Company, and had the cotton delivered to those designated by him.

These defendants allege that if they be held liable to the plaintiff then the Cotton Association and W. T. Lamm, who surrendered the receipts to the Warehouse Company and to or for whom the cotton was actually delivered, should be held liable over to these defendants; and that if G. S. Williams wrongfully converted plaintiff's cotton, which these defendants deny, he was acting not as their agent but individually, and they ask that his administrator be made party.

The Cotton Association and W. T. Lamm demurred to the complaint and to the answer and cross-complaint of the Warehouse Company and Henry Clark Bridgers. Both demurrers were sustained. The plaintiff Harris excepted but withdrew his appeal. The defendant Warehouse Company and Henry Clark Bridgers excepted to the judgment sustaining the demurrers and appealed.

Philips & Philips, S. B. Underwood, Jr., and Henry C. Bourne for Farmville Bonded Warehouse Company, Henry Clark Bridgers, and National Surety Corporation, appellants.

Lucas & Rand and Z. Hardy Rose for W. T. Lamm, appellee.

Burgess, Baker & Duncan for defendant North Carolina Cotton Growers Cooperative Association, appellee.

DEVIN, J. The Farmville Bonded Warehouse Company, Henry Clark Bridgers, and the surety on the latter's bond, who had been made parties defendant on the motion of the original defendant Fairley, appealed from the judgment sustaining the demurrers of the North Carolina Cotton Growers Cooperative Association and W. T. Lamm to their answer and cross-complaint. The propriety of the ruling below in this respect is the only question presented by the appeal.

An examination of the answer and cross-complaint of the appellants leads us to the conclusion that the allegations therein contained are insufficient to support an action for affirmative relief against the Cotton Growers Cooperative Association or W. T. Lamm.

The answer filed by these appealing defendants denied liability to the plaintiff for the cotton stored by him in defendant's warehouse, but asserted, in the event they be held liable, that the Cotton Association

and W. T. Lamm should be held liable over to appellants on the ground that the Association and Lamm surrendered the warehouse receipts representing the 127 bales of cotton referred to in the complaint, and received the cotton represented thereby. But it was also alleged that these receipts had been delivered by plaintiff Harris to the Cotton Association and when surrendered to appellants had been duly and properly endorsed.

The statute makes these warehouse receipts negotiable by written assignment and delivery, and declares that the validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, if the person to whom the receipt was negotiated took the same for value, in good faith and without notice of the breach of duty. G.S. 27-51; G.S. 106-442; *Cotton Mills v. Cotton Co., ante,* 186, 59 S.E. 2d 570. Here, there is no allegation that impugns the good faith or title of the Cotton Association or of Lamm to the warehouse receipts covering plaintiff's cotton. On the contrary, it affirmatively appears from appellants' pleading that the Cotton Association received the warehouse receipts from the plaintiff himself, and that subsequently the receipts duly endorsed were surrendered to the Warehouse Company and the cotton delivered thereon. Thus the allegation by which appellants seek to avoid liability to the plaintiff would seem also to exonerate the Cotton Association and Lamm from liability under their cross-complaint.

It was argued on the hearing that plaintiff's complaint alleged the cotton was removed from the warehouse as the result of nefarious transactions by G. S. Williams, the local manager, who wrongfully obtained the proceeds of the sale of the cotton through the Association, and that this, taken in connection with the allegations in appellants' answer that Williams was also receiving agent of the Cotton Association, was sufficient to survive the demurrer. Whether by invoking the doctrine of aider and the principle that a demurrer requires search of the entire record the appellants may add those allegations in the complaint to their pleading against the Cotton Association need not be determined, for we observe that the appellants have denied the conversion of this cotton or wrongdoing on the part of Williams. Plaintiff sought recovery for the loss of his cotton only from defendant Fairley as State Warehouse Superintendent, and did not ask recovery against any of the defendants subsequently made parties.

There is no allegation against W. T. Lamm in the complaint, and the only reference to him in appellants' pleading is that he surrendered warehouse receipts for 7 bales of plaintiff's cotton, the receipts being properly endorsed, and received the cotton represented by the receipts. There was no allegation that the receipts were acquired by Lamm in any manner

that would affect his title as holder of properly endorsed negotiable warehouse receipts.

The demurrer to the complaint, interposed *ore tenus* in this Court by the appellants, cannot be sustained. The failure of plaintiff to take up his warehouse receipts when he delivered his cotton to the warehouse, if the allegations in the complaint bear that interpretation, would not alone be sufficient to relieve the warehouseman of liability for the removal of the cotton from the warehouse contrived by the fraud of the manager as alleged in the complaint. *Lacy v. Indemnity Co.*, 193 N.C. 179, 136 S.E. 359; *Northcutt v. Warehouse Co.*, 206 N.C. 842, 175 S.E. 165.

For the reasons stated we think the judgment sustaining the demurrers was properly entered, and must be

Affirmed.

J. H. HARRIS v. A. B. FAIRLEY, STATE WAREHOUSE SUPERINTENDENT, FARMVILLE BONDED WAREHOUSE COMPANY, HENRY CLARK BRIDGERS, HARTFORD ACCIDENT & INDEMNITY COMPANY, NATIONAL SURETY CORPORATION, THE INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, NORTH CAROLINA COTTON GROWERS COOPERATIVE ASSOCIATION, W. T. LAMM, TRADING AS W. T. LAMM AND COMPANY, AND WILLIAM J. WILLIAMS, ADMINISTRATOR OF GEORGE S. WILLIAMS, DECEASED.

(Filed 1 November, 1950.)

Appeal and Error § 14: Pleadings § 22b—

Ordinarily an appeal suspends all further proceedings in the trial court pending the appeal, and where an appeal is pending from order sustaining demurrer to the cross-action of defendants against those joined as additional defendants, the court has no power at a subsequent term to allow the plaintiff to amend so as to demand recovery against such additional defendants.

APPEAL by defendant North Carolina Cotton Growers Cooperative Association from *Morris, J.*, August Term, 1950, of PITT. Reversed.

James & Speight for plaintiff, appellee.

Burgess, Baker & Duncan for defendant North Carolina Cotton Growers Cooperative Association, appellant.

DEVIN, J. This was a separate appeal in the same case reported *ante*, 551, where the material portions of the pleadings are set out.

At the May Term, 1950, of the Superior Court of Pitt County, judgment was rendered sustaining the demurrer of the North Carolina Cotton

Growers Cooperative Association to the complaint and to the answer and cross-complaint of the defendants Farmville Bonded Warehouse Company, Henry Clark Bridgers and National Surety Corporation. The plaintiff noted exception and gave notice of appeal but later withdrew it. The defendant Warehouse Company and others appealed from the judgment and brought the case here for review.

Pending the appeal, at the August Term, 1950, of Pitt Superior Court plaintiff moved to amend his complaint so as to ask recovery on the original allegations of his complaint against the North Carolina Cotton Growers Cooperative Association, the Farmville Bonded Warehouse Company and others, and the court entered order allowing the amendment. The Cotton Growers Cooperative Association excepted and appealed.

Ordinarily the allowance of the amendment would have been a matter resting in the sound discretion of the Presiding Judge. But the appellant bases its appeal on the ground that at the time the order was entered the case was in the Supreme Court, and that the Superior Court was without power to enter the order.

Undoubtedly the rule is that an appeal from a judgment rendered in the Superior Court suspends all further proceedings in the cause in that court, pending the appeal. *Vaughan v. Vaughan,* 211 N.C. 354, 190 S.E. 492; *Ridenhour v. Ridenhour,* 225 N.C. 508 (514), 35 S.E. 2d 617; *Lawrence v. Lawrence,* 226 N.C. 221, 37 S.E. 2d 496; *Hoke v. Greyhound Corp.,* 227 N.C. 374, 42 S.E. 2d 407; *In re Will of Puett,* 229 N.C. 8 (14), 47 S.E. 2d 488; *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377; G.S. 1-294. This rule is subject to the exceptions noted in *Hoke v. Greyhound Corp., supra,* which, however, have no application here. In *Pruett v. Power Co.,* 167 N.C. 598, 83 S.E. 830, it was said, "The court below is without power to hear and determine questions involved in an appeal pending in the Supreme Court."

The case cited by the plaintiff, *Powell v. Ingram,* 231 N.C. 427, is not in point. Nor does the decision in *Veazey v. Durham, supra,* sustain the ruling below. In that case the trial of the cause on its merits was affirmed though an attempted appeal by the defendant from the denial of its motion for a reference was pending at the time. *Justice Ervin,* speaking for the Court, said: "An appeal did not lie from the discretionary ruling denying the motion for a compulsory reference, and in consequence the attempted appeal of the defendant was simply a nullity."

Here the appeal, properly constituted, which was pending presented the question of the sufficiency of the pleading of the Bonded Warehouse Company to impose liability on the defendant Cotton Association for the loss complained of in plaintiff's complaint.

We think the order to which appellant excepted was improvidently entered while the case was pending here on appeal.

Reversed.

REBA S. LAWRENCE v. LUTHER M. HEAVNER.

(Filed 1 November, 1950.)

1. Husband and Wife § 14: Tenants in Common § 2—

Where a man has property conveyed to himself and a woman under the mistaken belief that they are man and wife, and the purported marriage is later decreed void *ab initio*, the conveyance makes them tenants in common and, nothing else appearing, each is entitled to one-half the rents received from third parties.

2. Trusts § 4b—

The power of equity to decree a resulting trust where one person pays the purchase price for lands and has title taken in the name of another is exercised to effectuate the presumed intention of the parties, and therefore where a man intentionally has lands conveyed to himself and a woman under erroneous belief that they are man and wife, he is not entitled to have himself declared the sole owner under the doctrine of resulting trust even though he had paid the entire purchase price, since in such instance the deed was executed in accordance with the actual intent of the parties.

3. Reformation of Instruments § 7—

The equitable right to reformation may be invoked by a defendant by way of defense or counterclaim in an action based on the deed.

4. Same—

In plaintiff's action to recover one-half the rents from property as tenant in common, allegations in the answer that defendant had the property conveyed to himself and plaintiff under the mistaken belief that he and plaintiff were husband and wife and that her name was erroneously inserted therein as co-grantee because of her fraud in marrying him with knowledge that she had a living and undivorced husband by a former marriage, *is held* sufficient to invoke the equitable relief of reformation for mistake on one side induced by fraud on the other.

5. Reformation of Instruments § 11—

Where a man has a conveyance executed to himself and a woman under the mistaken belief that they are man and wife, and sufficiently sets forth a cause of action to reform the deed by striking therefrom her name as co-grantee on the ground of mistake induced by fraud, a verdict which merely establishes that the woman paid no part of the purchase price or improvement of the property is insufficient to support decree of reformation.

6. Judgments § 9—

Where an answer containing a counterclaim is not served on plaintiff or her attorney of record each allegation of the answer is deemed denied, G.S. 1-140, and therefore defendant cannot be entitled to a default judgment on the counterclaim on the ground that no reply was filed thereto.

APPEAL by plaintiff from *Crisp, Special Judge,* at the May Term, 1950, of CATAWBA.

Civil action in which plaintiff seeks an accounting for rents received by defendant from realty allegedly owned by parties in equal shares as tenants in common, and in which defendant undertakes by way of counterclaim to reform deed conveying such realty to the parties by striking out the name of the plaintiff as a co-grantee.

The matters stated in this paragraph are not in dispute. Plaintiff and defendant were purportedly married to each other in due form of law on 17 October, 1943, and cohabited together until February, 1947, when defendant learned that plaintiff's previous marriage to one Winfred T. Lawrence was still subsisting. Soon thereafter the defendant procured a decree in the Superior Court of Catawba County annulling his supposed marriage to the plaintiff and declaring it void *ab initio* on the ground that plaintiff had a living and undivorced husband at the time of its attempted solemnization. While they were living together, however, under color of their purported marriage, to wit, on 3 November, 1945, the plaintiff and the defendant acquired title to a three-apartment dwelling at West Hickory in Catawba County under a deed describing them "as Luther Heavner and wife, Reba Heavner." The defendant has enjoyed all rents arising from the property since his separation from plaintiff in February, 1947.

The complaint makes out this case: Plaintiff and defendant, honestly believing themselves to be united in lawful wedlock, bought the dwelling jointly, and took title to it in both of their names with actual intent to hold it as tenants by the entireties. Owing to the invalidity of their marriage, however, they became seized of the property in equal shares as tenants in common, and consequently the plaintiff is entitled to have the defendant account to her for one-half of the net rents received by him. The plaintiff prays judgment accordingly.

The answer contains a counterclaim. The answer was not served upon the plaintiff or her attorney of record, and the plaintiff did not reply to the counterclaim.

The counterclaim avers in specific detail that the defendant bought the three-apartment dwelling with his own moneys, and caused the deed covering it to be made to him and his supposed wife, the plaintiff, so that they could hold the property as tenants by the entireties; that the name of the plaintiff was erroneously inserted in the deed as a co-grantee at his

instance because of his mistaken belief that she was in fact his wife, and her fraud in marrying him with knowledge that she had a living and undivorced husband by a former marriage; and that the court should correct the deed by striking out the name of the plaintiff as a co-grantee. The defendant prays that the deed be reformed accordingly.

The parties offered testimony at the trial in support of their respective allegations.

The court submitted these four issues to the jury: (1) What is the purchase price of the real estate described in the complaint? (2) What amount, if any, did the plaintiff contribute towards the purchase price and improvement of the property described in the complaint? (3) What amount, if any, did the defendant contribute towards the purchase price and improvement of the property described in the complaint? (4) What amount, if any, has the defendant received from the property described in the complaint?

The jury answered the first issue "$2,800.00" and the second issue "nothing" and left the third and fourth issues unanswered. The court thereupon entered judgment reforming the deed by striking out the name of the plaintiff as a co-grantee, and the plaintiff appealed, making assignments of error sufficient in form to present the questions hereafter discussed.

George D. Hovey for plaintiff, appellant.

R. H. Shuford and Russell W. Whitener for defendant, appellee.

ERVIN, J. If plaintiff and defendant had actually been married, they would have taken title to the property as tenants by the entireties in conformity with the manifest intention of the parties to the deed. *Winchester-Simmons Co. v. Cutler,* 199 N.C. 709, 155 S.E. 611. But since they were not in fact husband and wife, the conveyance to them made them tenants in common. *Texido v. Merical,* 230 N.Y.S. 605, 132 Misc. 764. Nothing else appearing, the interests of plaintiff and defendant in the property are equal, and plaintiff is entitled to have the defendant account to her for one-half of the net rents received by him from third persons. *Roberts v. Roberts,* 55 N.C. 128; *Jolly v. Bryan,* 86 N.C. 457.

It seems advisable to note at this point that no factual foundation exists for any contention that a resulting trust was raised in favor of the defendant in respect to the interest vested in the plaintiff by the conveyance, even if the defendant paid the entire purchase price for the property. Resulting trusts are established by equity for the purpose of carrying out the presumed intention of the parties. *Avery v. Stewart,* 136 N.C. 426, 48 S.E. 775, 68 L.R.A. 776. This being true, a resulting trust does not arise where a purchaser pays the purchase price of prop-

erty and takes the title to it in the name of another unless it can be reasonably presumed from the attending circumstances that the parties intend to create the trust at the time of the acquisition of the property. 65 C.J., Trusts, section 141. No such presumption can be indulged in the instant case. Both the pleadings and the testimony reveal that the parties actually intended that no trust should result.

When all is said, the answer alleges only one thing sufficient to defeat the plaintiff's cause of action on the present record, and that is the defendant's demand for the correction of the deed on which plaintiff's cause of action is based. Equity has jurisdiction to reform a deed for mutual mistake, or for mistake on one side and fraud on the other. *Cobb v. Cobb,* 211 N.C. 146, 189 S.E. 479; *Potato Co. v. Jeanette,* 174 N.C. 236, 93 S.E. 795; *Allen v. R. R.,* 171 N.C. 339, 88 S.E. 492. The equitable right to reformation may be invoked by a defendant by way of defense or counterclaim in an action based on the deed. *Cuthbertson v. Morgan,* 149 N.C. 72, 62 S.E. 744; *Manufacturing Co. v. Cloer,* 140 N.C. 128, 52 S.E. 305; *McLamb v. McPhail,* 126 N.C. 218, 35 S.E. 426.

The defendant does not seek to correct the deed for mutual mistake. He alleges with particularity in his counterclaim, however, that the name of the plaintiff was erroneously inserted in the deed as a co-grantee at his instance because of a mistake on his part superinduced by fraud on her part. He prays the court to reform the deed by striking out the name of the plaintiff as co-grantee. *Burleson v. Stewart,* 180 N.C. 584, 105 S.E. 182. The defendant will be entitled to the relief he seeks if he establishes the truth of his counterclaim by clear, strong and convincing evidence. *Hubbard & Co. v. Horne,* 203 N.C. 205, 165 S.E. 347; *Burton v. Insurance Company,* 198 N.C. 498, 152 S.E. 396.

The court erred, however, in granting the defendant such relief on the answers of the jury to the first and second issues, for the very simple reason that the issues submitted, with the responses of the jury thereto, are not sufficient to support the judgment and dispose of the matters in controversy. *McKenzie v. McKenzie,* 153 N.C. 242, 69 S.E. 134.

The suggestion of the defendant that the decree of the court can be sustained as a default judgment because the plaintiff did not reply to the counterclaim lacks validity. The answer containing the counterclaim was not served on the plaintiff or her attorney of record, and for this reason the counterclaim must "be deemed to be denied as fully as if the plaintiff . . . had filed an answer or reply denying the same." G.S. 1-140; *Miller v. Grimsley,* 220 N.C. 514, 17 S.E. 2d 642; *Lumber Co. v. Welch,* 197 N.C. 249, 148 S.E. 250.

For the reasons given, the verdict and judgment are vacated, and the plaintiff is awarded a

New trial.

MARY PARKS BELL WEATHERS AND CARROLL W. WEATHERS, HER HUSBAND; LOUISE BELL MOFFITT AND H. A. MOFFITT, HER HUSBAND; HELEN BELL RANKIN AND HENRY H. RANKIN, HER HUSBAND; LILLA BELL WINSTEAD AND JACOB WINSTEAD, HER HUSBAND; AND ELEANOR BELL ALEXANDER AND JOHN W. ALEXANDER, HER HUSBAND, v. RALPH M. BELL.

(Filed 1 November, 1950.)

1. Wills § 31—

The intent of testator as gathered from the four corners of the instrument must be given effect unless contrary to some rule of law or at variance with public policy, and such intent is the will even though not within the letter, and a thing within the letter is not within the will if not also within the intent.

2. Wills § 33g—Under terms of devise, marriage of devisee terminated her estate, and remainder vested in ultimate devisees.

The will devised the *locus* to two daughters who were unmarried at the time of the execution of the will, so long as either of them remained single, with provision that if either married the property should be owned by the remaining single daughter for her lifetime, and at her death be equally divided among testatrix' living daughters. One of the designated daughters was married at the time of testatrix' death, and the other married subsequently. *Held:* The daughter who was single at the time of testatrix' death took an estate for life or so long as she remained single, and upon her marriage such estate was divested, and all the married daughters took a fee simple title as tenants in common.

APPEAL by defendant from *Bobbitt, J.*, at May Term, 1950, of IREDELL.

This is a controversy without action submitted on an agreed statement of facts, as authorized by G.S. 1-250.

Lilla Mann Bell died in Iredell County, North Carolina, on 24 April, 1949, seized and possessed of a house and lot in Mooresville, North Carolina. She left a last will and testament, which has been admitted to probate in common form, in which she devised the aforesaid property in the following language:

"I will and bequeath my house on South Academy St., Mooresville, to my husband, Dr. A. E. Bell his life time, and after his death the house with all of its furnishings is to be owned by Lilla and Eleanor, as long as either of them remain single.

"If either marries the property will then be owned by the remaining single daughter her life time and at her death to be divided equally among the living sisters or their heirs."

Dr. Bell, husband of the testatrix, predeceased her. Her daughter, Lilla, referred to in the first paragraph of the will, is the plaintiff Lilla Bell Winstead, who was married prior to the death of her mother, and Eleanor, referred to in the same paragraph of the will, is the plaintiff

Eleanor Bell Alexander, who was not married at the time of her mother's death, but has since married.

The *feme* plaintiffs and the defendant are the children of the late Dr. A. E. Bell and his wife, Mrs. Lilla Mann Bell, and the sole devisees and legatees under the will of the testatrix.

The defendant was not devised any interest in the real estate referred to herein, which was the family home place, but after the marriage of his sister Eleanor Bell, he entered into a written contract with the *feme* plaintiffs, by the terms of which he agreed to pay the sum of $2,000.00 for an indefeasible fee simple title to a one-sixth undivided interest therein, and the *feme* plaintiffs with their respective husbands agreed to convey said interest upon the payment of the aforesaid sum.

Pursuant to the execution of the aforesaid agreement, the plaintiffs executed and tendered to the defendant a warranty deed in form sufficient to convey a one-sixth undivided interest in fee simple in and to said property. The defendant declined to accept the deed and pay the purchase price as agreed, for the reason, as he contends, the plaintiffs cannot convey an indefeasible fee simple title thereto.

The court below held the *feme* plaintiffs are the owners in fee simple of the real estate devised in the aforesaid will, and entered judgment requiring the defendant to accept the tendered deed and to pay the purchase price for the one-sixth interest therein, in accordance with the terms of the contract. The defendant appeals and assigns error.

Land, Sowers & Avery for plaintiffs.

Z. V. Turlington and W. R. Pope for defendant.

DENNY, J. The defendant contends that his sister Eleanor, upon the death of the testatrix, became seized of a life estate in the real property in question, and that her subsequent marriage did not divest her of such estate; and, that not until her death is the property to be divided equally among her living sisters or their heirs.

The intent of the testatrix is the polar star that must guide us in the interpretation of her will. This intent is to be gathered from a consideration of the instrument from its four corners, and such intent will be given effect, unless contrary to some rule of law or at variance with public policy. *Featherstone v. Pass, ante,* 349, 60 S.E. 2d 236; *Buffaloe v. Blalock, ante,* 105, 59 S.E. 2d 625; *Elmore v. Austin, ante,* 13, 59 S.E. 2d 205; *House v. House,* 231 N.C. 218, 56 S.E. 2d 695; *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17; *Holland v. Smith,* 224 N.C. 255, 29 S.E. 2d 888; *Williams v. Rand,* 223 N.C. 734, 28 S.E. 2d 247; *Culbreth v. Caison,* 220 N.C. 717, 18 S.E. 2d 136; *Smith v. Mears,* 218 N.C. 193, 10 S.E. 2d 659; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356.

Stacy, C. J., in speaking for the Court in *Cannon v. Cannon, supra,* said: "In interpreting the different provisions of a will, the courts are not confined to the literal meaning of a single phrase. A thing within the intention is regarded within the will though not within the letter. A thing within the letter is not within the will if not also within the intention."

In applying the rules of construction to the will under consideration, we think the testatrix intended to devise to her daughters Lilla and Eleanor, who were her only unmarried daughters at the time of the execution of her will, the home place with all its furnishings, to be used by them so long as they or either of them remained single. It so happened that Lilla married before the death of the testatrix. Therefore, under the terms of the will, Eleanor alone became possessed of an estate for life or so long as she remained single. She married, thereby divesting herself of such estate, in favor of the ultimate devisees, the *feme* plaintiffs herein. This devise is analogous to a devise to a widow "during her widowhood." Such a devise is for life or until she remarries. *Sink v. Sink,* 150 N.C. 444, 64 S.E. 193; *Smith v. Smith,* 173 N.C. 124, 91 S.E. 721; *Alexander v. Alexander,* 210 N.C. 281, 186 S.E. 319.

The second paragraph of the will, which provides that "If either marries the property will then be owned by the remaining single daughter her life time and at her death to be divided equally among the living sisters or their heirs," must be construed in light of the limitation placed upon the devise in the first paragraph of the will.

It is our opinion, and we so hold, that upon the marriage of Eleanor Bell to John W. Alexander, her life estate terminated, and that the five daughters of the testatrix, who are the *feme* plaintiffs in this proceeding, are seized and possessed of an indefeasible fee simple title to the property herein described.

The judgment of the court below is

Affirmed.

DR. P. L. FEEZOR, DR. F. L. MOCK, BAXTER CARTER, ROY LOHR AND GLENN PENNINGTON, MEMBERS OF THE DAVIDSON COUNTY BOARD OF EDUCATION, v. D. S. SICELOFF, JR., CHARLES F. CLINE, A. A. FOLTZ, ROBY TAYLOR, AND A. R. MORRIS, COMPOSING THE BOARD OF COMMISSIONERS OF DAVIDSON COUNTY, AND MANIE HEGE, A TAXPAYER.

(Filed 1 November, 1950.)

1. Schools § 3a—

A county board of education has the power, with the approval of the State Board of Education, to consolidate school districts under its juris-

diction whenever and wherever in its judgment the consolidation will better serve the educational interest of the county or any part of it. G.S. 115-99.

2. Schools § 6a—

The power to change the location of a school and to select a site for a new school are vested in the sound discretion of the school authorities, with the exercise of which discretion the courts will not interfere in the absence of manifest abuse. G.S. 115-85.

3. Schools § 10h—Held: County commissioners had authority to allocate funds for new central high school in lieu of remodeling old buildings.

A bond issue for the erection of new school buildings and remodeling and enlarging existing school buildings of the county, including in the list of improvements to be made in each district the remodeling and enlarging of the high schools of three districts, was approved by the voters in an election. The county board of education with the approval of the State Board of Education found that the interests of education in the three districts would be better promoted and the purpose of maintaining the constitutional six months' school term in the district would be better accomplished by building one consolidated high school for the three districts, and using the three old high schools for elementary purposes. *Held:* The change does not involve any change of purpose for which the bonds were issued but only a change in the manner or method of accomplishing that purpose, and therefore the board of county commissioners has the legal authority to allocate funds for the purpose of constructing the proposed central high school if it finds that the proposed expenditure is not excessive but is necessary to the maintenance of the constitutional six months' school term in said districts.

APPEAL by defendants from *Sink, J.*, at Chambers in Lexington, N. C., 18 August, 1950. From DAVIDSON.

This is an action brought under the provisions of the Uniform Declaratory Judgment Act to determine whether or not the Board of Commissioners of Davidson County has the legal right, under the provisions of a bond ordinance adopted by it, to authorize the construction of a central high school to serve the school districts of Midway, Welcome and Arcadia, in said County, in lieu of enlarging the present small high schools in said districts.

The Board of Commissioners of Davidson County, at the request of the Board of Education of said County and of the Trustees of Thomasville and Lexington Administrative Units respectively, duly called a bond election for said county, to be held 22 April, 1950, to pass upon the issuance of $3,500,000 in bonds "for the purpose of providing funds for erecting additional school buildings, remodeling and enlarging existing school buildings and acquiring necessary land and equipment therefor in order to maintain the six months' school term in Davidson County as required by the Constitution and briefly described as follows, subject to

such changes in the character or in the location of any improvements as may be found necessary or advisable in the preparation of plans and the letting of contracts or as may be necessary to secure the approval of plans by the State Superintendent, . . ." The description referred to above was a list of the school districts in the respective units where additional buildings were required, and old buildings were to be remodeled or remodeled and enlarged. Twelve districts were listed in the Davidson County Administrative Unit, among them Midway, Welcome and Arcadia, in which the school buildings were designated for improvements, as follows: "Remodel and enlarge." No allocation of funds for the various projects was made in the bond ordinance or in the notice of election.

The election was held and the issuance of the bonds duly authorized.

Among other things, the court below found as a fact, that after the bond election carried, a number of public meetings of citizens and taxpayers of the above named districts were held and the County Board of Education was requested to construct a centrally located high school for the three districts in lieu of enlarging the present old buildings for high school purposes; that the Davidson County Administrative Unit and the State Board of Education have investigated the situation in these districts and have recommended that a centrally located high school be constructed rather than enlarging the old buildings for high school purposes.

It further appears that the County Board of Education has found as a fact "It is to the best interest of education that a centrally located high school be constructed rather than additional rooms to the old buildings," and that the present high school facilities which constitute a part of elementary school buildings, be used to provide additional space for the elementary schools, and that the State Board of Education will approve an additional allotment from State funds to complete the centrally located high school.

Upon the facts found the court concluded as a matter of law that the construction of a centrally located high school in the districts of Midway, Welcome and Arcadia, in lieu of enlarging the present buildings for high school purposes, is for the same educational purpose as set out in the original bond order, and that the purpose for which the bonds were issued and taxes to be levied, is the same as allowed by General Statutes of North Carolina, Chapter 153-77, subsection (a), and that the Board of Education of Davidson County should be allowed the use of said funds for the construction of the proposed centrally located high school in said districts, and that the use of said funds falls within the general purpose designated by statute.

Judgment was accordingly entered and the defendants appealed, assigning error.

P. V. Critcher for plaintiffs.
Sim A. DeLapp for defendants.

DENNY, J. The defendants challenge the correctness of the ruling below solely on the ground that the Board of Commissioners of Davidson County is without legal authority to grant the request of the plaintiffs. In our opinion the challenge cannot be sustained.

A county board of education has the authority "to consolidate schools located in the same district, and, with the approval of the State Board of Education, to consolidate school districts, over which the board has full control, whenever and wherever in its judgment the consolidation will better serve the educational interests of the county or any part of it." G.S. 115-99. And whether a change should be made in the location of a school, as well as the selection of a site for a new one, is vested in the sound discretion of the school authorities, and their action cannot be restrained by the courts unless in violation of some provision of law, or the authorities have been influenced by improper motives, or there has been a manifest abuse of discretion on their part. G.S. 115-84 and 85; *Atkins v. McAden,* 229 N.C. 752, 51 S.E. 2d 484; *Board of Education v. Pegram,* 197 N.C. 33, 147 S.E. 622; *Board of Education v. Forrest,* 190 N.C. 753, 130 S.E. 621; *School Commissioners v. Aldermen,* 158 N.C. 191, 73 S.E. 905; *Venable v. School Committee,* 149 N.C. 120, 62 S.E. 902.

The question before us does not involve any change of purpose for which the school bonds were issued, but only a change in the manner or method of accomplishing that purpose. Nor are we confronted with the abandonment of projects in the districts of Midway, Welcome and Arcadia, and the transfer of the funds provided therefor to improve or construct school buildings in other districts, as we were in the case of *Atkins v. McAden, supra.* Neither is there a contemplated diversion of the proceeds of a bond issue, approved by a vote of the people, to construct a particular school, as was the case in *Waldrop v. Hodges,* 230 N.C. 370, 53 S.E. 2d 263.

It appears from the facts found herein, to which there is no exception, that the state and local school authorities, at the request of the citizens and taxpayers of the districts involved, investigated the situation as it now exists in these districts, with particular reference to the high school facilities, and they have unanimously recommended that a centrally located high school be constructed in lieu of enlarging the present buildings in the district which are presently used for elementary and high school purposes. And the County Board of Education of Davidson County has found as a fact that such a course will better serve the educational interests in the districts of Midway, Welcome and Arcadia. There-

fore, we hold that the Board of Commissioners of Davidson County does have the legal authority to allocate such available funds as it may determine to be necessary for the construction of the proposed high school. This authority, however, is bottomed on the assumption that the Board of Commissioners of Davidson County, upon investigation, finds that the proposed expenditure is not excessive, but necessary in order to maintain the constitutional six months' school term in said districts. *Atkins v. McAden, supra.*

The judgment of the court below is

Affirmed.

STATE v. JOHNNY COTTLE, JAMES COTTLE AND EDGAR RENFROW.

(Filed 1 November, 1950.)

Conspiracy § 6: Robbery § 3—

Evidence in this case tending to show that one defendant arranged to have the prosecuting witness stopped at a country store where all of the defendants, acting in concert, assaulted and robbed him of a sum of money, *is held* sufficient to be submitted to the jury on the charges of conspiracy to assault and rob, and with robbery.

APPEAL by defendants James Cottle and Edgar Renfrow from *Parker, J.*, at February Term, 1950, of SAMPSON.

Criminal prosecution upon a bill of indictment containing three counts charging: (1) That defendants James Cottle, Johnny Cottle and Edgar Renfrow "did unlawfully, willfully, feloniously combine, conspire, confederate and agree each and every one with the other, to assault, beat and wound one Will Fowler with deadly weapon, to wit: fists, clubs, and knives, and to steal, take and carry away cash money of the value of $85.00, the property of Will Fowler"; (2) That said defendants with force and arms . . . $85.00 cash money, the monies of Will Fowler, then and there being found, feloniously did steal, take and carry away; and (3) That said defendants did receive and have the said $85.00 cash money property of the said Will Fowler, well knowing it to have been feloniously stolen, taken and carried away, etc.

Upon the trial in Superior Court the State offered evidence tending to show, in the light most favorable to the State, the following: On 19 December, 1949, about 7:30 p.m., James Cottle, now a defendant here, went to the taxi stand of Will Fowler, a Negro, in the town of Clinton, Sampson County, N. C., and engaged Fowler to carry him to Turkey, also in that county. On the way, and as they were approaching Turkey, James Cottle said to Will Fowler that he had better stop and get some

change because he wanted to go about four miles out in the country, and would be unable to get change for a $100.00 bill out there. As Will Fowler stopped beside Hudson's store, James Cottle gave a $100.00 bill to him. Will Fowler went into the store and asked Mr. Hudson if he could change a $100.00 bill. He said he could not. Then Will Fowler pulled out his pocketbook to see if he could make change. He had $85.00 in it, and $12.00 and some pennies in his pocket. Looking around he saw Johnny Cottle, now a defendant here, and another fellow come in. Johnny "had eyes right on" Will. Will testified: "It looked as though something was going to take place so I get out of the station as fast as I can." When he stepped out of the store, Edgar Renfrow, now a defendant here, who had not been in the store, slipped up behind him and hit him from the back, and knocked him to his knees, saying 'What the G—— D—— H—— are you doing with my $100.00 bill?'" Will Fowler replied, "I haven't got your $100.00 bill, I just come here to get the $100.00 bill changed." When Will got up there was a man behind him and one at his head, and, quoting Will, "Mr. Renfrow got the $100.00 bill right then *hisself,* and then I lost my money there in the affray. Then I managed to get *aloose* and then they got me down again. Three or four of them were around there. They were Johnny, Edgar and this other fellow. I got loose . . . and ran . . . to the . . . side of the car . . . As I went to get in Mr. Jimmy sailed on me with both fists and began to beat me . . . When I got out they got me down there in the dirt, but I got away, and trotted toward Clinton. They chunked bottles and bricks. Then they caught me and said they were going to kill me, that is, Johnny Cottle, Jimmy Cottle and Edgar Renfrow. I got away from them and ran across the railroad . . . as I ran up to the store (Mr. Shipps') all three got me and said 'We are going to kill you tonight' . . . they were beating me at the time . . . I went on in the store and they come in behind me. I then left and went towards Clinton . . . I left my car . . . My glasses and hat were lost in the scuffle but I got them back later."

(The following was admitted in evidence against the Cottle boys, but not as to Renfrow.)

After the preliminary hearing, according to testimony of Will Fowler, the two Cottle boys came to see him at his taxi stand. Quoting Fowler: "Mr. Jimmy said, 'Will, I am sorry that this happened. We haven't got no harm against you and I would like to come over here and see if I couldn't get you to make this up.' I said 'Why did you boys treat me like that?' He said 'Well, I was at home that night,' that Renfrow came to his house and got him to come over and 'got me back to Turkey.'"

Will Fowler also testified: "Johnny and Mr. James come back the second time. I was uptown . . . in the sheriff's office. So he come in,

just James. He said he would like to make it up, and I asked him to make up what. He said he wanted to give me $85.00 back, pay for my suit . . . my watch . . . my lawyer's fee and doctor's bill, if he could get it made up . . . I have not seen him or either of them since."

The State also offered evidence tending to corroborate in material aspects the narrative of events as portrayed by the testimony of Will Fowler, and other evidence tending to show that Will Fowler is a man of good character.

On the other hand, the defendants, while not testifying in the case, offered evidence tending in material aspects to controvert the evidence offered by the State.

The court submitted the case to the jury on the first and second counts, but did not submit the third count. And as to the first count the court ruled that there is no evidence of any use of clubs or knives, nor of any deadly weapon.

Verdict: Guilty of conspiracy and guilty of stealing and taking away $85.00 cash money of Will Fowler, with force and arms as charged in the bill of indictment.

Judgment: That defendants Johnny Cottle, James Cottle and Edgar Renfrow, be confined to State's Prison for two (2) years and thirty (30) days, to be assigned to the State Highway and Public Works Commission.

Defendants James Cottle and Edgar Renfrow appeal to Supreme Court and assign error.

Attorney-General McMullan and Assistant Attorney-General Rhodes for the State.

A. M. Britt for defendants, appellants.

WINBORNE, J. When the evidence shown in the record on this appeal is considered in the light most favorable to the State, it appears to be sufficient to take the case to the jury, and to support a verdict of guilty as to each appealing defendant on each of the counts submitted to the jury.

It is manifest that the defendants were acting under an agreement to do the unlawful act charged. Hence the exception to the denial of defendants' motion for judgment as of nonsuit is without merit.

Also, the exception to the charge of the court fails to show error. The crimes charged were properly defined by the court, and the case was fairly presented to the jury.

And error is not made to otherwise appear.

Hence in the judgment below, there is

No error.

STATE v. J. M. LAMBE.

(Filed 1 November, 1950.)

1. Criminal Law § 78e (1)—

In regard to the trial court's instructions as to applicable law and as to the contentions of the parties with respect to such law, a party is not required to except at the trial but may set out exceptions for the first time in his case on appeal. G.S. 1-206, G.S. 1-282.

2. Criminal Law § 78e (2)—

Misstatements of the evidence or the contentions of the parties arising on the evidence must be called to the trial court's attention in time to afford opportunity for correction, and in event the request for correction is refused, appellant must note an immediate exception to such ruling in order to present the matter for review on appeal.

3. Criminal Law § 78e (1)—

An exception to the charge must point out some specific part thereof as erroneous, and an exception to a portion of the charge embracing a number of propositions is insufficient if any of the propositions are correct.

4. Criminal Law § 53g—

The court's charge as to the permissible verdicts which the jury could return *held* in accord with G.S. 15-170, relating to conviction of less degrees of the same crime.

APPEAL by defendant from *Bobbitt, J.*, and a jury, at the February Term, 1950, of ROWAN.

Four criminal actions consolidated for trial by consent.

The defendant was charged in case 59 with feloniously assaulting his mother-in-law, Mrs. John Y. Hedrick, with a deadly weapon, to wit, a rifle, with intent to kill, and inflicting upon her serious injury not resulting in death contrary to G.S. 14-32; in case 60 with feloniously assaulting his wife, Mrs. J. M. Lambe, with a deadly weapon, to wit, a rifle, with intent to kill and inflicting upon her serious injury not resulting in death contrary to G.S. 14-32; in case 61 with assaulting a female person, to wit, his daughter, Mrs. Evelyn Jacobs, contrary to G.S. 14-33; and in case 62 with assaulting his son-in-law, Edward H. Jacobs by pointing a shotgun at him contrary to G.S. 14-34. The defendant pleaded not guilty to all charges.

Both the State and the defendant offered testimony at the trial.

The jury found the defendant guilty as charged in cases 59, 61, and 62. It acquitted him of the felonious assault charged in case 60, but convicted him of a less degree of that crime, to wit, an assault causing serious injury contrary to G.S. 14-33.

The trial judge imposed the following sentences: "In case . . . 59, judgment of the court is that the defendant be confined in the State's Prison at Raleigh for a period of three years. In cases . . . 60, 61, and 62, these three cases are consolidated for the purpose of judgment. The judgment of the court is that the defendant be confined in the Rowan County jail and assigned to work on the public highways of the State under the supervision of the State Highway and Public Works Commission for a period of twelve months. The sentence in these three cases to commence upon the expiration of the sentence imposed in case . . . 59."

The defendant excepted to each judgment and appealed, assigning errors.

Attorney-General McMullan and Assistant Attorney-General Moody for the State, appellee.

P. S. Carlton for defendant, appellant.

ERVIN, J. The first, second, and third exceptions relate to the denial of motions for compulsory nonsuits under G.S. 15-173. Appellant has expressly abandoned these exceptions. Such action is well advised; for there was plenary evidence at the trial to carry the cases to the jury, and support the verdicts for the State.

The fourth and fifth exceptions question the validity of lengthy portions of the charge. They were noted for the first time in the case on appeal on the theory that the judge expressed opinions on facts in these parts of the charge in violation of the statute embodied in G.S. 1-180. This position is not well taken. The specified portions of the charge constitute mere statements by the judge of contentions of the parties arising upon evidence. This being true, the fourth and fifth exceptions are without value to appellant, for the reasons stated below.

Under the appellate practice which obtains in this jurisdiction, it is not incumbent upon a litigant to except at the trial to errors in the instructions of the judge as to applicable law, or in the instructions of the judge as to the contentions of the parties with respect to such law. It is sufficient if he sets out his exceptions to errors in such instructions for the first time in his case on appeal. G.S. 1-206, 1-282; *S. v. Johnson*, 227 N.C. 587, 42 S.E. 2d 685; *Cherry v. R. R.*, 186 N.C. 263, 119 S.E. 361. The rule is otherwise, however, where the judge misstates the evidence, or the contentions of the parties arising on the evidence. When that occurs, the litigant must call the attention of the judge to the misstatement at the time it is made, and thus afford the judge an opportunity to correct it before the case is given to the jury. Furthermore, he must note an immediate exception to the ruling of the judge in case his request for the correction of the misstatement is refused. If this course is not

pursued, the misstatement of the evidence or of the contentions based thereon is not subject to attack or review on appeal. *S. v. Thompson,* 226 N.C. 651, 39 S.E. 2d 823; *S. v. McNair,* 226 N.C. 462, 38 S.E. 2d 514; *S. v. Shoup,* 226 N.C. 69, 36 S.E. 2d 697; *S. v. Rising,* 223 N.C. 747, 28 S.E. 2d 221.

The sixth exception is a general exception to a lengthy portion of the charge relating to case 60, and containing a number of propositions, including the following: "If the State has failed to satisfy you from the evidence beyond a reasonable doubt that the defendant unlawfully assaulted Mrs. Lambe, it would be your duty to return a verdict of not guilty." This exception falls under the condemnation of the necessary rule of appellate practice that an exception must point out some specific part in the charge as erroneous, and that an exception to a portion of a charge embracing a number of propositions is insufficient if any of the propositions are correct. *S. v. Bryant,* 178 N.C. 702, 100 S.E. 430; *S. v. Bowman,* 152 N.C. 817, 67 S.E. 1058. See, also, in this connection: *S. v. Cameron,* 166 N.C. 379, 81 S.E. 748. Similar observations apply to the seventh exception, which is directed to a part of the charge relating to case 62.

The eighth exception is to an instruction to the petit jury that it could return any one of four verdicts, to wit, guilty of an assault with a deadly weapon with intent to kill resulting in serious injury, as charged, or guilty of an assault with a deadly weapon, or guilty of an assault doing serious injury, or not guilty under each indictment charging a violation of G.S. 14-32, depending upon what it found the facts to be from the testimony. There is no discrepancy on the present record between this instruction and the statute providing that "upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." G.S. 15-170; *S. v. Anderson,* 230 N.C. 54, 51 S.E. 2d 895; *S. v. Elmore,* 212 N.C. 531, 193 S.E. 713.

The remaining exceptions are formal and need not be discussed.

The proceedings in the Superior Court will be upheld, for there is in law

No error.

STATE v. RALPH J. PENNELL.

(Filed 1 November, 1950.)

1. Criminal Law § 53l—

While the trial court is bound to give a special instruction duly requested when it is correct in itself and supported by evidence, the court is not required to adopt the precise language of the prayer but it is sufficient if the court gives the requested instruction in substance either in response to the prayer or in other portions of the charge.

2. Same: Homicide § 27f—Requested instruction held substantially given.

Defendant requested special instruction as to his right to use a deadly weapon, such as a rifle, to repel an assault made upon him in his own home by a larger, younger, and stronger man, even though his assailant was unarmed, if it reasonably appeared to him necessary to save himself from death or great bodily harm. An instruction to the effect that defendant's right of self-defense did not depend upon whether his assailant was armed and that defendant would be legally entitled to stand his ground and repel force with force and to increase his force so as not only to resist but also to overcome the assault, *is held* in substantial compliance with the prayer, and the charge is not subject to criticism for the failure of the court to specifically state that defendant had a right to use a rifle in his self-defense.

APPEAL by defendant from *Bobbitt, J.*, August Term, 1950, of CALDWELL.

Criminal prosecution on indictment charging the defendant with the murder of Clarence Russell.

Upon the defendant's arraignment and plea of traverse, the solicitor announced that he would not ask for a verdict on the capital charge, but would insist upon a verdict of murder in the second degree or manslaughter as the evidence should warrant.

For convenience and to avoid repetition, reference is made to former appeal reported in 231 N.C. 651, for full statement of the facts. A new trial was awarded on the first appeal because of error in the charge in respect of the defendant's right to defend himself in his own home without retreating.

On the day of the homicide, 26 October, 1949, the deceased, Clarence Russell, came to the home of the defendant after drinking and bringing some liquor with him. He grew impatient with the defendant, while in the dining room, over missing some of his liquor. The defendant said the deceased had consumed it himself. Words were exchanged between the two and the defendant went back into his bedroom. The deceased followed him, whether upon call of the defendant or of his own volition and in anger, was the subject of debate on the hearing. The defendant says the deceased was approaching him in a threatening manner with

an open knife and that he shot to repel the assault. The State contends that the defendant asked the deceased to step forward where he was, and as he did so the defendant shot him. The deceased was a larger, younger and stronger man than the defendant.

Verdict: Guilty of murder in the second degree with recommendation of mercy.

Judgment: Imprisonment in the State's Prison for a term of not less than 9 nor more than 12 years.

The defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

G. W. Klutz and Hal B. Adams for defendant.

STACY, C. J. The pivotal question for decision is whether the defendant's special prayer for instruction called for substantial compliance; and, if so, whether the charge as given suffices for the purpose.

Practically the same question was involved on the former appeal, only in a little different form. The defendant presently complains at the failure of the court to give an instruction, seasonably proffered, touching his right of self-defense. It was given in substance, though not in the precise language of the prayer.

It is well understood that when a defendant in a criminal prosecution duly makes request for a special instruction, which is correct in itself and supported by evidence, the trial court, while not required to adopt the precise language of the prayer, is in duty bound to give the instruction, in substance at least, and, unless this is done, either in direct response to the request or otherwise in some portion of the charge, the failure may be preserved for valid exception on appeal. *Groome v. Statesville,* 207 N.C. 538, 177 S.E. 638; *S. v. Henderson,* 206 N.C. 830, 175 S.E. 201; *S. v. Lee,* 196 N.C. 714, 146 S.E. 858.

In apt time, the defendant asked the court to instruct the jury that the principle of self-defense "gives the defendant the right to use a deadly weapon, such as a rifle, if it appear to him reasonably necessary for him to do so, by reason of the fact that the deceased, his alleged assailant, was a larger, younger, stronger and more vigorous man . . . and you further find that the defendant . . . having a reasonable apprehension . . . of being seriously . . . injured by the deceased, without the deceased having any deadly weapon . . . the law gives the defendant the right to repel such assault . . . by using a rifle in his self-defense."

Without following the language of the special prayer the court stated the same principle in different words: "The defendant's right of self-defense does not depend upon whether . . . you find from the evidence

that Clarence Russell had a knife, or that he was engaging in any specific kind of conduct at the particular time. The question is whether the circumstances were such that he had reasonable grounds for the apprehension that he was in danger of death or great bodily harm, even though the assailant may not have possessed any deadly or dangerous weapon. Whether the deceased had a weapon; . . . whether the deceased advanced towards the defendant in a belligerent manner; . . . whether the defendant was kicked there in the dining room," are all circumstances to be taken into consideration by you; "and then it is for you to say whether the defendant had reasonable grounds for the belief that he was in danger of death or great bodily harm under the circumstances in which he found himself at the time."

Without pausing to inquire whether the accuracy of the prayer is such as to demand compliance, we regard the instruction as given a sufficient response. *S. v. Beachum,* 220 N.C. 531, 17 S.E. 2d 674; *S. v. McKinnon,* 197 N.C. 576, 150 S.E. 25; *S. v. Williams,* 189 N.C. 616, 127 S.E. 675; *S. v. Baldwin,* 184 N.C. 789, 114 S.E. 837; *S. v. Baldwin,* 178 N.C. 693, 100 S.E. 345; *S. v. Wilcox,* 132 N.C. 1120, 44 S.E. 625. The defendant criticizes the court's charge as being too general and unresponsive to his specific prayer that the jury be told he had a right to use a rifle in his self-defense. *S. v. Hill,* 141 N.C. 769, 53 S.E. 311; *S. v. Hough,* 138 N.C. 663, 50 S.E. 709. The jury was instructed, however, that the defendant, being in his own home, was under no obligation to retreat to avoid the combat, "but would be legally entitled to stand his ground and to repel force with force and to increase his force so as not only to resist but also to overcome the assault." The jury hardly could have misunderstood this instruction.

The record reveals no exceptive assignment of error which would seem to require a third trial of the case. The verdict and judgment will be upheld.

No error.

STATE v. WILLIAM BEST.

(Filed 1 November, 1950.)

1. Criminal Law § 8b—

A person present, aiding and abetting another in the commission of a crime is guilty as a principal.

2. Burglary §§ 4, 11—

It is unlawful to enter a dwelling with intent to commit a felony therein even though there be no breaking, and therefore while evidence of a breaking, when available, is always relevant, absence of such evidence does not constitute a fatal defect of proof. G.S. 14-54.

3. Larceny § 5—

Defendant's possession of stolen property recently after it is stolen raises an inference of guilt of larceny.

4. Criminal Law § 81c (4)—

Where judgment is pronounced upon a general verdict of guilty on an indictment containing several counts, defendant's exception to the refusal of his motion to nonsuit cannot be sustained if there is sufficient evidence to support any one of the counts in the bill.

APPEAL by defendant from *Bone, J.*, June Term, 1950, of CRAVEN.

Criminal prosecution on a three-count bill charging the defendant with (1) non-burglariously breaking and entering, (2) grand larceny, and (3) receiving.

On 29 October, 1949, the defendant and one Ralph Godfrey went to the home of Mr. and Mrs. Elmer W. Rutt, No. 1312 Spencer Avenue, New Bern, and took therefrom a small amount of money and a large quantity of clothing belonging to the owners of the house.

The defendant and Godfrey were traveling in defendant's car. The defendant did not enter the house. He remained in the car while Godfrey went in through an open door, brought out the money and clothing and put them into the car. Earlier on the same day or the day before, Godfrey, when alone, had entered the house burglariously and left the door open as he departed. He gained knowledge of the contents of the house at this time, however.

The defendant and Godfrey took the clothing, first to defendant's house, then to Kinston, and finally to the home of defendant's parents in Pitt County.

The defendant offered no evidence. He demurred to the State's evidence, especially as it relates to the first and second counts in the bill.

The jury returned a general verdict of "guilty as charged."

Judgment: Imprisonment in the State's Prison for a period of not less than 2, nor more than 3, years.

The defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorney-General Bruton and Walter F. Brinkley, Member of Staff, for the State.

Charles L. Abernethy, Jr., for defendant.

STACY, C. J. The question for decision is whether the State's evidence survives the demurrer and suffices to carry the case to the jury on any or all of the counts in the bill of indictment. The trial court answered in the affirmative in respect of all three counts, and we approve.

The defendant was present, aiding and abetting the witness Godfrey at the time he entered the house and brought out the stolen chattels. This inculpates him as a principal in the crime then being committed. *S. v. Johnson,* 226 N.C. 671, 40 S.E. 2d 113; *S. v. Bell,* 205 N.C. 225, 171 S.E. 50; *S. v. Whitehurst and Manning,* 202 N.C. 631, 163 S.E. 683; *S. v. Jarrell,* 141 N.C. 722, 53 S.E. 127.

The fact that there was no burglarious breaking and entering at the time can avail the defendant naught. *S. v. Mumford,* 227 N.C. 132, 41 S.E. 2d 201. Indeed, the prior breaking and entering by Godfrey, when alone or when the defendant was not with him, has no bearing on the case. G.S. 14-54.

S. v. Mumford, supra, speaks directly to the point: "Under the statute it is unlawful to break into a dwelling with intent to commit a felony therein. It is likewise unlawful to enter, with like intent, without a breaking. Hence, evidence of a breaking, when available, is always relevant, but absence of such evidence does not constitute a fatal defect of proof."

Then, too, the defendant's possession of the fruits of the crime recently after its commission justified the inference of guilt on his trial for larceny. *S. v. Holbrook,* 223 N.C. 622, 27 S.E. 2d 725.

Moreover, there is ample evidence to support the third count in the bill of receiving stolen goods knowing them to have been stolen. G.S. 14-71; *S. v. Oxendine,* 223 N.C. 659, 27 S.E. 2d 814. This would sustain the judgment and repel the motion for nonsuit, even if the first two counts were eliminated. *S. v. Smith,* 226 N.C. 738, 40 S.E. 2d 363; *S. v. Graham,* 224 N.C. 347, 30 S.E. 2d 151; *S. v. Toole,* 106 N.C. 736, 11 S.E. 168.

No sufficient reason has been shown to justify an interference with the results of the trial. Hence, the verdict and judgment will be upheld.

No error.

STATE v. RUSSELL JOHN CHARLES BARBER.

(Filed 1 November, 1950.)

Criminal Law § 14—

Certiorari will not lie from the Superior Court to the Recorder's Court when judgment has been entered in the Recorder's Court upon defendant's plea of guilty. G.S. 1-269.

APPEAL by defendant from *Bone, J.,* June Term, 1950, of CARTERET. Appeal dismissed.

The defendant was charged in the Recorder's Court of Carteret County with operating a motor vehicle on a state highway at a greater rate of speed than 55 miles per hour. Defendant appeared 11 April, 1950, without counsel, entered plea of guilty, and was fined $10 and costs, which he paid. On 8 May, 1950, defendant's counsel applied to the resident Judge of the District for writ of *certiorari*. The resident Judge signed an order that the papers in the case be certified to the Superior Court of Carteret County, which was done. On the hearing in the Superior Court defendant's counsel moved that the conviction and judgment in the Recorder's Court be expunged from the record. *Certiorari* was denied as was also the motion to expunge conviction from the record. Defendant excepted and appealed.

Attorney-General McMullan and Assistant Attorney-General Rhodes for the State.

Charles L. Abernethy, Jr., for defendant, appellant.

DEVIN, J. The motion in the Superior Court for writ of *certiorari* was properly denied, G.S. 1-269. *Taylor v. Johnson*, 171 N.C. 84, 87 S.E. 981; *Pue v. Hood, Commissioner of Banks*, 222 N.C. 310, 22 S.E. 2d 896. There was nothing to invoke the jurisdiction of the Superior Court. The appeal therefrom will stand dismissed.

Appeal dismissed.

ROY SAUNDERS v. T. F. BULLA, ALBERT TAYLOR AND JOHN G. PREVETTE.

(Filed 1 November, 1950.)

Appeal and Error § 31e—

Where the election sought to be restrained has been held pending the appeal, the appeal will be dismissed.

APPEAL by plaintiff from *Bobbitt, J.*, March Term, 1950, RANDOLPH.

Civil action to enjoin the holding of a beer and wine election and to have said election, if held, declared null and void, heard on motion for temporary restraining order.

The court below denied the motion for a temporary restraining order and plaintiff appealed.

Ottway Burton for plaintiff appellant.

Ferree & Gavin for defendant appellees.

PER CURIAM. The election plaintiff seeks to enjoin was held 25 March 1950 and is now an accomplished fact. Hence the question he seeks to present on this appeal is academic. For that reason the appeal is dismissed on authority of *Nance v. Winston-Salem,* 229 N.C. 732, 51 S.E. 2d 185, and *Eller v. Wall,* 229 N.C. 359, 49 S.E. 2d 758.

Appeal dismissed.

W. F. BETTS v. T. F. BULLA, ALBERT TAYLOR AND JOHN G. PREVETTE.

APPEAL by plaintiff from *Bobbitt, J.,* March Term, 1950, RANDOLPH.

Motion by defendants, appellees, to dismiss on the ground that the election sought to be restrained has been held and therefore the question involved has become moot.

BARNHILL, J., for the Court: Motion allowed and appeal dismissed on authority of *Saunders v. Bulla, ante,* 578. This 1 November, 1950.

JOHN HORACE EASON AND WIFE, RUTH EASON; LOUIZA TILTON AND HUSBAND, LITMAN TILTON; LOSSIE BELLE BRADSHAW AND HUSBAND, ERNEST BRADSHAW; JAMES A. EASON AND WIFE, TREASSIE EASON; WOODROW EASON AND WIFE, JOANNIE EASON (ORIGINAL PARTIES PLAINTIFF) AND (THE FOLLOWING ADDITIONAL PARTIES PLAINTIFF); GUY ABNER EASON (SON OF B. F. EASON, DECEASED); THOMAS EDWARD EASON (SON OF B. F. EASON, DECEASED); HELEN LUCILLE E. THOMAS (DAUGHTER OF B. F. EASON, DECEASED); JAMES FARRIOR EASON (SON OF B. F. EASON, DECEASED); AND DRUCILLA PRICE BEATY (DAUGHTER OF MINNIE VICTORIA EASON PRICE), v. MRS. ALMA SPENCE, ERSULA SPENCE AND NINA ANN SPENCE, THE LAST TWO BEING MINORS; AND MRS. ALMA SPENCE, GENERAL GUARDIAN OF ERSULA SPENCE AND NINA ANN SPENCE.

(Filed 8 November, 1950.)

1. Constitutional Law § 20a—

No person can be deprived of his property except by his own consent or the law of the land, which term is synonymous with due process of law. Constitution of N. C., Art. I, Sec. 17.

2. Constitutional Law § 21—

Due process of law imports notice and an opportunity to be heard or defend in a regular proceeding before a competent tribunal.

3. Taxation § 40g—

In proceedings to sell lands for taxes, the court, even though it be a court of general jurisdiction, exercises a limited statutory authority, and therefore it must appear by the recitals of the record itself that the court not only had authority over the subject matter but also that it acquired jurisdiction of the parties in some manner recognized by law.

4. Estates § 9d—

While it is the duty of the life tenant to pay the taxes assessed upon the land, the taxes constitute a lien upon the entire fee, and the interest of the remaindermen as well as that of the life tenant is subject to sale for the satisfaction of the lien.

5. Taxation § 40b—

Where a proceeding to foreclose a tax sale certificate under Chap. 260, Public Laws of 1931, is instituted solely against the life tenant and her husband, the remaindermen who are neither made parties nor served with summons are not before the court notwithstanding that notice to "all persons claiming any interest" was posted at the courthouse door and published in a general advertisement in some newspaper in the county, and therefore a sale of such lands pursuant to such proceeding does not pass the interest of the remaindermen.

6. Taxation § 41—

Where foreclosure of a tax sale certificate is had in proceedings in which the life tenant alone is made a party, the commissioner's deed conveys only the interest of the life tenant, but the sale is for the full amount of the tax lien and necessarily extinguishes it, and therefore the remaindermen are under no necessity to attempt redemption subsequent to the sale in order to protect their interests.

7. Taxation § 40g—

Foreclosure of a tax sale certificate in proceedings in which the life tenant alone is a party is void as to the remaindermen for want of jurisdiction and the remaindermen may attack it collaterally.

8. Adverse Possession § 13a—

Adverse possession does not begin to run in favor of a person taking actual possession under color of title or claim of right until such possession gives rise to a cause of action in favor of the true owner.

9. Same: Adverse Possession § 4i—

Plaintiffs claimed under foreclosure of a tax sale certificate in a proceeding instituted solely against the life tenant and in which the remaindermen were neither parties nor brought before the court in any manner sanctioned by law. *Held:* While commissioner's deed of foreclosure did not affect the interest of the remaindermen, it did convey the interest of the life tenant, and plaintiffs' were entitled to possession during the continuance of the life estate, which possession could not be adverse to the remaindermen until the death of the life tenant gave them legal power to sue. G.S. 1-38.

10. Estates § 9f—

The forfeiture of a life estate for nonpayment of taxes, G.S. 105-410, is not automatic, but the statute contemplates an adjudication of forfeiture by a court of competent jurisdiction in a proceeding in which the alleged delinquent life tenant has notice and an opportunity to be heard in order to satisfy the requirements of due process of law.

11. Adverse Possession § 13a—

Persons in possession pursuant to foreclosure of a tax sale certificate conveying only the title of the life tenant may not maintain that their possession is adverse to the remaindermen on the ground that the life tenant's failure to pay taxes forfeited her estate to the remaindermen and thus gave them immediate right to possession, since such forfeiture under G.S. 105-410 is not automatic but must be judicially determined in an appropriate proceeding. G.S. 1-38.

APPEAL by defendants from *Parker, J.*, at the June Term, 1950, of LENOIR.

Civil action in ejectment involving title to land in Moseley Hall Township, Lenoir County, heard upon a case agreed.

The case agreed discloses these facts:

1. On 14 January, 1920, J. T. Taylor and his wife, Bessie Taylor, made a deed, which was forthwith duly registered, conveying the land in suit to Victoria Eason for life, with remainder in fee to her seven children, B. F. Eason, John Horace Eason, Minnie Victoria Eason Price, Louiza Tilton, Lossie Belle Bradshaw, James A. Eason, and Woodrow Eason. B. F. Eason and Minnie Victoria Eason Price died intestate during the life of their mother. B. F. Eason was survived by four children, Guy Abner Eason, Thomas Edward Eason, Helen Lucille E. Thomas, and James Farrior Eason. Minnie Victoria Eason Price left an only daughter, Drucilla Price Beaty. The living children of Victoria Eason, the surviving children of B. F. Eason, and the surviving child of Minnie Victoria Eason Price and their spouses are the plaintiffs in this action.

2. The land was listed for taxes in the name of A. M. Eason, the husband of the life tenant, Victoria Eason, for 1927, and the taxes assessed upon it by Lenoir County for that year were not paid by Victoria Eason or any other person. The Sheriff of Lenoir County sold the land for such taxes, and issued a certificate of sale to Lenoir County, the purchaser at the tax sale. Victoria Eason did not redeem the land.

3. Subsequent to the Sheriff's sale, Lenoir County, as plaintiff, sued "A. M. Eason and his wife, Mrs. A. M. Eason, defendants" in the Superior Court of Lenoir County to foreclose the tax sale certificate. Only three parts of the record in this action can be found. These are an interlocutory judgment of foreclosure entered by the Clerk on 14 September, 1931; a report of sale made by Thomas J. White, Commissioner, on

28 March, 1932; and a final decree entered by the Clerk on 25 April, 1932. The interlocutory judgment of foreclosure was rendered by default. It recites "that summons herein was duly served, as required by law, upon the defendants." It adjudges that they are indebted to Lenoir County in the "sum of $333.86 with interest . . . on account of taxes lawfully assessed and levied upon the property of the defendants for the years set forth in the complaint," and that such debt constitutes a lien upon the land in controversy in the present action. It further adjudges that "the defendants and all persons claiming under them shall be forever barred and foreclosed of all equity of redemption" in the land in the event "the foregoing taxes and interest thereon" are not paid . . . on or before 16 November, 1931, and that "any persons claiming any interest in the land . . . shall be forever barred and foreclosed of any . . . interest or claim" in it unless they "set up their claims within six months from date of advertisement in this cause." It appoints Thomas J. White as commissioner, and directs him "to sell said land at public auction at the courthouse door in Kinston, N. C., to the highest bidder, for cash, after having posted a notice of said sale at the courthouse door and three other public places in Lenoir County, thirty days prior to said sale, and by publishing a notice thereof once a week for four successive weeks immediately preceding said sale in some newspaper published in Lenoir County." The report of sale recites that Thomas J. White, Commissioner, sold the land at public auction to Lenoir County for "the sum of $368.86 and taxes accrued since 1927" after advertisement in the manner specified in the interlocutory judgment of foreclosure. The final decree recites that "notices of said sale were duly posted and published as required by statute" and that "no exceptions or raised bid has been made in the time allowed by law." It orders Thomas J. White, Commissioner, to collect the bid made by Lenoir County at the foreclosure sale, and "to make and deliver a deed in fee simple for the said lands to Lenoir County, its successors and assigns." On 26 April, 1932, Thomas J. White, Commissioner, delivered his deed to Lenoir County. Such deed recited that the bid had been paid in full, and undertook to convey to Lenoir County, "its successors and assigns forever all the right, title, interest, and estate of the defendants named in the . . . action, and any and all other persons bound by the judgment in such action" in the land in dispute.

4. At the time the proceedings were had in the tax foreclosure suit, the plaintiffs, Guy Abner Eason, Thomas Edward Eason, Helen Lucille E. Thomas, and James Farrior Eason, resided with their father, B. F. Eason, in Duplin County, North Carolina. All of the other plaintiffs were living in Lenoir County, North Carolina.

5. On 11 March, 1936, Lenoir County made a deed sufficient in form to convey the land in controversy to Levert L. Smith in fee simple, and

on 30 September, 1941, Levert L. Smith and his wife, Geneva Smith, made a deed sufficient in form to transfer such land to H. D. Spence in fee simple.

6. H. D. Spence died intestate on 12 December, 1946, survived by his widow, Alma Spence, and two children, Ersula Spence and Nina Ann Spence, who are the defendants in this action.

7. The land in suit was vacant from the date of the deed from Thomas J. White, Commissioner, to Lenoir County, until the date of the deed from Lenoir County to Levert L. Smith.

8. Ever since 11 March, 1936, however, the defendants and those under whom they claim, to wit, H. D. Spence and Levert L. Smith, have been in the actual and exclusive possession of the land in dispute under known and visible lines and boundaries, claiming to be the absolute owners of the same under the Commissioner's deed and the *mesne* conveyances mentioned above.

9. Victoria Eason died in November, 1949, having outlived her husband, A. M. Eason, by three years.

10. This action was begun on 31 December, 1949. The pleadings put the title and the right to possession of the property in issue. No previous action was brought by the plaintiffs, or any of them, to recover the land, or to set aside the tax foreclosure suit, or any proceeding had in it. Moreover, the plaintiffs have never attempted to redeem the land from the alleged tax sale.

Judge Parker made these legal conclusions on the case agreed: That the proceedings had in the tax foreclosure action were not binding on the plaintiffs because "the remaindermen were not made parties and were not served with summons"; "that the deed from Thomas J. White, Commissioner, to Lenoir County, and the deed from Lenoir County to Levert L. Smith, and the deed from Levert L. Smith and wife, Geneva Smith, to H. D. Spence, were tacked-to, and were a continuation of the title of Victoria Eason, the life tenant"; and "that no statute of limitation began to run 'against the plaintiffs' until the death of Victoria Eason in November, 1949." Judge Parker thereupon entered judgment that the plaintiffs own the land in dispute, and are entitled to its immediate possession; and the defendants excepted and appealed, assigning errors.

Wallace & Wallace and J. Faison Thomson for plaintiffs, appellees.

Whitaker & Jeffress and George B. Greene for defendants, appellants.

ERVIN, J. Under Article I, Section 17, of the State Constitution, no person can be deprived of his property except by his own consent or the law of the land. The law of the land and due process of law are interchangeable terms. *S. v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731, 7 A.L.R.

2d 407. The significance of the law of the land in its procedural aspect is laid bare by a famous phrase used by Daniel Webster in his argument in the *Dartmouth College case.* "By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial." *The Trustees of Dartmouth College v. Woodward,* 4 Wheat. 518, 4 L. Ed. 629. "Its essential elements are notice and opportunity to be heard or defend, before a competent tribunal, in an orderly proceeding adapted to the nature of the case, which is uniform and regular, and in accord with established rules which do not violate fundamental rights." 16 C.J.S., Constitutional Law, section 569; *Surety Co. v. Sharpe, ante,* 98, 59 S.E. 2d 593.

This question arises at the threshold of the appeal: Were the remaindermen brought before the court in the proceeding to foreclose the tax sale certificate?

In any judicial proceeding to sell property for unpaid taxes, the court "must have that authority of law for the purpose, which is called jurisdiction. This consists in, first, authority over the subject matter, and, second, authority over the parties concerned. The first comes from the statutory law, which designates the particular proceeding as one of which the court may take cognizance when the parties are properly before it; the second comes from the proper institution of proceedings, and the service of process upon the parties concerned, or something which is by the statute made equivalent to such service. Concerning jurisdiction of the subject-matter, it is only necessary to observe that it must come wholly from the Constitution or statutes of the State; the common law giving to the courts no authority in such cases. Moreover, that which is conferred is a special and limited jurisdiction. The importance of this fact appears in that familiar principle that nothing is taken by intendment in favor of a court of special and limited jurisdiction, but it must appear, by the recitals of the record itself, that the facts existed which authorized the court to act, and that in acting the court has kept within the limits of its lawful authority. This principle is applicable to the case of a court of general jurisdiction, which in the particular case is exercising this peculiar special and limited authority, as well as to the case of special courts created for such special and limited authority only." Cooley: The Law of Taxation (4th Ed.), section 1401. See, also, in this connection: *Harshaw v. Taylor,* 48 N.C. 513; *Jennings v. Stafford,* 23 N.C. 404.

Although the remaindermen were residents of North Carolina and their interest in the land was disclosed by the public records of Lenoir County at the time of the proceeding to foreclose the tax sale certificate, they were not named as parties in such proceeding. Furthermore, it

must be held that they were not notified of the proceeding by summons, for the only recital of the record in the proceeding relating to the service of summons is "that summons herein was duly served . . . upon the defendants," that is to say, the life tenant, Victoria Eason, and her husband, A. M. Eason.

Since they were not made parties to the proceeding or served with summons in it, the remaindermen cannot be said to have been before the court in the proceeding.

This observation is sound even if we accept as valid the contention of the defendants that the case agreed establishes this twofold proposition: (1) That the foreclosure proceeding was brought under Chapter 260 of the Public Laws of 1931 rather than under Chapter 221 of the Public Laws of 1927 or Chapter 334 of the Public Laws of 1929; and (2) that notice was posted at the courthouse door and published in a general advertisement in some newspaper in Lenoir County in compliance with section 5 of Chapter 260 of the Public Laws of 1931, calling upon "all . . . persons claiming any interest in the subject matter of the action" other than those actually "served with process as in civil actions" to appear, present, and defend their claims. See Michie's North Carolina Code of 1931, section 8037.

Despite some *dicta* to the contrary in *Orange County v. Wilson,* 202 N.C. 424, 163 S.E. 113, it is now well established by authoritative decisions that the provisions of section 5 of Chapter 260 of the Public Laws of 1931 relating to the posting of notices and the making of general advertisements as a procedure for bringing unnamed claimants before courts in tax foreclosure suits offend the constitutional guaranty of due process of law because such procedure does not afford the claimants reasonable notice and reasonable opportunity to be heard. *Johnston County v. Stewart,* 217 N.C. 334, 7 S.E. 2d 708; *Hill v. Street,* 215 N.C. 313, 1 S.E. 2d 850; *Beaufort County v. Mayo,* 207 N.C. 211, 176 S.E. 753; *Buncombe County v. Penland,* 206 N.C. 299, 173 S.E. 609; *Guy v. Harmon,* 204 N.C. 226, 167 S.E. 796.

We deem it advisable to observe, in passing from this phase of the controversy, that the case at bar is readily distinguishable from *Orange County v. Wilson, supra,* where the trustees of the claimants "were parties defendant and were served with process." Besides, it is unlike *Orange County v. Jenkins,* 200 N.C. 202, 156 S.E. 774, which was brought under Chapter 334 of the Public Laws of 1929, and involved the validity of a tax foreclosure sale as against Andrew Jenkins, who listed the property for taxes in his character as owner, was designated by name as defendant in the tax foreclosure suit, and was "duly and regularly served" with summons by publication in it.

This brings us to this inquiry: Where only the life tenant is made a party to a judicial proceeding to foreclose a tax sale certificate, and the remaindermen are not before the court, does a sale of land pursuant to such proceeding pass the interest of the remaindermen as well as the life estate to the purchaser? This question must be answered in the negative, for the very fundamental reason that under the law of the land clause of the State Constitution a judgment of a court cannot bind a person unless he is brought before the court in some way sanctioned by law and afforded an opportunity to be heard in defense of his right. *Beaufort County v. Mayo,* 207 N.C. 211, 176 S.E. 753; *Jennings v. Stafford,* 23 N.C. 404; *Hamilton v. Adams,* 6 N.C. 161.

It was the duty of Victoria Eason, as life tenant, to pay the taxes assessed upon the land. C.S. 7982, now G.S. 105-410. Nevertheless, such taxes constituted a lien upon the entire fee. In consequence, the interest of the remaindermen as well as that of the life tenant was subject to sale for the satisfaction of the lien. The statute then in force provided, however, that such sale could only be made under the judgment of the court in a judicial proceeding in the nature of an action to foreclose a mortgage. Michie's North Carolina Code of 1931, section 8037.

The life tenant, Victoria Eason, and her husband, A. M. Eason, were the only defendants in the action to foreclose the tax sale certificate. The remaindermen were not made parties to the action, or brought before the court in any way sanctioned by law. These things being true, the sale and the Commissioners' deed conveyed to the purchaser no more than the interest of Victoria Eason, to wit, the life estate. The interest of the remaindermen was not affected by the judgment in the tax foreclosure suit, or by any proceeding had under it. *Guy v. Harmon,* 204 N.C. 226, 167 S.E. 796; *Williams v. Hedrick,* 37 C.C.A. 552, 96 F. 657; *Rissberger v. Brown,* 120 Ky. 142, 85 S.W. 731; *City of Louisville v. Kohnhorst,* 25 Ky. L. Rep. 532, 76 S.W. 43; *Falvey v. Hicks,* 315 Mo. 442, 286 S.W. 385; *Bradley v. Goff,* 243 Mo. 95, 147 S.W. 1012; *Allen v. DeGroodt,* 98 Mo. 159, 11 S.W. 240, 14 Am. St. Rep. 626.

Some subsidiary observations are proper at this point. Although the interest of the life tenant only passed by the Commissioner's deed, the sale was for the full amount of the tax lien, and necessarily extinguished the lien on the interest of the remaindermen. Hence, they were under no necessity to attempt a redemption of the land subsequent to the sale in order to protect their own interest. *Williams v. Hedrick,* 37 C.C.A. 552, 96 F. 657. Since the judgment in the proceeding to foreclose the tax sale certificate is void as to them under the law of the land clause, the remaindermen may impeach it in this action of ejectment. A judgment void for want of jurisdiction is open to attack in a collateral proceeding. *Powell v. Turpin,* 224 N.C. 67, 29 S.E. 2d 26.

The defendants insist, however, that they now own the land in dispute even if the Commissioner's deed and the *mesne* conveyances did not transfer to them the rights of the plaintiffs. They say that in any event the deeds are good as color of title to the entire fee; that they and those under whom they claim have occupied the land since 11 March, 1936, asserting absolute ownership under their deeds; and that by reason thereof they have acquired a good title by adverse possession under color of title under the statute of limitation set forth in G.S. 1-38.

We now reach this last question: Have the defendants acquired a good title to the land in controversy by seven years' adverse possession under color of title?

A statute prescribing the length of time during which an adverse possession of land must be maintained in order for it to ripen into title will not begin to run until these two things concur: (1) The claimant has actual possession of the land under color of title, or claim of right; and (2) the possession of the claimant gives rise to a cause of action in favor of the true owner. *Everett v. Newton,* 118 N.C. 919, 23 S.E. 961. In other words, an adverse possession will never run against the owner of an interest in land unless he has legal power to stop it.

This consideration supports the rule that prior to the death of the life tenant a person occupying land under a deed effective only as to the life interest does not hold adversely to the remainderman or reversioner. *Barnhardt v. Morrison,* 178 N.C. 563, 101 S.E. 218; *Norcum v. Savage,* 140 N.C. 472, 53 S.E. 289; *Smith v. Proctor,* 139 N.C. 314, 51 S.E. 889, 2 L.R.A. (N.S.) 762; *Huneycutt v. Brooks,* 116 N.C. 788, 21 S.E. 558.

The two estates, the life estate of Victoria Eason and the remainder in her children, were created twelve years before the final judgment in the tax foreclosure suit. Although the Commissioner's deed did not pass the remainder interest of the plaintiffs, it did convey the life estate of Victoria Eason. This being so, the defendants and those under whom they claim occupied the land under conveyances which actually vested in them the interest of the life tenant. Manifestly, their possession was not adverse to the plaintiffs during the life of Victoria Eason. While they held the interest of the life tenant, their occupation was lawful, and did not subject them to an action by the plaintiffs. Their possession became wrongful, however, at the death of the life tenant, and the plaintiffs thereupon acquired a right to sue them for the land.

For these reasons, the adverse possession of the defendants and those under whom they claim did not set the statute of limitation in motion against the plaintiffs until the expiration of the life estate by the death of Victoria Eason. As this event did not occur until November, 1949, the possession of the defendants and those under whom they claim has not ripened into a good title under G.S. 1-38.

In reaching this conclusion, we have not ignored the argument of the defendants based on section 7982 of the Consolidated Statutes, which is now codified as G.S. 105-410. This section is as follows: "Every person shall be liable for the taxes assessed or charged upon the property or estate, real or personal, of which he is tenant for life. If any tenant for life of real estate shall suffer the same to be sold for taxes by reason of his neglect or refusal to pay the taxes thereon, and shall fail to redeem the same within one year after such sale, he shall thereby forfeit his life estate to the remainderman or reversioner. The remainderman or reversioner may redeem such lands, in the same manner that is provided for the redemption of other lands. Moreover, such remainderman or reversioner shall have the right to recover of such tenant for life all damages sustained by reason of such neglect or refusal on the part of such tenant for life."

The defendants advance this argument: That Victoria Eason automatically forfeited her life estate to the plaintiffs under the statute by permitting the land to be sold for the nonpayment of the 1927 taxes, and by failing to redeem it within one year after the sale; that the plaintiffs thus acquired a fee simple estate in the land, with an inseparable right to its possession, immediately upon the occurrence of the automatic forfeiture of the life estate; and that by reason of these matters Levert L. Smith, one of the persons under whom the defendants claim, committed an actionable wrong against the right of possession of the plaintiffs on 11 March, 1936, when he took possession of the land, thereby setting the statute of limitation now embodied in G.S. 1-38 in motion against the plaintiffs.

This argument lacks validity because the premise on which it rests, *i.e.,* that the statute worked an automatic forfeiture of the interest of the life tenant, is untenable. Although the statute does not expressly so provide, it must be interpreted to contemplate a judicial determination of the forfeiture by a court of competent jurisdiction in a proceeding of which the alleged delinquent life tenant shall have notice and in which he shall be given an opportunity to be heard. *Land Co. v. Board of Education,* 101 N.C. 35, 7 S.E. 573; *Phelps v. Chesson,* 34 N.C. 194. A contrary construction of the statute would render the provision for forfeiture violative of Article I, Section 17, of the State Constitution; for the forfeiture of the property of one person and the vesting of the title thereto in another for tax delinquency by mere legislative declaration is the taking of property without due process of law. *Lumber Co. v. Lumber Co.,* 135 N.C. 742, 47 S.E. 757; *Parish v. Cedar Co.,* 133 N.C. 478, 45 S.E. 768, 98 Am. St. Rep. 718. This holding is implicit in all of the decisions relating to the statute, except *Sibley v. Townsend,* 206 N.C. 649, 175 S.E. 107, where the constitutional question was not

broached by counsel or considered by the Court. *Crandall v. Clemmons,* 222 N.C. 225, 22 S.E. 2d 448; *Cooper v. Cooper,* 221 N.C. 124, 19 S.E. 2d 237; *Cooper v. Cooper,* 220 N.C. 490, 17 S.E. 2d 655; *Meadows v. Meadows,* 216 N.C. 413, 5 S.E. 2d 128; *Rigsbee v. Brogden,* 209 N.C. 510, 184 S.E. 24; *Bryan v. Bryan,* 206 N.C. 464, 174 S.E. 269; *Hutchins v. Mangum,* 198 N.C. 774, 153 S.E. 409; *Tucker v. Tucker,* 108 N.C. 235, 13 S.E. 5; *Smith v. Miller,* 158 N.C. 98, 73 S.E. 118.

The life estate of Victoria Eason was not forfeited to the plaintiffs, for it was not judicially determined in an appropriate proceeding that any event giving rise to the alleged forfeiture occurred.

In closing, we deem it proper to call attention to *Crandall v. Clemmons,* 222 N.C. 225, 22 S.E. 2d 448, a case arising under Chapter 310 of the Public Laws of 1939, where it is said that "under our present tax foreclosure laws, life estates are no longer forfeited under the provisions of section 7982 of the Consolidated Statutes of North Carolina." The sound reasoning underlying the *Crandall case* applies with like force to the statute involved in the instant case, which also provided that a tax lien can be enforced only by a judicial proceeding in the nature of an action to foreclose a mortgage.

The judgment is

Affirmed.

LESTER J. SPARROW AND EDITH J. SPARROW v. DIXIE LEAF TOBACCO COMPANY, INC., AND THE ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY, AND ATLANTIC AND EAST CAROLINA RAILWAY COMPANY.

(Filed 8 November, 1950.)

1. Easements § 5: Eminent Domain § 26—

A railroad company's power to condemn a right of way is for the benefit of the general public, and the easement thus acquired is limited to use for any purpose in furtherance of or incidental to its business as a common carrier, but its use of the land for nonrailroad purposes is outside the scope of its easement and imposes an additional burden for which the owner of the fee has not been compensated. Sec. 27, Chap. 136, Laws 1852.

2. Same—

The extent and method which its right of way is necessary to be used for railroad purposes rests in the sound discretion of the railroad company, but a declaration by the company that a proposed private use is necessary for railroad purposes does not make it so.

3. Same—

A railroad company may permit third persons to use its right of way when such use is primarily for the benefit of the railroad company as a

common carrier, even though incidental benefits flow to the private user, but it may not lease a part of its right of way to a private business for a nonrailroad use merely because such business is a customer, or potential customer, and such use tends incidentally to enhance the expectation of additional freight business.

4. Same—

A railroad company leased a part of its right of way to a tobacco company for the purpose of conducting a general tobacco storage and curing business, without contractual obligation on the part of the lessee to ship over the line of the railroad company. The tobacco company used the land to extend its storage facilities in furtherance of its business. Its buildings did not afford shipping facilities, but it trucked its merchandise from its warehouse to the railroad loading platform. *Held:* The use of the leased property was not in furtherance of the railroad's business as a common carrier.

5. Estoppel § 6c—

Mere knowledge and observation by the owner of the unauthorized use of his land by third parties in erecting and maintaining buildings thereon does not estop the owner on the ground of laches from maintaining an action in ejectment.

6. Adverse Possession § 13b—

The owner of the fee is not barred from maintaining an action in ejectment against a railroad company or its lessee to recover that part of the right of way used for nonrailroad purposes until the expiration of twenty years. G.S. 1-40.

7. Adverse Possession § 10—

G.S. 1-51 has no application to an action in ejectment by the owner of the fee to recover that part of the right of way used by the railroad company or its lessee for nonrailroad purposes.

8. Limitation of Actions § 6b—

An action in ejectment by the owner of the fee to recover that part of the right of way used by the railroad company or its lessee for nonrailroad purposes is not subject to the three year statute of limitations, since it is not an action in trespass for damages.

APPEAL by plaintiffs from *Parker, J.*, June Term, 1950, LENOIR. Reversed.

Civil action in ejectment.

The parties waived trial by jury, entered into a stipulation as to the facts, and agreed that the court should hear and determine the cause on the facts agreed. The stipulated facts are in substance as follows: The defendant Atlantic and North Carolina Railroad Company, hereinafter referred to as lessor road, owns a right of way or easement extending 100 feet on either side of its tracks from the center thereof, and specifically including the property in dispute, by virtue of Sec. 27, Chap. 136,

Laws 1852. The plaintiffs are the owners of the fee, subject to said easement, of the property in dispute. On 25 September 1935, defendant tobacco company acquired title to a tract of land adjoining said right of way and erected thereon tobacco storage warehouse buildings. On 27 July 1936, the lessor road leased to the tobacco company a part of its right of way adjoining said property, and the defendant tobacco company constructed upon the right of way so leased two storage warehouse buildings which were extensions of the building originally erected upon their property. In 1936 the lessor road constructed a sidetrack leading to said warehouse building, which track was used in servicing the said warehouse buildings from 1936 to June 1949, at which time the said sidetrack was taken up and removed, the sidetrack being removed because the tobacco company, for causes satisfactory to itself, had abandoned same. On 1 September 1939, the lessor road leased its land, business, and existing contracts to the defendant Atlantic and East Carolina Railway Company, and said last-named railroad company is operating said line. On 5 April 1944, the plaintiff Lester J. Sparrow acquired title to a tract of land which includes that part of the right of way leased by the lessor road to the tobacco company, subject to the easement or right of way of the lessor road.

The warehouses erected by the defendant Tobacco Company are used for the storage of tobacco purchased on the Kinston tobacco market and for the storage of tobacco purchased by the Tobacco Company and shipped into Kinston from points in South Carolina and Georgia, for processing and storage and reshipment. That part of the tobacco coming from other points is shipped partly by truck and partly by rail. These buildings have been so used for the storage, processing, and shipment and reshipment of tobacco continuously since 1936-1938. Prior to the erection of buildings on the railroad right of way, shipments made by the Tobacco Company were divided between the two railroads serving Kinston, and since the construction of said warehouses all the tobacco purchased by the Tobacco Company stored and processed in said buildings has been shipped over the lessor road and the operating railway, except in those cases where the tobacco company failed to give shipping instructions. Since the construction of said warehouses, the tobacco company has averaged shipping over the line of the defendant railroads 250 carloads per year, yielding a net revenue to said railroads of $10,000 per year. No protest or objection to the construction of said buildings or the occupancy thereof was made by plaintiffs or their predecessors in title prior to January 1949. The defendant railroad companies received the rentals from said property from the date of the lease until the present time.

The lease agreement between the tobacco company and the lessor road contains the following: "PURPOSE. 3. The said premises shall be used for conducting a general tobacco storage and curing business." This is the sole purpose stipulated in the lease. It contains no provision obligating the tobacco company to ship any part of its tobacco, either incoming or outgoing, over the defendant railroad.

Upon the facts stipulated, the court below concluded that the lease to the tobacco company and the use of the two storage warehouse buildings erected upon the right of way pursuant to said lease "was and is for railroad purposes within the meaning of Section 27, of Chapter 136, of the Laws of 1852, and that, therefore, the plaintiffs are not entitled to recovery." It thereupon entered judgment that the plaintiffs take nothing and that the defendants go hence without day. Plaintiffs excepted and appealed.

Albert W. Cowper for plaintiff appellants.

R. Mayne Albright for defendant Atlantic and North Carolina Railroad Company, appellee.

Allen, Allen & LaRoque, Charles H. Taylor, and Warren S. Perry for defendants Dixie Leaf Tobacco Company, Inc., and Atlantic and East Carolina Railway Company, appellees.

BARNHILL, J. The lessor railroad acquired its right of way under and by virtue of Sec. 27, Chap. 136, Laws 1852. It thus acquired and possesses nothing more than an easement for railroad purposes, with the right of actual possession of so much thereof as is necessary for the operation of its road and to carry on its business as a common carrier of freight and passengers with dispatch and convenience. *R. R. v. Sturgeon*, 120 N.C. 225; *Shields v. R. R.*, 129 N.C. 1; *R. R. v. Olive*, 142 N.C. 257; *Coit v. Owenby*, 166 N.C. 136, 81 S.E. 1067; *R. R. v. Manufacturing Co.*, 229 N.C. 695, 51 S.E. 2d 301; Anno. 94 A.L.R. 525, 149 A.L.R. 380.

It may devote the right of way to any use which is indispensable to, or which will facilitate the fulfillment of, the objects of its corporate existence as a common carrier, or which is reasonably in aid of those purposes. 44 A.J. 338. Ownership of the easement carries with it the right to use the property within the bounds of the right of way for any purpose the primary object of which is the furtherance of the business of the railroad. So long as the use to which the easement is subjected comes within this rule, the owner of the servient estate has no cause to complain, for the grant of the easement was for such purpose and constitutes a part of the dominant estate. The use, however, must be reasonably necessary for or convenient to the operation of the railroad. *Hodges v. R. R.*, 196 N.C. 66, 144 S.E. 528; *R. R. v. Manufacturing Co., supra.*

On the other hand, the railroad company possesses no right or authority to use or to let the property for private or nonrailroad purposes. Anno. 94 A.L.R. 524, 528, 535, 149 A.L.R. 380. It cannot erect or permit the erection of warehouses, factories, and the like, not necessarily connected with the use of their franchise, within the limits of their right of way. When property is taken for railroad purposes, the fee remains with the owner and, outside of the authorized use, the proprietary right is in the original owner. *Lyon v. McDonald,* 14 S.W. 261; *Bond v. Ry. Co.,* 160 So. 406; *Lance's Appeal,* 55 Pa. 16; *Rock Island & P. R. Co. v. Brewing Co.,* 51 N.E. 572; Anno. 94 A.L.R. 528, 149 A.L.R. 378.

The reason underlying the rule which prohibits the use of the railroad right of way for nonrailroad purposes or purposes which are not primarily in furtherance of the business of the corporation as a common carrier is twofold:

(1) A railroad is a *quasi*-public corporation and its right to acquire a right of way by condemnation is founded upon the fact that the property thus acquired is to be used for the benefit of the general public. It is acquired for the public use and so its use must be confined to that purpose.

(2) To subject the property to an additional use of a private nature, not incident to or in furtherance of the operation of the railroad, imposes on the servient estate an additional burden for which the easement was not acquired and the owner has not been compensated.

It is argued here that the uses to which the right of way may be subjected rest within the sound discretion of the corporate authorities. But the rule is not quite so broad. While the railroad is the judge of the necessity of extending the use of its right of way, the proposed additional use must be incidental to or in furtherance of the business of the railroad as a common carrier—a *quasi*-public use. Only so long as the use is in furtherance of the business of the railroad does the extent of that use rest with the railroad authorities, and the mere decision of the officers of the railroad that a proposed use is a railroad use does not make it so.

The only limit upon the use which the railroad company may make of the land within the bounds of its easement is that it shall be a use authorized by its incorporation as a common carrier. Within that limit the manner in which the land shall be used or occupied is in the discretion of the corporation. *R. R. v. Lissenbee,* 219 N.C. 318, 13 S.E. 2d 561; *Peirce v. R. R.,* 141 Mass. 481. The right to use, however, is definitely limited to railroad purposes. Any use of the land for other purposes is not protected by its authority. *Anderson v. Interstate Mfg. Co.,* 36 L.R.A. 512; *Lyon v. McDonald, supra.*

When the use by third parties is primarily for the benefit of the railroad as a common carrier, then it is for railroad purposes, even though

incidental benefits flow to the private user. On the other hand, if the use is primarily private in nature, the fact that the railroad is incidentally benefited thereby, through the acquisition of a new customer or increased shipments, does not convert it into a railroad use. *Coit v. Owenby, supra; Sturgeon v. Wabash Ry. Co.*, 17 S.W. 2d 616; *In re Chicago & N. W. Ry. Co.*, 127 Fed. 2d 1001; Anno. 94 A.L.R. 928; 149 A.L.R. 378.

Every new or enlarged business within a municipality served by a railroad enhances the probability of additional freight business for the railroad. But if the mere fact the user of railroad property is a customer, or potential customer, and the use tends incidentally to enhance the expectation of obtaining additional freight business, converts the use for private business into a use in furtherance of the business of the railroad as a common carrier, the railroad could let its right of way to all types of private enterprises to the complete exclusion of the owner of the fee. *Lance's Appeal, supra; Rock Island & P. R. Co. v. Brewing Co., supra,* Anno. 149 A.L.R. 378, 94 A.L.R. 529.

The concrete question, therefore, is whether the use of the building in question as a tobacco redrying and storage plant is, under the facts agreed, a misuse of the railroad company's easement in the land occupied by the said buildings.

A careful appraisal of the facts in the light of the controlling principles of law to which we have referred leads to an affirmative answer.

The tobacco company was already engaged in the business of processing and storing tobacco at the time it acquired the lease in question. Tobacco is stored for the purpose of curing over a period of years. Its plant was located on property adjoining the railroad right of way. It leased the property in question for the purpose of enlarging and extending its plant by the erection of an additional storage warehouse. The purpose for which the property was leased to it is spelled out in the lease contract: "The said premises shall be used for conducting a general tobacco storage and curing business." The tobacco company did not, as in *Coit v. Owenby, supra,* and *Anderson v. Interstate Mfg. Co., supra,* contract, as a part of the consideration for the lease, to ship its merchandise, or any part thereof, over the line of defendant railroad. It is free to patronize, or to withhold its patronage from, the lessor line. All the railroad acquired in this respect was the enhanced probability of additional freight business.

The tobacco company is engaged in private business in no way connected with the railroad. The buildings on the right of way were erected in furtherance of that business and not chiefly to afford facilities for the lessee as a patron of the railroad to receive, store, and reship freight over the lessor's line. It receives its merchandise for processing and storage purposes and, as other customers of the railroad, it has to truck its mer-

chandise from the warehouses to the railroad loading platform. So then, the warehouses are not intended primarily for the storage of tobacco for reshipment or to furnish the tobacco company with facilities for the shipment thereof. *Coit v. Owenby, supra.*

A careful examination of the cases from other jurisdictions to which our attention is directed by counsel discloses that those which are seemingly at odds with the conclusion here reached are factually distinguishable. We need not undertake to point out the distinguishing features here. Suffice it to say that these and many other cases are to be found in the notes in 36 L.R.A. (N.S.) 512, and in the A.L.R. annotations herein cited.

The defendants plead estoppel by laches. They allege that plaintiffs and their predecessors in title had actual knowledge and frequent observation of the use of the buildings on their premises for a period of fourteen years and yet they did not warn the defendants they had built on and were using plaintiff's land. They contend that this laches on the part of plaintiffs now estops them from claiming title to the land or denying the title of defendants. But these facts are not sufficient to work an estoppel. *Ramsey v. Nebel,* 226 N.C. 590, 39 S.E. 2d 616.

The possession of the defendant tobacco company is the possession of the railroad and the railroad possesses only an easement. They have not asserted possession adverse to plaintiff's ownership of the servient estate. But even if it be conceded that their possession has been adverse, they have no color of title. Hence it takes twenty years within which to ripen their title. G.S. 1-40.

But, they assert, a different rule applies here—G.S. 1-51 is controlling. However, that section pertains to the acquisition of a right of way and limits the right of the owner of the fee to maintain an action for damages resulting from the taking of the right of way easement. It in no way affects the rights of the owner in respect to the fee, subject to the easement, and that is what is involved here. Plaintiffs make no claim adverse to the right of the railroad in the easement or its right to use the easement for railroad purposes. Their claim rests squarely on the allegation that the use by the defendants is for a nonrailroad purpose.

Nor does the three-year statute of limitations apply, for this is not an action in trespass for damages. It is an action in ejectment for the possession of the premises.

For the reasons stated the judgment below is

Reversed.

J. R. LAUGHINGHOUSE; T. A. ADAMS, W. W. WOOTEN, W. P. BOYD, R. C. WHITLEY, JR., P. C. BRINSON, F. E. FARRIS, J. F. HARRIETT, M. S. PARKER, WILLIAM H. SMITH, P. M. BRATCHER, C. B. CATON, AND J. R. RICKS, MEMBERS OF THE POLICE FORCE OF THE CITY OF NEW BERN ON BEHALF OF THEMSELVES AND SUCH OTHER CITY EMPLOYEES AND CITIZENS AS MAY HEREAFTER BECOME PARTIES-PLAINTIFF, v. THE CITY OF NEW BERN, HON. FRED G. HUSSEY, MAYOR, HON. GEORGE ROBERTS, MEMBER OF THE BOARD OF ALDERMEN, HON. MACK LUPTON, MEMBER OF THE BOARD OF ALDERMEN, HON. C. L. CARTER, MEMBER OF THE BOARD OF ALDERMEN, HON. WALTER W. SMITH, MEMBER OF THE BOARD OF ALDERMEN, HON. J. R. BELL, MEMBER OF THE BOARD OF ALDERMEN, AND HON. C. L. BARNHART, CITY MANAGER.

(Filed 8 November, 1950.)

1. Mandamus § 1—

Mandamus can confer no new authority, but will lie only to enforce a clear legal right of the party seeking the writ against a party under legal obligation to perform the act sought to be enforced.

2. Municipal Corporations § 5—

A municipal corporation has only such powers as are conferred upon it expressly or by necessary implication by its charter and by the applicable general laws, construed together.

3. Same—

Where a municipal corporation is given a specified power both by general statute and by amendment to its charter, and later the charter amendment is repealed, the power under the general statute is left unimpaired and available to the city.

4. Retirement Systems § 9—

Defendant municipality became an employer participating in the State Retirement System under authority of General Statutes 128-21 through 128-38, and also under authority of an act amending its charter, Chap. 30, Sec. 1, sub-section 5 (a), 5 (b), Session Laws of 1947. Later the charter amendment was repealed upon approval of the voters, Chap. 650, Session Laws of 1949. *Held:* The municipality retained the power to participate in the State Retirement System by virtue of authority granted by the General Statutes.

5. Retirement Systems § 8: Elections § 1—

Where a city has no authority to inaugurate its own retirement system for its employees, there is no authority for the submission of such question to its voters, and a majority vote in favor of such municipal system amounts to no more than an expression of popular opinion on a subject not legally presented.

6. Mandamus § 2b: Retirement Systems § 10—

Where a city has become an employer participating in the State Retirement System under authority conferred by General Statutes and by an act amending its charter, the repeal of the charter provision leaves its

governing authorities with discretionary power to participate in the retirement system under authority conferred by the General Statutes, and *mandamus* will not lie to compel it to withdraw from the State Retirement System.

APPEALS both by plaintiffs and by defendants from *Frizzelle, J.*, resident of Fifth Judicial District, 23 September, 1950, of CRAVEN.

Civil action for *mandamus* directing the mayor and Board of Aldermen of the city of New Bern (1) to proceed to set up a retirement system for the city of New Bern, and (2) to request refund to the city or directly to the employees involved, of all amounts paid into the North Carolina Governmental Employees' Retirement System by the city and its employees.

Plaintiffs' complaint appears to be constructed on the framework of the following facts:

The charter of the city of New Bern was amended in 1947 so as to authorize the city to participate in the State Retirement System as provided in G.S. 128-21 through G.S. 128-38 inclusive, when the question of the adoption of the amendment should be approved by a majority of the votes cast in a special election. Sub-section 5 (a) and (b) of Section 1 of Chapter 30 of 1947 Session Laws of North Carolina. The question was submitted to, and adopted by a majority of the votes cast at a city election held 2 April, 1947. And as stated in brief of plaintiffs filed in this Court, "The Board of Aldermen did such acts as were necessary to make the city of New Bern a member of the said State system and thereafter regular, authorized payments and contributions were made to the System, and a number of the employees were retired under the provisions of the North Carolina Governmental Employees' Retirement System."

Thereafter, the Board of Aldermen, at meeting in February, 1949, approved the form of a bill to be presented to the Legislature for enactment providing for the city "to withdraw from the North Carolina Local Governmental Employees' Retirement System and for the city to inaugurate its own retirement system."

Subsequent thereto an act was passed by the General Assembly of North Carolina which provided only that "Sub-section 5 (a) and (b) of Section 1 of Chapter 30 of the Session Laws of 1947 be, and the same is, hereby repealed," and that "the foregoing shall not go into effect unless approved by a majority of the votes cast by the qualified voters of the city of New Bern in the election to be held April 5, 1949." Chapter 650 of 1949 Session Laws of North Carolina.

The Board of Aldermen of the city of New Bern prepared and approved an official ballot for the election on 5 April, 1949. On it there were printed directions to the voter to vote for or against "amendment

providing for withdrawing from the North Carolina Governmental Employees' Retirement System, the city to inaugurate its own retirement system." A majority of the votes cast at such election were for the proposal.

The city primary election was also held on 5 April, 1949, at which the incumbents mayor and members of the Board of Aldermen, who were sponsoring the city's withdrawal from the State system were defeated or retired and succeeded by new members who had not officially expressed their opinions on the question.

The Board of Aldermen, in June, 1950, upon advice that it could and should mail to the North Carolina Governmental Employees' Retirement System check which had been withheld, voted to do so.

Upon these facts plaintiffs allege and contend that the result of the election on 5 April, 1949, on the form of ballot submitted constitutes a withdrawal from the State system, and is a mandate to the Board of Aldermen to set up for the city of New Bern its own retirement system, and that, hence, the Board of Aldermen is under clear legal duty to do so.

And plaintiffs pray that *mandamus* issue to require the Board of Aldermen of the city of New Bern (1) to take steps to perfect a withdrawal from the State system, and (2) to set up a city system of retirement.

Defendants demurred to the complaint for that (1) it does not state facts sufficient to constitute a cause of action against defendants, or either of them, and fails to allege facts sufficient to entitle plaintiffs to the relief demanded; and (2) the relief sought by plaintiffs is to compel action of defendants in the exercise of official duties which are discretionary and ministerial.

Defendants, also, answering the complaint deny the legal effect of the vote cast on the referendum submitted 5 April, 1949; and, among other things, aver (1) that the ballot, on the referendum as submitted, is not in conformity with the provisions of Chapter 650 of the 1949 Session Laws of North Carolina, which purported only to repeal sub-section 5 (a) and (b) of Section 1 of Chapter 30 of the 1947 Session Laws of North Carolina, and did not provide that the city inaugurate its own retirement system as printed and shown on the ballot, and the submission of it was without legal sanction and unauthorized; and (2) that, though a majority of the votes cast were in approval of the proposal submitted, neither the vote nor the purported amendment has the effect to compel the Board of Aldermen to inaugurate and establish a retirement system.

Defendants also aver that since 1 June, 1948, the effective date of the city's participation in the State Retirement System, the city of New Bern and its employees have paid to it in excess of $30,000, and the

employees of the city eligible for retirement and retired have received and are receiving monthly allowances and benefits as provided under the State system.

Upon the complaint, and petition filed, an order was entered by the resident judge of the judicial district requiring the city of New Bern, through its legal representatives, to appear at certain time and place, and show cause, if any, why the writ of *mandamus* prayed for should not be issued.

And after hearing, the court (1) overruled the demurrer, and (2) denied the application for *mandamus,* but (3) enjoined defendants from making further monthly payments to the Trustees of the State system until a final adjudication in the cause; and the court also made an order for the preservation of funds paid to the State system by the city of New Bern and its employees, and held as a reserve, etc.

Both plaintiffs and defendants except to the judgment as rendered and each appeals to the Supreme Court and assigns error.

Charles L. Abernethy for plaintiffs.

Lee & Hancock for defendants.

WINBORNE, J. *On Plaintiffs' Appeal:* The only assignment of error presented here is based upon exception to the refusal of the trial court to grant a writ of *mandamus* as prayed by the plaintiffs. On the facts alleged and shown, the exception is not well taken.

"*Mandamus* lies only to compel a party to do that which it is his duty to do without it. It confers no new authority. The party seeking the writ must have a clear legal right to demand it, and the party to be coerced must be under a legal obligation to perform the act sought to be enforced." *Person v. Doughton,* 186 N.C. 723, 120 S.E. 481; *White v. Commrs. of Johnston,* 217 N.C. 329, 7 S.E. 2d 702; *Steele v. Cotton Mills,* 231 N.C. 636, 58 S.E. 2d 620; *Hancock v. Bulla, post,* 620.

It is provided by statute in this State that a city or town, as a body politic and corporate, "shall have the powers prescribed by statute, and those necessarily implied by law, and no other." See *Riddle v. Ledbetter,* 216 N.C. 491, 5 S.E. 2d 542. In the *Riddle case, Devin, J.,* for the Court, wrote: "A municipal corporation has only such powers as are granted to it by the General Assembly in its specific charter or by the general laws of the State applicable to all municipal corporations, and the powers granted in the charter will be construed together with those given under the general statutes," citing cases.

In the General Statutes of North Carolina 1943, Chapter 128, Article 3, provision is made for a retirement system for counties, cities and towns, or other eligible employers participating therein. The system is known

as the "North Carolina Local Governmental Employees' Retirement System." It became operative 1 July, 1943. The statute also provides that the governing body of any incorporated city or town by resolution legally adopted and approved by the board of trustees of the system, may elect to have its employees become eligible to participate in the retirement system. G.S. 128-23 (1).

The statute further provides that any eligible employer desiring to participate in the retirement system shall file with the board of trustees an application for participation under the conditions included in this article. In such application the employer shall agree to make the contributions required of participating employers, to deduct from the salaries of the employees who may become members the contribution required of members under this article, and to transmit such contributions to the board of trustees. It is also provided that the employer shall also agree to make the employer's contribution for the participation in the retirement system of all employees entering the service of the employer after its participation begins, who shall become members. G.S. 128-23 (3).

And the statute provides that "the agreement of such employer to contribute on account of its employees shall be irrevocable . . ." G.S. 128-23 (5).

Moreover, the General Assembly of 1945 repealed an original provision, G.S. 128-38, that "any county, city or town participating in the retirement system may by action of its governing body later withdraw from the system, and all contributions of employees and employers shall be returned to them or their representatives." See 1945 Session Laws, Chapter 526, Section 8.

Such was the statute in 1947 when the charter of the city of New Bern was amended by Sub-section 5 (a) and (b) of Section 1 of Chapter 30 of 1947 Session Laws of North Carolina,—the amendment being approved by a majority of the votes cast in the election held on 2 April, 1947.

So, then, when the city of New Bern became a participating member of the State system, 1 June, 1948, it was authorized to do so both by the General Statute, available to all incorporated cities, and by the special amendment to its charter "that the city . . . shall participate in the State retirement system as provided in Section 128-121 through 128-138, inclusive, General Statutes, North Carolina." (The correct Sections are 128-21 and 128-38).

What then is the effect of the provisions of Chapter 650 of 1949 Session Laws? Its sole provision is to repeal "sub-section 5 (a) and (b) of Section 1 of Chapter 30 of the Session Laws of 1947,"—the repeal not to become effective "unless approved by a majority of the votes cast by the qualified voters of the city of New Bern in the election to be held April 5,

1949." If it be conceded that the ballot voted in the election of 5 April, 1949, properly presented the question of the repeal to the electorate, and that the vote cast constitutes an approval of the repeal as provided in the act, the only effect would be to strike down the special authority given to the city, under the 1947 act, and to leave unimpaired and available to the city the provisions of the general statute, Article 3 of Chapter 128 of General Statutes. However, it may be fairly doubted that the form of ballot, provided by the Board of Aldermen of the city of New Bern for the election on 5 April, 1949, presented the question for approval as required by the 1949 act. But be that as it may, it is clear that the General Assembly in the Act of 1949, gave no authority to the city of New Bern to inaugurate its own retirement system. And so far as we have ascertained, the General Assembly has not otherwise granted such authority to the city of New Bern. Hence the Board of Aldermen of the city was without authority to insert in the ballot the clause "the city to inaugurate its own retirement system." Thus the majority vote for the proposal is without binding effect. It amounts to no more than an expression of popular opinion on a subject not legally presented.

On Defendants' Appeal: The first and determinative assignment of error on this appeal challenges the correctness of the order overruling defendants' demurrer to the complaint, on the ground, in the main, that it fails to state facts sufficient to constitute a cause of action. The purpose of this action is to obtain a writ of *mandamus* to require the Board of Aldermen of the city of New Bern to effect a withdrawal of the city from the North Carolina Local Governmental Employees' Retirement System. The facts alleged in the complaint fail to make out a case for such relief. What is said on plaintiffs' appeal, as hereinabove set forth, is determinative of the assignment of error here under consideration. We hold, therefore, that the demurrer of defendants is well taken.

Moreover, for like reason the complaint fails to state a cause of action in support of the matters to which the injunction relates.

On plaintiffs' appeal—Affirmed.

On defendants' appeal—Reversed.

STATE v. JAMES H. NELSON.

(Filed 8 November, 1950.)

Criminal Law §§ 6a, 29d: Rape § 23—

In those offenses in which the want of consent of the person affected is an element, such as assault on a female, entrapment amounting to a consent of the person affected cannot be made the basis of a criminal charge, and therefore in a prosecution for such offense defendant is entitled to introduce evidence tending to show that the prosecuting witness agreed with officers that she would meet defendant and go with him voluntarily for the purpose of prosecuting him for any offense he might commit.

APPEAL by defendant from *Rousseau, J.*, at August Term, 1950, of BUNCOMBE.

Criminal prosecution upon a bill of indictment charging defendant with the crime of assault with intent to rape one Janet Haynes.

Defendant pleaded not guilty.

On the trial in Superior Court the State offered as witnesses Janet Haynes and deputy sheriff J. B. Gibbs.

Janet Haynes testified, substantially, as follows: That in June, 1950, she put an advertisement in a local newspaper for work after school was out; that she received several calls each day after the advertisement appeared; that a man, she later ascertained to be the defendant, called and made arrangement to meet her at the end of the Beaverdam bus line at 11:30 in the daytime; that she met him there at the appointed time and he asked if she were the girl he called concerning the ad that was in the paper,—saying he had called several girls and didn't know whether she was the particular one; that he said he would take her to his house to talk to his wife; that she got into his car, and he took her up the road; that as they were riding along he asked her if she would like to have a date; that she told him "No," and he offered to give her money, but she declined it, and asked him to take her back and let her out and she would catch a bus and go home; that he told her he was not going to hurt her; that he continued to talk about a date, and each time that he made a remark about a date, he would feel her leg; that she asked him not to do that; that he put his hands on her leg several times; that it was against her will for him to put his hand on her, and she told him so; that he did not take her to his home to speak to his wife, but parked beside a little side road leading into the woods, and had taken out his billfold when the officers came up; and that before she went out there in response to his request she conferred with the sheriff's department.

The deputy sheriff testified substantially as follows: That Janet Haynes had talked with him about the advertisement she had inserted

in the newspaper asking for work; that she said she put an ad in the paper and got a call; (defendant objected, and the testimony was admitted for corroboration) that because of what she said, he and other officers, naming them, followed her; that as they walked up to the parked car defendant had in one hand his pocketbook, and the other was on the back of the seat; that defendant in response to inquiry, stated what he was trying to do.

The officer, under cross-examination, testified that he talked with Janet Haynes over the telephone before she went out, and that he did not know whether it is a fact that she put the advertisement in the paper without any idea of working or not. "Objection by the State. Q. If you know? A. I don't know. The Court: I don't know that that would be material or not. If you insist upon your objection I will sustain it. The Solicitor: I wouldn't know unless I had the prosecuting witness here. Objection sustained." Exception No. 12.

The officer then stated, "I talked with her over the telephone before she went out there and I told her to go out and do as she was instructed by him."

Then defendant's counsel asked this question: "Q. You told her that you would be out there and that you would take care of her? Objection by the State sustained." Then the following occurred: "The Court: I don't see how that is material in this case. I will ask the jury not to consider that. That is not impeachment of this witness.

"Mr. Crawford: It isn't impeachment? She said nothing about that. It does not corroborate or contradict her.

"Mr. Crawford: Will you let the jury go out?

"The Court: Not now. I will give you an exception." Exception by defendant—Exception No. 13.

Then the witness testified that "she described the sort of car he described he would have and I followed her and saw her get in this car. I followed it up Beaverdam Road . . . about 100 yards behind it . . . in sight of her at all times . . . traveled . . . on the hard surface approximately one mile and a half . . . he barely pulled off the main road when he parked."

The State rested.

Defendant made motion to be permitted to recall the prosecutrix for further cross-examination. The court in its discretion denied the motion, and stated to counsel for defendant that he could call her as his witness and examine her as an adverse witness. This was not done—and no exception appears.

At close of State's evidence defendant moved for judgment as of nonsuit. Motion denied and defendant excepted. Defendant then rested his

case and renewed his motion at the close of all the evidence. Motion denied and defendant excepted.

In the course of the trial the solicitor for the State said that the State would not ask that defendant be convicted of attempt at rape, but only for assault on a female. And the court at the close of the State's evidence nonsuited the State on assault with intent to commit rape,—leaving one count in the bill of indictment, assault upon a female.

Verdict: Guilty of assault on a female, defendant being a male over eighteen years of age.

Judgment: Confinement in the common jail of Buncombe County for nine months,—assigned to work on the roads under the supervision of State Highway and Public Works Commission.

Defendant appeals therefrom to Supreme Court, and assigns error.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Walter F. Brinkley, Member of the Staff, for the State.

I. C. Crawford and Robert S. Swain for defendant, appellant.

WINBORNE, J. While defendant has brought forward and debated in this Court, by brief and orally, numerous assignments of error based on exceptions taken during the course of the trial, express consideration is required only as to the twelfth and thirteenth.

In this connection, defendant contends that the State had introduced evidence tending to show a conference between Janet Haynes and officer Gibbs before she went out to meet defendant, and indicating in part the subject discussed in the conference. Hence the purpose of the questions was to show that Janet Haynes acted freely and voluntarily; that she knew she was going to meet defendant, and had agreed to meet him for the purpose of getting him to say or do something to her that would constitute a criminal offense; and that in effect she consented to all that was done. In other words, that defendant was lured into putting his hands upon the person of Janet Haynes, that is, entrapped to commit an offense with the view to prosecution therefor.

It is a principle of law that in those crimes in which an essential element is the violation of individual rights of persons, an entrapment must not be under such circumstances as will amount to the consent of the person affected. If want of consent is an element of a crime, an act done with the consent of the person affected cannot be made the basis of a criminal charge. It is said that no offense is committed where a person arranges for a crime to be committed against himself, and aids, encourages or solicits the commission of it. 15 Am. Jur. 23, Criminal Law 334, 336. Annotation on subject "Entrapment to commit crime with view to prosecute therefor," 18 A.L.R. 146 and 86 A.L.R. 263.

In the light of these principles the matters to which the exceptions under consideration relate were material to the defense interposed by defendant. Indeed, the materiality is emphasized by the denial of motion of defendant to be permitted to recall Janet Haynes for further cross-examination, to which no exception was taken. Defendant was entitled to an opportunity to develop his defense.

For error pointed out, there must be a

New trial.

H. A. SNOTHERLY AND J. E. SNOTHERLY v. J. M. JENRETTE, JR., AND J. M. JENRETTE, SR.

(Filed 8 November, 1950.)

1. Pleadings § 20½—

Where there is a misjoinder of parties and causes, the action must be dismissed upon demurrer.

2. Same—

Where several causes of action have been improperly united, the cause will not be dismissed, but the court will sever the causes and divide the action. G.S. 1-132.

3. Pleadings § 19b—Where upon the pleadings only one party is entitled to recover, there can be no misjoinder of parties plaintiff.

Where, in an action instituted by copartners against lessors to recover for wrongful eviction and detention of personal property, breach of lease contract and malicious injury to business and credit standing, the complaint alleges that the original lease was made to the copartners but prior to the acts complained of a new agreement was entered into under which one of the partners bought out the interest of the other and the agreement sued on was made solely with the remaining partner, *held* there is but one party plaintiff to whom relief could be available on the facts alleged, and therefore dismissal on demurrer for misjoinder of parties and causes was improperly entered.

4. Pleadings §§ 2, 19b—

Causes of action to recover for wrongful eviction and detention of personal property, breach of lease contract and malicious injury to business and credit standing, may not be properly joined in the same complaint and the causes should be severed upon demurrer. G.S. 1-132.

5. Pleadings § 19b—

While a complaint will be construed liberally in favor of the pleader, where its allegations are sufficient to state several causes of action, the pleader may not successfully contend that the allegations constituting a misjoinder of causes should be limited to the function of stating transactions connected with the main cause of action and be related to it solely

on the question of damages, but the question of misjoinder must be determined in accordance with the allegations in the pleading.

6. Pleadings § 19c—

Defendant's demurrer on the ground that the complaint failed to state a cause of action *held* properly overruled upon the principle that to be subject to demurrer a pleading must be fatally defective, and that if any portion of it or to any extent it presents facts sufficient to constitute a cause of action, the demurrer should be overruled.

APPEAL by plaintiffs from *Williams, J.*, May Term, 1950, of WAKE. Reversed.

This was an action to recover damages for injuries suffered from defendants' wrongful breach of agreement with respect to the operation of a restaurant business on the premises of the defendants, and for wrongful eviction and detention of certain personal property.

Defendants demurred on the ground of misjoinder of parties and causes of action, and also for failure to state facts sufficient to constitute a cause of action. The demurrer for misjoinder of parties and causes of action was sustained and the action dismissed. Plaintiffs appealed.

F. T. Dupree, Jr., for plaintiffs, appellants.

Lassiter, Leager & Walker for defendants, appellees.

DEVIN, J. The facts alleged in the complaint to which the demurrer was directed were substantially these:

In December 1949 plaintiffs leased from defendants a building near Raleigh for the purpose of engaging in the restaurant business, and installed therein suitable equipment and fixtures. On 1 February, 1950, plaintiffs asked for reduction in rental or deferment of payment, and defendants replied with a proposal that plaintiff J. E. Snotherly should purchase the share and interest of H. A. Snotherly for $100, that defendants would make all delinquent payments on plaintiffs' equipment, and that on payment of the balance due thereon defendants would own two-thirds interest in all the assets and business and J. E. Snotherly one-third, J. E. Snotherly to operate the business and have a drawing account of $25 per week. It was proposed that the net profits should be divided, two-thirds to defendants and one-third to J. E. Snotherly, and that the previous lease of the building to the plaintiffs should be rescinded. Plaintiffs agreed to this proposal, and the defendants installed other equipment, and the restaurant was reopened for business under the new agreement. Two weeks later, on 17 February, 1950, defendants informed J. E. Snotherly that they had decided to change the agreement, and that defendants would assume all bills, pay off unpaid balances on equipment and pay

J. E. Snotherly $25, and let him out. Defendants said, "We are not going any further." J. E. Snotherly protested and declined the proposed change and refused the $25. Thereupon the defendants locked up the place and notified plaintiffs that their property must be removed by noon the following day. Plaintiffs instituted action with ancillary remedy of claim and delivery.

Plaintiffs alleged that defendants had wrongfully breached the agreement entered into, had wrongfully seized plaintiffs' property, and, maliciously designing to deprive plaintiffs of their property and to convert same to their own use, had evicted plaintiffs and negotiated with plaintiffs' creditors in attempt to secure the mortgaged property; and further that as result of defendants' malicious conduct plaintiffs' property was withheld, their business destroyed, their relations with their creditors embarrassed, and their credit, standing and good name in the community damaged. Plaintiffs prayed that they recover $5,000 compensatory damages and $5,000 punitive damages, and that they be declared entitled to the possession of the property described in the affidavit in claim and delivery proceedings.

To this complaint the defendants demurred on the ground of misjoinder of parties and causes of action. The court below sustained the demurrer on this ground and dismissed the action.

It has been uniformly held by this Court that separate and distinct causes of action set up by different plaintiffs or against different defendants may not be incorporated in the same pleading, and that such a misjoinder would require dismissal of the action. *Teague v. Oil Co., ante,* 469, 61 S.E. 2d 345; *Foote v. Davis & Co.,* 230 N.C. 422, 53 S.E. 2d 311; *Southern Mills, Inc. v. Yarn Co.,* 223 N.C. 479, 27 S.E. 2d 289; *Wingler v. Miller,* 221 N.C. 137, 19 S.E. 2d 247; *Holland v. Whittington,* 215 N.C. 330, 1 S.E. 2d 813; *Wilkesboro v. Jordan,* 212 N.C. 197, 193 S.E. 155; *Roberts v. Utilities Mfg. Co.,* 181 N.C. 204, 106 S.E. 664. But where several causes of action have been improperly united, the cause will not be dismissed and the court will sever the causes and divide the action. G.S. 1-132; *Southern Mills Co. v. Yarn Co.,* 223 N.C. 479 (485), 27 S.E. 2d 289; *Gattis v. Kilgo,* 125 N.C. 133, 34 S.E. 246. In the case at bar we note that it is alleged in the complaint that in accord with the defendants' proposal of 3 February, 1950, to which the plaintiffs agreed, the interest of H. A. Snotherly in the assets and business was eliminated. Hence only one of the two parties named as plaintiffs would be entitled to the relief demanded in the causes of action declared against the defendants jointly. While the complaint throughout uses the plural "plaintiffs" the only party aggrieved and to whom relief could be made available was the plaintiff J. E. Snotherly. It follows that the judgment sustaining the demurrer on the ground of misjoinder of parties and causes of action

was improperly entered. See *Campbell v. Power Co.*, 166 N.C. 488, 82 S.E. 842.

The complaint, in setting out the transactions with defendants, contains allegations of facts which would constitute grounds for separate and distinct causes of action, but it is contended by plaintiffs that only a cause of action for damages for wrongful eviction from the premises and wrongful detention of plaintiffs' personal property was attempted to be set up in the complaint, and that the allegations relating to breach of contract are by way of inducement, and that allegations of injury to plaintiffs' credit and standing in the community and malicious injury to plaintiffs' business are set out to show the extent of the injury and damage caused by defendants' wrongful conduct. However, the plaintiff may not now limit the purpose and legal extent of the allegations of fact which have been incorporated in the complaint.

While the rule in this jurisdiction requires that the allegations of the complaint be liberally construed and "every reasonable intendment and presumption must be made in favor of the pleader" (*Blackmore v. Winders*, 144 N.C. 212, 56 S.E. 874), it is also required that there be substantial accuracy in the averments of the complaint, with such clearness and conciseness of statement that the real issues in the controversy may be evolved. True, the plaintiff is entitled to unite in same complaint several causes of action where they all arise out of the same transaction or connected with same subject of action (G.S. 1-123), but we think there are in the complaint here allegations of fact which would give rise to separate and distinct causes of action, and that defendants would be entitled to the allowance of motion for severance under such terms as the court, in accordance with the statute G.S. 1-132, may properly order.

The suggestion that H. A. Snotherly has not been paid for his interest in the assets and business, and, hence, has a cause of action against J. E. Snotherly or the defendants therefor is not borne out by the allegations of the complaint.

The defendants' demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action was not decided by the court below, but the demurrer is in the record and was argued here. Adhering to the rule that a complaint must be fatally defective before it will be rejected as insufficient, and that if in any portion of it or to any extent it presents facts sufficient to constitute a cause of action the pleading will stand, we think the demurrer on this ground must be overruled. *Davis v. Rhodes*, 231 N.C. 71, 56 S.E. 2d 43; *Winston v. Lumber Co.*, 227 N.C. 339, 42 S.E. 2d 218; *Sandlin v. Yancey*, 224 N.C. 519, 31 S.E. 2d 532; *Blackmore v. Winders, supra.*

The judgment sustaining the demurrer and dismissing the action is Reversed.

GERALD RUFUS WILLIAMS v. ROBERT HUBERT KIRKMAN.

(Filed 8 November, 1950.)

1. Automobiles §§ 15, 18h (3)—

Plaintiff's evidence to the effect that defendant, who was traveling on a hard surface highway, approached an intersection with a dirt road at excessive speed and collided with the bicycle ridden by plaintiff as it entered the intersection from the dirt road, *is held* not to establish contributory negligence as a matter of law on the part of plaintiff and nonsuit on that ground was properly denied, notwithstanding conflicting evidence introduced by defendant or even contradictions and discrepancies in plaintiff's own evidence.

2. Negligence § 19c—

Plaintiff's own evidence must show contributory negligence without opposing inferences in order to justify nonsuit on this ground, since defendant's evidence upon the issue is not to be considered in passing upon the question and contradictions and discrepancies in plaintiff's own evidence do not justify nonsuit.

3. Trial § 22c—

Discrepancies or contradictions in plaintiff's own evidence do not justify nonsuit.

APPEAL by defendant from *Bobbitt, J.*, March Term, 1950, of RANDOLPH.

Civil action to recover damages for personal injuries sustained in a collision between plaintiff's bicycle and defendant's automobile allegedly caused by the negligence of the defendant.

The transcript reveals that plaintiff and defendant are both residents of Randolph County. In the late afternoon of 11 May, 1949, the plaintiff, a boy 17 years of age, was delivering papers with his bicycle (apparently on the outskirts of High Point, though this is not clear from the record). He was riding on a dirt road which intersects with the paved highway known as the "Old Thomasville Road," and collided with the defendant's 1946 Mercury Coupe within this intersection.

The defendant had been to High Point and was traveling southward on the "Old Thomasville Road" or Highway, presumably going to his home in Randolph County, and was "making not less than 70" miles an hour according to one of plaintiff's witnesses who observed the car 250 feet north of the intersection. She further stated, "almost the second I saw the car I heard the brakes begin to screech." There is also evidence that 350 yards north of the intersection the defendant was "driving very fast."

The skid marks on the hard surface indicated that defendant's car was from 2½ to 3 feet over the center of the highway "about 50 to 70 feet from where he hit the boy."

The defendant, on the other hand, testified that he was traveling between 40 and 45 miles an hour; that there was a lot of shrubbery on the left side of the road; that he saw the top of the boy's head when the boy was about 50 feet from the intersection, "and saw that he was running fast. . . . I was then about 50 feet back from this road . . . or 75 feet further up. . . . I slowed straight to the ditch, just as he came out of the road into the side of the car. . . . He came in too fast. . . . His front wheel came straight into my front wheel on the left side."

The jury answered the issue of negligence and contributory negligence in plaintiff's favor and awarded him damages in the sum of $1,000.00.

From judgment on the verdict, the defendant appeals, assigning error in the refusal of the court to dismiss the action as in case of nonsuit.

Ottway Burton for plaintiff, appellee.

Spence, Smith & Walker for defendant, appellant.

STACY, C. J. The question for decision is whether the evidence making for plaintiff's cause survives the demurrer, carries the case to the jury and suffices to support the verdict. The trial court answered in the affirmative and we approve.

The evidence readily permits an inference of excessive speed and reckless driving on the part of the defendant. This was in violation of law and calls for a jury verdict, unless the plaintiff's own evidence establishes his contributory negligence as a matter of law. The trial court was of opinion that it did not and that the issue was one for the twelve. We agree. *Bailey v. Michael,* 231 N.C. 404, 57 S.E. 2d 372; *Gladden v. Setzer,* 230 N.C. 269, 52 S.E. 2d 804; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307; *Hancock v. Wilson,* 211 N.C. 129, 189 S.E. 631.

There is evidence to the effect that the defendant approached the point of collision at a negligent rate of speed; that he saw the plaintiff peddling his bicycle towards the intersection at a fast pace when he, the plaintiff, was yet 50 feet away, and that the defendant by reason of his own speed—he then being from 50 to 75 feet above the intersection—was unable to avoid the collision, albeit he applied his brakes immediately upon noticing the plaintiff. "When I saw him," the defendant says, "I hit my brakes because he was coming fast." And yet the defendant says he was traveling only 40 to 45 miles an hour. How fast was he going? The witnesses do not agree. The jury alone may answer.

Conceding the sufficiency of defendant's evidence to support a finding of contributory negligence on the part of the plaintiff, still this is the defendant's evidence to be considered by the jury on the issue, but not by the court on a motion for judgment as in case of nonsuit. *Bailey v. Michael, supra; Barlow v. Bus Line,* 229 N.C. 382, 49 S.E. 2d 793;

Phillips v. Nessmith, 226 N.C. 174, 37 S.E. 2d 178; *Lincoln v. R. R.,* 207 N.C. 787, 178 S.E. 601.

It is only when the plaintiff proves himself out of court that a judgment of nonsuit may be entered on the issue of contributory negligence. *Bailey v. Michael, supra; Howard v. Bingham,* 231 N.C. 420, 57 S.E. 2d 401. When the plaintiff goes upon the witness-stand he necessarily subjects himself to cross-examination, and here is where his admissions may be fatal to his case. But even then, mere discrepancies or contradictions in his evidence will not take the case from the jury. *Bailey v. Michael, supra; Emery v. Ins. Co.,* 228 N.C. 532, 46 S.E. 2d 309; *Shell v. Roseman,* 155 N.C. 90, 71 S.E. 86. He must show or reveal, without opposing inference, that he was contributorily negligent. Speaking to the point in *Battle v. Cleave,* 179 N.C. 112, 101 S.E. 555, *Hoke, J.,* with his usual clarity and accuracy of statement, put it this way: "The burden of showing contributory negligence, however, is on the defendant, and the motion for nonsuit may never be allowed on such an issue where the controlling and pertinent facts are in dispute, nor where opposing inferences are permissible from plaintiff's proof, nor where it is necessary in support of the motion to rely, in whole or in part, on evidence offered for the defense." *Bailey v. Michael,* 231 N.C. 404, 57 S.E. 2d 372; *Templeton v. Kelley,* 215 N.C. 577, 2 S.E. 2d 696; *Ferguson v. Asheville,* 213 N.C. 569, 197 S.E. 146.

This is the only question presented by the appeal. As the ruling below is approved, the verdict and judgment will be upheld.

No error.

B. C. HOWARD v. W. C. BELL, ET AL.

(Filed 8 November, 1950.)

1. Automobiles § 18h (2)—Whether driver should have anticipated that injury might result from driving at high speed over loose stone on highway held for jury.

Plaintiff's evidence tended to show that defendant's truck was being operated at excessive speed on a sand-clay-gravel road upon which crushed stone had been newly spread, with two lanes of travel worn therein and a slight ridge of gravel and crushed stone left by traffic in the center, and that as defendant's truck swerved to its right to pass plaintiff's approaching car, the dual left rear wheel of the truck passed over the center ridge of gravel and threw small stones which broke plaintiff's windshield and struck him, inflicting serious injury. On cross-examination the truck driver admitted that such "loose rock is damaging to that speed of 50 miles an hour." *Held:* The evidence is sufficient to be submitted to the jury upon the issue of actionable negligence notwithstanding defendant's

evidence in contradiction as to the speed of the truck and the condition of the road.

2. Trial § 22b—

Defendant's evidence in conflict with that of plaintiff is not to be considered on motion to nonsuit.

3. Negligence § 9—

It is not required that the exact injury be foreseeable, it being sufficient if plaintiff could have reasonably foreseen that some likely injury or injurious consequences might result under the circumstances.

APPEAL by defendants from *Gwyn, J.*, August Term, 1950, of IREDELL.

Civil action to recover damages for personal injuries alleged to have been caused by the negligence of the defendants.

The transcript reveals that in the early afternoon of 4 April, 1949, the plaintiff, while driving his automobile eastward on the Statesville-Amity Hill highway, met the defendants' truck near the Experimental Farm in Iredell County. When the plaintiff first saw the truck it was coming over the crest of a hill in the middle of the road at a "terrific rate of speed"—from 50 to 60 miles an hour. Plaintiff was driving slowly on his right side and when the truck reached a point about 200 feet away it suddenly swerved to its right in order to pass the plaintiff. This caused the left wheels of the truck to cross a little ridge of loose rock and gravel which the traffic had caused to form in the center of the road. When the left dual wheels crossed this ridge of loose rock and gravel they picked up one or more stones and hurled them against plaintiff's windshield. The windshield was broken, plaintiff's face and hands were cut and bruised and one of his eyes was put out.

The road was a standard all-weather sand-clay-gravel top under the control and maintenance of the State Highway & Public Work Commission. Only recently, new gravel and crushed stone had been spread over the surface of the road. Long enough, however, for two lanes of travel to be worn in the road, with a slight ridge of loose gravel and crushed stone left between them. This ridge was plainly visible to all drivers.

The defendants' truck was a dump-truck with no fenders over the rear dual wheels. The plaintiff says he first saw the flying rock as they left the wheels of the truck and that he had no time to dodge them or to get out of their way.

The jury answered the issue of negligence and contributory negligence in plaintiff's favor and awarded him damages in the sum of $5,000.00.

The defendants appeal, relying principally upon their exception to the refusal of the court to grant their motion for judgment as in case of nonsuit.

Lewis, Lewis & Hedrick and Hugh G. Mitchell for plaintiff, appellee.
Land, Sowers & Avery and Z. V. Turlington for defendants, appellants.

STACY, C. J. The question for decision is whether the plaintiff's case survives the challenge interposed by demurrer to the evidence. The trial court answered in the affirmative, and we are inclined to uphold the ruling; conceding at once, however, that much could be written in support of the opposite view. It is clearly a border-line case.

The one circumstance which seems to favor recovery is the speed at which the defendants' truck was being driven in the obvious light of the condition of the road. The driver should have known and realized, in the exercise of due care, that his uncovered wheels, spinning at a high rate of revolution, were liable to pick up some of the loose rocks and hurl them in any direction. He was not entitled to use the road as if he alone were on it. *Sic utere tuo,* etc., applies on the highway as well as elsewhere. It is not only good law but also good morals.

Speaking to a similar question in *Teche Lines v. Bateman,* 162 Miss. 404, 139 So. 159, *Etheridge, P. J.,* observed: "It is well known that cars proceeding at a high rate of speed on gravel roads throw gravel by reason of the force of the car striking the gravel, or by reason of the suction of the car; and it is well known that such flying gravel, or small rocks are calculated to inflict injuries. The greater the rate of speed the more violent the hurling of such gravel or rock becomes."

It is true the driver of defendants' truck disputes the plaintiff's testimony in respect of the condition of the road and the rate of his speed, but this is not to be considered on motion for nonsuit. *Williams v. Kirkman, ante,* 609; *Carson v. Doggett,* 231 N.C. 629. We take the plaintiff's evidence as true in testing the sufficiency of his case. *Graham v. Gas Co.,* 231 N.C. 680. "On motion to nonsuit, plaintiff's evidence will be taken as true and he will be given advantage of every fair and legitimate inference which it raises." 7th Syllabus, *Higdon v. Jaffa,* 231 N.C. 242, 56 S.E. 2d 661.

On cross-examination, the driver of the truck did admit that he saw some loose rocks and gravel on the road, "not a great amount," and that "this loose rock is damaging to that speed of 50 miles an hour," *i.e.,* he means to say, and did say, as we understand his testimony, that he knew some damage was likely to result from running over the loose rock at such speed. This, then, is an admission coming from the defendants which is favorable to the plaintiff.

Two cases in our Reports need to be considered, *Stewart v. R. R.,* 202 N.C. 288, 162 S.E. 547, and *Gant v. Gant,* 197 N.C. 164, 148 S.E. 34. The plaintiff relies on one; the defendants on the other.

In the *Stewart case,* the defendant railroad was held liable for maintaining a negligent road crossing, in that loose rocks and stones were placed or allowed to remain on the crossing, which were thrown or hurled against the plaintiff by a rapidly passing truck. The case supports the plaintiff obliquely, but it is not directly in point. There, the action was against the builder and keeper of the crossing. Here, the suit is against the owner of the offending truck.

The *Gant case,* cited by the defendants, is more nearly in point, but not quite controlling. There, a car was stuck in snow and ice. Boards were placed in front and under the wheels to give them gripping or purchasing power in pulling the car out. One of the spinning wheels threw its board backward and against the plaintiff's leg, injuring it. Recovery was denied on the ground of a non-foreseeable result or accident. Accordant: *Warner v. Lazarus,* 229 N.C. 27, 47 S.E. 2d 496; *Brady v. R. R.,* 222 N.C. 367, 23 S.E. 2d 334, 320 U.S. 476, 88 L. Ed. 239; 38 Am. Jur. 712.

We think the testimony of the driver of the truck brings the case within a foreseeable injurious result. The exact injury need not have been foreseen. It is enough if some likely injury or injurious consequence could have been foreseen, or should have been anticipated, in the exercise of reasonable prevision. *McIntyre v. Elevator Co.,* 230 N.C. 539, 54 S.E. 2d 45.

The verdict and judgment will be upheld.

No error.

GERALDINE C. CARTER v. RONALD W. CARTER.

(Filed 8 November, 1950.)

1. Appeal and Error § 40d—

Where the testimony offered at the hearing is not brought forward in the record, it will be presumed that the findings of fact are supported by competent evidence.

2. Divorce and Alimony § 17—

G.S. 49-12 and G.S. 50-13 must be construed *in pari materia,* and therefore where the reputed father of a child marries the child's mother after its birth, such child is deemed legitimate just as if it had been born in lawful wedlock, G.S. 49-12, and such child is a minor child of the marriage within the purview of G.S. 50-13, and the father may be required to furnish support for such child upon motion made either before or after decree of divorce.

3. Statutes § 5a—

The General Assembly may define a word used in a statute and give it new or additional meaning not strictly within its ordinary definition, which meaning the courts must follow to effectuate the intent and purpose of the legislative act.

4. Divorce and Alimony § 18—

Whether a child is a "minor child of the marriage" within the purview of G.S. 50-13 may be a question of fact rather than an issue of fact, but even so, the trial court may call a jury to its aid to hear the evidence and determine the question.

APPEAL by defendant from *Williams, J.*, March Term, 1950, LENOIR. Affirmed.

Divorce action, heard on motion for allowance for the education and maintenance of the minor child of the marriage as provided by G.S. 50-13.

The child in question was born to plaintiff shortly before her marriage to defendant. She and defendant were married 4 November 1946, pending an action against defendant for the support of said child in which he was charged with her paternity. Shortly after the marriage they separated. After two years had elapsed, plaintiff instituted this action for divorce under G.S. 50-6. Since that time defendant had contributed nothing toward the support of said child. A final decree of divorce was entered at the January Term, 1950, Lenoir Superior Court.

On 10 February 1950, plaintiff entered a motion in the cause for an order requiring defendant to pay plaintiff a reasonable sum at stated intervals "for the tuition and maintenance of the said minor child of plaintiff and defendant." The defendant filed answer to the motion in which he alleges the birth of said child to plaintiff before she and he intermarried and denies that he is the father of said child or that it is a child "born to the marriage between him and . . . plaintiff."

The motion came on for hearing out of the county, at Kenansville, N. C., by consent. The court below, "after hearing the evidence of the respective parties and the arguments of counsel," found the facts, including the finding that defendant "was the putative father of said child." It thereupon transferred the motion to the civil issue docket to the end that defendant may have a jury trial on the question of paternity, and ordered that the defendant, pending hearing before a jury, pay $30 per month for the support and maintenance of said child and certain attorneys' fees. Defendant excepted and appealed.

Sutton & Greene for plaintiff appellee.

Jones, Reed & Griffin for defendant appellant.

BARNHILL, J. The testimony offered at the hearing is not brought forward in the record. Therefore, it must be presumed that the findings of fact are supported by competent evidence. *Hughes v. Oliver,* 228 N.C. 680, 47 S.E. 2d 6; *Roach v. Pritchett,* 228 N.C. 747, 47 S.E. 2d 20; *Radeker v. Royal Pines Park, Inc.,* 207 N.C. 209, 176 S.E. 285.

Upon the facts found, the one question presented for decision is this: Is the child born to plaintiff and defendant prior to their intermarriage a child of the marriage within the meaning of G.S. 50-13? We are constrained to answer in the affirmative.

G.S. 49-12 provides that when the mother of an illegitimate child and the reputed father of such child shall intermarry at any time after the birth of such child, the child "shall in all respects after such intermarriage be deemed and held to be legitimate and entitled to all the rights in and to the estate, real and personal, of its father and mother that it would have had had it been born in lawful wedlock."

Under G.S. 50-13, the judge may enter an order in a divorce action, either before or after final judgment therein, requiring the father to furnish support for the education and maintenance of the "minor children of the marriage" which is the subject matter of the action. *Winfield v. Winfield,* 228 N.C. 256, 45 S.E. 2d 259.

In part these two sections of our statutes regulate the family circle and define the rights and responsibilities of members of that circle. They must therefore be construed *in pari materia.*

From and after the marriage of the mother and the reputed father of an illegitimate child, such child shall be deemed and held to be legitimate just as if it had been born in lawful wedlock. In a divorce action the father of a child of the marriage may be required to support such child. In brief, these are the pertinent provisions of the two sections.

When used in reference to a child, "legitimate" means "lawfully begotten," "born in wedlock," "having or involving full filial rights and obligations by birth." Webster's New Int. Dic., 2d Ed.

G.S. 49-12 gives to the word "legitimate" a new or additional meaning not strictly within its ordinary definition. It is within the legislative power to define the sense in which words are employed. For it to do so is not an invasion of the province of the courts. 50 A.J. 253. Instead, we adopt the meaning impressed upon words by legislative enactment, for we are bound to follow the intent and purpose of its acts.

So then, in determining the status and rights of the child of plaintiff and defendant under the circumstances here existing, we are enjoined by the Legislature to hold that it is legitimate, that is, that it was lawfully begotten, was born in wedlock, and possesses full filial rights and obligations by birth. This being true, we must conclude that it is in law a minor child of the marriage of the plaintiff and defendant. *Stewart*

v. Stewart, 195 N.C. 476, 142 S.E. 577; *In re Estate of Wallace,* 197 N.C. 334, 148 S.E. 456. If it was lawfully begotten and born in wedlock —as, under the statute, we must conclude—it is a child of the marriage within the meaning of G.S. 50-13.

The use of the word "reputed" rather than "putative" in G.S. 49-12 "was intended merely to dispense with absolute proof of paternity, so that, if the child is 'regarded,' 'deemed,' 'considered,' or 'held in thought' by the parents themselves as their child, either before or after marriage, it is legitimate." *Bowman v. Howard,* 182 N.C. 662, 110 S.E. 98.

On the hearing of a motion of this kind, whether the child is "a minor child of the marriage" is perhaps a question of fact rather than an issue of fact. Even so, the trial judge had the authority to call a jury to his aid to hear the evidence and determine the question at issue. *Barker v. Humphrey,* 218 N.C. 389, 11 S.E. 2d 280. It was to this end that the motion was transferred to the civil issue docket. The allowance of support for the child, pending final hearing, was not improper.

The judgment entered in the court below is

Affirmed.

PANDORA HOOVER v. R. C. CROTTS AND WIFE, SARAH CROTTS, AND THELMA W. THOMPSON AND HUSBAND, M. R. THOMPSON.

(Filed 8 November, 1950.)

1. Pleadings § 28—

Motion for judgment on the pleadings is properly denied when the material facts are not admitted, *a fortiari* when the answer raises issues of fact.

2. Appeal and Error § 6c (2)—

Exception must be made to a particular finding of fact, and a broadside exception to the findings of fact and the conclusions of law based thereon, is insufficient.

3. Same—

An exception to the judgment presents the single question whether the facts found and admitted are sufficient to support the judgment, and does not bring up for review the findings of fact or the evidence upon which they are based.

4. Ejectment § 5—

Where, in an action in ejectment against a tenant for nonpayment of rent, the answer denies default and pleads tender of the rent under G.S. 42-33, judgment on the pleadings in plaintiff's favor is properly denied, and the term not having expired, the tender of rent in arrears before judgment would bar the cause.

5. Landlord and Tenant § 23—

The lease in suit was for a period of five years with the right to renew for an additional five year period, the rent being payable the first of each month in advance. The term began on the fourteenth of the month. On the first of that month during which the first five year term ended, notice to vacate on the tenth of the next succeeding month was served on lessees. *Held:* The notice is insufficient.

APPEAL by plaintiff from *Sharp, Special Judge,* May Special Term, 1950, RANDOLPH. Affirmed.

Civil action in ejectment.

On 14 June 1945, plaintiff leased the *locus in quo* to defendant for a term of five years, with the right to renew for an additional five-year period, at the rental of $300 per year, payable monthly on the first day of each month. It had become the custom for plaintiff to call by the premises on the first or second of each month to receive her rent. On 1 June 1950, she did not call for the monthly rental due on that day and it was not paid on that day. Plaintiff immediately served notice on defendants to vacate on or before 10 July, 1950. Defendants, on 2 June 1950, after service of said notice, tendered the rent due, which plaintiff declined to accept.

The parties having waived trial by jury and agreed that the court should hear the evidence, find the facts, and render judgment thereon, the court below found the facts and rendered judgment for defendants.

At the beginning and at the conclusion of the hearing, the plaintiff moved for judgment on the pleadings. The motion was denied and plaintiff excepted and appealed from the judgment entered.

Miller & Moser for plaintiff appellant.

Spence, Smith & Walker for defendant appellees.

BARNHILL, J. The exception to the refusal of the court to render judgment on the pleadings is untenable. Defendants denied default in the payment of rent and plead tender thereof under G.S. 42-33. Thus it appears that all material facts are not admitted. Instead, the answer raises issues of fact for the jury. There can be no judgment for plaintiff on the pleadings unless the facts entitling plaintiff to relief are admitted, and no valid defense or plea in avoidance is asserted in the answer.

The plaintiff does not except to any particular finding of fact. She merely enters a broadside exception "to the findings of fact and the conclusions of law based thereon." Such exception presents nothing for review.

The exception to the judgment entered presents the single question whether the facts found and admitted are sufficient to support the judg-

ment. It is insufficient to bring up for review the findings of fact or the evidence upon which they are based. *Roach v. Pritchett,* 228 N.C. 747, 47 S.E. 2d 20; *Russos v. Bailey,* 228 N.C. 783, 47 S.E. 2d 22; *Rader v. Coach Co.,* 225 N.C. 537, 35 S.E. 2d 609.

This is an action brought to recover possession of demised premises before the expiration of the term, upon allegation of a forfeiture for the nonpayment of rent. Hence a tender of the rent in arrears before judgment barred further proceedings in the cause. G.S. 42-33. On this point plaintiff cites and relies on *Midimis v. Murrell,* 189 N.C. 740, 128 S.E. 150, but that case is clearly distinguishable and does not control decision here.

The notice to vacate served on defendants does not appear of record. If it is in conformity with the allegation in the complaint, it is insufficient.

In short, the facts found by the court below sustain the judgment entered. It must therefore be

Affirmed.

STATE v. LIZZIE WIGGINS.

(Filed 8 November, 1950.)

1. Homicide § 8a—Evidence of culpable negligence held sufficient.

The evidence tended to show that a dog belonging to deceased and one belonging to defendant were fighting, that after unsuccessful efforts by both of them to part the dogs, defendant procured a shotgun from her house, and fired, as deceased was stooping over the dogs trying to part them, inflicting mortal injury on deceased and injuring four other persons standing nearby. There was no evidence of malice, and defendant contended she fired to stop the dog fight and that deceased's death was the result of an accident. *Held:* The evidence was sufficient to be submitted to the jury on the question of defendant's culpable negligence and sustain verdict of guilty of involuntary manslaughter.

2. Criminal Law § 79—

Exceptions not presented in the brief are deemed abandoned. Rule 28.

APPEAL by defendant from *Bone, J.,* August Term, 1950, of LENOIR. No error.

The defendant was charged in the bill with manslaughter.

The State's evidence tended to show that in the late afternoon of 9 July a dog belonging to the deceased Eugene Williams was fighting with a dog belonging to the defendant in the street in front of defendant's home in the City of Kinston. The dog of the deceased was larger than

defendant's dog. Both the deceased and the defendant tried without success to separate the dogs. Spectators gathered. Sticks were used, and the defendant poured water on the dogs in the effort to end the combat, all to no avail. Defendant then went in her house and came out with a shotgun. The deceased was at the moment stooping over with his hands on his dog trying to pull him away, when the defendant fired from a distance of 15 feet, inflicting a wound on the deceased from which he shortly thereafter died. Four other persons were struck by the shot.

There was no evidence of malice or ill-will on the part of the defendant, and she contended she was shooting at the dog to stop the fight and the death of deceased resulted from a wound accidentally inflicted.

The jury returned verdict of guilty of manslaughter, and from judgment imposing sentence defendant appealed.

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

Jones, Reed & Griffin for defendant, appellant.

DEVIN, J. The court submitted the case to the jury only on the theory of culpable negligence proximately resulting in the death of deceased. There was sufficient evidence to warrant finding the defendant guilty of involuntary manslaughter. *S. v. Williams,* 231 N.C. 214, 56 S.E. 2d 574; *S. v. Blankenship,* 229 N.C. 589, 50 S.E. 2d 724; *S. v. Scoggins,* 225 N.C. 71, 33 S.E. 2d 473; *S. v. Rountree,* 181 N.C. 535, 106 S.E. 669. The court stated the evidence, the contentions of the parties and the law arising thereon to the jury in a charge free from error.

The defendant noted exception to certain portions of the charge, but in her brief has presented to us only the question of nonsuit on the ground that the evidence showed nothing more than death by accident or misadventure. Hence the other exceptions are deemed abandoned. Rule 28. The motion for judgment of nonsuit was properly denied. In the trial we find

No error.

HOMER HANCOCK v. T. F. BULLA, ALBERT TAYLOR, AND E. T. WALTON.

(Filed 8 November, 1950.)

1. Mandamus § 1—

The party seeking *mandamus* must show a clear legal right to demand it, and the party to be coerced must be under positive legal obligation to perform the act sought to be required.

HANCOCK *v.* BULLA.

2. Elections § 9—

Mandamus to compel the county board of elections to review the sufficiency of a petition for an election on the question of establishing liquor control stores in the county, *held* properly denied upon the facts found without exception.

APPEAL by plaintiff from *Gwyn, J.*, September Term, 1950, of RANDOLPH. Affirmed.

Ottway Burton for plaintiff, appellant.
John G. Prevette for defendants, appellees.

DEVIN, J. Plaintiff, a citizen and voter of Randolph County, instituted this action to require the members of the County Board of Elections to review the sufficiency of a petition heretofore filed for an election on the question of establishing liquor control stores in the County.

The petition had been denied 19 January, 1950, by the County Board of Elections as then constituted, on the ground that an insufficient number of qualified voters had signed the petition. The total number of qualified voters in the county was 15,824, and of the signers of the petition only 1,414 were found to have been qualified, as required by the statute G.S. 18-61. The statute requires that the petition be "signed by at least fifteen per centum of the registered voters in said County that voted in the last election for governor."

The ground of plaintiff's suit is that the Board of Elections in checking over a total of 2,593 names appearing on the petition employed a person not a member of the Board to check the books and records to ascertain the number qualified under the statute, but the court found as a fact that this checking was done in the presence and under the supervision of the then Chairman of the Board of Elections.

Subsequent to the action denying the petition, in March, 1950, there was a change in the personnel of the Board and two new members were installed in place of two former members. The reconstituted Board refused to take any further action in the matter.

No evidence was offered by plaintiff other than his complaint. Defendants offered the affidavit of the former Chairman of the Board and the minutes of the Board.

The court, after finding the facts to which there was no exception, held that plaintiff had failed to establish a clear legal right to have *mandamus* issue, and denied plaintiff's prayer and petition therefor.

It is well settled by numerous decisions of this Court that a party seeking writ of *mandamus* must have a clear legal right to demand it, and the party to be coerced must be under positive legal obligation to

perform the act sought to be required. *Steele v. Cotton Mills,* 231 N.C. 636, 58 S.E. 2d 620; *Ingle v. Board of Elections,* 226 N.C. 454, 38 S.E. 2d 566; *White v. Commissioners,* 217 N.C. 329, 7 S.E. 2d 825; *Mears v. Board of Education,* 214 N.C. 89, 197 S.E. 752; *Person v. Doughton,* 186 N.C. 723, 120 S.E. 481.

Judging by this standard, we think the court below has ruled correctly, and accordingly the judgment is

Affirmed.

STATE v. ERNEST LILES.

(Filed 8 November, 1950.)

Criminal Law § 80b (5)—

Where the case on appeal contains no exceptions or assignments of error, motion to dismiss for failure to comply with Rules of Practice in the Supreme Court will be allowed, but where defendant has been convicted of a capital felony this will be done only after examination of the record fails to disclose error.

APPEAL by defendant from *Hatch, Special Judge,* at April Term, 1950, of FRANKLIN.

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

H. C. Kearney for defendant.

PER CURIAM. The defendant was convicted of rape without recommendation of mercy. Sentence of death by asphyxiation was imposed. Defendant gave notice of appeal. The case on appeal was docketed, but it contains no exceptions or assignments of error.

The Attorney-General moves to dismiss the appeal for failure to comply with Rules 19 (3), 21, 27½ and 28 of Rules of Practice in the Supreme Court, 221 N.C. 546. This motion will be allowed, but, according to the usual custom of the Court in capital cases, we have examined the record to see if any error appears thereon, and we find none.

Judgment affirmed.

Appeal dismissed.

H. O. HOLDERFIELD v. RUMMAGE BROTHERS TRUCKING COMPANY.

(Filed 22 November, 1950.)

1. Negligence § 1—

Negligence is the failure to perform some legal duty imposed by statute or the failure to observe the duty arising out of the conditions or the relationship between the parties to exercise due care and caution.

2. Negligence § 5—

The violation of a statute designed and intended to protect life or property renders the tort-feasor liable for all damages naturally and proximately resulting therefrom regardless of whether he could have foreseen such injurious result, but otherwise foreseeability is an element of proximate cause.

3. Negligence § 11—

Contributory negligence is the breach of duty of the plaintiff to exercise due care for his own safety in respect of the occurrence about which he complains, which bars recovery if one of the proximate contributing causes of his injury, foreseeability and proximate cause being essential elements of both negligence and contributory negligence.

4. Master and Servant § 20: Negligence § 11—

Where an employee has a choice of two places in which to do his work, one safe and the other dangerous, his duty to select the safe place is a duty owed by him to his employer, but he owes no such duty to third persons.

5. Automobiles § 18c—

Where a railroad employee, notwithstanding he might have chosen a safe place, chooses to ride on the pilot platform of the engine, he is under duty to anticipate injuries which might naturally and proximately result therefrom, such as the risk of being thrown from the platform by the sudden starting, stopping, or other negligent operation of the train, but he is not under duty to anticipate that a motorist will negligently operate his vehicle so as to collide with the train at a grade crossing and cause him injury, but to the contrary is entitled to assume that motorists approaching a grade crossing will exercise due care and obey the rules of the road.

6. Automobiles § 18h (3)—

Plaintiff, a railroad employee, chose to ride on the pilot platform of the engine instead of a safe place afforded him by his employer. Defendant's employee collided with the engine at a grade crossing as the result of his negligent operation of defendant's truck. *Held:* Whether plaintiff's selection of the position of peril on the engine was one of the proximate causes of his injury or whether his position simply afforded an opportunity for defendant's negligence to cause the injury, but which was not in itself a contributing cause, is a question for the jury, and the granting of nonsuit on the ground of contributory negligence was error.

APPEAL by plaintiff from *Williams, J.*, May Term, 1950, WAKE. Reversed.

Civil action in tort to recover damages proximately resulting from the alleged negligence of defendant's employee.

Plaintiff, at the time of his injury, was head brakeman on a Norfolk Southern local freight train being operated on a feeder or branch road from Candor to Ellerbe, N. C. He was riding on the pilot platform of the engine. The defendant's truck approached the railroad at a grade crossing, traveling at a high rate of speed. The driver first tried to turn his truck to the right, down a road that parallels the railroad. Because of his speed he was unable to make the turn. "He whipped it right back" to his left and drove on the railroad track immediately in front of the oncoming train. As a result, the engine of the train collided with the truck-trailer. Plaintiff was thrown "up underneath the smokebox" of the engine and received serious personal injuries.

The pilot platform is in front of the boiler or smokebox of the engine at the top and just back of the cowcatcher. It extends across the front of the engine and is wide enough to permit plaintiff to sit down with his legs extended without having his feet hang over the edge. Plaintiff was sitting "directly in the middle, directly in the center of the engine, in the center of the platform."

Plaintiff could have taken a seat in the caboose or the cab of the engine. It was at that time customary for brakemen on local trains operated on branch lines to ride on the pilot platform if they so desired. Plaintiff knew it was more dangerous to ride on the pilot platform than it was to ride in the cab or caboose.

The court below, at the conclusion of plaintiff's evidence in chief, sustained the motion of defendant for judgment as in case of nonsuit and signed judgment of dismissal. Plaintiff excepted and appealed.

Douglass & McMillan for plaintiff appellant.

Wm. G. Pittman, J. Elsie Webb, and Smith, Leach & Anderson for defendant appellee.

BARNHILL, J. There is ample evidence of the negligent operation of the truck to require the submission of appropriate issues to the jury. We may assume, therefore, that the court below concluded that the plaintiff was guilty of contributory negligence as a matter of law. It is upon this theory the cause is debated here.

Ordinarily, in actions founded on negligence, the mutual obligations of the parties are so apparent discussion thereof is not required. But here the "duty" feature of negligence is determinative.

Negligence is a failure to perform some duty imposed by law. It may be the breach of the duty imposed by some statute designed and intended to protect life or property. In that event the tort-feasor is liable for all damages which may naturally and proximately result from his wrong without regard to whether he could have foreseen such injurious result.

"Then we have the general duty of using due care and caution." *Drum v. Miller,* 135 N.C. 204. The existing conditions or the relation of the parties creates this duty, the breach of which may give rise to a cause of action for damages. But there must be some circumstance which imposes the duty such as the relationship of master and servant, owner and invitee, or the contemporaneous use of the same highway by two or more persons. The surrounding circumstances or the relation of the parties must create the duty before there can be any breach thereof. *Drum v. Miller, supra.*

Actionable negligence is the breach of the duty of the party sought to be charged to exercise ordinary care for the safety of the plaintiff and others similarly situated, which proximately causes the injury alleged. Contributory negligence is the breach of the duty of the plaintiff to exercise due care for his own safety in respect of the occurrence about which he complains, and if his failure to exercise due care for his own safety is one of the proximate contributing causes of his injury, it will bar recovery. Otherwise, there is no real distinction between actionable negligence on the one hand and contributory negligence on the other. Foreseeability and proximate cause are essential elements of both.

Where an employee has the choice of two ways in which to do his work, one safe and the other dangerous, he owes his employer the duty of selecting the safe way. This principle of law is so well established it needs no citation of authority to sustain it.

Where, as here, a brakeman or trainman has selected an unsafe and dangerous place to ride, and injury results, some courts hold that, as between him and his employer, he is guilty of contributory negligence as a matter of law. *Williams v. Monongahela Connecting R. Co.,* 72 A. 811; *Chattanooga & S. R. Co. v. Myers,* 37 S.E. 439; *Martin v. Kansas City M. & B. R. Co.,* 27 So. 646; *Warden v. Louisville & Nashville R. Co.,* 14 L.R.A. 552, and notes; *Balt. & P. R. R. Co. v. Jones,* 95 U.S. 439, 24 L. Ed. 506. Others hold that his conduct in selecting the dangerous way presents a question for the jury. *Southern Ry. Co. v. Harrison,* 24 So. 552; *Illinois Cent. R. Co. v. Carter,* 157 S.W. 719; *Chicago & E. R. Co. v. Kiracofe,* 95 N.E. 1117; *Milbourne v. Arnold Electric Power & Station Co.,* 103 N.W. 821; *Mo. Pac. Rly. Co. v. McCally,* 41 Kan. 639; *El Dorado & B. R. Co. v. Whatley,* 114 S.W. 234; *Powers v. Boston M. R. R.,* 56 N.E. 710.

The nearest approach to this particular phase of the question in our reports is *Wimberley v. R. R.*, 190 N.C. 444. There the cause was submitted to a jury. On appeal this decision was reversed on the ground there was no evidence of negligence on the part of the railroad. 273 U.S. 673, 71 L. Ed. 833. See also *Biles v. R. R.*, 143 N.C. 78.

When the plaintiff took his seat on the pilot he may be said to have assumed the risks naturally incident to his exposed position, such as the risk of being thrown from the platform by the sudden starting, stopping, or other negligent operation, of the train. Whether, as between him and his employer, his negligence in assuming a place so obviously dangerous constitutes contributory negligence as a matter of law we need not now say, for this is not the question presented for decision.

Bearing in mind that, as applied here, contributory negligence is the breach of the duty, if any, to exercise ordinary care for his own safety which the plaintiff owed the defendant under the circumstances then existing, it cannot be said as a matter of law that he was guilty of such negligence as would necessarily bar recovery; that is, as between him and the defendant, his position on the train, voluntarily assumed, does not constitute contributory negligence as a matter of law under the circumstances here disclosed. To so hold would bar recovery in most, if not all, actions founded on negligence. If the plaintiff had been elsewhere, or at a safer place, rather than at the scene of the accident, he would have received no injury. This is not the proper basis for decision. We start with the fact that he had voluntarily taken a seat on the pilot platform of the train and, while in that position, came in the line of defendant's operation of its truck. Was his mere presence there one of the proximate causes of his injury? This is the crux of the case.

Plaintiff owed no duty to the defendant or its truck driver. It was no concern of theirs whether he rode on the pilot platform or in the cab or in the caboose. They had no right to direct where he should ride or to complain that he chose a dangerous place when a safe place was available to him. However his act in assuming a dangerous place to ride may be labeled as between him and his employer, the jury may find here that the conduct of defendant's driver constitutes an independent, intervening act of negligence and that the position of plaintiff on the train was merely a condition or circumstance of the accident rather than one of the proximate causes thereof. *Powers v. Sternberg*, 213 N.C. 41, 195 S.E. 88; *Kryger v. Panaszy*, 195 A. 795; *Montambault v. Waterbury & Milldale T. Co.*, 120 A. 145; *Smithwick v. Hall & Upson Co.*, 21 A. 924, 12 L.R.A. 279.

Plaintiff was required to foresee those results which might naturally and proximately flow from his act in selecting a dangerous seat on the train. *Wood v. Telephone Co.*, 228 N.C. 605, 46 S.E. 2d 717, 3 A.L.R.

2d 1; *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; *Ellis v. Refining Co.*, 214 N.C. 388, 199 S.E. 403.

He was not under the duty to anticipate or foresee the negligent conduct of defendant's servant and its attendant results. Instead, he had the right to assume that defendant's driver and other motorists approaching the railroad at a grade crossing would exercise due care and obey the rules of the road. *Hobbs v. Coach Co.*, 225 N.C. 323, 34 S.E. 2d 211, and cases cited; *Cummins v. Fruit Co.*, 225 N.C. 625, 36 S.E. 2d 11; *Tysinger v. Dairy Products*, 225 N.C. 717, 36 S.E. 2d 246; *Bobbitt v. Haynes*, 231 N.C. 373.

There is no case in this jurisdiction in which the facts are substantially identical. Counsel have not cited, and we have not found, any decision from any other jurisdiction with a similar fact situation. Yet there are cases in this and other jurisdictions in which the applicable principle of law has been invoked.

In *Graham v. Charlotte*, 186 N.C. 649, 120 S.E. 466, the plaintiff was riding on the side of a flat-bottom truck with his feet over the side and extending beyond the line of the wheels. He was injured when his feet came in contact with a post at the entrance of a bridge in Charlotte. It was held that as between him and the defendant, the question of proximate cause was one for the jury.

In *Roberson v. Taxi Service, Inc.*, 214 N.C. 624, 200 S.E. 363, the plaintiff was riding on the left running board of an automobile which was being operated on its proper side of the highway. Defendant's taxi, proceeding in the opposite direction, cut across the center line of the highway and collided with the vehicle on which plaintiff was riding. Defendant contended that plaintiff, by voluntarily taking a position of danger on the running board of a moving automobile, committed an act of negligence which as a matter of law barred recovery. This Court held it was a question for the jury.

In *Kryger v. Panaszy, supra*, the plaintiff's intestate got on the running board of an automobile, facing inside. The defendant suddenly and without warning backed a truck out of his driveway into the car. As a result, plaintiff's intestate was killed. It was insisted that the negligence of deceased barred recovery as a matter of law. The court did not agree. Instead, it said: "While the conduct of the deceased might be found negligent as regards the hazards naturally accompanying riding on a running board, that a truck such as the one operated by Panaszy should back out of a private driveway and crush her against the side of the car in which she was riding was not necessarily and as a matter of law a hazard in respect to which her conduct was negligent. In other words, even if the jury found that the decedent was negligent under the

circumstances in riding upon the running board, they might also have found that her position was a condition merely of her injury and not a cause of it."

In *Robinson v. American Ice Co.*, 292 Pa. 366, plaintiff was riding on the left front step of his employer's truck in violation of an ordinance. He was injured when defendant pulled his car out of a parking place into the traveled portion of the street, causing a collision with the truck and injury to plaintiff. The Court said: "The position of plaintiff on the truck is a mere incident in the line of defendant's unlawful act, which was not to be anticipated, and without which no harm would have resulted; it in no way contributed to the injury. He had the right to assume that the driver of the ice wagon would be regardful of his duties to and the rights of others on the highway, and would take care not to collide with him."

In a similar case, *Guile v. Greenberg*, 257 N.W. 649, the Court said: "Nothing that plaintiff did caused the two cars to come together . . . Plaintiff assumed risks naturally incident to his exposed position such as the risk of being thrown from the front of the truck upon starting, stopping, turning a corner, or hitting a bump on the road, etc. But in this case plaintiff's injuries did not come proximately from his exposed position voluntarily assumed." See also *Kuykendall v. Coach Line*, 196 N.C. 423, 145 S.E. 770; *Washington v. Gulf Refining Co.*, 257 Pa. 157; *Little v. Telegraph Co.*, 213 Pa. 229; *Montambault v. Waterbury & Milldale T. Co., supra; Smithwick v. Hall & Upson, supra;* Anno. 80 A.L.R. 558 and 104 A.L.R. 326.

So then the mere fact the plaintiff assumed a position of peril on the pilot platform of the train, standing alone, is not sufficient to bar his recovery. To charge him with contributory negligence it must be made to appear that he had knowledge of the risk which caused his injury and that, having opportunity either to incur it or to avoid it, he voluntarily chose to incur it. If his position simply afforded an opportunity for defendant's negligence to cause injury, but was not in itself a contributing cause of the injury, there was no negligence on his part.

It follows that the question presented is one for a jury to decide. For that reason the judgment entered is

Reversed.

THE CITY OF RALEIGH v. MRS. KARLIE KEITH FISHER, F. HERBERT FISHER, AND W. THOMAS FISHER, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS FISHER'S BAKERY AND SANDWICH COMPANY.

(Filed 22 November, 1950.)

1. Pleadings § 28—

A motion for judgment on the pleadings is in the nature of a general demurrer, and its purpose is to test the sufficiency of the adversary's pleading to state facts which constitute a cause of action or a defense, admitting for the purpose the truth of all well pleaded facts in the pleading of the adversary and the untruth of movant's allegations which are controverted by them.

2. Statutes § 15—

Where a statute or an ordinance expressly repeals a former and at the same time re-enacts all or some of the provisions of the statute or ordinance repealed, the provisions re-enacted continue in force without interruption.

3. Municipal Corporations § 37—Answer held to show violation of zoning regulations.

Where it appears from the facts alleged in the answer that defendants were issued a building permit for a residence and thereafter erected a dwelling but conducted a commercial enterprise thereat notwithstanding that the premises were located in a residential district as prescribed by an ordinance then in effect and also a subsequent ordinance which repealed the former but re-enacted the provisions requiring building permits and certificates of occupancy and prohibiting the maintenance of businesses in residential districts, *held* the answer establishes violation of the zoning regulations from the inception of such use, and that such use does not come within the saving clause of the second ordinance stipulating that its provisions should not impair the force of building permits theretofore issued or interfere with the continuance of a use theretofore lawful.

4. Municipal Corporations § 6—

A function of a municipality which is discretionary, political, legislative, or public in nature and performed for the public good in promotion or protection of the health, safety, security or general welfare of its citizens, is a governmental function.

5. Municipal Corporations § 37—

In enacting and enforcing zoning regulations a municipality acts as an agency of the State in the exercise of a delegated police power.

6. Constitutional Law § 11—

The police power is that power inherent in the State to prohibit things hurtful to the health, morals, safety, and welfare. This power cannot be contracted away or lost by estoppel or by any other mode.

7. Municipal Corporations § 37: Estoppel § 10—

A municipal corporation cannot be estopped from enforcing a valid zoning regulation because of the conduct of its officials in permitting or even

encouraging its violation by issuing a permit for a permissive use with knowledge that the owner intended to use it for a prohibited purpose or by acquiescing in such unlawful use over a period of years.

8. Municipal Corporations § 40—

A municipality may enjoin a violation of its zoning ordinances. G.S. 160-179.

APPEAL by defendants from *Williams, J.*, at the April Term, 1950, of WAKE.

Civil action by municipality to enjoin landowners from carrying on business in a residential district in violation of a zoning ordinance.

On 20 April, 1923, the City of Raleigh, acting through its legislative body, adopted a comprehensive zoning ordinance dividing the municipality into clearly designated business, neighborhood business, industrial, residence, and unrestricted districts, and imposing various limitations on the alteration and construction of buildings, and the use of real property in each of such districts.

Briefly stated, the zoning ordinance prescribed that no real property in the city should be used for any purpose other than a purpose permitted in the district in which the property was located, and prohibited the establishment or maintenance of businesses in residential districts. It made it unlawful for any person to construct a new building or to alter an existing one without a permit from the building inspector of the city, and forbade the building inspector to issue a permit unless the plans, specifications, and proposed use of the building complied in all respects with the zoning regulations. It also specified that it should be "unlawful to use . . . any building or land or part thereof hereafter created, erected, altered, changed, or converted wholly or partly in its use or structure" without a certificate of occupancy from the building inspector, and decreed that the building inspector should not grant such certificate unless "said building or land or the part thereof so created, erected, altered, changed, or converted, and the proposed use thereof" conformed with all the requirements of the zoning regulations. The ordinance expressly exempted from its operation, however, all nonconforming structures and uses existing at the time of its adoption.

On 9 November, 1944, the City of Raleigh, acting through its legislative body, adopted a lengthy ordinance, which became effective 1 December, 1944, and which professed to repeal the ordinance of 20 April, 1923, and to set up another comprehensive zoning plan for the municipality. The new ordinance re-enacted in substantially the same terms numerous provisions of the old, including those requiring building permits and certificates of occupancy, those specifying the permitted uses of property in residence districts, and those prohibiting the establishment or mainte-

nance of businesses in residential districts. It does not exempt from its operation nonconforming structures or uses existing at its enactment or effective date. But it permits the "continuance of any use of land or buildings which now legally exists" (section 10); does not "repeal, abrogate, annul, or in any way . . . impair or interfere with any . . . permits previously . . . issued" (section 26); and does not "require any change in the plans, construction, designated or intended use of a building, for which a building permit has been heretofore issued" (section 28).

This action was instituted by the plaintiff, the City of Raleigh, on 8 August, 1949, to enjoin the defendants "from conducting business operations, and particularly the business of operating a bakery and sandwich company" upon certain premises in Raleigh known as 2512 Everett Avenue on the theory that the conduct sought to be enjoined constitutes a violation of the zoning ordinance of the city. As a basis for the injunctive relief prayed, the plaintiff filed a verified complaint alleging these things:

The plaintiff adopted the zoning ordinances of 20 April, 1923, and 9 November, 1944, in its capacity as a municipal corporation. The premises at 2512 Everett Avenue are now, and ever since 20 April, 1923, have been within the borders of a residence district as defined by the zoning ordinances of the city. After the passage of the first ordinance and before the enactment of the second, these premises, which were then vacant land, were bought by the *feme* defendant, Mrs. Karlie Keith Fisher, who soon applied for and obtained building permits authorizing her to construct a residence on the property. Shortly thereafter she erected a dwelling house on the premises under color of these permits. The building inspector of the city has never issued any certificate of occupancy, however, permitting the use of the building and land by any person for any purpose. Notwithstanding the want of such certificate and the location of the premises within a residence district of the city, the *feme* defendant and her associates, F. Herbert Fisher and W. Thomas Fisher, trading as "Fisher's Bakery and Sandwich Company," entered into the actual occupation of the premises upon the completion of the building, and ever since that time have been carrying on a substantial commercial business, to wit, a bakery and a sandwich company, "on the said lands and within the said building." On 4 August, 1948, the governing body of the City of Raleigh notified the defendants by a formal resolution "to discontinue their business operations within said residential district." The defendants have refused to heed such notice, and "will continue to operate their bakery and sandwich business within said residential district . . . unless they are restrained and enjoined by court decree."

The defendants answered, admitting all the factual averments of the complaint and alleging these additional matters: Although the vacant land at 2512 Everett Avenue was situated in a residence district of the City of Raleigh within the purview of the ordinance of 1923, the *feme* defendant bought the property from the City of Raleigh in 1936 upon the understanding that she would erect a residence upon it, and that the defendants would use such residence in carrying on a bakery and sandwich business on the premises. Pursuant to this understanding, the *feme* defendant constructed a residence upon this property in 1938 under building permits issued to her by the building inspector of the city, and ever since that time the defendants have used the residence in carrying on a constantly expanding bakery and sandwich business upon the premises. All of the actions of the defendants in this connection antedating the resolution of 4 August, 1948, were done with the full approval and consent of the officials of the City of Raleigh. Indeed, the City of Raleigh has collected from the defendants an annual "privilege tax for the conduct of a bakery" during the nine years next preceding the bringing of the action. Relying upon the knowledge of the officials of the City of Raleigh as to their intentions, the defendants "have increased their facilities for the operation of their business until at present time they have invested in said premises and business at least $75,000.00," which will be lost in case they are precluded from continuing their commercial operations at 2512 Everett Avenue.

The defendants concluded that the conduct sought to be enjoined does not constitute a violation of the zoning regulations because their business and property are exempt from the operation of such regulations under sections 10, 26, and 28 of the zoning ordinance of 1944, and that the City of Raleigh is estopped from bringing this suit for an injunction against them even if the conduct sought to be enjoined does constitute a violation of the zoning regulations because its officials have encouraged and permitted such conduct for at least ten years.

The court granted the motion of the plaintiff for judgment upon the pleadings, and entered a final decree enjoining the defendants "from and after the first day of September, 1951, from conducting business operations, and particularly the business of operating a bakery and sandwich company" upon the premises at 2512 Everett Avenue. The defendant excepted to the judgment, and appealed, assigning errors.

Wm. C. Lassiter and James H. Walker for plaintiff, appellee.

John W. Hinsdale for defendants, appellants.

ERVIN, J. The appeal is from a judgment on the pleadings. A court of record has inherent power to render judgment on the pleadings where

the facts shown and admitted by the pleadings entitle a party to such judgment. 49 C.J., Pleading, section 944.

A motion for judgment on the pleadings is in the nature of a general demurrer. *Pridgen v. Pridgen,* 190 N.C. 102, 129 S.E. 419. Its function is to raise this issue of law: Whether the matters set up in the pleading of an opposing party are sufficient in law to constitute a cause of action or a defense. *Adams v. Cleve,* 218 N.C. 302, 10 S.E. 2d 911.

When a party moves for judgment on the pleadings, he admits these two things for the purpose of his motion, namely: (1) The truth of all well-pleaded facts in the pleading of his adversary; and (2) the untruth of his own allegations in so far as they are controverted by the pleading of his adversary. *Oldham v. Ross,* 214 N.C. 696, 200 S.E. 393; *Churchwell v. Trust Co.,* 181 N.C. 21, 105 S.E. 889; *Alston v. Hill,* 165 N.C. 255, 81 S.E. 291; *Helms v. Holton,* 152 N.C. 587, 67 S.E. 1061.

For this reason, a motion for judgment on the pleadings constitutes an appropriate remedy where the pleading of the opposite party is so fatally deficient in substance as to present no material issue of fact. *Dunn v. Tew,* 219 N.C. 286, 13 S.E. 2d 536; *Penny v. Ludwick,* 152 N.C. 375, 67 S.E. 919. A plaintiff is entitled to judgment on the pleadings where the answer admits every material averment in the complaint and fails to set up any defense or new matter sufficient in law to defeat his claim; and a defendant is entitled to judgment on the pleadings where the complaint fails to state a good cause of action in favor of the plaintiff and against the defendant. *Smith v. Smith,* 225 N.C. 189, 34 S.E. 2d 148, 160 A.L.R. 460; *Mitchell v. Strickland,* 207 N.C. 141, 176 S.E. 468.

The first issue of law raised by the plaintiff's motion for judgment on the pleadings is whether the admitted acts of the defendants constitute a violation of the zoning ordinance of the City of Raleigh.

Although the zoning ordinance of 9 November, 1944, professed to repeal the zoning ordinance of 20 April, 1923, it simultaneously re-enacted in substantially the same terms the provisions of the old ordinance requiring building permits and certificates of occupancy, prescribing permitted uses of property in residence districts, and prohibiting the establishment or maintenance of businesses in residence districts. This being true, these provisions have been in force at all times since their original enactment on 20 April, 1923; for it is well settled "that where a statute is repealed and all, or some, of its provisions are at the same time re-enacted, the re-enactment is considered a reaffirmance of the old law, and a neutralization of the repeal, so that the provisions of the repealed act which are thus re-enacted continue in force without interruption, and all rights and liabilities thereunder are preserved and may be enforced." 50 Am. Jur., Statutes, section 555; *Brown v. Brown,* 213 N.C. 347, 196 S.E. 333.

The answer admits that the premises at 2512 Everett Avenue have been located in a residence district of the City of Raleigh since 1923; that the defendants have been conducting a commercial business upon such premises since 1938; and that the building inspector of the City of Raleigh has never issued a certificate of occupancy authorizing the defendants to use such premises for any purpose. Hence, the pleading of the defendants makes it plain that they are now, and ever since 1938 have been, engaged in a twofold violation of the zoning ordinance of the City of Raleigh.

Sections 10, 26, and 28 of the ordinance of 9 November, 1944, have no application to this litigation. As the defendants have been acting in contravention of the zoning regulations at all times since 1938, it cannot be said that they are simply continuing a use of the premises which was legal at the effective date of the new ordinance or at any other time. The building permits authorized the *feme* defendant to erect the building at 2512 Everett Avenue for a "designated or intended use," to wit, a residence. The plaintiff does not prosecute this action against the defendants to "repeal, abrogate, annul, or in any way impair or interfere with" such building permits, or to "require any change in the plans, construction, (or) designated or intended use" of the building erected under them.

The second issue raised by the plaintiff's motion for judgment on the pleadings is whether the City of Raleigh is estopped to enforce its zoning ordinance against the defendants by the fact that its officials have encouraged or permitted them to violate it for at least ten years.

The motion admits the truth of the factual averments in the answer. In consequence, it must be taken for granted that the *feme* defendant bought the land at 2512 Everett Avenue and erected a residence on it upon an understanding that the officials of the City of Raleigh would permit the premises to be used for business purposes in violation of the zoning ordinance putting such premises in a residence district; that at all times between the year 1938 and 4 August, 1948, the officials of the City of Raleigh knowingly encouraged or permitted the defendants to devote the premises in question to business purposes in violation of the zoning ordinance restricting them to residential uses; and that the defendants made substantial outlays of money in their business and upon their property in reliance upon their belief that the officials of the City of Raleigh would permit them to continue the use of the premises at 2512 Everett Avenue for commercial purposes in violation of the zoning ordinance.

Even so, the second issue of law raised by the plaintiff's motion must be resolved against the defendants.

The zoning ordinance was adopted by the City of Raleigh, a municipal corporation, under statutes originally embodied in Chapters 169 and 246

of the Public-Local Laws of the Extra Session of 1921 and Chapter 250 of the Public Laws of 1923.

"A municipal corporation is dual in character and exercises two classes of powers—governmental and proprietary. It has a twofold existence—one as a governmental agency, the other as a private corporation. Any activity of the municipality which is discretionary, political, legislative or public in nature and performed for the public good in behalf of the State, rather than for itself, comes within the class of governmental functions . . . While acting in behalf of the State in promoting or protecting the health, safety, security, or general welfare of its citizens, it is an agency of the sovereign." *Green v. Kitchin,* 229 N.C. 450, 50 S.E. 2d 545; *Millar v. Wilson,* 222 N.C. 340, 23 S.E. 2d 42.

In enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State. *Kinney v. Sutton,* 230 N.C. 404, 53 S.E. 2d 306; *Elizabeth City v. Aydlett,* 201 N.C. 602, 161 S.E. 78; *S. v. Roberson,* 198 N.C. 70, 150 S.E. 674. The police power is that inherent and plenary power in the State which enables it to govern, and to prohibit things hurtful to the health, morals, safety, and welfare of society. *Drysdale v. Prudden,* 195 N.C. 722, 143 S.E. 530; *Skinner v. Thomas,* 171 N.C. 98, 87 S.E. 976. L.R.A. 1916E, 338. In the very nature of things, the police power of the State cannot be bartered away by contract, or lost by any other mode.

This being true, a municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting such violator to violate such ordinance in times past. *Leigh v. Wichita,* 148 Kan. 607, 83 P. 2d 644, 119 A.L.R. 1503, and cases noted in the ensuing annotation. See these North Carolina decisions: *Jenkins v. Henderson,* 214 N.C. 244, 199 S.E. 37; *S. v. Finch,* 177 N.C. 599, 99 S.E. 409; *Bank v. Commissioners,* 119 N.C. 214, 25 S.E. 966, 34 L.R.A. 487; *S. v. Beavers,* 86 N.C. 588; *Wallace v. Maxwell,* 32 N.C. 110, 51 Am. Dec. 380; *Candler v. Lunsford,* 20 N.C. 542.

Undoubtedly this conclusion entails much hardship to the defendants. Nevertheless, the law must be so written; for a contrary decision would require an acceptance of the paradoxical proposition that a citizen can acquire immunity to the law of his country by habitually violating such law with the consent of unfaithful public officials charged with the duty of enforcing it.

The pertinent statute expressly provides that an injunction may be secured by a municipality to prevent a violation of a zoning ordinance. G.S. 160-179.

For the reasons given, the judgment is

Affirmed.

M. W. GORE, F. E. LAY, H. L. SMITH, C. C. NEEDHAM, E. H. COX, TILLMAN SUGGS, CLAY FORMYDUVAL, AND OTHERS, PATRONS OF GUIDEWAY AND OLD DOCK-NAKINA SCHOOL DISTRICTS, AND TAXPAYERS, FOR THEMSELVES, AND ON BEHALF OF ALL OTHER PROPERTY OWNERS AND TAXPAYERS OF THE COLUMBUS COUNTY ADMINISTRATIVE UNIT OF PUBLIC SCHOOLS, WHO MAY COME IN AND MAKE THEMSELVES PARTIES, v. COLUMBUS COUNTY, ALEX WEIR, D. H. JORDAN, BUD STEPHENS, W. F. FLOYD, J. T. WOOTEN, JR., CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF COLUMBUS; THE BOARD OF EDUCATION OF COLUMBUS COUNTY, R. J. LAMB, JAMES W. PEAY, LEEMAN WARD, KINSEY LONG, B. L. TOWNSEND, F. T. WOOTEN AND BROADUS SMALL, MEMBERS OF SAID BOARD OF EDUCATION OF COLUMBUS COUNTY.

(Filed 22 November, 1950.)

1. Schools §§ 3a, 6a—

Ordinarily the courts will not interfere with the discretionary authority of the county board of education to select school sites and consolidate schools of a district, and, with the approval of the State Board of Education, to consolidate school districts. G.S. 115-99.

2. Schools § 10h: Administrative Law § 2—

A statute authorizing a school board to make changes in the allocation of funds from a school bond issue cannot empower the board to do so in the exercise of an arbitrary discretion but only in the exercise of a discretion in good faith in the light of existing facts and circumstances. Chap. 942, Session Laws of 1949.

3. Schools § 10h—County board may not use funds from school bond issue for different project without finding that original project was no longer necessary.

The bond order and the advertised statement of the purpose for which funds from a proposed school bond issue were to be used stipulated, *inter alia*, improvements in the elementary school of one district by the addition of eight classrooms, and improvements in the elementary and high school of another district. Thereafter the county board of education, on the basis of a survey, proposed to use the entire funds allocated for such improvements for the erection of a new high school building for the use of both schools. *Held:* The county board of education has no power to reallocate the funds for the erection of the new high school in the absence of a finding in good faith that the erection of such new high school would so relieve the pupil load on the elementary schools that the use of the funds for the improvement and enlargement of the elementary schools would no longer be necessary because of changed conditions. G.S. 115-99.

APPEAL by plaintiffs from *Burgwyn, Special Judge,* at Chambers in the City of Wilmington, N. C., 16 August, 1950. From COLUMBUS.

This action was instituted for the purpose of restraining the defendants, their agents and employees, from using the funds originally allo-

cated to the Old Dock-Nakina and Guideway School Districts for remodeling and enlarging the elementary school buildings for any other purpose.

1. In February, 1947, the Board of Commissioners of Columbus County passed an order "authorizing not exceeding $1,000,000 school building bonds of Columbus County for the purpose of erecting, remodeling and enlarging school buildings, including the acquisition of necessary land and equipment."

2. A special election was duly and legally held on 25 March, 1947, and the voters approved the issuance of the bonds.

3. The bond order contained the following statement: "The order referred to above authorizing not exceeding $1,000,000 school building bonds for the purpose of erecting, remodeling and enlarging school buildings, including the acquisition of necessary land and equipment, as follows: . . . Columbus County Administrative Unit; Remodeling and enlarging the following school buildings for white children." There follows a list of eight districts, among them being District No. 9, Old Dock-Nakina School and District No. 10, Guideway School.

4. Prior to the special election, John M. Hough, the Superintendent of Public Instruction of Columbus County, caused a statement to be published in a local newspaper, informing the citizens of Columbus County what each school district would get if the voters approved the proposed bond issue. The improvements listed for the school districts involved in this controversy were described as follows: "Old Dock Nakina—Gymnasium—alterations." "Guideway—8 class rooms—gymnasium." Proceeds from the bond issue were thereafter allocated for the purpose of making the above improvements.

5. Thereafter, W. J. Boger was elected Superintendent of Public Instruction for Columbus County, and he requested the Director of the Bureau of Educational Research and Service of the University of North Carolina to make a survey of the county schools of Columbus County "to serve as a guide for the County Board of Education in the development of the schools." The Bureau, together with numerous other persons connected with educational institutions and organizations in North Carolina, made the survey. Whereupon, in May, 1948, the Bureau of Educational Research and Service made the following report:

"In light of the conditions and a knowledge of certain facts concerning Columbus County and its educational needs and problems, the following recommendations are made: WHITE RACE. High School District #1.

"At the present time there are three high school and eleven elementary teachers housed in the Old Dock School. There are 82 high school and 480 elementary pupils enrolled in this school. In the Guideway School there are 11 elementary teachers and 478 elementary pupils. The high school pupils from the Guideway district are being transported twenty

miles or more daily. Although this area of the county is sparsely settled, it is thought that there should be a high school built on a new 20 acre site in the vicinity of Nakina. This high school should be either a four year (grades 9 through 12) or a six year (grades 7 through 12) high school. If a four year high school, there should be approximately 150 pupils within a short time. If a six year high school, the enrollment would be about 325 pupils. It is thought the latter organization might develop a better school for a longer period of time. This will require the erection of a modern high school plant, including auditorium, gymnasium, cafeteria, and facilities for vocational education. Old Dock and Guideway should remain as elementary centers.

"a. Old Dock Elementary Center—Six grades. This school would have approximately 380 pupils and require the services of about 10 teachers. This building will be adequate for either a six or eight grade school. It will need some minor repairs such as painting, repairing plaster, and new shades. The grounds should be made more suitable for school use.

"b. Guideway Center—Six grades. This school would have approximately 380 pupils and require the services of about 10 teachers. If this school is made a six grade elementary school, the old frame building could be discontinued. The present building will meet the needs of a six grade school. There will be needed some major repairs such as new light fixtures, drinking fountains inside building and new chalkboards. The frame building being used for class rooms could be made into a cafeteria. More playground is needed for this center."

6. The General Assembly passed an Act, being Chapter 942, 1949 Session Laws of North Carolina, authorizing the Board of Education, and the Board of Commissioners of Columbus County, to reallocate a portion of the funds of the $1,000,000 bond issue "in their discretion, subject to the approval of the State Superintendent of Public Instruction and the Director of School Planning, for the following school purposes: Erecting a central high school building to serve the Old Dock-Nakina and Guideway Schools in lieu of remodeling and enlarging said two schools as recited in said order."

7. On 1 October, 1949, the County Board of Education of Columbus County passed a resolution which was approved on 3 October, 1949, by the Board of Commissioners of said county, which recited in its preamble the report of the Bureau of Educational Research and Service, exclusive of paragraphs a and b, and further recited that the School Committee members of Old Dock-Nakina and Guideway Schools had requested the building of a central high school upon a suitable site midway between the present schools, and that the sum of $40,000 had been allocated to Guideway School and the sum of $50,000 had been allocated

to Old Dock-Nakina School. The preamble states at some length the advantages to be gained by the construction of the high school, and then adopts the following resolution:

"Now, therefore, be it resolved that the Board of Commissioners of Columbus County do hereby authorize and approve the reallocation of $90,000 of the proceeds of the unissued $335,000 school building bonds authorized by the bond order herein aforementioned for the erection of a central high school building to serve the Old Dock-Nakina and Guideway Schools, in lieu of remodeling and enlarging said two schools as recited in said bond order."

8. The plaintiffs obtained a temporary injunction, on 24 July, 1950, restraining the defendants from entering into any contract which would obligate them to use the funds originally allocated to the Old Dock-Nakina and Guideway Schools.

At the hearing below, the court held the Act passed by the General Assembly in 1949, referred to above, authorizing the transfer of the funds in question, is constitutional; and, that the resolution referred to in the 7th paragraph herein, finds facts sufficient to authorize the construction of the proposed high school in lieu of remodeling and enlarging the present schools in the two districts involved.

The court further found as a fact "that it is the duty of the Board of Education of Columbus County to furnish all necessary improvements on the old buildings at the said two schools, to the end that the pupils in both schools should be as well provided for in buildings and equipment as any other comparable or like schools in Columbus County."

Upon the aforesaid findings of fact, the court dissolved the temporary restraining order.

The plaintiffs except, appeal and assign error.

Alton A. Lennon and Isaac C. Wright for plaintiffs.

W. H. Powell, E. K. Proctor, and McLean & Stacy for defendants.

DENNY, J. The sole question presented for determination on this appeal is whether or not the court below committed error in dissolving the restraining order heretofore issued.

The appellants strenuously contend the order should have been continued to the final hearing, and we are inclined to agree.

A county board of education has the authority "to consolidate schools located in the same district, and, with the approval of the State Board of Education, to consolidate school districts, over which the board has full control, whenever and wherever in its judgment the consolidation will better serve the educational interests of the county or any part of it." G.S. 115-99.

Ordinarily the courts will not interfere with the control and supervision of the school authorities in the exercise of their discretion in creating or consolidating school districts, or in the selection of a school site. *Feezor v. Siceloff, ante,* 563; *Atkins v. McAden,* 229 N.C. 752, 51 S.E. 2d 484; *Board of Education v. Pegram,* 197 N.C. 33, 147 S.E. 622; *Board of Education v. Forrest,* 190 N.C. 753, 130 S.E. 621; *Davenport v. Board of Education,* 183 N.C. 570, 112 S.E. 246; *School Commissioners v. Aldermen,* 158 N.C. 191, 73 S.E. 905; *Venable v. School Committee,* 149 N.C. 120, 62 S.E. 902. And it must be conceded that when the entire evidence disclosed by the record herein is considered, a strong case can be made out in favor of the construction of the proposed high school. Such a high school would no doubt "better serve the educational interests" of the two districts with respect to high school courses, courses in agriculture, home economics and commercial training. But the real question which is determinative of this appeal is whether the law sanctions the reallocation of these funds without an affirmative finding that the construction of the proposed high school will relieve the elementary schools in the two districts of their overcrowded conditions and make the whole or any part of the expenditure of such funds on these elementary school plants unnecessary.

On the present record there is no finding by the County Board of Education of Columbus County, or of its Board of County Commissioners, whether the proposed high school will accommodate four or six grades. It is clearly disclosed by the evidence, however, that if it is to be a four year high school (grades 9 through 12), the enrollment of the Guideway School will not be reduced by a single pupil, and yet it has been found, heretofore, that eight additional classrooms are necessary to meet the needs of that elementary school. Likewise, if the proposed high school is to be a four year school, the Old Dock-Nakina School will be relieved only of its high school pupils. This high school is a sub-standard one with a present enrollment of 66 and an average daily attendance of only 61. If, on the other hand, the new high school is to take care of six grades (7 through 12), the Board of Education may find that the present facilities at these schools will be adequate to take care of the remaining elementary grades. If such be the case, and sufficient funds are retained from the funds allocated to these districts, or if funds are available from other sources, to put these elementary school buildings in adequate repair, then any surplus funds allocated to these school districts may be reallocated for the purpose of building the proposed high school. *Atkins v. McAden, supra.*

The General Assembly has no power to authorize local school authorities to exercise an arbitrary discretion, without regard to the existing facts and circumstances involved. Therefore, we hold that Chapter 942,

of the 1949 Session Laws of North Carolina, authorizing the transfer of these funds in the discretion of the Board of Education and the Board of Commissioners of Columbus County, did not obviate the necessity for such discretion to be exercised in good faith, in light of the existing facts and circumstances. And if it be conceded the facts found with respect to the establishment of a new central high school are sufficient to justify the reallocation of any surplus bond funds to that project, they are insufficient, in our opinion, to authorize the reallocation of the funds theretofore allocated to other projects, unless it is found as a fact by the Board of Commissioners of Columbus County, acting in good faith, that such original projects are no longer necessary by reason of changed conditions, or that the proposed new project will eliminate the necessity for the originally contemplated expenditures, and "will better serve the educational interests" of the districts involved. G.S. 115-99; *Atkins v. McAden, supra; Waldrop v. Hodges,* 230 N.C. 370, 53 S.E. 2d 263; *Feezor v. Siceloff, supra.*

In the case of *Waldrop v. Hodges, supra,* this Court held that a board of education and a board of commissioners in a county "have limited authority, under certain conditions, to transfer or allocate funds from one project to another, *included within the general purpose for which bonds were authorized,* the transfer must be to a project included in the general purpose as stated in the bond resolution and notice of election. *Atkins v. McAden, supra.* The funds may be diverted to the proposed purposes only in the event the defendant Board of Commissioners finds in good faith that conditions have so changed since the bonds were authorized that the proceeds therefrom are no longer needed for the original purpose."

In the case of *Feezor v. Siceloff, supra,* the question presented on this appeal was not raised. But, on the contrary, each school district involved had a small high school in a building occupied by an elementary school, and one of the arguments for the construction of a consolidated high school, to serve all three districts, was to give the elementary schools the additional space occupied by the high schools. No question of the adequacy of the elementary schools was raised or the need of funds for their repair.

On the present record, in our opinion, it was error to dismiss the restraining order, but it should have been continued to the final hearing. Consequently, the order dissolving the restraining order heretofore entered is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Error.

W. B. WEAVER, JR., v. B. F. MORGAN, SHERIFF OF RANDOLPH COUNTY, AND ALL OTHER LAW ENFORCEMENT OFFICERS OF RANDOLPH COUNTY.

(Filed 22 November, 1950.)

1. **Appeal and Error § 6c (2)—**

Exceptions and assignments of error to the findings of fact must point out specifically and distinctly the alleged errors, and an exception "to the foregoing findings of fact" is a broadside exception and is insufficient to challenge the sufficiency of the evidence to support the findings or any one of them.

2. **Same—**

An exception to the signing of the judgment presents only the question whether error of law appears on the face of the record, and is insufficient to bring up for review the findings of fact.

3. **Appeal and Error § 29—**

Exceptions in the record not set out in appellant's brief are deemed abandoned. Rule 28.

4. **Elections § 1—**

The requirement that a petition for an election on the question of prohibiting the sale of beer and wine in a county shall be signed by 15% of the registered voters of the county who voted for Governor in the last general election, *is held* to refer to the total number of votes cast for Governor in such election and does not require that each signer of the petition should have personally voted for a gubernatorial candidate in such election. G.S. 18-124 (b).

5. **Appeal and Error § 28—**

The grouping of cases cited in the brief does not authorize the use of the names of such cases throughout the brief without giving the citation of such cases. Rule 28.

APPEAL by plaintiff from *Sharp, Special Judge,* at May Term, 1950, of RANDOLPH.

Civil action to restrain the sheriff, and all other law enforcement officers of Randolph County, from enforcing the law against the sale of beer and wine in said county, for that the election held 25 March, 1950, on the question of the sale of beer and wine was, and is invalid for matters to which the findings of fact made by the court hereinafter shown relate.

Plaintiff alleges in his complaint that he is a resident, citizen and taxpayer of Randolph County, North Carolina, and is duly licensed by the United States Government, the State of North Carolina, the county of Randolph, and the city of Randleman to engage in, and is engaged in selling wine and malt beverages in said county, and that he is one of a general class of approximately fifteen licensed malt beverages dealers in

said county, and that he brings this action in behalf of himself and others of the class named similarly situated, and engaged in the business of selling wine and malt beverages.

The cause was heard in Superior Court upon (1) complaint of plaintiff, used as an affidavit, (2) oral testimony, (3) affidavits, and (4) admissions and argument of counsel. Thereupon the court entered judgment in which substantially these findings of fact were made, to portions of which, indicated within parentheses, plaintiff excepts—the numbering being inserted:

1. That in March, 1948, John G. Prevette, R. A. Gaddis and Zell Brown were appointed members of the Board of Elections for Randolph County, and each took the oath of office on 10 April, 1948, and, acting as such Board of Elections, conducted the two primary elections, and the general election in 1948, and two special elections in 1949, and their right to exercise the powers of such Board was not challenged prior to 23 January, 1950.

2. That on 19 January, 1950, a petition, purporting to be drawn under General Statutes 18-124, requesting an election on the question of the sale of beer and wine in Randolph County, and consisting of 344 pages and containing 3,620 signatures, was presented to the Board of Elections of said county, constituted as set forth in preceding paragraph; that thereupon the Board of Elections employed the services of Miss Iola Lowdermilk and approximately twenty-five paid helpers to check the petition; ("that the checking was done under the instruction and general supervision of the Board of Elections of Randolph County but the actual work was done by the paid checkers who consulted from time to time with one or more members of the Board of Elections"); (This is covered by assignment of error #1); that on 21 January, 1950, the Board determined (1) that 15,824 persons voted for Governor in the 1948 general election; (2) that fifteen per cent of this number is 2,374; (3) that the petition contained more than 2,374 signatures of registered voters of Randolph County; and (4) that the petition was legally sufficient and met the requirements of the law; that thereupon the Board called a beer and wine election as provided by General Statutes 18-124 for 25 March, 1950, and duly advertised the election as required by law, and opened the registration books for the registration of new voters as required by law, keeping them open on two Saturdays, to wit: 25 February, 1950, and 4 March, 1950, under its supervision.

3. That on 23 January, 1950, plaintiff in this action called upon the said members of the Board of Elections to resign on the ground that each of them had vacated his office on the Board by reason of subsequent qualification in another office, and on 2 February, 1950, W. F. Betts and others instituted a *quo warranto* action to remove each of the mem-

bers of said Board, and on 8 March, 1950, by judgment of court, Brown and Gaddis were removed as members of the Board,—Brown, because of double office holding, and Gaddis, because he was at the time a candidate for office of justice of the peace; (and "that there was no appeal from this judgment in the *quo warranto* proceeding"); (This is covered by assignment of error #2).

4. Thereafter on 9 March, 1950, the chairman of the State Board of Elections appointed T. F. Bulla and Albert Taylor to fill the offices from which Brown and Gaddis had been removed, and on 10 March, 1950, they, Bulla and Taylor, took the oath of office as members of the Board of Elections of Randolph County; that thereafter, the Board, as then constituted, voted to proceed, without interruption, with the beer and wine election which had been called for 25 March, 1950,—taking over in its entirety the machinery and personnel which had been set up and appointed by the Board as formerly constituted,—without additional oaths being taken by precinct officials; that the registration books were kept open on 11 March, 1950, under orders and direction of the Board as the third Saturday, and the legal requirements of challenge day were duly observed on Saturday, 18 March, 1950.

5. That in all but 8 of the 31 precincts in Randolph County the registration books purport to show what persons voted in the 1948 general election,—but in the 8 the registration books did not so show, however the poll books did. That in the checking of petition in January, 1950, the Board as then constituted had counted every petitioner registered in these 8 precincts as having voted in the 1948 general election, and, because of this, the Board, as newly constituted, ordered a recheck of the petition as to these 8 precincts, using the poll books, and re-employed Miss Iola Lowdermilk and ten of the original checkers to do the rechecking; that this rechecking was done under the direction of the Board, and under the supervision of the chairman, who although not personally present during the entire time consumed in checking, ("he was frequently present and consulted with reference to said checking"); (This is covered by assignment of error #3); that at the completion of the recheck, Miss Lowdermilk certified to the Board ("and the Board found as a fact") that the total number of signatures on the original beer and wine petition was 3,620; (The clause in parenthesis is covered by assignment of error #4); that the number of signers on said petition legally registered and who personally voted in the 1948 general election was 2,464; that the number of signatures on the petition of persons regularly registered but who had not themselves voted in the 1948 general election was 571; that 426 persons who were not registered for the 1948 general election had signed the petition; that 4 signatures were duplications; that 29 were

illegible; and that 126 signatures appearing were not counted because there was reason to believe they were not genuine.

6. That the election which had been called upon the petition presented to the Board of Elections on 19 January, 1950, and for which the advertisement was begun by the Board as then constituted and was completed by the Board as newly constituted, was held on 25 March, 1950, and every qualified voter in Randolph County had a fair and ample opportunity to register and vote in said election; that no fraud or irregularities occurred on election day; that the results of said election, which were correctly canvassed, were duly certified by the Board of Elections to the clerk of Superior Court of Randolph County on 27 March, 1950, as follows: 753 for, and 7,924 against the legal sale of wine; and 783 for, and 7,856 against the legal sale of beer.

7. That in paragraph 4 of the affidavit of J. F. Trazzare there are listed 303 names which in his opinion were written by the same person, of which number 45 were not counted as valid by the Board of Elections in passing upon the sufficiency of the petition, and the court adopts same as its finding of fact, with the exception of (35 named persons, none of whose signatures the court finds were written by the same person); (This is covered by assignment of error #5); that the names of five named persons were duplications; that the names of two others are in the same handwriting, and that another is not a registered voter.

8. (That in checking the petition and in holding the said election the Board of Elections of Randolph County acted in good faith). (This is covered by assignment of error #6).

The court held: (1) That the requirement of General Statutes 18-124 (b) that "15 per cent of the registered voters of the county that voted for Governor in the last election" shall sign the petition requesting a beer and wine election refers to the total number of votes cast for Governor in the last general election and does not necessarily mean that the persons who signed the petition must be the identical persons who cast votes for Governor in said election; (2) that the petition on which the election held on 25 March, 1950, was called, fully complied with the requirements of General Statutes 18-124; and (3) that to meet these requirements it is not necessary to count any signatures contested by the plaintiff in this action.

Also the court held: (1) That every ruling of the Board and holding upon the validity of said petition is *prima facie* correct and the burden is upon plaintiff to establish facts to the contrary; (2) that this presumption of validity is not overcome solely by evidence that certain signatures (a large majority of same being signatures of persons within the same family) are in the same handwriting; and (3) that the petition requesting the election contained 3,029 valid signatures.

And the court further held: (1) That the petition on which the election of 25 March, 1950, was called was, in all respects, legally sufficient; (2) that it was the legal duty of the Board of Elections of Randolph County to call said election upon the presentation of said petition; and (3) that said election is in all respects legal and valid.

Therefore the court held that plaintiff is not entitled to an order restraining the sheriff of Randolph County from enforcing the law prohibiting the sale of wine and beer in Randolph County after the expiration of 60 days from the date of election, and that plaintiff's application is denied.

The record on appeal shows that: "To the foregoing findings of fact and judgment, the plaintiff enters exceptions." And plaintiff appeals to the Supreme Court and assigns error.

Ottway Burton for plaintiff, appellant.

Ferree & Gavin for defendants, appellees.

WINBORNE, J. The exception in the case in hand is "to the foregoing findings of fact and judgment." This, as to findings of fact, is a broadside exception. It fails to point out and designate the particular findings of fact to which exception is taken, and it is insufficient to challenge the sufficiency of the evidence to support the findings, or any one or more of them. *Vestal v. Machine Co.*, 219 N.C. 468, 14 S.E. 2d 427.

When it is claimed that findings of fact made by the trial judge are not supported by evidence, the exceptions and assignments of error in relation thereto must specifically and distinctly point out the alleged errors. *Burnsville v. Boone*, 231 N.C. 577, 58 S.E. 2d 351, and cases cited; also *Paper Co. v. Sanitary District, ante*, 421; *Johnson v. Barham, ante*, 508.

In the absence of proper exceptions to the finding of fact on which a judgment is based, an exception to the signing of the judgment is insufficient to bring up for review the findings of fact. *Fox v. Mills*, 225 N.C. 580, 35 S.E. 2d 869; *Burnsville v. Boone, supra.*

However, in the grouped assignments of error plaintiff has set out specific portions of the findings of fact to which exceptions are there stated. But these are apparently abandoned, since they are not brought forward in the appellant's brief filed in this Court. "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." Rule 28 of the Rules of Practice in the Supreme Court, 221 N.C. 544, p. 562.

Nevertheless, a reading of the record fails to show error in the findings of fact to which the above assignments of error relate.

The remaining portion of the exception is to the judgment, and the assignment of error based thereon. These present only the question as to whether, on the facts found, error in matters of law appears upon the face of the record. *Culbreth v. Britt Corp.*, 231 N.C. 76, 56 S.E. 2d 15; *Terry v. Coal Co.*, 231 N.C. 103, 55 S.E. 2d 926, and cases cited.

And the assignment of error as stated in the grouping of assignments of error is "to the holding of the court that the petition and election was in all respects legal and valid and that a person only has to be a registered voter of Randolph County to be a valid petitioner, and that the plaintiff has not established a *prima facie* case to entitle him to a restraining order, the plaintiff excepts, and to the judgment signed in this matter." Thus the challenge to validity of the election is expressly limited to and focused upon the point that the trial court erred in respect of the ruling as to who is a valid petitioner within the meaning of General Statutes 18-124 (b), which is subsection b of Section 1 of Chapter 1084 of 1947 Session Laws of North Carolina. This is the sole question. This statute pertains to petitions requesting that an election be held for the purpose of submitting to the voters of the county the question of whether or not wine or beer or both shall legally be sold therein, and provides that the county board of elections, "upon presentation to it of a petition signed by fifteen per cent (15%) of the registered voters of the county that voted for governor in the last general election requesting" such an election, shall call it for the purposes above stated.

The court below held that the words "15 per cent of the registered voters of the county that voted for governor in the last general election," as used in the statute refers to the total number of votes cast for Governor in the last general election, and not necessarily the identical persons who cast votes for Governor in said election. This appears to be the fair and reasonable meaning of the statute.

Since the election laws of this State provide for a secret ballot, it would be impossible for a county board of elections to determine how or whether any particular voter voted for Governor in the last general election. Hence, it is inconceivable that the General Assembly intended to do a vain thing.

Indeed, the findings of fact hereinabove stated show not only that the number of signers on the petition in question who were legally registered, but that the number of the signers who personally voted in the 1948 general election exceeded fifteen per cent of the number of votes then cast for Governor.

It is noted that appellant debates, in his brief, various other questions of law in respect of matters of law in the judgment from which appeal is taken. And while not presented by the assignments of error, a reading

of the facts, in the light of pertinent statutes and decisions of this Court fails to show error upon the face of the record.

Attention is directed to the fact that in brief filed here, appellant groups on one page all cases cited, and in the text of the brief does not give the volume and page of any case cited, but follows each with the word *"supra,"* thereby necessitating a checking with the list of grouped cases to find where any case is reported. This is not a compliance with Rule 28 of the Rules of Practice in the Supreme Court. 221 N.C. 544, at page 562.

Upon full consideration of the case as presented, error is not made to appear in the judgment from which appeal is taken.

Affirmed.

IONIC LODGE #72 F. & A. A. M. v. IONIC LODGE FREE ANCIENT & ACCEPTED MASONS #72 COMPANY, W. S. SCALES AND GEORGE W. HARRIS.

(Filed 22 November, 1950.)

1. Associations § 5: Common Law—

The common law rule that a unincorporated association has no legal entity and can neither sue nor be sued in its own name obtains in this State except to the extent it has been modified by statute. G.S. 4-1.

2. Parties § 1—

An action must be prosecuted in the name of the real party in interest. G.S. 1-57, G.S. 1-68.

3. Associations § 5—

The common law rule that an association is without power to sue in its common name has been modified by statute in this State only to the extent of permitting an association to sue in its common name in an action concerning a certificate or policy of insurance issued by it, and in other cases permitting one or more members of an association to sue for the benefit of all when its members are so numerous that it is impractical to bring them all before the court, G.S. 1-70, and provisions of this statute are controlling and preclude an association from suing in its common name on a cause of action unrelated to insurance.

DEVIN, J., dissenting.

ERVIN, J., concurs in dissent.

PETITION by defendants, appellees, to rehear the case reported *ante*, 252, 59 S.E. 2d 829, where the facts as shown in the record on appeal are stated.

Elledge & Browder and Eugene H. Phillips for plaintiff.
Ingle, Rucker & Ingle for petitioners.

WINBORNE, J. The ground on which the petition to rehear, now in hand, is based is that, in passing upon the question as to whether plaintiff has the legal capacity to sue in this action, the provisions of G.S. 1-70 were not taken into consideration, and that the conclusion reached was made to rest upon statutes which are not pertinent. It is contended, and we think properly so, that the provisions of G.S. 1-70 are pertinent to and determinative of the question.

It is well settled that at common law an unincorporated association was not recognized as having legal entity, and could not sue or be sued in the association name. The common law required the action to be brought by or against the members composing the association. In this State, so much of the common law as has not been abrogated or repealed by statute is in full force and effect. G.S. 4-1, formerly C.S. 970. *Scholtens v. Scholtens,* 230 N.C. 149, 52 S.E. 2d 350, and cases there cited.

And in this State the statute on civil procedure, Chapter 1 of the General Statutes, provides that every action must be prosecuted in the name of the real party in interest, G.S. 1-57; and that all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, either jointly, severally, or in the alternative, except as otherwise provided, G.S. 1-68.

And G.S. 1-70, as now constituted, a consolidation of what was formerly C.S. 457, and an act amendatory thereof, Chapter 182 of Public Laws of 1933, relates to "Joinder of Parties"; and to "Actions by or against one for the benefit of a class." In pertinent part C.S. 457 reads as follows: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants," and "When the question is one of common or general interest of many persons, or where the parties are so numerous that it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

The 1933 Act amended C.S. 457 "by adding another section thereto as follows: Any and/or all unincorporated, beneficial organizations, fraternal benefit orders, associations and/or societies, or voluntary fraternal beneficial organizations, orders, associations and/or societies issuing certificates and/or policies of insurance, foreign or domestic, now or hereafter doing business in this State, shall have the power to sue and/or be sued in the name commonly known and/or used by them in the conduct of their business to the same extent as any other legal entity established by law, and without naming any of the individual members composing it: Provided, however, this act shall apply only in actions concerning such certificates and/or policies of insurance."

Thus it is clear that the General Assembly has, by the provisions of G.S. 1-70 abrogated the common law in respect of the parties to an action at law to the extent, and only to the extent that (1) "when the question is one of common or general interest of many persons, or where the parties are so numerous that it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all"; and (2) when an unincorporated association of the kind or character enumerated, is engaged in issuing certificates and policies of insurance, or either, and doing business in this State, it may sue or be sued in any action concerning such certificates and policies, or either, without naming any of the individual members composing it.

In the present action, plaintiff alleges in its complaint that it is "an unincorporated fraternal organization or society," but there is no allegation, proof or suggestion that it is engaged in the business of issuing certificates and policies of insurance, or of either. Therefore, plaintiff, as an unincorporated fraternal association, may not, as such, maintain an action at law,—but the provisions of the statute are open to its members.

It is noted that the opinion reported *ante,* at 252, recognizes the uniform holding of the courts that following the rule of common law an unincorporated association does not have the capacity to sue, unless given that capacity by some pertinent statute. And the opinion points out, G.S. 1-97 (6), requiring certain unincorporated associations to appoint process agents, and G.S. 39-24 through G.S. 39-27, authorizing certain voluntary organizations and associations to acquire, hold and convey real estate, as grants of implied authority. It would seem, however, that the provisions of G.S. 1-70 bear directly and expressly upon the question presented, and are controlling.

Hence the petition is allowed, and the judgment from which appeal is taken is affirmed.

Petition allowed.

DEVIN, J., dissenting: I am unable to agree with the disposition made of this case. By the majority opinion on rehearing the decision heretofore rendered by this Court is overruled, and it is now held that the plaintiff, a fraternal association known as Ionic Lodge F. & A. A. M., be denied the right to go into court to assert its title to an interest in real property and for the rents thereof of which it is alleged it is being deprived by the wrongful acts of the defendants.

It is declared that the plaintiff association, the owner of real property lawfully acquired, has not capacity to sue to protect its rights therein, and the action it has instituted therefor is dismissed on that ground. With this I cannot agree. In my opinion, under the facts here alleged,

Ionic Lodge should not be denied capacity to present its plea for redress for wrongs done its property rights.

At common law an unincorporated association of persons was not recognized as having capacity to sue or be sued. It was a nonentity. Its members were regarded as acting only in the character of partners in whatever they undertook to do. *Tucker v. Eatough,* 186 N.C. 505, 120 S.E. 57; *Lodge v. Benevolent Association,* 231 N.C. 522, 58 S.E. 2d 109; *United Mine Workers v. Coronado,* 259 U.S. 344. But modern social and economic conditions presented a different picture. The fact that lodges, fraternal benefit societies, labor unions were entering into contracts and under well-known names acquiring and owning property and property rights of substantial value necessitated reconsideration of the status of such associations in courts of justice. Now, both by statute and by judicial decisions, the legal existence of such well-defined associations has been fully recognized and their rights to contract, to own and deal with property, real and personal, in the common name of the association has been established. We have emerged from the shadow of the common law into the light of reason and practical experience.

The existence of associations such as plaintiff as distinct entities has been recognized by statute in North Carolina, and the rights of these associations with respect to the acquisition, ownership and disposition of real property fully assured.

G.S. 39-24 provides that "voluntary organizations and associations organized for charitable, fraternal, religious or patriotic purposes . . . are hereby authorized and empowered to acquire real estate and to hold the same in their common or corporate names." G.S. 39-25 declares that real property which has been conveyed to such organization or association in the name by which it is commonly known "shall vest in said organization and may be conveyed by said organization in its common name . . . by deed."

By G.S. 1-97 (6) provision is made for service of process on "any unincorporated association or organization," and it is declared that service by the method prescribed "shall be legal and binding upon the association or organization," and any judgment rendered thereunder "may be collected out of any property belonging to the association or organization."

These statutes removed plaintiff association from the category of a nonentity, and recognized its right in its own name to acquire and own real property. These rights would be stripped of an essential value unless it be held that the powers expressly conferred were accompanied, by necessary implication, by the right to apply to the courts for redress for wrongful invasion of the rights thus conferred.

As result of the decision in this case a complainant can bring such an association into court and by judgment take away its property, but when the association's property has been wrongfully taken by another, it is powerless to come into court for redress. It should have the right to sue as well as be sued.

While the statutes quoted do not in direct language confer upon an association like the plaintiff the capacity to sue and be sued in its common name, the intent and effect cannot be mistaken. Recognition of such association as legal entities clothed with all the incidents of property ownership should be held to confer upon it as upon an individual who has been disseized the right to present to a court of justice its plea for redress. The statutory provision for service of process on an association in its common name, and upon which it may be sued in court, suggests the conclusion that it also may come into court voluntarily and be heard on its complaint. From an examination of these statutes I reach the conclusion that the legislative intent appears sufficiently manifest to justify this Court in declaring the law in accord with the implications necessarily flowing therefrom.

As the basis for rehearing it was argued that *Justice Seawell* in writing the former opinion overlooked G.S. 1-70. I doubt that. In his carefully prepared opinion it was said, "The plaintiff comes within the pale of recently enacted statutes vesting them with that capacity (to sue)." In any event I do not regard that statute as controlling the decision on the facts here made to appear. G.S. 1-70 requires that those who are "united in interest must be joined as plaintiffs, and where the parties are so numerous that it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." This statute, as result of subsequent amendment, further provides that an unincorporated fraternal benefit association "issuing certificate of insurance" shall have power to sue and be sued in its common name as any other legal entity established by law; "provided, however, this section shall apply only in actions concerning such certificates of insurance."

The plaintiff is not a fraternal benefit association "issuing certificates of insurance," and this action in no way relates thereto. Plaintiff is seeking to recover its right to an interest in real property of which it has been wrongfully deprived by the defendants. This section G.S. 1-70 is not comprehensive. It does not apply to suits against the plaintiff, nor should it be held to prohibit suits by the plaintiff. It applies by its terms to a particular business in which plaintiff is not engaged and with which it has no concern. I do not think this amendment to an older statute now codified as part of G.S. 1-70 was intended to shut the door of a court of justice in the face of an association which had been expressly authorized and empowered by statute to acquire and own real property

when it comes seeking redress for the wrongful deprivation of that property.

It will not do to say that if the parties are so numerous that it is impracticable to bring them all into court, one may sue for the benefit of all. The number of members of the lodge does not appear, but that is not material, as the beneficial ownership of the property involved vested in the lodge as such. Plaintiff Lodge is the real party in interest. The members as individuals do not own the property and are not the real parties in interest. It was alleged in the complaint that it was the intent of all parties "that the beneficial ownership of the property above described should, at all times, be held for the use of the plaintiff Lodge."

The views herein expressed are fortified by what was said by this Court in the recent case of *Lodge v. Benevolent Association,* 231 N.C. 522, 58 S.E. 2d 109. In that case the question here debated was not directly presented, but *Justice Ervin,* writing the opinion for the Court, called attention to the several statutes hereinbefore cited, and made this comment: "A thoughtful note in the North Carolina Law Review suggests that the last cited statute (G.S. 1-97 (6)) must be interpreted to render all unincorporated associations capable of suing and being sued in their own names in North Carolina courts. 25 N.C.L.R. 319." It will be observed in the article in the Law Review referred to that the author, after reviewing all these statutes, concluded that the principle of fairness dictated "if one had capacity to be sued, he must also have capacity to sue in the same manner."

In my judgment the petition to rehear should have been dismissed.

I am authorized to say that *Justice Ervin* concurs in this opinion.

W. P. PRICE v. DICKSON WHISNANT, GUARDIAN OF A. H. McRARY, NON COMPOS MENTIS; MATTIE McRARY, EARL BRADFORD AND FINLEY McGEE.

(Filed 22 November, 1950.)

1. Evidence § 32—

A party interested in the event of the action may not testify as a witness as to a transaction with the adverse party who at the time of trial has been adjudged *non compos mentis.* G.S. 8-51.

2. Appeal and Error § 39c—

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

3. Evidence § 7e—

The showing of a *prima facie* case entitles plaintiff to go to the jury and shifts the burden of going forward with the evidence to defendant, but defendant is not bound to rebut the *prima facie* case but merely assumes the risk of an adverse verdict if he fails to do so.

4. Adverse Possession § 9b—There must be pedis possessio under deed in order to entitle grantee to presumptive possession to outermost boundaries.

Plaintiff went into possession under a deed conveying a particular tract under belief that the deed conveyed also a contiguous tract. Years later, upon discovering that the contiguous tract was not included in the description of this deed, he obtained a quitclaim deed to his own and the contiguous tract, and continued in possession thereafter for more than seven years. *Held:* There was no entry upon the land under color of the quitclaim deed, and therefore plaintiff is not entitled to the benefit of presumptive possession to the outermost boundary described in the quitclaim deed as an aid in establishing his claim to the contiguous tract by adverse possession.

APPEAL by defendants from *Bennett, Special Judge,* at June Term, 1950, of CALDWELL.

This is an action to recover damages for alleged trespass.

1. The plaintiff alleges he is the owner and in possession of the tract of land consisting of 175 acres in Little River Township, Caldwell County, N. C., described in the complaint by metes and bounds; that the defendants in person and through their agents, servants and employees have trespassed upon said lands and have cut and removed therefrom certain timber of the value of $120.00.

2. The plaintiff prays for a restraining order, restraining and enjoining the defendants and their agents, servants, employees, assignees and attorneys from any further trespass upon the lands described in the complaint; and, for judgment for double the value of the timber theretofore cut and removed from said premises by the defendants.

3. The defendants deny that the plaintiff is the owner of 64.4 acres of the land described in the complaint, and allege that the defendant A. H. McRary and his predecessors in title have owned and possessed the 64.4 acre tract of land adversely and under known and visible lines and boundaries, continuously for more than twenty years, and under color of title under known and visible lines and boundaries for more than seven years.

4. It is disclosed by the evidence that the plaintiff purchased a tract of land in 1913 from T. H. Broyhill, which is the land described in the plaintiff's complaint less the 64.4 acres now in dispute. The plaintiff offered evidence tending to show acts of ownership since 1913 of the land now in dispute. In 1923 he discovered that the 64.4 acre tract of

land was not included in the description in the deed from Broyhill to him. The plaintiff testified, however, that the deed to Broyhill did contain the disputed land. Even so, he thereupon obtained a quitclaim deed in 1923 to the entire 175 acre tract of land described in the complaint, not from Broyhill, but from the widow and heirs of Broyhill's predecessor in title and filed the same in the office of the Register of Deeds of Caldwell County on 13 January, 1926.

5. It is admitted that the defendant A. H. McRary is *non compos mentis,* and is now confined to the State Hospital in Morganton, N. C., and that Dickson Whisnant is his duly appointed guardian.

6. The defendants offered evidence tending to show that the defendant A. H. McRary is the grandson of Francis McRary; that Francis McRary obtained warranty deeds to the disputed lands in 1851 and 1876, which respective deeds were duly recorded on 5 August, 1851, and 29 November, 1877. After the institution of this action, the heirs of Francis McRary executed a quitclaim deed to A. H. McRary to all the tracts of land conveyed to Francis McRary in 1851 and 1876, being in excess of 200 acres, excepting therefrom certain lands conveyed by Francis McRary during his lifetime. This quitclaim deed was filed for record and duly recorded 31 December, 1949. The defendants contend that the descriptions contained in the deeds referred to in this paragraph include the 64.4 acres in dispute in this action. All these conveyances were offered in evidence by the defendants. Defendants also offered evidence tending to show acts of ownership of the disputed lands for a period of more than twenty years.

7. The plaintiff concedes in his brief that he rests his ownership to the disputed tract of land on his quitclaim deed and adverse possession for more than twenty years.

Issues were submitted to and answered by the jury as follows:

"1. Is the plaintiff the owner and entitled to the possession of the lands in dispute embraced by the letters B-2-P-D-E-F-G-B, as shown on the court map? Answer: Yes.

"2. If so, have the defendants trespassed upon the same? Answer: Yes.

"3. What damage is plaintiff entitled to recover of defendants? Answer: $1.00."

From the verdict and judgment entered thereon, the defendants appeal, and assign error.

Folger Townsend and Fate J. Beal for plaintiff.

B. F. Williams and Hal B. Adams for defendants.

DENNY, J. The defendants assign as error the admission of plaintiff's testimony, over objection, to the effect that the defendant A. H. McRary, who is now *non compos mentis,* sent for him "quite a few years ago" to meet him at a designated place; that he did so and McRary had Charles Barlow (now deceased), the County Surveyor, to run certain lines, one of which is now in dispute.

We think this evidence coming from the plaintiff was inadmissible. It was evidence concerning a transaction between the witness and the defendant, who is *non compos mentis.* Such testimony is inhibited by the provisions of G.S. 8-51. This statute expressly provides that "a party or person interested in the event . . . shall not be examined as a witness in his own behalf or interest . . . against the executor, administrator or survivor of a deceased person, or the committee of a lunatic . . . concerning a personal transaction or communication between the witness and the deceased person or lunatic . . ."

W. P. Price, the witness, is (a) a party to the action, (b) he is interested in the event of the action, and (c) the defendant A. H. McRary at the time of the trial below had been adjudged *non compos mentis,* and by reason of this fact was incompetent to testify in his own behalf; therefore, the plaintiff was likewise incompetent to testify in his own behalf concerning any transaction or communication between himself and this defendant. *Perry v. Trust Co.,* 226 N.C. 667, 40 S.E. 2d 116; *Wingler v. Miller,* 223 N.C. 15, 25 S.E. 2d 160; *Cartwright v. Coppersmith,* 222 N.C. 573, 24 S.E. 2d 246; *Wilder v. Medlin,* 215 N.C. 542, 2 S.E. 2d 549; *Poole v. Russell,* 197 N.C. 246, 148 S.E. 242. *Cf. Turlington v. Neighbors,* 222 N.C. 694, 24 S.E. 2d 648, and *Abernathy v. Skidmore,* 190 N.C. 66, 128 S.E. 475. Even so, the witness was permittd to testify thereafter without objection as to where the defendant had the County Surveyor run the disputed line and to testify as to the point where such line began, the bearing and distance thereof; that the line was marked with an axe and that the plaintiff and the defendant A. H. McRary were with the surveyor when the line was run.

The admission of this evidence without objection, rendered harmless the previously admitted evidence of similar import over objection. *S. v. Summerlin, ante,* 333, 60 S.E. 2d 322; *S. v. King,* 226 N.C. 241, 37 S.E. 2d 684; *S. v. Godwin,* 224 N.C. 846, 32 S.E. 2d 609. This assignment of error will not be sustained.

The appellants except and assign as error two excerpts from the charge, as follows:

"When the plaintiff has shown a *prima facie* title, it behooves the defendant to show a superior title. The burden of proof upon this issue is upon the plaintiff. The plaintiff alleges ownership and right to possession and the defendant denies it. Ordinarily the burden of proof never

shifts from the plaintiff, but our courts have said that when a plaintiff shows *prima facie* title, that then the burden of going forward with the evidence shifts to the defendant, and he must then rebut the evidence of the plaintiff. Showing *prima facie* title does not shift the burden of proof upon this issue, but imposes upon the defendant the burden of going forward with evidence." Exception No. 39.

"Now, if you are satisfied from the evidence and by its greater weight that the plaintiff received a quitclaim deed which described the property in question, and that he lived on a portion of the property described in the quitclaim deed, and actually occupied a portion of it, then the court instructs you that in that event that the actual occupancy of the plaintiff in such case would be deemed in our law to extend to the outermost limits of the description contained in the quitclaim deed, nothing else appearing, and it would then be necessary for the defendant to satisfy you from the evidence that he had held it adversely for the required statutory period of time. Or, the defendant would have to satisfy you that he has a superior title to the property." Exception No. 41.

The assignment of error based on the 39th exception challenges the correctness of the court's instruction as to the effect of a *prima facie* case. We think the instruction is inexact and may have misled the jury. When a plaintiff makes out a *prima facie* case, it simply means he has offered sufficient evidence in support of his allegations to warrant the submission of his case to the jury, and the jury may, but is not compelled to find for him. However, in such cases, the burden of going forward with the evidence shifts to the defendant, and if the defendant elects to offer no evidence he merely assumes the risk of an adverse verdict *Precythe v. R. R.*, 230 N.C. 195, 52 S.E. 2d 360; *Vance v. Guy*, 224 N.C. 607, 31 S.E. 2d 766; *Star Mfg. Co. v. R. R.*, 222 N.C. 330, 23 S.E. 2d 32; *McDaniel v. R. R.*, 190 N.C. 474, 130 S.E. 208; *Speas v. Bank*, 188 N.C. 524, 125 S.E. 398. "A *prima facie* showing merely takes the case to the jury, and upon it alone they may decide with the actor or they may decide against him, and whether the defendant shall go forward with evidence or not is always a question for him to determine." *Hunt v. Eure*, 189 N.C. 482, 127 S.E. 593.

Likewise, the assignment of error bottomed on the 41st exception challenges the correctness of the charge on constructive possession, when considered in light of the facts disclosed on the record.

It is settled law with us that where one enters into possession of land under a colorable title which describes the land by definite metes and bounds, and occupies and holds a portion of the land within such description, asserting ownership of the whole, by construction of law his possession is extended to the outer bounds of his deed, and possession so held adversely for seven years ripens his title to all the land embraced in the

description in his deed which is not adversely held by another. *Vance v. Guy,* 223 N.C. 409, 27 S.E. 2d 117; *Ware v. Knight,* 199 N.C. 251, 154 S.E. 35; *Ray v. Anders,* 164 N.C. 311, 80 S.E. 403; *Simmons v. Box Co.,* 153 N.C. 257, 69 S.E. 146; *Haddock v. Leary,* 148 N.C. 378, 62 S.E. 426.

In this case, however, the plaintiff went into possession of the 175 acres of land described in the complaint, except the 64.4 acre tract now in dispute, under a warranty deed executed by T. H. Broyhill in 1913. No one disputes the plaintiff's title to or the right of occupancy of the approximately 110 acres of land conveyed to him by Broyhill, which occupancy has continued uninterrupted and unchallenged to the present time.

Since the plaintiff owned the tract of land occupied by him at the time he obtained the quitclaim deed, he did not enter upon his own land thereunder, and his continued occupation thereof would not, by construction of law, extend his possession to the outermost boundaries of the description in the quitclaim deed. The quitclaim deed was color of title only to the 64.4 acres of land not contained within the boundaries of the Broyhill deed. Therefore, in order to establish title to the disputed tract of land, the plaintiff must do so under the rule of *pedis possessio,* or show entry upon the disputed tract under his quitclaim deed and actual occupancy of a portion thereof adversely, in order to extend the force and effect of his possession to the outer borders of the disputed lands contained within the description of the quitclaim deed.

In order "to ripen a colorable title into a good title, there must be such possession and acts of dominion by the colorable claimant as will make him liable to an action of ejectment. *This is said to be the test.*" *Lewis v. Covington,* 130 N.C. 541, 41 S.E. 677. If the plaintiff had had no title to the 175 acres except under his quitclaim deed, and he had entered thereunder, the exception to the charge with respect to constructive possession by operation of law would be without merit; but he had a good title to the part of the boundary of which he had the actual possession, *Lewis v. Covington, supra; Elliott v. R. R.,* 169 N.C. 394, 86 S.E. 506, consequently such possession, by construction of law, did not extend to the outer boundaries of the quitclaim deed. At no time since 1913 could an action in ejectment have been maintained against the plaintiff with respect to his occupancy of the 110 acres purchased from Broyhill.

The defendants, for the reasons stated, are entitled to a new trial, and it is so ordered.

New trial.

RUBY H. BATEMAN v. THOMAS E. BATEMAN.

(Filed 22 November, 1950.)

1. Divorce and Alimony § 5d—

Allegations in an action for alimony without divorce to the effect that defendant constantly mistreated plaintiff and offered such indignities to her person as to endanger her health and safety, and forced her to separate herself from defendant, that defendant drank excessively and failed to provide for her support, and that plaintiff had at all times been a dutiful wife to the defendant, together with plaintiff's denial of defendant's allegations tending to establish want of adequate provocation, *is held* sufficient to state a cause of action for alimony without divorce, and defendant's demurrer thereto was properly overruled. G.S. 50-16.

2. Divorce and Alimony § 14—

In an action for alimony without divorce plaintiff must allege and prove with particularity not only the acts constituting grounds for divorce from bed and board relied on, but also that such acts were without adequate provocation on her part.

3. Divorce and Alimony § 10—

A verdict establishing that defendant did not separate himself from his wife and fail to provide her with necessary subsistence according to his condition and means in life and did not wrongfully abandon plaintiff *is held* to preclude plaintiff's right to alimony without divorce notwithstanding the jury's finding on a subsequent issue that defendant offered such indignities to her person as to render her condition intolerable and life burdensome, since the verdict establishes that plaintiff was not free from fault and therefore that the acts complained of were not without legal provocation.

DEFENDANT'S appeal from *Williams, J.*, June Civil Term, 1950, WAKE. New trial.

This is a civil action for divorce from bed and board and for subsistence, the grounds for divorce from bed and board relied upon by the plaintiff being under subsections 1, 3, 4 and 5 of Section 7, Chapter 50, of the General Statutes of North Carolina, and for subsistence under G.S. 50-16.

The complaint was filed 11 February, 1950, and alleges in substance: That the plaintiff and defendant are citizens and residents of Wake County, N. C., and were married in South Carolina on or about 20 July, 1949; that most of the time after their marriage until this cause was instituted they lived together as man and wife; that since the date of their marriage the defendant has almost continuously mistreated and abused plaintiff; that plaintiff has at all times been a dutiful wife to the defendant; that because of defendant's constant mistreatment the plaintiff has been caused to suffer many indignities to her person and that about

the first of 1950 was caused to spend over a week in the hospital after defendant had mistreated and abused her; that plaintiff separated herself from defendant on said occasion but defendant begged her to return to live with him and promised to behave himself and make proper provision for her, but to the contrary defendant has continued to mistreat and abuse plaintiff and to drink excessively and has choked her on numerous occasions and threatened to kill her; that on the night of 9 February, 1950, defendant came home and mistreated the plaintiff and violently beat and choked and otherwise physically abused her; that on account of his said misconduct the plaintiff has been forced to separate from the defendant and desires the protection of the court to prevent the defendant from further molesting and abusing her; that defendant squanders much of his money and has not properly provided and does not properly provide for the necessary household and living expenses of the plaintiff; and although defendant has frequently promised to provide for the plaintiff he has failed and neglected to do so and should be required by the court to make proper provision for the plaintiff.

The defendant, by his answer, admits that he and the plaintiff are residents of Wake County and were married in South Carolina on or about 20 July, 1949, but denies the remaining material allegations in the complaint, alleging in the further answer and defense, and as a plea in bar of the recovery of any further sums by plaintiff against defendant, that the true facts are, in substance:

That following his marriage with the plaintiff the defendant was a faithful and dutiful husband and sought to the best of his ability and means to provide for plaintiff but despite the efforts of the defendant various and unhappy differences arose between the plaintiff and the defendant due to the fact that the plaintiff was a selfish, extravagant and exacting wife, forcing the defendant to live and spend sums beyond his means, and in the course of months the defendant became heavily indebted and was unable to please and satisfy the plaintiff, who became ill in temper and violent in her abuse and mistreatment of the defendant; and on various occasions in the presence of others and in public abused and used violent, profane and offensive language against the defendant, causing him great humiliation and mortification; that on various occasions the plaintiff in a violent temper struck and assaulted the defendant with articles extending from an ashtray to a knife; that defendant during the period of separation has sought to restore marital relationship and has beseeched plaintiff to settle their differences, without success, and that defendant verily believes plaintiff's marriage to him was for the selfish purpose of providing herself with material comforts; that as a result of worry, difficulties and humiliation flowing from the treatment, attitude and conduct of the plaintiff toward him he has lost efficiency in

work, has been discharged from his position, and has yielded to excessive use of alcohol; and the defendant expressly denies that he separated from the plaintiff and failed to provide her with the necessary subsistence according to his means and condition in life but did provide amply for the plaintiff and in excess of his means; that a separation between the plaintiff and defendant was caused and brought about on account of the fault of the plaintiff in numerous respects, including those alleged; that her disposition, attitude and treatment of the defendant was such that it was impossible for the defendant, in spite of his every effort, to please and satisfy the plaintiff; and defendant further expressly denies that he has been guilty of any misconduct or act which would be grounds for divorce, either absolute or from bed and board; and alleges that the separation of the plaintiff and defendant was brought about and caused by the wrongful acts of the plaintiff; that the plaintiff did refuse and continues to refuse to return and live with the defendant under conditions and circumstances within his means and condition in life.

The plaintiff in reply to the further answer and defense of the defendant denied the material allegations, and alleged in substance that the defendant has abused the plaintiff so violently that neither the plaintiff nor any other person could continue to love the defendant and such mistreatment and abuse has rendered plaintiff's condition intolerable and her life burdensome so long as she remained with the defendant; but that defendant's bad habits of drink and otherwise left no alternative for the plaintiff except to leave defendant for her own health and safety.

Upon the reading of the pleadings the defendant demurred *ore tenus* to the complaint for that same did not state facts sufficient to constitute a cause of action in that it was not alleged that the husband separated himself from the wife and failed to provide her with the necessary subsistence according to his means and condition in life or that he had become a spendthrift or a drunkard or was guilty of any misconduct or act that constituted grounds for divorce, either absolute or from bed and board.

The demurrer was overruled and the defendant excepted.

Upon the close of the testimony the defendant entered the following issues:

1. Were the plaintiff and the defendant married as alleged in the complaint?

2. Did the defendant separate himself from his wife and fail to provide her with the necessary subsistence according to his means and condition in life?

3. Was the separation of the plaintiff and the defendant caused in whole or in part by the plaintiff's own fault and wrongdoing as alleged in the answer?

His Honor refused the issues as tendered by the defendant and submitted the following issues:

1. Were the plaintiff and the defendant married as alleged?

2. Did the defendant Thomas E. Bateman separate himself from his wife and fail to provide her with the necessary subsistence according to his means and condition in life?

3. At the time of the separation was the husband a drunkard?

4. Did the defendant wrongfully abandon the plaintiff?

5. Did the defendant by cruel or barbarous treatment endanger the life of the plaintiff?

6. Did the defendant offer such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome?

7. Was the defendant an habitual drunkard?

After the jury had been out for some time it returned its verdict to the court with the issues Nos. 4, 5, 6 and 7 unanswered. The court refused to accept the verdict and instructed that all issues must be answered. After further deliberation the jury brought in their verdict with the answers as follows:

Issue 1, Yes; Issue 2, No; Issue 3, No; Issue 4, No; Issue 5, 8—No, 4—Yes; Issue 6, 8—No, 4—Yes; Issue 7, No.

Upon further instruction by the court that the answers to all issues must be unanimous, the jury returned and deliberated and answered the 5th issue No, and the 6th issue, Yes.

Upon the coming in of the verdict the defendant in due time moved the court that the answer to issue No. 6 be set aside for that it was contrary to the greater weight of the evidence, was not supported by competent evidence, and was in conflict with and repugnant to the answers to issue No. 2 and issue No. 4; and further that under the charge of the court the answer to issue No. 6 was comprehended and included in the answer to issue No. 2 and that the negative answer to the second issue and the affirmative answer to the sixth issue were in conflict and repugnant to each other.

The motions were each denied and the defendant excepted. The defendant moved to set the verdict aside and for a new trial, which motion was overruled, and the defendant excepted. Judgment was signed as appears in the record awarding the plaintiff alimony and support, to which judgment the defendant duly excepted and appealed, assigning errors.

Simms & Simms and John M. Simms for plaintiff, appellee.

Bickett & Banks for defendant, appellant.

JAMES, J. The defendant filed a demurrer *ore tenus* upon the reading of the pleadings upon the ground that the complaint did not state facts sufficient to constitute a cause of action in that it was not alleged that the husband separated himself from the wife and failed to provide her with the necessary subsistence according to his means and condition in life or that he had become a spendthrift or a drunkard or was guilty of any misconduct or act that constituted grounds for divorce, either absolute or from bed and board.

His Honor overruled the demurrer and this Court is in agreement with that ruling. We are of the opinion that the alleged facts contained in the pleadings of the plaintiff are sufficient to withstand the demurrer, are sufficient to constitute a cause of action, and we so hold. *Barwick v. Barwick,* 228 N.C. 109, 44 S.E. 2d 597; *Trull v. Trull,* 229 N.C. 196, 49 S.E. 2d 225, and cases therein cited.

But upon the coming in of the verdict the defendant in apt time moved to set it aside and for a new trial, which motion was overruled, and defendant excepted. Judgment was signed, as appears in the record, awarding the plaintiff alimony, to which judgment the defendant duly excepted, and appealed, assigning error. And thereupon the question arises as to whether or not the answers to the issues submitted to the jury support the judgment.

We are of the opinion that they do not, and so hold.

It was stipulated during the trial of the cause, and the pleadings support the stipulation, that the grounds for divorce from bed and board relied upon by the plaintiff are under subsections 1, 3, 4 and 5 of Sec. 7, Chapter 50, of the General Statutes. Those sections are as follows:

"G.S. 50-7. Grounds for divorce from bed and board.—The Superior Court may grant divorce from bed and board on application of the party injured, made as by law provided, in the following cases:

"(1) If either party abandons his or her family.

"(3) By cruel or barbarous treatment endangers the life of the other.

"(4) Offers such indignities to the person of the other as to render his or her condition intolerable and life burdensome.

"(5) Becomes an habitual drunkard."

The plaintiff's claim for alimony without divorce under G.S. 50-16 was based upon the above sections of G.S. 50-7, and the issues submitted to the jury should have been framed upon the allegations in the pleadings and the evidence introduced under those allegations, with reference to the provisions of G.S. 50-7 upon which the plaintiff relied as grounds for divorce from bed and board.

In an action by a wife against her husband for divorce from bed and board, she must not only set out with particularity the acts of cruelty on the part of the husband upon which she relies, but she is also required to

aver, and consequently to prove, that such acts were without adequate provocation on her part. *Hyder v. Hyder,* 215 N.C. 239, 1 S.E. 2d 540; *Pollard v. Pollard,* 221 N.C. 46, 19 S.E. 2d 1; *Trull v. Trull, supra.*

In this connection, although issues No. 2 and No. 4 are to some extent overlapping, the answer to both of them in the negative, under the charge of his Honor with reference to them, is a finding that the plaintiff was not free from fault or blame with reference to her marital difficulties. Hence the affirmative answer to the 6th issue would not entitle the plaintiff to an award of alimony. *Page v. Page,* 161 N.C. 170, 76 S.E. 619. Therefore, the answers to the issues submitted will not support the judgment.

We are of the opinion that for the reasons stated the defendant is entitled to a new trial, and it is so ordered.

It is, therefore, unnecessary to pass upon the other questions raised by the appeal.

New trial.

SAWYER CANAL COMPANY AND HOOKER & CAMPEN CANAL, INC., v. ELIZABETH M. KEYS AND ELIZABETH KEYS ALLEMAN, EXECUTRIX OF ELIZABETH M. KEYS, DECEASED.

(Filed 22 November, 1950.)

1. Drainage Districts and Corporations § 6—

In a proceeding by drainage corporations to have lands of respondents assessed for improvements upon allegations that respondents are not members of the corporation but that nevertheless their lands drain into the canals and would be materially benefited by the improvements, *held:* Respondents' contention that the sole remedy of petitioners is under the provisions of G.S. 156-51 to construct dams to prevent water draining from respondents' lands into the canals is untenable, since the provisions of the statute are inapplicable to such proceeding, the statute being applicable solely as a remedy where incorporators fail and refuse to pay assessments duly levied.

2. Same—

In this proceeding by drainage corporations to levy assessments against the lands of respondents for the proportionate part of the expense of making necessary improvements upon allegations that such lands drained into the corporations' canals and would be greatly benefited by the improvements, it appeared that respondents' predecessor in title cut a large canal through his lands draining into the lands of the corporation. *Held:* It will be presumed that respondents' predecessor in title acquired the right to cut into the canal of plaintiff pursuant to G.S. 156-10, and the petition should be considered as a motion in that cause for the proper adjudication of the rights of the parties.

APPEAL by plaintiffs from *Bone, J.*, at May Term, 1950, of PAMLICO.

Special proceeding upon petition of petitioners to have the Keys' Hudnell land of defendant assessed for part of expense of enlarging the outlets of plaintiffs' drainways into which defendant drains her said land.

The parties stipulate that the plaintiffs are duly incorporated under Sub-chapter II of Chapter 156 of the General Statutes of North Carolina; that as to the Keys' Hudnell land neither the defendant nor her predecessors in title are, or have been incorporators of either of said corporations; that no part of the Sawyer Canal is located on the Keys' Hudnell land, and no part of plaintiffs' lands drain through the Keys' Hudnell land; that the greater area of the lands of plaintiffs that drain into Sawyer Canal are located nearer the ultimate outlet of the canal than are the lands of defendant; and that defendant owns in the Hudnell tract approximately 1,200 acres, the natural drainage of which does run into the plaintiffs' drainways.

In the petition of petitioners, designated "motion," it is stated: That the petitioners are incorporated drainways created and existing under the drainage laws of the State of North Carolina; that their canals are the natural and only drainways for more than 2,500 acres of fertile lands situate in Nos. 1 and 3 Townships, Pamlico County, North Carolina, and owned and cultivated by fifty different farmers, residing in the said vicinity; that on account of the large volume of water flowing into said canals from the farming lands draining therein it has been determined by the stockholders and directors of said drainways, with the aid and assistance of efficient and competent drainage engineers, that it is necessary for the proper drainage of the lands to enlarge the outlets of said canals from their mouths to a width of 32 feet and depth of 5 feet for a distance of 5,751 feet at a cost of approximately $5,000; that the defendant owns and drains into the Sawyer Canal a large area of fertile farm lands, known as the Hudnell land, containing approximately 1,200 acres, and has refused to contribute anything to the cost of enlarging the outlets of the said canals; and that, as petitioners are informed and believe, the defendant is liable for a part of the expense incurred in providing the proper and necessary outlets for the large volume of water flowing into plaintiffs' drainways from the defendant's lands. Wherefore, petitioners pray the court to appoint commissioners to view the land and determine (1) the number of acres of defendant's land that drain into plaintiffs' drainways, and (2) the amount of expense of enlarging the outlets for said drainways, and (3) that the lands of defendant be assessed for the privilege of draining into plaintiffs' drainways.

Defendant, being notified to appear at certain time and place to show cause, if any she has, why the motion should not be granted, appeared through her attorneys, and objected to the appointment of commissioners

on the ground that she intended to completely dam and prevent the water from her canals or drainways emptying into plaintiffs' canals. And defendant contended, and contends that the only remedy, if any, petitioners have is limited by the provisions of the statute which permits them to block or dam their canals at the border of defendant's land, and thereby dam up the flow of water from defendant's said land of which they complain.

The clerk appointed commissioners as prayed by petitioners. The commissioners reported favorably to petitioners' contentions.

And it is made to appear from the reply of petitioners to the answer of defendant and the duly filed supplemental report of the commissioners, that in the year 1928 Joseph Keys, predecessor in title of defendant, constructed and cut into the Sawyer Canal, a large canal, several miles in length, 20 feet wide and 6 feet deep, for the purpose of draining his land, known as the Hudnell land, and other land owned by him; and that the canal, called the Keys Canal, diverted and turned into plaintiffs' drainways large volumes of water that had never flowed into said drainways prior to the cutting of said canal.

The commissioners find that defendant's said land has been greatly benefited by the recent improvement of plaintiffs' drainways and should bear a reasonable and proportionate part of the expenses of enlarging the outlets of said drainways, and they find in what proportion and amount the lands of defendant are benefited.

The clerk of Superior Court entered an order confirming the report of the commissioners as supplemented, and declared a lien on defendant's land for the amount her land is benefited, as found by the commissioners.

Defendant, having excepted to various orders, and the report and the supplement thereto, excepted to the order of confirmation, and appealed to Superior Court.

The cause came on for hearing in Superior Court, upon the exceptions of defendant to the said order of the clerk, and "the court being of the opinion that the plaintiffs are not entitled to the remedy they seek in this action, to wit, assessment of the defendant's lands," sustained the said exceptions of defendant, and entered judgment reversing the order of the clerk of Superior Court, and declaring that plaintiffs take nothing against defendant by reason of this action, etc.

Plaintiffs appeal therefrom to Supreme Court, and assign error.

Z. V. Rawls for plaintiffs, appellants.
R. E. Whitehurst for defendant, appellee.

WINBORNE, J. Apparently the ruling of the trial court assigned as error on this appeal is predicated upon the provisions of G.S. 156-51, prescribing the penalty for nonpayment of drainage assessments.

This statute provides that "whenever any person whose lands have been adjudged liable to contribute to the maintenance or repair of such canal shall fail or refuse to pay the amount assessed against his land for such maintenance or repair for thirty days after such payment has been demanded by the company, then the company may give such person notice in writing of its intention to cut off his right of drainage into the canal, and if such person shall still neglect and refuse to pay such assessment for thirty days after such notice, then the company may proceed to so obstruct and dam up the ditches of such delinquent as will effectually prevent his draining into the canal."

But this statute is inapplicable to the factual situation in hand. Sub-chapter II of Chapter 156 of the General Statutes, entitled "Drainage by Corporation," prescribes in Article 3, comprising Sections G.S. 156-37 through G.S. 156-43, the "manner of organization" of corporations for the construction of canals. And in Article 4, comprising Sections G.S. 156-44 through G.S. 156-53, and including Section G.S. 156-51, the "Rights and Liabilities in the Corporation," are defined. And in Section G.S. 156-51, the penalty relates to obstruction and damming of "ditches" that drain into the canal. Thus it seems clear that the provisions of G.S. 156-51 relate only to stockholders in the corporation so formed.

In the case in hand it is stipulated that neither the defendant nor her predecessors in title are, or were stockholders in the plaintiff corporations which were organized under Sub-chapter II of Chapter 156 of the General Statutes. Hence the provisions of G.S. 156-51 are unavailing to her.

On the other hand, Sub-chapter I of Chapter 156 of the General Statutes of North Carolina entitled "Drainage by Individual Owners," comprising Section G.S. 156-1 through G.S. 156-15, authorizes, and prescribes the procedure for, "any person owning pocosin, swamp, or flat lands, or owning lowlands subject to inundation, which cannot be conveniently drained or embanked so as to drain off or dam out the water from such lands, except by cutting a canal or ditch, or erecting a dam through or upon the lands of other persons," to apply for, and to obtain the right to cut such canal or ditch, or to erect such dam. The statute provides for the appointment of commissioners, G.S. 156-2, prescribes the duty of the commissioners, G.S. 156-3, and requires report and confirmation of report of commissioners, by which easement is acquired. G.S. 156-4.

And in Section G.S. 156-10 the privilege of cutting into and draining through canal or ditch of another is granted, and the procedure for acquiring such privilege is prescribed. This section of the statute reads in pertinent part: "Any person desirous of draining into the canal or ditch of another person as an outlet may do so in the manner hereinbefore provided . . . And the privilege of cutting into such canal or ditch may be granted under the same rules and upon the same conditions and re-

strictions as are provided in respect to cutting the first canal or ditch . . . Provided, that any party to the proceeding may appeal from the judgment of the court rendered under this Section to the Superior Court of the county at term time, where a trial and determination of all issues raised in the pleadings shall be had as in other cases before a judge and jury."

And the statute, in Section G.S. 156-11, declares that, "Besides the damages which the commissioners may assess against the petitioner for the privilege of cutting into such canal or ditch, they shall assess and apportion the labor which the petitioner and defendants shall severally contribute towards repairing the canal or ditch into or through which the petitioner drains the water from his lands, and report the same to court, which, when confirmed, shall stand as a judgment of the court against each of the parties, his executors and administrators, heirs and assigns."

And provision is made in G.S. 156-12 for notice of making repairs, and in G.S. 156-13 for judgment against owner in default for the value of his proportionate share of work and labor, "which judgment shall be a lien upon the lands from the date of the performance of the work."

Also it is provided in G.S. 156-14 that "all persons to whom may descend, or who may otherwise own or occupy lands drained by any canal or ditch, for the privilege of cutting which any labor for repairing is assessed, shall contribute the same, and shall be bound therefor to all intents and purposes, and in the same manner and by the same judgment as the original party himself would be if he occupied the land."

In the light of these provisions, it may be assumed that, since there was litigation in respect thereto, Joseph Keys, the predecessor in title of defendant, in exercising the right to cut into the canals of plaintiff, did so under, and pursuant to the provisions of the statute granting such right. G.S. 156-10. And if Joseph Keys did not initiate such proceeding, it may be assumed that the assessment of damages in the litigation to which reference is made in the record was made under the provisions of the statute.

Nevertheless, the record and case on appeal fail to show the proceeding, or the report of commissioners, or that commissioners assessed and apportioned the labor which he, the said Joseph Keys, should contribute toward repairing the canal into or through which he drained the water from his land. Hence it seems expedient that the cause be remanded for the ascertainment of the facts in these respects. And if it should appear either that in the proceedings had no commissioners were appointed in accordance with the statute, or that commissioners were appointed and failed to assess and apportion the labor which Joseph Keys should contribute, as aforesaid, the petition filed by the petitioners in the proceeding

in hand may be considered a motion in the cause,—and the rights of the parties determined in accordance with law and justice.

Error and remanded.

W. O. MINOR AND WIFE, LAURA HORTON MINOR, v. W. A. MINOR AND WIFE, EVELYN MINOR.

(Filed 22 November, 1950.)

1. Reformation of Instruments § 3—

Where it is judicially admitted by the parties that the male defendant agreed to support plaintiffs for the rest of their lives as consideration for deed to lands executed by plaintiffs to defendants, and that this provision was omitted from the deed through the mutual mistake of the parties, the court may decree reformation of the deed by the insertion of such provision.

2. Deeds § 16c—

Agreement by the grantee to support the grantors for the rest of their lives is a valuable consideration for the transfer of the property by grantors.

3. Same—

A provision in a deed that grantee should support grantors for the remainder of the grantors' lives may be a condition precedent to the vesting of title, a condition subsequent, or a covenant, depending upon the wording of the agreement in the instrument.

4. Same—

A covenant by grantee to support grantors for the balance of their lives may impose a mere personal obligation on the grantee, or may make the obligation a charge or lien on the rents and profits from the land conveyed, or may make such obligation a lien on the land itself, depending on the wording of the agreement.

5. Same—

An agreement in a deed that the grantee support grantors for the remainder of their lives will be construed as a mere covenant rather than a condition if the language will reasonably admit of such interpretation, since the law does not favor conditions precedent or subsequent.

6. Same—

It was judicially admitted by the parties that the male defendant agreed to support plaintiffs for the rest of their lives as consideration for a deed executed by plaintiffs to defendants, and that this agreement was omitted from the instrument through the mutual mistake of the parties. *Held:* There being no understanding that the promise was to operate as a condition precedent and all indicia of a condition subsequent being lacking, the

agreement is construed as a covenant making the obligation a charge or lien on the land.

7. Same—

Where the grantee breaches a covenant to support grantors which obligation constitutes a charge or lien on the land, grantors are not entitled to a cancellation of the instrument for condition broken but are remitted to an action for damages to be measured by the value of the promised support lost by grantors.

APPEAL by defendants from *Burgwyn, Special Judge,* at the April Term, 1950, of WAKE.

Civil action in which grantors seek to reform a deed by inserting in it a promise by the grantee to support them allegedly omitted through mutual mistake, and to cancel deed as reformed for breach of such promise by the grantee.

W. O. Minor and his wife, Laura Horton Minor, owned a fifty acre farm in Wake County, North Carolina, as tenants by the entireties. On 23 October, 1939, they deeded the farm to their son, W. A. Minor, in fee, subject, however, to life estates in their favor.

On 6 April, 1949, W. O. Minor and Laura Horton Minor, as plaintiffs, brought this action against W. A. Minor and his wife, Evelyn Minor, as defendants, in the Superior Court of Wake County. The case made out by the complaint and the evidence for the plaintiffs was as follows:

The conveyance of 23 October, 1939, was made by the plaintiffs in consideration of a promise by the male defendant, W. A. Minor, to furnish them with support for the remainder of their lives. The parties agreed that the provision for the support of the grantors by the grantee was to be inserted in the deed, but it was omitted from the conveyance through mutual mistake. The plaintiffs did not discover the error in the deed until one year before the commencement of the suit. The male defendant actually provided his parents with support in accordance with his promise until April, 1948. Since that time, however, he has willfully failed to furnish them with any support whatever.

The complaint prayed for the cancellation of the deed.

The defendants judicially admitted at the trial that the conveyance was made to the male defendant in consideration of a promise by him to support his parents during the remainder of their lives, and that the agreement to that effect was omitted from the deed through mutual mistake. They offered testimony, however, tending to sustain the allegations of their answer that the male defendant fully complied with his promise to support the plaintiffs at all times between 23 October, 1939, and 1 January, 1948, but had been unable to perform his agreement in that respect since the date last stated because the plaintiffs had unjustifiedly refused to accept the support offered by him.

There was neither allegation nor evidence in behalf of any party to the action as to the value of the support called for by the agreement.

These issues were submitted: (1) Did the defendant, W. A. Minor, agree to support and maintain the plaintiffs as a consideration for the conveyance of the property described in the complaint? (2) Was the consideration left out of the deed of conveyance by mutual mistake? (3) Has the defendant willfully failed to comply with the agreement of consideration?

The first and second issues were answered "Yes" by consent of the parties, and the third issue was answered "Yes" by the jury. The court entered judgment canceling the deed, and the defendants appealed, assigning errors.

Sam J. Morris for plaintiffs, appellees.

Ellis Nassif for defendants, appellants.

ERVIN, J. Under the allegations of the complaint, the judicial admissions of the defendants at the trial, and the answers to the first and second issues, the plaintiffs were entitled to have the court reform the deed by inserting in it the omitted agreement of the parties requiring the male defendant to support the plaintiffs for the remainder of their lives. *Cuthbertson v. Morgan,* 149 N.C. 72, 62 S.E. 744. Instead of entering a judgment of reformation, however, the court decreed that the conveyance should be canceled in its entirety. The defendants challenge the propriety of this action by an appropriate exception to the judgment.

It is a common practice in this State for a person to convey his real property to another in consideration of a promise by the latter to furnish him with support for the remainder of his life. In such case, the agreement of the grantee to support the grantor is a valuable consideration for the transfer of the property. *Lee v. Ledbetter,* 229 N.C. 330, 49 S.E. 2d 634; *Ayers v. Banks,* 201 N.C. 811, 161 S.E. 550; *Salms v. Martin,* 63 N.C. 608.

A provision in a deed for the support of the grantor by the grantee may constitute a mere covenant, or operate as a condition, depending solely upon the expressed intention of the parties to the conveyance. Thus the language employed in a particular instrument may make the performance of the promise of the grantee to support the grantor a condition precedent to the vesting of the estate (*Cox v. Hinshaw,* 226 N.C. 700, 40 S.E. 2d 358), or a condition subsequent for which the estate might be divested. *Barkley v. Thomas,* 220 N.C. 341, 17 S.E. 2d 482; *Huntley v. McBrayer,* 169 N.C. 75, 85 S.E. 213; *Brittain v. Taylor,* 168 N.C. 271, 84 S.E. 280.

But the law does not favor either the postponement of the vesting of estates by conditions precedent, or the destruction of estates already vested by conditions subsequent. In consequence, courts will construe the words of a deed requiring the grantee to support the grantor to create a mere covenant rather than a condition, if they will reasonably admit of such interpretation. *Helms v. Helms,* 135 N.C. 164, 47 S.E. 415, rehearing denied in 137 N.C. 206, 49 S.E. 110.

Where an agreement of the grantee to support the grantor as stated in the deed, or in another instrument executed in consideration of the deed, is simply a covenant, it falls into one of three legal categories, depending entirely upon the expressed intention of the parties. *Marsh v. Marsh,* 200 N.C. 746, 158 S.E. 400. A covenant of the first class imposes upon the grantee a mere personal obligation to support the grantor. *Higgins v. Higgins,* 223 N.C. 453, 27 S.E. 2d 128; *Bailey v. Land Bank,* 217 N.C. 512, 8 S.E. 2d 614; *Hart v. Dougherty,* 51 N.C. 86; *Taylor v. Lanier,* 7 N.C. 98, 9 Am. Dec. 599. A covenant of the second class makes the obligation of the grantee to support the grantor a charge or lien on the rents and profits from the land conveyed. *Wall v. Wall,* 126 N.C. 405, 35 S.E. 811. A covenant of the third class makes such obligation a charge or lien on the land itself. *Marsh v. Marsh, supra; Fleming v. Motz,* 187 N.C. 593, 122 S.E. 369; *Bailey v. Bailey,* 172 N.C. 671, 90 S.E. 803; *Helms v. Helms, supra; Laxton v. Tilley,* 66 N.C. 327.

The distinction between conditions and covenants becomes important in determining the remedy available to a grantor whose grantee has breached the agreement to furnish support. It is settled law in this jurisdiction that the nonperformance by the grantee of an agreement to support the grantor does not authorize the cancellation of the deed made in consideration of the agreement, unless the performance of the agreement is made a condition precedent to the vesting of the estate, or a condition subsequent for which the estate might be divested. *Helms v. Helms, supra.* The rule in respect to covenants is epitomized in this headnote to a decision handed down exactly one hundred years ago: "Where the *feme* plaintiff had conveyed her estate in dower to the defendant, and he had covenanted, in consideration thereof, to support her, *Held,* that, if he failed to do so, she could not set aside the whole contract, but must resort to her remedy at law for damages." *Murray v. King,* 42 N.C. 19.

The reasoning underlying this principle is well stated by the Supreme Court of Alabama in these words: "The first ground is obviously wanting in merit. The fact that J. C. Knight (the grantee) failed to carry out his undertaking or that both he and his wife failed and refused to carry out the undertaking in consideration of which the conveyance was made is no ground for the cancellation of the conveyance. The undertaking

was in no sense a condition subsequent upon the breach of which the conveyance was void or voidable, but at most it was a covenant on the part of J. C. Knight to pay, acquit and satisfy the price of the land in a particular way, or rather the consideration upon which the deed was made; and there is no more room or reason for a cancellation of the conveyance for default in the satisfaction of such a consideration or for failure to carry out such an undertaking than there would have been had the consideration been so much money and the purchaser had made default in the payment thereof. In both cases the remedy of the vendor would be on the undertaking, and not by way of cancellation and revestiture of title in himself." *Gardner v. Knight,* 124 Ala. 273, 27 So. 298.

The remedy available to a grantor whose grantee has breached a covenant to furnish support is an action for damages. *Murray v. King, supra.* The proper measure of damages in such action is the value of the promised support lost by the grantor. 50 Am. Jur., Support of Persons, section 26. The judgment for the damages suffered by the grantor is enforced as a charge or lien on the rents and profits from the land in case the covenant in question is a covenant of the second class (*Wall v. Wall, supra*), or as a charge or lien on the land itself in the event the covenant involved is a covenant of the third class. *Cuthbertson v. Morgan, supra.*

The task of applying these principles to the instant case must now be performed. There is no suggestion in the record of any understanding that the promise of the male defendant to furnish the plaintiffs with support was to operate as a condition precedent. Moreover, all of the indicia of a condition subsequent are lacking. *Shannonhouse v. Wolfe,* 191 N.C. 769, 133 S.E. 93; *Hall v. Quinn,* 190 N.C. 326, 130 S.E. 18. When the record in this cause is analyzed in the light of pertinent precedents, it is manifest that the promise of the male defendant to furnish the plaintiffs with support for the remainder of their lives is simply a covenant of the third class, *i.e.,* a covenant making the obligation of the male defendant to support the plaintiffs a charge or lien on the interest conveyed to him by the deed in suit. *Helms v. Helms, supra; Laxton v. Tilly, supra.*

This being so, the court erred in adjudging the cancellation of the deed. Furthermore, it committed error in submitting the third issue to the jury; for the pleadings did not put the right of the plaintiffs to recover damages for the alleged breach of the agreement in issue.

For the reasons given, the answer to the third issue is set aside, and the judgment is vacated, and the cause is remanded to the Superior Court of Wake County, with directions that it enter a final judgment on the admissions of the defendants and the answers to the first and second issues reforming the deed in suit by inserting in it the agreement of the male

defendant to support the plaintiffs during the remainder of their lives. If the plaintiffs should desire to claim damages of the male defendant for any supposed breach of the agreement, they are at liberty to proceed against him in another action.

Error.

H. R. RUSSELL AND WIFE, MERIAL W. RUSSELL, v. GEORGE W. COGGIN AND WIFE, MRS. GEORGE W. COGGIN.

(Filed 22 November, 1950.)

1. **Dedication § 5—**

Where the owner of lands subdivides and sells same by block and lot number with reference to a plat showing streets therein, a purchaser of lots acquires only an easement in the streets notwithstanding that he may purchase all the lots on both sides of a particular street and notwithstanding that a deed in *mesne* conveyances from the original owner purports to convey the fee to the center of one of the streets.

2. **Dedication § 6—**

Where individual owners of lands subdivide and sell same by block and lot number with reference to a plat showing streets therein, they retain the fee in the streets subject to the easement thus dedicated to the public in general and to the private owners of adjacent lots in particular, and are the only parties entitled to withdraw the streets from dedication when the streets have not been used for twenty years subsequent to such dedication and are not necessary for ingress and egress to any of the lots sold. G.S. 136-96.

3. **Same—**

The only instance in which owners of adjacent lots may be deemed to have anything more than an easement in abandoned streets sought to be withdrawn from dedication is when such streets were dedicated by a corporation which has become nonexistent. G.S. 136-96.

APPEAL by plaintiffs from *Bobbitt, J.*, April Term, 1950, of MONTGOMERY.

Action to remove a cloud from the title to plaintiffs' land.

The facts pertinent to this appeal are as follows:

1. Jonah and Ernest Leach owned a tract of land, in fee simple, in the town of Star, Montgomery County, N. C., which they subdivided in 1917 into blocks and lots, laid out streets between the blocks; and had the plats of the subdivision recorded in the office of the Register of Deeds for Montgomery County, in Book of Maps No. 1, at pages 36, 37, *et seq.*

2. On 10 October, 1946, Jonah Leach and the heirs at law of Ernest Leach (Ernest Leach having died intestate), executed an instrument

withdrawing from dedication the street between Block 1 and Block 4 of the subdivision, pursuant to the provisions of G.S. 136-96, which instrument was duly recorded; and on 7 August, 1949, by similar instrument the same parties withdrew from dedication a street shown on the map as Monroe Street, together with other streets, which instrument was also duly recorded.

3. The plaintiff H. R. Russell, by *mesne* conveyances from the Leaches, purchased in 1949 all of Block No. 1, of the Leach subdivision except lots 1 and 2, and Blocks Nos. 12 and 13. According to the allegations of the complaint, the grantor in Russell's deed undertook to convey to him one-half of the street lying between Block 1 and Block 4.

4. The defendant George W. Coggin, by *mesne* conveyances from the Leaches, owns certain property in Block 4. And on 10 October, 1946, Jonah Leach and the heirs of Ernest Leach conveyed the land which they withdrew from dedication between Blocks 1 and 4, to one D. H. Cochrane, and Cochrane conveyed the property by warranty deed to the defendant, George W. Coggin, on 26 May, 1949. These conveyances have been duly recorded as required by law.

5. All conveyances made by the original grantors, as well as those made by Jonah Leach and the heirs of Ernest Leach, were made by Block and lot number, as shown on the various plats, and did not purport to convey any portion of the street or streets adjacent to said lot or lots, except the land withdrawn from dedication.

The plaintiffs contend (1) that the certificates of withdrawal are null and void; and (2) that in any event they own to the center of the streets adjacent to their property, subject to whatever easement the public and other lot owners in the subdivision may have in the streets.

At the close of plaintiffs' evidence the defendants moved for judgment as of nonsuit. Motion allowed, and plaintiffs except and appeal.

Carrol & Steele for plaintiffs.

Currie & Garriss for defendants.

DENNY, J. It is now well settled the dedication of a street may not be withdrawn, if the dedication has been accepted and the street or any part of it is actually opened and used by the public. *Insurance Co. v. Carolina Beach,* 216 N.C. 778, 7 S.E. 2d 13; *Broocks v. Muirhead,* 223 N.C. 227, 25 S.E. 2d 889. Moreover, "where lots are sold and conveyed by reference to a map or plat which represent a division of a tract of land into subdivisions or streets and lots, such streets become dedicated to the public use, and the purchaser of a lot or lots acquires the right to have all and each of the streets kept open; and it makes no difference whether the streets be in fact opened or accepted by the governing boards

of towns or cities if they lie within municipal corporations. There is a dedication, and if they are not actually opened at the time of the sale they must be at all times free to be opened as occasion may require." *Hughes v. Clark,* 134 N.C. 457, 47 S.E. 462; *Wheeler v. Construction Co.,* 170 N.C. 427, 87 S.E. 221; *Elizabeth City v. Commander,* 176 N.C. 26; 96 S.E. 736; *Stephens Co. v. Homes Co.,* 181 N.C. 335, 107 S.E. 233.

However, it is provided in Chapter 174 of the Public Laws of 1921, as amended by Chapter 406 of the Public Laws of 1939, and now codified as G.S. 136-96, that land "dedicated to public use as a road, highway, street, avenue, or for any other purpose whatsoever, by any deed, grant, map, plat, or other means, which shall not have been actually opened and used by the public within twenty years from and after dedication thereof, shall be thereby conclusively presumed to have been abandoned by the public for the purposes for which the same shall have been dedicated; and no person shall have any right, or cause of action thereafter, to enforce any public or private easement therein, . . . Provided . . . the dedicator, or those claiming under him, shall file and cause to be recorded in the register's office of the county where said land lies a declaration withdrawing such strip, piece or parcel of land from the public or private use to which it shall have theretofore been dedicated in the manner aforesaid, . . ."

Withdrawals of the dedication of land for public purposes, pursuant to the provisions of the above statute, have been approved by this Court, where the road, street, highway, avenue or park had not been actually opened and used by the public within twenty years from and after the dedication thereof. *Irwin v. Charlotte,* 193 N.C. 109, 136 S.E. 368; *Foster v. Atwater,* 226 N.C. 472, 38 S.E. 2d 316. See also *Pritchard v. Fields,* 228 N.C. 441, 45 S.E. 2d 575. Where land was dedicated for street and highway purposes and such street or highway is necessary to afford convenient ingress and egress to any parcel of land sold and conveyed by the dedicator of such street or highway prior to 8 March, 1921, the dedication may not be withdrawn under the provisions of the statute. *Evans v. Horne,* 226 N.C. 581, 39 S.E. 2d 612.

The plaintiffs allege in their complaint that the certificates, purporting to withdraw from dedication the streets referred to herein, were sufficient in law to accomplish that purpose had the persons, purporting to withdraw them from dedication, been the owners thereof. There is no contention that the streets in controversy have been opened or used by the public or by the private owners of lots lying adjacent thereto, at any time.

It appears from the record that Jonah Leach, one of the original grantors, and the heirs at law of Ernest Leach, the other original grantor, were the parties who executed the certificates withdrawing the streets

involved from dedication. And since it further appears that these grantors, prior to the execution of the withdrawal certificates never conveyed any property in the subdivision except by block and lot number, they were the only parties who had the legal right, under the statute, to withdraw the streets from dedication.

The only instance in which the adjacent owners of lots in a subdivision, like the one under consideration, may be deemed to own any right, title or interest in a dedicated street, except an easement therein, is where the street was dedicated by a corporation which has become nonexistent. *Sheets v. Walsh,* 217 N.C. 32, 6 S.E. 2d 817; G.S. 136-96.

The case of *Patrick v. Jefferson Standard Life Ins. Co.,* 176 N.C. 660, 97 S.E. 657, upon which the plaintiffs rely, is not applicable to the facts disclosed on this record. There an alleyway had been reserved in a deed as appurtenant to the use of the land and the grantee thereafter acquired the fee simple title to the dominant and servient estates. The Court held that when these estates were merged, the easement in the alleyway being no longer necessary was extinguished, and the alleyway became a part of the merged estate.

In applying the provisions of G.S. 136-96 and our decisions applicable to the facts in this case, we hold that the purchasers of lots in the Leach subdivision, by block and lot number, acquired no right, title or interest in and to the streets in the subdivision, except an easement therein for the purposes of ingress and egress to and from their respective lots, which easement had been granted to the public in general and to the purchasers of the lots in particular. It follows, therefore, that when the streets were not opened and "used by the public within twenty years from and after the dedication thereof," there being no allegation to the effect that the closed streets are necessary for purposes of ingress and egress to and from plaintiffs' lots, the streets were conclusively presumed to have been abandoned by the public upon the filing and recording of the withdrawal certificates, as required by the statute, and no public or private easement may now be asserted thereto. The plaintiffs are not entitled to the relief they seek, and the judgment as of nonsuit is

Affirmed.

MRS. CARMEN EUDY ROTH, WIDOW, GAYNELLE HELMS, MINOR STEPCHILD OF JOHN D. ROTH, DECEASED, EMPLOYEE, v. McCORD & DELLINGER, INSURED BY BITUMINOUS CASUALTY CORPORATION, AND/OR CENTRAL MOTOR LINES, INC., INSURED BY TRAVELERS INSURANCE COMPANY.

(Filed 22 November, 1950.)

1. Master and Servant § 39f—

Where a truck belonging to one holding no franchise as a common carrier is leased to a holder of a franchise as a common carrier in interstate commerce, the driver of the truck, even though furnished by the lessor, must be deemed an employee of the franchise holder while making a trip in interstate commerce, both by reason of statutory provisions and also by reason of the lease agreement when the lease specifically provides that the driver should be under the exclusive control and direction of the lessee.

2. Master and Servant § 39b—

The driver of a truck leased to an interstate common carrier cannot be held an independent contractor when the lease agreement under which he performs his duties gives the lessee specific supervision, control and direction in the performance of the work.

3. Master and Servant § 39f—

Where the holder of a franchise in interstate commerce leases the tractor of a nonfranchise holder for an interstate shipment upon an agreement which stipulates that lessor should carry workmen's compensation insurance, those entitled to recover under the Workmen's Compensation Act for fatal injury to the driver on such trip are not bound by the lease provision as to carriage of workmen's compensation, but are entitled to recover from the lessee employer.

APPEAL by plaintiffs and by defendants Central Motor Lines, Inc., and Travelers Insurance Company from *Patton, Special Judge,* September Extra Term, 1950, MECKLENBURG. Affirmed.

Claim for death benefit compensation under the Workmen's Compensation Act, prosecuted by the widow and child of John D. Roth, the deceased employee.

The defendants McCord and Dellinger, hereinafter referred to as McCord, own a tractor which they leased to Central Motor Lines, hereinafter referred to as Motor Lines. They also employed Roth, the deceased, to operate the tractor.

The Motor Lines is, but McCord is not, a common carrier of freight under franchise from the Interstate Commerce Commission within the area involved.

In 1949 (prior to Roth's death) McCord leased the tractor to the Motor Lines and furnished Roth as driver. On 22 September 1949, the tractor was attached to a trailer belonging to the Motor Lines and was

being used on a trip from Charlotte, N. C., to Lodi, N. J., with a cargo of Cannon Mills products being transported by the Motor Lines under its Interstate Commerce Commission franchise. The Motor Lines' Interstate Commerce Commission identification plate was attached to the vehicle and Roth was operating the same. The truck and trailer ran off the side of a bridge near Clover, Va., and Roth was killed.

The lease agreement between McCord and the Motor Lines provides in part:

1. The lessor (McCord) shall furnish such drivers and helpers as may be required by the lessee for the proper operation of the vehicles demised, to be obtained by him as the agent of the Motor Lines.

2. The possession and control of the vehicle leased is vested exclusively in the Motor Lines while in its service and the lessee Motor Lines shall have "exclusive supervision and control over the operation of same and over said drivers and helpers," and that while said vehicle is in the service of the lessee, it shall "be operated by drivers exclusively under the direction and control of the Lessee and who shall be exclusively the servants of the Lessee . . . the said Lessee shall have the right to discharge, remove and replace said driver as well as the right to direct the manner in which the same (*sic*) driver shall perform his duties, the routes and efficient operation of said vehicle." The right of the lessee to control the driver as to the manner of operation, routes, time, the keeping of logs and other records, and the like is spelled out with particularity.

3. While the vehicle and driver are not in the service of the lessee, they may be used in the business of the lessor.

4. Insurance shall be maintained and kept in force as follows: By the lessee—public liability, property damage, and cargo insurance in the name of the lessee; by the lessor—workmen's compensation insurance and insurance to cover loss by fire, theft, or collision in the name of the lessor.

The Commission found that Roth, at the time of his injury and death, was an employee of the Motor Lines within the meaning of the Workmen's Compensation Act and made an award against it and its insurance carrier. They appealed to the Superior Court. The court below affirmed, and the Motor Lines and its insurance carrier appealed. The plaintiffs also appealed.

M. K. Harrill and Smathers & Carpenter for plaintiff appellant.

Pierce and Blakeney for defendants McCord & Dellinger and Bituminous Casualty Corporation.

B. Irvin Boyle for defendants Central Motor Lines, Inc., and The Travelers Insurance Company.

BARNHILL, J. There is no contest as to the right of plaintiffs to death benefit compensation under the Workmen's Compensation Act. G.S. 97-38, *et seq.* The controversy is as to which group of defendants is liable therefor. As to this there is no valid ground for debate. The judgment entered must be affirmed for two reasons:

(1) Roth, at the time of his injury and death, was operating a vehicle being used by the Motor Lines to haul freight in the course of its business as a common carrier under franchise from the Interstate Commerce Commission. The vehicle was being operated under its identification plate. "The operation of the truck was in law under the supervision and control of the interstate franchise carrier and could be lawfully operated only by those standing in the relationship of employees to the authorized carrier." *Brown v. Truck Lines,* 227 N.C. 299, 42 S.E. 2d 71.

(2) It is stipulated in the lease contract that while they are in the service of the Motor Lines, the vehicle and its driver shall be under the exclusive supervision, control, and direction of the lessee. The all-inclusive extent of this right of control is spelled out in the lease in detail. As the Motor Lines has contracted, so is it bound.

In determining whether Roth was an independent contractor or an employee of the Motor Lines, "the vital test is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details." ". . . the retention by the employer of the right to control and direct the manner in which the details of the work are to be executed and what the laborers shall do as the work progresses is decisive, and when this appears it is universally held that the relationship of master and servant or employer and employee is created." *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137; *Brown v. Truck Lines, supra.*

It is true that McCord contracted to carry workmen's compensation insurance, but Roth was not a party to that contract and his dependents are not bound by its terms. Furthermore, Roth was at liberty to work for McCord when not actually engaged by the Motor Lines, and the McCord firm was subject to the Workmen's Compensation Act.

Whether the stipulations in the contract vest in the Motor Lines the right to recover over against McCord the amounts expended by reason of the judgment herein, we need not now say. That question must be presented, if presented at all, to another court in another action.

The plaintiffs' appeal was precautionary. They are entitled to recover from either one or the other group of defendants. They wish to protect their rights in this respect in the event the Court concludes the Motor Lines and its insurance carrier are not liable. Their appeal is dismissed and they will be taxed with the costs of their brief.

As to the Motor Lines and its insurance carrier, the judgment entered is Affirmed.

H. L. GRAY AND WIFE, LEONA GRAY, v. JAMES EDMONDS AND WIFE, EDNA EDMONDS, AND W. K. COVINGTON, TRUSTEE.

(Filed 22 November, 1950.)

Cancellation and Rescission of Instruments § 2—Plaintiffs held without equal knowledge or means of information as to facts misrepresented.

Allegations and evidence to the effect that plaintiffs were induced to purchase property from defendants and execute a purchase money mortgage for the balance of the purchase price because of false representations of defendants knowingly made as to the character and permanency of the tenants and amount of rents received by defendants from the property during the prior year, and that plaintiffs relied upon such misrepresentations and were induced thereby to purchase the property, *is held* sufficient to overrule defendants' demurrer to the complaint and motion to nonsuit on the evidence, since the permanency of the tenants and the amount of rents were facts within the personal knowledge of defendants, and whether they were of such character and were made under such circumstances as were calculated to deceive a person of ordinary prudence, and whether plaintiffs reasonably relied thereon, are questions for the jury.

APPEAL by defendants from *Gwyn, J.*, May Term, 1950, of MECKLENBURG. No error.

This was an action to set aside a deed of trust for fraud and to enjoin foreclosure thereunder.

The plaintiffs alleged they had been induced by the false and fraudulent representations of the defendants to buy an apartment house in Charlotte and in payment of the purchase price of $30,875 to execute a deed of trust on the apartment house and a farm of 65 acres belonging to plaintiffs.

According to plaintiffs' allegations the defendants, in order to induce plaintiffs to make the purchase, represented that the twenty or more units of the apartment house had been constantly occupied during the preceding year by steady and permanent tenants who paid rentals of $1,000 to $1,200 each month, whereas in truth over said period and long prior thereto the building had been only partly tenanted and the rentals were not more than $500 to $600 per month. Defendants also represented that the building was in good repair and structurally sound, whereas it was found to be infested with termites. Defendants represented that they had paid for the property substantially the amount for which it was offered to plaintiffs, whereas they had paid not more than half that amount. It was alleged that these representations were made with intent to deceive and did deceive the plaintiffs, and the plaintiffs in reliance thereon were induced to purchase the property and to execute deed of trust thereon and on plaintiffs' farm in payment therefor. Plaintiffs alleged that on discovery of the fraud, plaintiffs offered to reconvey

upon cancellation of the deed of trust on the farm which was refused, and plaintiffs left the building and defendants have resumed possession; that 6 February, 1950, defendants attempted to sell under the deed of trust, and both the apartment house and the farm were bid off by defendants for $20,000. Whereupon further proceedings in foreclosure were enjoined by the court.

Defendants, answering, admitted the sale of the apartment house to the plaintiffs, and the execution of the deed of trust in payment therefor, but denied all allegations of fraud. Defendants further alleged that plaintiffs had full knowledge of the apartment house and of its condition and rentals at the time they bought, having lived in the house several months before; that if the rentals received by plaintiffs were less than expected it was due to improper management.

On the trial plaintiffs offered evidence tending to show they had purchased the property as an investment induced by defendants' representations as alleged, and by an advertisement in the newspaper inserted by defendants that it rented for $270 a week—$14,000 per annum—and that plaintiffs relied on these representations which were calculated to deceive and did deceive the plaintiffs; that during the nine months plaintiffs occupied the building rentals received amounted to $3,300; that the most they could get in any month was $450 to $550; that the house was only half-filled, and at times there were only three or four tenants; that Mrs. Edmonds, one of the defendants, testified on adverse examination that the defendants had collected in 1948 only $5,200 as rentals, and that most of the tenants were transients. Plaintiffs offered to reconvey and sought only cancellation of the deed of trust on their farm.

Defendants offered no evidence.

The jury for their verdict answered the determinative issue as follows: "Were the plaintiffs induced to make said purchase and execute and deliver deed of trust as result of the misrepresentation and fraud of the defendants as alleged in the complaint? Answer: Yes."

From judgment declaring the deed of trust void, and cancelling the deed, the defendants appealed.

B. F. Wellons and Brock Barkley for plaintiffs, appellees.

J. Louis Carter and J. F. Flowers for defendants, appellants.

DEVIN, J. The defendants' demurrer *ore tenus* to the complaint cannot be sustained. Sufficient facts are alleged to constitute a cause of action for relief on the ground of fraud.

The defendants' motion for judgment of nonsuit was properly denied. Considering the plaintiffs' evidence in the light most favorable for them, it is apparent that it was sufficient to carry the case to the jury on the

issue of actionable fraud. *Whitehurst v. Ins. Co.*, 149 N.C. 273, 62 S.E. 1067; *Petty v. Ins. Co.*, 210 N.C. 500, 187 S.E. 816; *Ward v. Heath*, 222 N.C. 470, 24 S.E. 2d 5; *Atkinson v. Charlotte Builders, ante*, 67, 59 S.E. 2d 1.

The defendants bottom their defense on the principle that the purchaser of property seeking redress on account of loss sustained by reliance upon a false representation of a material fact made by the seller may not be heard to complain if the parties were on equal terms and he had knowledge of the facts or means of information readily available and failed to make use of his knowledge or information, unless prevented by the seller. *Harding v. Ins. Co.*, 218 N.C. 129, 10 S.E. 2d 599; *Peyton v. Griffin*, 195 N.C. 685, 143 S.E. 525. But the rule is also well established that one to whom a positive and definite representation has been made is entitled to rely on such representation if the representation is of a character to induce action by a person of ordinary prudence, and is reasonably relied upon. 23 A.J. 970, Restatement Torts, secs. 537, 540. According to plaintiffs' evidence here the amount of rentals collectible was a material inducement to the purchase of an apartment house for investment, and the representations as to what had been collected over a period and as to the character and permanency of the tenants occupying it presented matters of fact within the personal knowledge of the defendants, and about which the plaintiffs had no means of accurate information, and upon which plaintiffs justifiably relied. *Mills v. Mills*, 230 N.C. 286, 52 S.E. 2d 915; *Haywood v. Morton*, 209 N.C. 235, 183 S.E. 280; *Sanders v. Mayo*, 186 N.C. 108, 118 S.E. 910; *Currie v. Malloy*, 185 N.C. 206, 116 S.E. 564; *Stewart v. Realty Co.*, 159 N.C. 230, 74 S.E. 736; *Walsh v. Hall*, 66 N.C. 233.

The evidence introduced by plaintiffs was sufficient to present issues for the jury to determine whether the representations as alleged were made, and, if so, whether they were of such character and made under such circumstances as were calculated to impose upon or deceive a person of ordinary prudence and whether they were reasonably relied upon. *Sanders v. Mayo, supra.*

Defendants noted exceptions to the rulings of the court in the admission of testimony, but these are without merit. Defendants also noted exception to portions of the judge's charge to the jury, but considering the charge as a whole, we perceive no substantial error of which defendants can justly complain.

In the trial we find

No error.

DAIRY & ICE CREAM SUPPLY COMPANY, INC., v. GASTONIA ICE CREAM COMPANY.

(Filed 22 November, 1950.)

1. Evidence § 36—

The rule permitting the introduction in evidence of original entries recorded in regular course of business at or near the time of the transactions involved, when authenticated by one who is familiar with them and the method under which they were made, cannot be extended to permit a witness who has no personal knowledge of the transactions to testify in regard thereto from a memorandum or statement of such transactions made up by a bookkeeper under the witness' direction from such original records.

2. Appeal and Error § 40i—

Nonsuit will not be granted on appeal notwithstanding that the evidence relied upon by plaintiff is incompetent and was erroneously admitted, since plaintiff might have offered other proof if the incompetent evidence had been excluded at the trial.

APPEAL by defendant from *Alley, Emergency Judge,* May Term, 1950, of GASTON. New trial.

This was an action to recover the value of empty cream cans and jackets which it was alleged the defendant had failed to return to plaintiff according to contract.

Plaintiff, a Georgia corporation, was engaged in business in Atlanta in buying and selling dairy supplies and equipment, and during 1947 and 1948 shipped to the defendant a quantity of frozen cream in cans and insulated jackets by Southern Railway baggage, under agreement that the empty cans and jackets be returned to plaintiff by the same method of transportation.

Plaintiff claimed to have shipped to defendant during the period from February 1947 to April 1948, 1,528 cans and 1,113 jackets, and received back 1,129 cans and 896 jackets, leaving 399 cans and 217 jackets unreturned of the value of $5 each, amounting to $3,080. Suit was instituted to recover this amount. Plaintiff's only witness was J. M. Henson, the president of plaintiff corporation, who was permitted over objection to testify from a pencil memorandum as to the number of cans and jackets shipped and returned, together with the dates, covering 113 transactions during the period mentioned. The witness had no personal knowledge of the shipment and return of cans though the business was conducted under his general supervision. "Mr. Taylor handled the shipping and had the cream shipped. I did not handle it. . . . Attached to the duplicate order at the end of the day was a signed copy from the (railroad) baggage department that they had received that shipment." Shipments were sent to the Southern Railway by plaintiff's trucks and receipts brought

back by the drivers, and upon notice by the carrier of the arrival of returned cans and jackets the plaintiff would send trucks and pick them up. Plaintiff had some 50 customers to whom similar shipments were made and by whom cans were returned. Cans were all alike. There were other shippers of like products from Atlanta. "The knowledge I have about the cans coming into the depot would be from truck drivers that went there to pick them up . . . the shipping clerk and baggage clerk would tell me." The custom was for defendant to deliver the cans back to the same carrier for transportation by baggage. Witness had no means of knowing how many cans the defendant took to the baggage room in Gastonia. No waybills were issued, but baggage checks were used. "We kept record of our sales on a ledger record just like a ledger record of merchandise we shipped to somebody. Nothing on that page except cans and jackets that go out, and cans and jackets that come back . . . I never made those entries myself."

This witness was permitted to read to the jury from a written statement the dates of shipment, the number of cans and jackets shipped, and the number returned. "The statement that I had this morning and which I read from was made up in pencil by the bookkeeper under my direction. She and I went along and got this thing together and she wrote the things down." Witness testified that daily reports were put on his desk each day, and the records were kept in a binder in his office, and that he took them out and brought them with him.

There was verdict for plaintiff for the amount claimed, and from judgment in accord therewith defendant appealed.

Basil L. Whitener for plaintiff, appellee.
Garland & Garland for defendant, appellant.

DEVIN, J. The plaintiff undertook to establish the facts upon which it based its action by the testimony of its president, who read to the jury from a written statement purporting to show the numerous items constituting plaintiff's claim. It was testified this statement had been made up by a bookkeeper under witness' direction from the records in his office. The witness had no personal knowledge of the shipments of cans of frozen cream, except from the carrier's receipts, or of defendant's failure to return the empty containers, except from the reports placed on his desk. Defendant noted exception to this testimony, and assigns its admission as error.

The rule of evidence formerly observed by the courts limiting proof of items of business transactions to matters within the personal knowledge of a witness, has undergone revision in the light of modern business conditions and methods. *Ins. Co. v. R. R.*, 138 N.C. 42, 50 S.E. 452;

Breneman Co. v. Cunningham, 207 N.C. 77, 175 S.E. 829; *Chaffee v. U. S.,* 18 Wallace, 516. The impossibility of producing in court all the persons who observed, reported and recorded each individual transaction gave rise to the modification which permits the introduction of recorded entries, made in the regular course of business, at or near the time of the transaction involved, and authenticated by a witness who is familiar with them and the method under which they are made. This rule applies to original entries made in books of account in regular course by those engaged in business, when properly identified, though the witness may not have made the entries and may have had no personal knowledge of the transactions. *Flowers v. Spears,* 190 N.C. 747, 130 S.E. 710; *Peebles v. Idol,* 198 N.C. 56 (60), 150 S.E. 665; *Supply Co. v. McCurry,* 199 N.C. 799 (802), 156 S.E. 91; *Edgerton v. Perkins,* 200 N.C. 650, 158 S.E. 197; *S. v. Shipman,* 202 N.C. 518 (525), 163 S.E. 657; *S. v. Lippard,* 223 N.C. 167 (172), 25 S.E. 2d 594; Stansbury on Evidence, sec. 155; 20 A. M. Jur. 881, 892. See also *Branch v. Ayscue,* 186 N.C. 219, 119 S.E. 201; *S. v. Breece,* 206 N.C. 92, 173 S.E. 9, and *Lister v. Lister,* 222 N.C. 555 (563), 24 S.E. 2d 342.

But in the case at bar, according to the record before us, the plaintiff did not introduce the original entries made in the regular course of business at the time the transactions occurred, but offered to prove the facts about 113 transactions extending over a period of 15 months by a witness who was speaking not from personal knowledge but reading from a written statement made for him by a bookkeeper in his office. The objection to the evidence thus presented should have been sustained.

Though this was the only evidence offered by plaintiff, defendant's motion for judgment of nonsuit cannot be allowed as but for the court's ruling plaintiff might have offered other proof. *Morgan v. Benefit Society,* 167 N.C. 262, 83 S.E. 479; *Midgett v. Nelson,* 212 N.C. 41, 192 S.E. 854; *Gibbs v. Russ,* 223 N.C. 349, 26 S.E. 2d 909; *Ballard v. Ballard,* 230 N.C. 629 (635), 55 S.E. 2d 316.

For the reasons stated there must be a

New trial.

MARY VAIL CAMERON v. BRUCE CAMERON.

(Filed 22 November, 1950.)

1. Divorce and Alimony § 12—

Motion for alimony *pendente lite* in the wife's action for divorce from bed and board is properly denied upon the court's findings supported by evidence negativing each of the allegations in plaintiff's complaint upon which her action is based and upon which the motion for alimony *pendente lite* is made.

2. Divorce and Alimony § 19—

The court's order awarding the custody of the children to their father, with provision that their mother should see them at reasonable times, will be upheld where the evidence supports the court's findings that the father is a fit, proper, and suitable person to have their custody and that their mother is not a fit and suitable person, and that the best interests of the children would be served by such award of their custody.

3. Divorce and Alimony § 12—

The amount to be allowed as counsel fees to plaintiff's attorneys in her action for divorce *a mensa et thoro* is within the sound discretion of the trial judge, but such award does not preclude plaintiff from thereafter seeking an increased award upon a showing of additional facts.

4. Same—

The trial court denied plaintiff's motion for alimony *pendente lite* in her action for divorce *a mensa et thoro* upon supporting findings, but declined to find that she had been guilty of adultery. *Held:* The denial of alimony *pendente lite* in her suit for divorce *a mensa* does not preclude her, in the husband's cross-action for divorce *a vinculo* on the ground of adultery, from moving under the common law for subsistence pending the action, when the husband is a man of wealth and she is without means to defray the necessary and proper expenses of presenting her defense that she had not committed adultery and she has expressed her desire to contest the issue.

5. Same—

When the trial court's determination of a motion for alimony *pendente lite* is predicated upon proper findings supported by competent evidence, the order will not be disturbed because of the general admission of evidence competent for a restricted purpose, or the admission of incompetent evidence, since it will be presumed that the judge in making the findings considered only that testimony properly tending to prove the facts to be found.

APPEAL by plaintiff from *Parker, J.*, March Term, 1950, of SAMPSON. Modified and affirmed.

This action was instituted by plaintiff for divorce *a mensa et thoro*. In her complaint she asked for alimony *pendente lite* and suit money, and also for custody of two children of the marriage.

The defendant answered denying plaintiff's accusations, and set up a cross-action for divorce *a vinculo* on the ground of adultery. The case was here at Fall Term, 1949, on defendant's appeal from an order allowing alimony *pendente lite* and counsel fees. For error found the cause was remanded to the Superior Court of Sampson County. *Cameron v. Cameron*, 231 N.C. 123, 56 S.E. 2d 384.

A second hearing on these motions was had before Judge Parker at March Term, 1950, of Sampson Superior Court, and an order was entered denying plaintiff's motion for alimony *pendente lite* in her action, deny-

ing plaintiff's plea for custody of the children and allowing plaintiff counsel fees for her defense to defendant's cross-action.

Plaintiff excepted and appealed.

Welch Jordan and Butler & Butler for plaintiff, appellant.

Stevens, Burgwyn & Mintz, Jeff D. Johnson, Jr., and Howard H. Hubbard for defendant, appellee.

DEVIN, J. The ruling of Judge Parker in denying plaintiff alimony *pendente lite* in her action for divorce *a mensa* was based upon the findings "that the plaintiff voluntarily left the defendant's home on or about the night of September 1, 1948, of her own free will and accord; that the defendant has not abandoned the plaintiff, nor has defendant maliciously turned plaintiff out of doors; that defendant has not offered any indignities to the person of the plaintiff as to render her condition intolerable and life burdensome." These findings are supported by evidence and negative each of the allegations in plaintiff's complaint upon which her action is based and upon which the motion for alimony pending the action was made. *Carnes v. Carnes,* 204 N.C. 636, 169 S.E. 222.

The court found "that the plaintiff was not a fit and suitable person to have at any time the custody of Mary Vail Cameron and Diana Banning Cameron." The evidence in the record is sufficient to support this finding, and also the finding that defendant is a fit, proper and suitable person to have custody of the children. Provision was made in the order which would enable plaintiff to see her children at reasonable hours three times a week. It was also found that the best interest of the children would be served by the award of custody as thus determined.

The court declined to find from the evidence offered that the plaintiff had committed adultery as alleged in the defendant's cross-action, but found that the plaintiff in her reply and in her oral testimony had denied in good faith that she had committed adultery and had expressed her desire to contest the issue. In view of its far-reaching effect the court expressed the natural hesitation of a judge to make such a finding without the aid of a jury. Consequently, since no finding was made on this question and no order entered based thereon, it is still open to the plaintiff to exercise her common law right to move for an allowance for subsistence pending the action to enable her to make her defense to the charges contained in defendant's cross-action.

The order requiring defendant to pay counsel fees and suit money in the sum of $3,500 *pendente lite* to enable plaintiff to defend against the charge of adultery was not objected to by defendant. Plaintiff, however, excepted to this order on the ground that the amount was inadequate in view of the circumstances of this case and the wide range the evidence

has taken, and the effort and expense required to rebut the testimony offered by the defendant on the charges contained in his cross-action. This was a matter resting in the sound discretion of the judge who had before him all the facts presented at that time. *Davidson v. Davidson,* 189 N.C. 625, 127 S.E. 682. However, we see no reason why the plaintiff may not be permitted to renew her motion for this purpose upon proper notice, if additional facts are made to appear.

The court found that the plaintiff had no property and only a meager earning ability, and that the defendant was a man of wealth. Though the plaintiff is precluded from alimony *pendente lite* in her action for divorce *a mensa* by reason of the court's findings hereinbefore referred to, which we affirm, nevertheless under the common law in the defendant's cross-action for divorce *a vincula* on the ground of adultery, upon a finding that she has not sufficient means whereon to subsist pending the suit and to defray the necessary and proper expenses of presenting her defense thereto, and that her husband is a man of wealth, an award for this purpose may be made in the defendant's cross-action. *Medlin v. Medlin,* 175 N.C. 529, 95 S.E. 857; *Holloway v. Holloway,* 214 N.C. 662, 200 S.E. 436; *Covington v. Covington,* 215 N.C. 569, 2 S.E. 2d 558; *Welch v. Welch,* 226 N.C. 541, 39 S.E. 2d 457; *Webber v. Webber,* 79 N.C. 572. Though plaintiff made her motion for alimony *pendente lite* in her action for divorce *a mensa,* which was denied, this would not prevent her from moving for this purpose in the cross-action of the defendant for divorce on the ground of adultery.

The plaintiff included in her assignments of error exception noted to the introduction in evidence at the hearing of certain letters which are set out in the record. It was urged that these letters were inadmissible and prejudicial, and that the findings and orders below should for this reason be set aside.

It was testified these letters were found in the plaintiff's private desk in the home in Wilmington. Plaintiff in her complaint had referred to the fact that her desk had been rifled and her personal papers removed, and she described their character as letters from members of her family, business correspondence and "two or three letters and telegrams from men acquaintances of the plaintiff." Plaintiff argued the incompetency of these letters for any purpose, for the reason that they were not identified, it had not been shown by whom they were written, and in any event their contents were hearsay.

Though the letters referred to were not admissible as evidence of adultery, we are not inclined to reverse the result below because of their introduction at the hearing. The retention of letters, apparently addressed to the plaintiff, in her private desk, together with her references to them in her complaint, would give rise to the inference of her knowledge of

their contents and acquiescence and assent thereto. 1 Wigmore, sec. 260; 2 Wigmore, sec. 1073. The fact of the preservation among her personal papers of letters of this type from "men acquaintances" might properly be considered as corroboratory of defendant's evidence as to the plaintiff's fitness to have the custody of the children and as tending to support defendant's contention that plaintiff had not in good faith renewed marital relations with defendant after a period of separation. As the hearing was before the judge on a preliminary motion, the ordinary rules as to the competency of evidence applied in a trial before a jury are to some extent relaxed, for the reason that the judge with knowledge of the law is able to eliminate from the testimony he hears that which is immaterial and incompetent, and consider only that which tends properly to prove the facts to be found. 64 C.J. 1202. For the same reason the exception to evidence as to phone calls we think insufficient to require setting aside the findings and orders entered below.

The Judge heard both parties at length and considered the voluminous evidence presented, and made carefully considered findings based thereon. These we will not disturb.

Except as herein modified, the judgment of the court is

Affirmed.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION v. MARTEL MILLS CORPORATION.

(Filed 22 November, 1950.)

1. Notice § 3—

Where a statute provides for service of a notice without prescribing a mode of service, it must be served by some officer authorized by law to make service of process, notices, and the like.

2. Parties § 1—

"Complainant" means the party who makes the complaint in an action or proceeding and is synonymous for all practical purposes with "petitioner" or "plaintiff."

3. Utilities Commission § 3—

A utility which files application for authority to amend its rate schedule originates the proceeding and complains that its rates are insufficient to provide reasonable and necessary revenue, and therefore is the original complainant in the proceeding. G.S. 62-25.

4. Utilities Commission § 5—

Where an interested party intervenes and contests an application filed by a utility for authority to amend its rate schedule, G.S. 62-24, and the application is granted, notice of appeal of such interested party from the

order of the Commission must be served upon the utility, G.S. 62-26.6, and where such interested party merely mails a copy of such notice to the utility the attempted appeal is ineffectual.

APPEAL by defendant from *Harris, J.*, July Term, 1950, of WAKE. Affirmed.

Petition by Carolina Power & Light Company before the Utilities Commission, heard in the court below on motion to dismiss defendant's appeal.

Carolina Power & Light Company, hereinafter referred to as the Light Company, filed an application with the Utilities Commission for the modification of its rate schedule by adding thereto a coal clause. The defendant and other interested customers of petitioner appeared and opposed the petition.

The Commission, upon hearing the petition, entered its order 28 February 1950 authorizing the complainant to put said coal clause into effect, but fixing the base price of coal at $7 per ton.

The defendant filed exceptions and moved for a rehearing. The Commission, on 1 May 1950, overruled the exceptions and denied the motion. Defendant in apt time gave the Commission notice of its appeal to the Superior Court and mailed a copy of said notice to the petitioner, which notice was duly received.

On 28 June 1950, the Light Company appeared in the court below and moved that the appeal from the Commission be dismissed for want of proper notice. The motion was allowed and defendant appealed.

Charles F. Rouse and W. H. Weatherspoon for Light Company, applicant appelle.

Oscar J. Mooneyham for defendant appellant.

BARNHILL, J. The merit of this appeal is made to turn upon whether the Light Company is the original complainant in this proceeding. If so, the notice of appeal was ineffective for the reason it was not served. If not, then the giving of notice by mailing a copy thereof to the Light Company met the requirements of the statute.

A public utility company may make complaint to the Utilities Commission respecting its rate structure. G.S. 62-24, 25. Interested parties may intervene, G.S. 62-24, and any party aggrieved by the final order of the Commission may appeal. G.S. 62-26.6. The party appealing must serve notice of its appeal upon the original complainant. G.S. 62-26.6.

The requirement that notice of appeal from an order of the Commission shall be served on the original complainant connotes service by some officer authorized by law to make service of process, notices, and the like.

Smith v. Smith, 119 N.C. 314; *Lowman v. Ballard,* 168 N.C. 16, 84 S.E. 21; *Hatch v. R. R.,* 183 N.C. 617, 112 S.E. 529.

Where a statute provides that a notice shall be served and no particular mode of service is provided for, "service must be made by an officer, unless service is accepted," *Smith v. Smith, supra,* and unless so served, there is no valid service. *Hatch v. R. R., supra.*

In law "complainant" means "the party who makes the complaint in an action or proceeding," Webster's New Int. Dic., 2d Ed.; "one who makes a complaint," Callaghan, Cyc. Law Dic., 2d Ed. For all practical purposes it is synonymous with "petitioner" and "plaintiff." The nature of the proceeding and the court in which it is instituted determines which term is the more appropriate under the circumstances.

The Utilities Commission is authorized to fix the rates for public utilities, G.S. 62-122, and may, on application, permit a change in the schedule of rates then existing. G.S. 62-125. It is the governmental agency to which a public utility must resort when it deems its rates and charges inadequate to provide a reasonable return on its investment.

The Light Company filed an application with the Commission in which it is alleged that its present rates in certain respects are inadequate and in which it seeks authority to amend its rate schedule. It thus originated this proceeding and complained that its rates are insufficient to provide reasonable and necessary revenue. The contention that it was not the original complainant cannot be sustained.

Since the Light Company is the original complainant, service of notice of appeal on it is required by the statute. G.S. 62-26.6. In the absence of such notice, the attempted appeal was ineffectual.

It is not amiss to call attention at this time to the fact that G.S. 62-21 (1943 Ed.) is modified by Sec. 1, Ch. 989, Session Laws 1949, now G.S. 62-26.8. Now on appeal "the complainant in the original complaint before the commission shall be a party to the record."

Since there has been no service of notice of appeal upon the Light Company, the original complainant, the judgment below must be

Affirmed.

LEON M. FUQUAY, EXR., v. CECIL FUQUAY ET AL.

(Filed 22 November, 1950.)

1. Appeal and Error § 3—

An appeal from a judgment affecting a ward's estate in an action in which the ward is represented by a guardian *ad litem* should be prosecuted in the name of the guardian.

2. Appeal and Error § 6c (1)—

Where there are no exceptions noted in the record but only a grouping of assignments of error with a notation after each that it constituted appellant's exception of corresponding number, there are no exceptive assignments of error.

3. Appeal and Error § 37—

The function of the Supreme Court is to correct errors of law or legal inference and not to approve judgments *pro forma*, and therefore where there are no exceptions in the record and appellant in his brief admits that there is no merit in any of his assignments of error, the brief fails to present any question of law or legal inference and the appeal will be dismissed.

ATTEMPTED appeal by infant defendant, Thomas Fuquay, from *Morris, J.*, June Term, 1950, of HARNETT.

Application by executor for interpretation and construction of will of C. G. Fuquay, deceased, and for instructions in respect of administration of his estate.

The record states that from the judgment rendered, Thomas Fuquay, infant defendant, appeals at the instance of the trial court "to the end that the said case and rulings be passed upon by the Supreme Court."

B. F. McLeod for plaintiff, appellee.
W. A. Johnson for defendant, appellant.

STACY, C. J. As the infant defendant was represented in the Superior Court by a guardian *ad litem*, presumably the attempted appeal should be regarded as one by the guardian, albeit he now designates himself simply as "attorney for appellant."

There are no exceptions to the judgment, only a grouping of five assignments of error, each of which ends with the notation: "This being defendant's Exception No."—1, 2, 3, 4, 5. Perhaps the better description would be to say the record contains five exceptive assignments of error in reverse, or five assignments of error in reverse of exceptive. There are no exceptive assignments of error on the record.

In appellant's brief, he says: "It will be observed that the appellant groups and sets forth five assignments of error. After a careful consideration of each and every of these assignments, and a careful examination of the cases bearing on each of said assignments, candor compels him to admit that there is no merit in any of them." Yet as the court below suggested an appeal "the appellant respectfully submits the matter to the Court and prays that it review the rulings . . . and the judgment."

This brief calls to mind the argument of a celebrated mountain lawyer in a murder case some years ago, which ran as follows: "If Your Honors please, I am somewhat embarrassed in this case—my client more so than

I am; he is over here in the Penitentiary under sentence of death. However, the re-cord is here; I have examined it; candor compels me to say I don't see much wrong with it. Still, if you gentlemen can find any error or any ground upon which to grant him a new trial, I shall appreciate it and I am sure he will." Took his seat, and much to his surprise, got a new trial, because it was discovered here that the jury had failed to designate in its verdict whether the crime was murder in the first or second degree. G.S. 14-17; *S. v. Truesdale,* 125 N.C. 696, 34 S.E. 646; *S. v. Gadberry,* 117 N.C. 811, 23 S.E. 477. In that case, however, there were exceptions on the record giving this Court authority to review the questions of law or legal inferences thereby presented. Const., Art. IV, Sec. 8. And these were debated on brief.

Moreover, that was a criminal prosecution and a capital case in which the appeal itself was or could have been regarded as an exception to the judgment and to the sufficiency of the record to support it. Here, however, we have an appeal in a civil action where all assignments of error and "exceptions," if they may be so designated, have been expressly abandoned or withdrawn by the appellant in his brief. There is nothing to retain the case on our docket. *S. v. Hicks, ante,* 520.

This Court is for the correction of errors and not for the approval of judgments *pro forma.* The Superior Court must take full responsibility for its orders, judgments and decrees. Affirmances here add nothing to their validity, force or effect. They are still orders, judgments and decrees of the Superior Court in which no error has been made to appear or found on appeal.

The appellant's brief negatives any question of law or legal inference upon which the attempted appeal might be predicated, or retained for consideration.

The case was submitted under Rule 10 without oral argument.

Attempted appeal dismissed.

W. C. JACKSON v. WILLIAM P. HODGES, INS. COMR., ET AL.

(Filed 22 November, 1950.)

1. Insurance § 34a—

Plaintiff's testimony that he had been totally and permanently disabled by bodily injury or disease, with testimony of his physician that defendant by reason of illness was permanently, continuously, and wholly prevented from doing any work whatsoever for compensation, gain, or profit, or from following any gainful occupation, *is held* sufficient to be submitted to the jury in an action on a disability clause in a certificate of insurance not-

withstanding defendant's evidence to the contrary and contradictions and discrepancies in the testimony of plaintiff's own witnesses.

2. Trial § 22b—

Defendant's evidence in conflict with that of plaintiff is not to be considered on motion to nonsuit.

3. Trial § 22c—

Discrepancies and contradictions, even in plaintiff's evidence, do not justify nonsuit.

APPEAL by plaintiff from *Williams, J.*, February Term, 1950, of WAKE.

Civil action instituted before justice of the peace on 29 March, 1947, to recover $190.05 alleged to be due under insurance contract.

There was a judgment for the plaintiff in the justice's court, and on appeal to the Superior Court, judgment as in case of nonsuit was entered at the close of plaintiff's evidence.

Plaintiff appeals.

Sam J. Morris for plaintiff, appellant.

Allen Langston for defendant, appellee, Jr. O. U. A. M.

STACY, C. J. The plaintiff undoubtedly suffered an adverse judgment in the Superior Court because no clear, succinct statement of the facts was made in that court, as none appears on the record here. And we may add that neither brief contains such a statement.

Repeated perusals of the record reveal these central facts:

1. The contract of insurance is admitted. It was issued to plaintiff by the defendant on 31 March, 1932.

2. Sick benefits for total and permanent disability were paid thereunder for four years beginning in 1937.

3. Payments were then stopped or suspended and additional proof of disability required.

4. Additional proof was furnished and payments were resumed for a period of four months. (Dates not ascertainable from the record.)

5. Payments were again stopped or suspended and additional proof of disability demanded. These were furnished, but payments were not resumed. (Dates not ascertainable from record.)

6. This suit was instituted 29 March, 1947, for 13 months' sick benefit, arrearage and certain premiums.

7. The only question debated on the hearing and here was and is the plaintiff "totally and permanently disabled by bodily injury or disease, so that he is and will be permanently, continuously and wholly prevented thereby from performing any work whatsoever for compensation, gain or profit, or from following any gainful occupation," in the language

of the certificate of insurance? If this be answered in the affirmative, liability is conceded.

The plaintiff testified that he had been totally and permanently disabled from bodily injury or disease for 10 or 12 years, and his doctor testified: "In my opinion, he was at that time (January 1947), by reason of his illness, permanently, continuously and wholly prevented from doing any work whatsoever for compensation, gain or profit, or from following any gainful occupation."

This evidence suffices to carry the case to the jury. True, there is other evidence tending to show the plaintiff's disability was neither total nor permanent, some from his own witnesses, but on demurrer, this is not to be considered. *Howard v. Bell, ante,* 611; *Graham v. Gas Co.,* 231 N.C. 680. Discrepancies and contradictions, even in plaintiff's evidence, are for the twelve and not for the court. *Williams v. Kirkman, ante,* 609; *Bailey v. Michael,* 231 N.C. 404, 57 S.E. 2d 372; *Barlow v. Bus Lines,* 229 N.C. 382, 49 S.E. 2d 793.

Reversed.

STATE v. JAMES P. CORRELL.

(Filed 22 November, 1950.)

1. Automobiles § 1—

The operation of a motor vehicle upon the public highways of the State is a privilege which can be exercised only in accordance with legislative restrictions.

2. Automobiles § 34d: Criminal Law § 1b—

The operation of a motor vehicle upon the highways of the State by a person whose driver's license has been revoked is unlawful, regardless of intent, since the specific performance of the act forbidden constitutes the offense itself. G.S. 20-28.

APPEAL by defendant from *Phillips, J.,* July Term, 1950, of MECKLENBURG. Affirmed.

Attorney-General McMullan, Assistant Attorney-General Bruton, and John R. Jordan, Jr., Member of Staff, for the State.

Uhlman S. Alexander for defendant, appellant.

JAMES, J. This cause was originally instituted in the Mecklenburg County Recorder's Court upon a warrant charging the defendant with operating a motor vehicle upon the public highways of North Carolina after having had his driver's license revoked, in violation of G.S. 20-28.

The cause came on for hearing before the Judge of the County Recorder's Court of Mecklenburg County on 30 June, 1950, at which time the defendant demanded a trial by jury, whereupon the case was sent to the Superior Court of Mecklenburg County to be tried by a jury. The cause came on for hearing at the regular term of Superior Court for Mecklenburg County on 10 July, 1950.

The defendant entered a plea of not guilty but the jury found as its verdict that the defendant was guilty.

The only assignment of error which the defendant has brought forward relates to His Honor's instruction to the jury that the defendant had no right to drive his car upon the highways of North Carolina after his license had been revoked and it made no difference what the defendant's intentions were in regard to so doing.

G.S. 20-28 provides as follows:

"(a) Any person whose operator's or chauffeur's license has been suspended or revoked other than permanently, as provided in this article, who shall drive any motor vehicle upon the highways of the state while such license is suspended or revoked, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $200 or imprisonment in the discretion of the court, or both such fine and imprisonment . . ."

The right to operate a motor vehicle upon the public highways of North Carolina is not an unrestricted right but a privilege which can be exercised only in accordance with the legislative restrictions fixed thereon. 5 Am. Jur., sec. 756.

The defendant did not deny that he had driven his car upon the highways after his license had been revoked but contended that he was attempting to get his car back home from a garage where it had been left. But the specific performance of an act which is expressly forbidden by statute constitutes the offense itself and we are of the opinion, and so hold, that the instruction of his Honor to the jury was proper. *S. v. Lattimore,* 201 N.C. 32, 158 S.E. 741; *S. v. Perley,* 173 N.C. 783, 92 S.E. 504, and cases cited.

The judgment of the court below is

Affirmed.

REBECCA W. HOPPE, BY HER NEXT FRIEND, R. W. HOPPE, v. R. N. DEESE AND SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY.

(Filed 22 November, 1950.)

Master and Servant § 22c—

Demurrer of corporate defendant is properly sustained to a complaint alleging that it sent its employee to the home of plaintiff on a business mission and that while there the employee committed an assault upon the *feme* plaintiff with licentious intent and purpose, since the complaint discloses that the assault was made to carry out an independent and licentious purpose of the employee and not to accomplish the business mission entrusted to him, and that therefore the employee in making the assault was not acting within the course and scope of his employment.

APPEAL by plaintiff from *Patton, Special Judge,* at the September Term, 1950, of MECKLENBURG.

Civil action by the *feme* plaintiff to recover damages of the corporate defendant and its employee, the natural defendant, for an assault and battery committed upon her by the latter.

The complaint alleges in specific detail that on 24 December, 1949, the corporate defendant, the Southern Bell Telephone and Telegraph Company, sent its employee, the male defendant, R. N. Deese, into the home of the *feme* plaintiff, Rebecca W. Hoppe, on a business mission; that while in the home on such mission the male defendant willfully and maliciously committed an assault and battery upon the *feme* plaintiff by picking her up in his arms and placing her upon a bed; and that such assault and battery was committed upon the *feme* plaintiff by the male defendant "with licentious intent and purpose."

The corporate defendant, the Southern Bell Telephone and Telegraph Company, demurred in writing to the complaint upon the ground that such pleading did not state facts sufficient to constitute a cause of action against it. G.S. 1-127, subsection 6. The court entered judgment sustaining the demurrer, and the plaintiff appealed.

Orr & Hovis for plaintiff, appellant.

Pierce & Blakeney for defendant, appellee.

ERVIN, J. A master is civilly liable for an assault and battery by his servant on a third person if, and only if, it is committed while the servant is acting within the course and scope of his employment. According to the allegations of the complaint, the male defendant assaulted the *feme* plaintiff to carry out an independent and licentious purpose of his own, and not to accomplish the business mission entrusted to him by the corporate defendant. This being true, the ruling on the demurrer was correct;

for it appears upon the face of the complaint that the wrongful act of the male defendant was outside the scope of his employment. *Robinson v. Sears, Roebuck & Co.*, 216 N.C. 322, 4 S.E. 2d 889; *Robinson v. McAlhaney*, 214 N.C. 180, 198 S.E. 647; *Snow v. DeButts*, 212 N.C. 120, 193 S.E. 224; *Smith v. Cathey*, 211 N.C. 747, 191 S.E. 505. The judgment sustaining the demurrer is

Affirmed.

R. C. BRAFFORD v. W. E. COOK.

(Filed 22 November, 1950.)

1. Trial § 22b—

Defendant's evidence in direct conflict with that of plaintiff is not to be considered by the court on motion for involuntary nonsuit.

2. Trial § 22a—

On motion to nonsuit, plaintiff's evidence is to be taken as true and he is entitled to every reasonable intendment and legitimate inference fairly deducible therefrom.

3. Automobiles §§ 16, 18h (2)—Plaintiff's evidence of defendant's excessive speed under circumstances held for jury on issue of negligence.

Plaintiff's evidence tending to show that defendant was driving his truck on the extreme right lane of a four lane highway following an automobile, that he came from behind the car into the passing lane at a terrific speed and struck plaintiff, who was a pedestrian attempting to cross the highway some 400 feet beyond an intersection, and knocked plaintiff some 15 yards and was unable to stop his truck under 75 yards from the impact, *is held* sufficient to be submitted to the jury upon the issue of negligence notwithstanding that the testimony of plaintiff's witnesses as to the speed of the truck was weakened somewhat on cross-examination, defendant's evidence in conflict with that of plaintiff as to the speed of the truck not being considered. G.S. 20-141 (a).

4. Trial § 22c—

Discrepancies and contradictions, even in plaintiff's evidence, do not justify nonsuit.

APPEAL by plaintiff from *Phillips, J.*, July Term, 1950, of GASTON.

Civil action to recover damages for an alleged negligent injury.

On the afternoon of 25 August, 1949, the plaintiff was undertaking to cross the Charlotte-Gastonia, four-lane, Highway—Wilkinson Boulevard —about 400 feet west of the Belmont-Mount Holly Highway intersection when he was struck by a Chevrolet truck, operated by defendant, and seriously injured.

Plaintiff was crossing on foot from north to south. He says he stopped and looked in both directions before entering upon the hard-surface. He saw a car about 200 feet away, approaching him in the northern lane at a moderate rate of speed. He did not see the defendant's truck which was either back of this car in the northern lane or in the second lane of travel. He heard a roar, started hurrying across, and was "three feet over in the third lane" when he was struck by defendant's truck, traveling westwardly towards Gastonia.

Plaintiff's witness, Mrs. Elizabeth Orr, says: "The truck was proceeding behind the family car in the extreme northerly lane when I first saw it. . . . This truck in behind comes with a roar and pulls around this car . . . going at a terrific speed and hit Mr. Brafford and knocked him angling 15 yards, and the truck didn't get stopped for 75 yards after it hit Mr. Brafford. . . . At the time of the accident the weather was clear and the highway was dry."

The defendant's evidence paints quite a different picture. It tends to show that the plaintiff ran into the right front fender of defendant's moving truck, which was traveling in the second or speed lane, and that the driver of the truck when he first saw the plaintiff, tried to avoid the injury by turning to his left.

From judgment of nonsuit entered at the close of all the evidence, the plaintiff appeals, assigning errors.

J. L. Hamme for plaintiff, appellant.
James Mullen for defendant, appellee.

STACY, C. J. It would seem that the trial court was influenced by the defendant's evidence in sustaining his demurrer and entering a compulsory nonsuit. However, as the defendant's evidence is in direct conflict with the evidence of the plaintiff, its credibility is for the jury and it is not to be considered by the court on motion for involuntary nonsuit. *Jackson v. Hodges, Comr., ante,* 694; *Graham v. Gas Co.,* 231 N.C. 680.

For present purposes, the plaintiff's evidence is to be taken as true, and he is entitled to every reasonable intendment and legitimate inference fairly deducible therefrom. *Howard v. Bell, ante,* 611; *Graham v. Gas Co., supra; Higdon v. Jaffa,* 231 N.C. 242, 56 S.E. 2d 661; *S. v. Blankenship,* 229 N.C. 589, 50 S.E. 2d 724; *Love v. Zimmerman,* 226 N.C. 389, 38 S.E. 2d 220; *Highway Com. v. Transp. Corp.,* 226 N.C. 371, 38 S.E. 2d 214; *Davis v. Wilmerding,* 222 N.C. 639, 24 S.E. 2d 337; *Diamond v. Service Stores,* 211 N.C. 632, 191 S.E. 355; *Lincoln v. R. R.,* 207 N.C. 787, 178 S.E. 601.

If the defendant came from behind the car in the northern lane at a terrific rate of speed, knocked the plaintiff angling for a distance of

15 yards and was unable to stop his truck under 75 yards from where he struck the plaintiff, as plaintiff's witness says, it would seem to be fairly debatable whether his speed was reasonable and prudent under the conditions then existing. G.S. 20-141 (a); *S. v. Blankenship, supra; Steelman v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829; *Baker v. Perrott,* 228 N.C. 558, 46 S.E. 2d 461; *Hoke v. Greyhound Corp.,* 226 N.C. 692, 40 S.E. 2d 345; *Tarrant v. Bottling Co.,* 221 N.C. 390, 20 S.E. 2d 565; *Kolman v. Silbert,* 219 N.C. 134, 12 S.E. 2d 915. True, the testimony of plaintiff's witness as to the speed of the truck was weakened somewhat on cross-examination, but this would still require a finding to determine the matter. *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. *Jackson v. Hodges, supra,* and cases cited; *Bailey v. Michael,* 231 N.C. 404, 57 S.E. 2d 372; *Barlow v. Bus Lines,* 229 N.C. 382, 49 S.E. 2d 793; *Emery v. Ins. Co.,* 228 N.C. 532, 46 S.E. 2d 309; *Lincoln v. R. R., supra.*

The case seems to be one for the jury. *Williams v. Kirkman, ante,* 609; *Bailey v. Michael, supra; Lincoln v. R. R., supra.*

Reversed.

LOUIS H. BRISSIE AND WIFE, SUE BRISSIE; ELLIE L. BRISSIE; T. A. FLOWE AND WIFE, LILLIAN BERNICE FLOWE, v. MARIE CRAIG, EVELYN CRAIG, JAMES GREY CRAIG, LAWRENCE CRAIG; JOE SATTERFIELD; W. G. SATTERFIELD AND WIFE, DOVIE SATTERFIELD; ROBERT SATTERFIELD AND WIFE, IDA SATTERFIELD; LOUIS H. BRISSIE, JR., AND WIFE, DIANA BRISSIE; W. T. BRISSIE; ALLEN ASHCRAFT AND WIFE, MARGARET ASHCRAFT; ALBERT THOMAS FLOWE AND WIFE, BRAUNDA FLOWE; ANNIE MAY SATTERFIELD BRYSON (NOW EVANS); ANNIE LOUISE BRYSON; CAROLINA EVANGELISTIC ASSOCIATION, A CORPORATION, ALSO KNOWN AS GARR AUDITORIUM.

(Filed 29 November, 1950.)

1. Pleadings § 16—

Demurrer *ore tenus* on the ground that it appears on the face of the complaint that the court is without jurisdiction may be made at any time, even in the Supreme Court on appeal. G.S. 1-127, G.S. 1-134.

2. Courts § 2—

In order for a court to have jurisdiction to determine a particular issue it must be brought before it in a proper proceeding.

3. Wills § 17: Clerks of Court § 4—

The clerk of the Superior Court has exclusive original jurisdiction of proceedings for the probate of wills, G.S. 2-16, G.S. 28-1, G.S. 31-12 through

31-27, and the Superior Court has no jurisdiction to determine whether a paper writing is or is not a will except upon the issue of *devisavit vel non* duly raised by a caveat filed with the clerk, G.S. 31-32 through 31-37.

4. Wills § 17—

A caveat is neither a civil action nor a special proceeding in the strict sense, but is a proceeding *in rem* in which the court pronounces the judgment as to whether the script itself is or is not the will of the deceased.

5. Wills § 1—

An instrument of testamentary character is wholly ineffectual until it is admitted to probate by a competent tribunal.

6. Wills § 15a—

The right to apply to have a paper writing probated is not limited to parties interested in establishing the paper writing as the will of deceased, but under the statute any "person interested in the estate" may make such application G.S. 31-13, which he may do even though his interest is against the instrument, and in such instance he may apply to have the will proved and simultaneously file a caveat thereto, G.S. 31-32.

7. Quieting Title § 2—

In an action to quiet title, plaintiffs may not seek to have an unprobated instrument declared invalid as the last will and testament of a decedent on the ground that defendants claim an interest in the land under such unprobated instrument, since equity has no jurisdiction to declare what is or what is not a last will and testament, and therefore the parties may not confer such jurisdiction upon it as an incident to its equitable jurisdiction to remove clouds and quiet titles.

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

APPEAL by defendants from *Crisp, Special Judge,* and a jury, at the May Term, 1950, of MECKLENBURG.

Civil action to annul or cancel an alleged unprobated will as a cloud on title.

The complaint states in detail that William Thomas Brissie, late a resident of Mecklenburg County, died intestate 3 July, 1949, owning certain land in Mecklenburg County and leaving the plaintiffs as his only heirs at law; that the defendants claim that the decedent devised various interests in his property to them by a paper writing dated "2-21-1949," which has never been propounded for probate by any person; that the paper writing is not the will of the decedent and cannot be probated as such because it was not found among his valuable papers; and that the paper writing constitutes a cloud on the title of the plaintiffs to the property of the decedent.

The complaint prays that the paper writing "be declared . . . not the last will" of the decedent, and that the plaintiffs be adjudged the owners of all his property free from the claims of the defendants.

The answer admits that the defendants claim interests in the property of the decedent under the paper writing mentioned in the complaint. It alleges in detail that the paper writing "was found among the valuable papers of the deceased," constitutes his valid holograph will, and "should be duly probated." The answer prays that the relief sought by the plaintiffs be denied, and "that the paper writing referred to be declared the last will and testament of the late William Thomas Brissie and probated as such."

The parties undertook to sustain their respective allegations by testimony, and the court submitted these two issues to the jury: (1) Was the said paper writing found among the valuable papers and effects of the said W. T. Brissie after his death? (2) Is the said paper writing the last will and testament of W. T. Brissie?

The jury answered the first issue "No," and left the second issue unanswered. The court entered judgment "that the paper writing . . . is not the last will and testament of . . . W. T. Brissie" and "does not . . . confer upon the defendants . . . any right, title, or interest in the property of . . . W. T. Brissie." The defendants excepted and appealed, assigning errors.

When the cause was heard in the Supreme Court, the defendants demurred *ore tenus* to the complaint and moved to dismiss the action for that the complaint affirmatively shows upon its face that the Superior Court had no jurisdiction of the subject matter of the action.

Ralph V. Kidd, Warren C. Stack, and John James for plaintiffs, appellees.

Ray Rankin and Henry E. Fisher for the defendants, appellants.

ERVIN, J. Inasmuch as a court has only the jurisdiction committed to it by law, an objection based on the want of jurisdiction over the subject matter of an action may be raised at any time during the progress of the action. *McCune v. Manufacturing Co.*, 217 N.C. 351, 8 S.E. 2d 219. As a consequence, the defendants had the right to demur to the complaint in the Supreme Court on the ground that it affirmatively shows upon its face that the Superior Court had no jurisdiction of the subject matter of the action. G.S., sections 1-127, 1-134; *Raleigh v. Hatcher*, 220 N.C. 613, 18 S.E. 2d 207.

In order for a court to have jurisdiction of the subject matter of an action, the particular issue involved must be properly brought before it for determination in the particular proceeding. *Helton v. Hubbs*, 278 Ky. 621, 129 S.W. 2d 116. See, also, in this connection: *Williams v. Williams*, 188 N.C. 728, 125 S.E. 482.

This being true, the Superior Court had no jurisdiction of the subject matter of this action; for under the law of North Carolina the issue of whether a paper writing is, or is not, a man's last will cannot be properly brought before the Superior Court for determination in an ordinary civil action.

The statutes of this State confer upon the Clerk of the Superior Court exclusive and original jurisdiction of proceedings for the probate of wills. G.S. 2-16, 28-1, and 31-12 to 31-27, inclusive; *McCormick v. Jernigan*, 110 N.C. 406, 14 S.E. 971. By this it is meant that the Clerk of the Superior Court has the sole power in the first instance to determine whether a decedent died testate or intestate, and if he died testate, whether the script in dispute is his will. *Hutson v. Sawyer*, 104 N.C. 1, 10 S.E. 85.

Under our procedure, the issue of whether a writing is, or is not, a decedent's will can be properly brought before the Superior Court for decision in a will contest only. McIntosh: North Carolina Practice and Procedure in Civil Cases, section 916. Such a contest is neither a civil action nor a special proceeding in a strict or technical sense. It is a proceeding *in rem* in which the court pronounces its judgment as to whether or not the *res, i.e.*, the script itself, is the will of the deceased. *In re Hinton*, 180 N.C. 206, 104 S.E. 341; *Sawyer v. Dozier's Heirs*, 27 N.C. 97. A proceeding to contest a will is begun by filing a caveat or objection to probate with the Clerk of the Superior Court, who thereupon transfers the proceeding to the civil issue docket of the Superior Court to the end that the issue of *devisavit vel non* may be tried in term by a jury. G.S. 31-32 to 31-37, inclusive; *In re Will of Roediger*, 209 N.C. 470, 184 S.E. 74; *In re Little*, 187 N.C. 177, 121 S.E. 453; *In re Will of Chisman*, 175 N.C. 420, 95 S.E. 769; McIntosh: North Carolina Practice and Procedure in Civil Cases, section 916.

An instrument of a testamentary character is wholly ineffectual until it is admitted to probate by a competent tribunal. *Cartwright v. Jones*, 215 N.C. 108, 1 S.E. 2d 359. Notwithstanding the vindication of their claim is dependent solely upon the lawful establishment of the paper writing in dispute as the valid will of the deceased, the defendants take no steps to offer the script for probate before the only tribunal having jurisdiction of the matter, *i.e.*, the Clerk of the Superior Court of Mecklenburg County. Their neglect in this respect provokes this civil action by the plaintiffs, who entertain the notion that the defendants have paralyzed the probate powers of the judiciary by failing to ask the Clerk of the Superior Court to adjudge that the paper is the will of the decedent.

The plaintiffs are mistaken, for the judiciary does not hold its probate powers by so tenuous a thread. Candor compels the confession, however,

that the misapprehension of the plaintiffs is understandable. Judges, like other men, have nothing except words in which to phrase their ideas, and the limitations of language produce much perplexity in the lexicon of the law. This observation finds ready illustration in the differing and sometimes inexact meanings given to identical terms in decisions concerned with the probate of wills. See: 2 Page on Wills (Lifetime Edition), section 561.

In its true sense, the probate or proof of a will is the judicial process by which a court of competent jurisdiction in a duly constituted proceeding tests the validity of the instrument before the court, and ascertains whether or not it is the last will of the deceased. *Hutson v. Sawyer, supra; Re Veazey,* 80 N. J. Eq. 866, 85 A. 176, Ann. Cas. 1914A, 980; *Winters v. American Trust Co.,* 158 Tenn. 479, 14 S.E. 2d 740. Thus the probating or proving of wills involves the rejection of void scripts as well as the establishment of valid ones.

Ordinarily a proceeding for the probate of a will is begun by a person who claims under the paper and instinctively makes the allegation that the script is the last will of the decedent. There is no reason in logic, however, why the proceeding should not be initiated by a person who claims against the instrument and makes the counter allegation that it is not the last will of the deceased. See: *Redmond v. Collins,* 15 N.C. 430.

Happily law and logic are compatible in this respect in North Carolina, for under the procedures prescribed any person having a legitimate end to be served by so doing may bring a proceeding for the probate of an alleged will without regard to whether he is interested for or against it.

G.S. 31-13 provides that "if no executor apply to have the will proved within sixty days after the death of the testator, any devisee or legatee named in the will, or any other person interested in the estate, may make such application, upon ten days notice thereof to the executor." Properly interpreted, this statute empowers any person interested in the estate of a decedent to make application to have a script purporting to be the will of such decedent "proved," *i.e.,* tested in respect to its validity as a testamentary instrument. It is obvious that the statutory clause "any . . . person interested in the estate" includes a person who will share in the estate under the law governing intestacy in case a script which purports to be the will of the deceased is adjudged invalid as a testamentary document. *In re Hardy,* 216 N.Y. 132, 110 N.E. 257; *In re Young's Estate,* 216 N.Y.S. 112, 216 App. D. 595. Hence, the statute permits a person interested in the estate of a supposed testator to present an alleged will for probate merely for the purpose of obtaining an adjudication of its invalidity. *In re Tankelowitz's Will,* 294 N.Y.S. 754, 162 Misc. 474; *In re Sappala's Will,* 267 N.Y.S. 776, 149 Misc. 479; *In re Bogstrand's Estate,* 267 N.Y.S. 396, 149 Misc. 356; *In re Tracy's Estate,* 258 N.Y.S. 657, 143 Misc. 800.

There is no incongruity in permitting a court to pass on the validity of an instrument of a testamentary nature upon the application of a person interested in its rejection.

G.S. 31-32 provides, in substance, that any person entitled under an alleged will, or interested in the estate of the supposed testator, may appear before the Clerk of the Superior Court and enter a caveat to the probate of the alleged will at the time of the application for its probate, or at any time within seven years after its probate in common form. This statute permits a person in interest to file a caveat to an alleged will, which has been offered for probate, and to contest the validity of such alleged will before it has been admitted to probate. *In re Little, supra;* 57 Am. Jur., Wills, section 762.

These things being true, the probate powers of the judiciary afford a complete remedy to a person interested against an alleged will in instances where those interested for the alleged will do not propound it for probate. He make invoke such remedy by the simple expedient of simultaneously applying to the Clerk of the Superior Court having jurisdiction to have the script probated or proved, *i.e.,* tested, and filing a caveat asking that it be declared invalid as a testamentary instrument.

Since the probate powers of the judiciary as defined by statute furnished an ample remedy, there was no occasion for the plaintiffs to ask the Superior Court to pass upon the validity of the disputed document as an incident to its equitable jurisdiction to cancel clouds and quiet titles.

A court of equity has no jurisdiction to declare what is, or is not, a man's last will. *Blue v. Patterson,* 21 N.C. 457. In consequence, such court has no power to entertain a will contest, *O'Brien v. Bonfield,* 220 Ill. 219, 77 N.E. 167; *Wheeler v. Wheeler,* 134 Ill. 522, 25 N.E. 588, 10 L.R.A. 613; or to determine whether a paper shall be admitted to probate. *Kaplan v. Coleman,* 180 Ala. 267, 60 So. 885; *Coulter v. Peterson,* 218 Iowa 512, 255 N.W. 684; *Bradley v. Bradley,* 117 Md. 515 83 A. 446; *Anderson v. Anderson,* 112 N.Y. 104, 19 N.E. 427, 2 L.R.A. 175; *Nicklin v. Downey,* 101 W. Va. 320, 132 S.E. 735.

When all is said, the entire controversy between the parties hinges on this single issue: Is the disputed document the last will of the deceased?

Under the statutes governing probate matters, the Superior Court, as a mere court of law and equity, has no jurisdiction to determine such an issue in an ordinary civil action. The plaintiffs could not confer upon the Superior Court the power denied to it by legislative act by asking the court to pass upon the validity of the alleged will as an incident to its equitable jurisdiction to remove clouds and quiet titles. The underlying reasons are plain. If the Superior Court sitting as a mere court of law and equity cannot entertain direct jurisdiction to establish or invalidate an alleged will in an ordinary civil action, it can possess

no jurisdiction to do so as an incident to its jurisdiction over other matters. Such a course would lead to grave complications; for it would destroy the uniformity of procedures for the probate and contest of wills, and otherwise conflict with the legal system established by the State. *McDaniel v. Pattison,* 98 Cal. 86, 27 P. 651, and *Milner v. Sims* (Tex. Civ. App.) 171 S.W. 784.

We deem it not altogether beside the mark to comment upon the all too frequent unconcern of litigants for the procedures established by law for the determination of juridical disputes. Rules of procedure are indispensable to the orderly and practical functioning of any system of law. The office assigned to them is a simple one. They may be likened unto a ship, for they are fashioned by lawmakers to carry legal controversies into judicial ports for decision. The most foolhardy of mariners does not dare to sail physical seas without chart and compass to steer his course. Yet every day litigants blithesomely embark upon the most boisterous of legal oceans without due heed for the charts and compasses afforded by judicial decision and statutory law. The inevitable results. Courts are compelled to expend much of their energy in rescuing litigants needlessly shipwrecked on procedural reefs, and in consequence have little time left to fulfill their true mission, that is, to administer "right and justice . . . by due course of law . . . without . . . sale, denial, or delay." North Carolina Constitution, Article I, Section 35.

As the Superior Court had no jurisdiction of the subject matter of the action, the judgment is vacated, the demurrer *ore tenus* is sustained, and the action is dismissed.

Action dismissed.

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

J. C. SEDBERRY AND IRENE SEDBERRY, HIS WIFE, v. GRADY L. PARSONS.

(Filed 29 November, 1950.)

1. Deeds § 16b—

Where the owner of lands subdivides same and sells separate parcels with restrictions pursuant to a general plan of development, each grantee and also each owner of a lot by *mesne* conveyances from such grantee, may enforce the restrictions against any other owner who took title with notice of the restrictions.

2. Same—

A purchaser of land is chargeable with notice of restrictive covenants if such covenants are contained in any recorded deed or other instrument

in his line of title, even though they do not appear in his immediate deed, since he is charged with notice of every fact affecting his title which an examination of his record chain of title would disclose.

3. Same—

The primary test of the existence of a general plan for the development or improvement of a tract of land divided into a number of lots is whether substantially common restrictions apply to all lots of like character or similarly situated.

4. Same—

Where a block comprising twenty-one lots is developed as a single subdivision and all the deeds to lots therein contain general restrictive covenants, but the deeds to only eleven of them contain provision against subdivision of any lot so as to result in a plot having less than one-half an acre, *held*, there is no substantial uniformity in the restrictions as to the size of the lots in the block, and the owner of a lot by *mesne* conveyances from the original purchaser, whose deed alone contained the restriction as to size, may sell same free of such restrictions.

5. Same—

The fact that lots in a block developed as a single subdivision are sold with reference to a map showing each lot to be at least one-half an acre in size cannot create a covenant by implication that the lots should not be changed in size.

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

APPEAL by defendant from *Phillips, J.*, at the October Term, 1950, of MECKLENBURG.

Controversy without action under G.S. 1-250 involving the question whether a clause in a deed in the chain of title of the vendors constitutes a restriction prohibiting the sale of the land conveyed by the deed in a parcel smaller in area than half an acre.

The facts giving rise to the controversy are as follows:

1. Block 40 of Myers Park in Charlotte, North Carolina, which was formerly owned by the Stephens Company, is irregular in shape, and is isolated from all other property by three public streets known as Queens Road, Briarcliff Place, and Briarwood Road.

2. The Stephens Company subdivided the block into 21 residential lots of varying shapes and sizes. The subdivision was not made on a single occasion. On 4 February, 1914, the eastern part of the tract, which comprised 57 per cent of the total area of the block, was partitioned into twelve lots numbered from 1 to 12, inclusive, and a first map depicting these twelve lots and the undivided western portion of the block as "Block 40, Myers Park, Charlotte, N. C.," was thereupon admitted to record in the office of the Register of Deeds of Mecklenburg County. The Stephens Company sold lots 2 to 9, inclusive, to various persons prior to

5 October, 1923, by deeds referring to the first map. On 5 October, 1923, the Stephens Company divided the western portion of the block into nine additional lots numbered from 12 to 21, inclusive, and caused a second map portraying all 21 lots "as Block 40, Myers Park, Charlotte, N. C.," to be recorded in the office of the Register of Deeds of Mecklenburg County. The Stephens Company sold lots 1, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21 to sundry purchasers subsequent to 5 October, 1923, by deeds referring to the second map. Although the record is silent on the point, it is assumed that the recorded maps indicate that each of the twenty-one lots in Block 40 of Myers Park was originally at least half an acre in area.

3. All of the deeds conveying lots in Block 40 of Myers Park to the immediate grantees of the Stephens Company were registered in due form of law in the office of the Register of Deeds of Mecklenburg County, and purport to impose numerous similar restrictions not germane to the present litigation upon the several lots in the block for the purpose of rendering them desirable for residential purposes.

4. Each of the deeds mentioned in the preceding paragraph provides that "nothing herein contained shall be held to impose any restriction on or easements in any land of the Stephens Company not hereby conveyed."

5. The several deeds conveying lots 1 to 11, inclusive, of Block 40 of Myers Park to the immediate grantees of the Stephens Company contain this clause: "No subdivision of any part of the above described property by sale, or otherwise, shall be made so as to result in a plot having an area of less than half an acre." But the several deeds conveying lots 12 to 21, inclusive, of Block 40 of Myers Park to the immediate grantees of the Stephens Company do not contain such clause, or any comparable provision.

6. This litigation is concerned primarily with lot 2, which originally embraced an area slightly in excess of half an acre. This lot was conveyed by the Stephens Company to the Thies-Smith Realty Company by a deed bearing date 1 June, 1916, and containing the restrictions referred to in paragraph three, the provisions quoted in paragraph four, and the clause set out in paragraph five. Lot 2 afterwards passed as a whole under *mesne* conveyances to Oliver F. Roddey and his wife, Lottie C. Roddey, who added a narrow strip of it to adjacent lot 3 owned by them, and conveyed the remainder, which embraced 1170 square feet less than one-half an acre, to the plaintiffs, J. C. Sedberry and wife, Irene Sedberry, by a deed dated 2 November, 1946. The plaintiffs thereafter reduced the size of the land thus acquired by them by conveying a part of it to Hannah J. Withers, owner of abutting lot 1, and by adding another part of it to adjoining lot 21 on which their home is situate.

The deeds to the plaintiffs and their immediate grantors do not contain restrictions of any sort. The only lots in Block 40 of Myers Park physically affected by the detachments from lot 2 are lots 1, 2, 3, and 21. The remaining portion of lot 2 contains 4,580 square feet less than one-half an acre. It is vacant, and affords a sufficient site for a house complying with all of the restrictions referred to in paragraph three.

7. On 1 November, 1949, the plaintiffs and the defendant, Grady L. Parsons, entered into a contract in writing whereby the defendant obligated himself to pay the plaintiffs $3,150.00 for the residue of lot 2 of Block 40 of Myers Park provided the clause in the deed from the Stephens Company to the Thies-Smith Realty Company, dated 1 June, 1916, and quoted in full in paragraph five does not impress a restriction upon lot 2, prohibiting a sale of any part thereof smaller in area than half an acre.

8. The plaintiffs have tendered to defendant a duly executed deed sufficient in form to vest the remainder of lot 2 in the defendant free from any restriction explicit or implicit in the clause in question, and have demanded payment by the defendant of the price specified in the contract of the parties. The defendant has refused to accept the proffered deed and to pay the stipulated price on the sole ground that the residue of lot 2 is smaller in area than half an acre and in consequence its sale is prohibited by the clause in question. Prior to the submission of the controversy to the court, the Stephens Company, which had previously sold all the lots in Block 40 of Myers Park, executed to plaintiffs a duly recorded instrument whereby it undertook to release "the plaintiffs, their heirs and assigns, and said lot 2 in Block 40 . . . from the restriction . . . contained in the deed from Stephens Company to Thies-Smith Realty Company." The controversy between the parties is whether the plaintiffs are entitled to enforce the contract of 1 November, 1949, against the defendant.

The court concluded that the clause in question does not restrict the sale of the residue of lot 2, and rendered a decree requiring the defendant to pay the stipulated price and accept the proffered deed. The defendant appealed, assigning errors.

James L. DeLaney for plaintiffs, appellees.
Charles Truett Myers for defendant, appellant.

ERVIN, J. These principles are well settled in this jurisdiction:

1. "Where the owner of a tract of land subdivides it and sells distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee, either on the

theory that there is a mutuality of covenant and consideration, or on the ground that mutual negative equitable easements are created." 26 C.J.S., Deeds, section 167; *Higdon v. Jaffa,* 231 N.C. 243, 56 S.E. 2d 661; *Brenizer v. Stephens,* 220 N.C. 395, 17 S.E. 2d 471; *Bailey v. Jackson,* 191 N.C. 61, 131 S.E. 567; *Homes Co. v. Falls,* 184 N.C. 426, 115 S.E. 184.

2. The right to enforce the restrictions in such case is not confined to immediate purchasers from the original grantor. It may be exercised by subsequent owners who acquire lots in the subdivision covered by the general plan through *mesne* conveyances from such immediate purchasers. *Higdon v. Jaffa, supra.*

3. The restrictions limiting the use of land in the subdivision embraced by the general plan can be enforced against a subsequent purchaser who takes title to the land with notice of the restrictions. *Higdon v. Jaffa, supra; Davis v. Robinson,* 189 N.C. 589, 127 S.E. 697.

4. A purchaser of land in a subdivision is chargeable in law with notice of restrictions limiting the use of the land adopted as a part of a general plan for the development or improvement of the subdivision if such restrictions are contained in any recorded deed or other instrument in his line of title, even though they do not appear in his immediate deed. *Higdon v. Jaffa, supra; Sheets v. Dillon,* 221 N.C. 426, 20 S.E. 2d 344; *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197; *Bailey v. Jackson, supra.*

This being true, the present appeal presents this solitary question: Was the clause providing that "no subdivision of any part of the above described property (*i.e.,* lot 2 of Block 40 of Myers Park) by sale, or otherwise, shall be made so as to result in a plot having an area of less than half an acre" inserted in the deed from the Stephens Company to the Thies-Smith Realty Company as a part of a general plan that the lots in Block 40 of Myers Park should not be smaller in size than half an acre?

The primary test of the existence of a general plan for the development or improvement of a tract of land divided into a number of lots is whether substantially common restrictions apply to all lots of like character or similarly situated. *Phillips v. Wearn,* 226 N.C. 290, 37 S.E. 2d 895; *Humphrey v. Beall,* 215 N.C. 15, 200 S.E. 918; 14 Am. Jur., Covenants, Conditions, and Restrictions, section 202; 26 C.J.S., Deeds, section 167.

When proper heed is paid to all pertinent facts shown in the record, it is plain that Block 40 of Myers Park is in fact, and was designed to be, a single subdivision of twenty-one lots. Eleven of the lots were conveyed by the Stephens Company to various purchasers by deeds which embody the clause in controversy, and the remainder of them were transferred by the Stephens Company to sundry other purchasers by deeds

which do not contain such clause or any comparable provision. In consequence, the substantial uniformity in restrictions essential to the existence of a general plan as to the size of lots in the subdivision does not exist, and the question posed by the appeal must be answered in the negative. *Stephens Company v. Binder,* 198 N.C. 295, 151 S.E. 639.

The validity of this conclusion is not impaired in any degree by the assumption that the maps indicate that each of the twenty-one lots in Block 40 of Myers Park was originally at least half an acre in area. A covenant that the lots in a subdivision shall not be changed in size cannot be implied from the mere circumstance that such lots are sold by reference to a recorded map. *Turner v. Glenn, supra; Stephens Company v. Binder, supra.*

For the reasons given, the judgment is

Affirmed.

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

G. H. GIBSON v. THE CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY.

(Filed 29 November, 1950.)

1. **Insurance §§ 25c, 50—**

Avoidance of a policy for false representations is an affirmative defense upon which insurer has the burden of proof.

2. **Insurance §§ 25d, 50—**

Insurer cannot be entitled to nonsuit because of its evidence establishing an affirmative defense.

3. **Trial § 24a—**

Nonsuit cannot be granted in favor of the party upon whom rests the burden of proof, and therefore defendant's evidence establishing an affirmative defense cannot entitle it to nonsuit.

4. **Appeal and Error § 6c (5½)—**

A general exception to the issues when taken in connection with an exception to a portion of the charge which points out the deficiency in one of the issues, *is held* sufficient to present the matter for review.

5. **Appeal and Error § 6c (2)—**

An appeal is in itself an exception to the judgment and any other matters appearing in essential parts of the record, such as the pleadings, verdict, and judgment, and therefore presents the question whether the judgment is supported by the verdict, *a fortiori* where there is an exception to the judgment.

6. Appeal and Error § 6c (1)—

Where error is manifest on the face of the record, even though it be not the subject of an exception, the Supreme Court may correct it *ex mero motu*. G.S. 7-11.

7. Judgments § 17a—

A judgment is a conclusion of law upon facts admitted or in some way established, and therefore a judgment cannot be entered properly upon an ambiguous verdict.

8. Trial § 36—

The issues should be certain and import a definite meaning free from ambiguity, and therefore an issue connecting two separate propositions by "and/or" is in the alternative and is inconclusive, and a finding thereon by the jury is insufficient to support a judgment.

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

APPEAL by defendant from *Sharp, Special Judge,* at 15 May, 1950, Extra Civil Term of MECKLENBURG.

Civil action to recover on standard policy of insurance for damage to plaintiff's automobile, by reason of collision or upset.

These facts appear to be uncontroverted:

Defendant, a mutual insurance company, in consideration of a certain premium, issued to plaintiff a standard automobile policy of insurance against loss or damage to a certain automobile, *inter alia,* by collision or upset during the period 15 February, 1949, to 15 August, 1950.

The declarations set forth in the policy in pertinent part are these:

"Item 3: In consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy, the company agrees to pay . . . damage to the automobile . . . sustained during the policy period with respect to . . . B 1 Collision or upset, actual cash value less $100.00 . . ." "Item 4: Description of the automobile and facts respecting its purchase by the insured: . . . 1949 . . . Kaiser . . . 4-door sedan . . . Actual cost when purchased including equipment $2794. Purchased—Month, year: M. Feb. Y. 1949. New or used: New . . ."

The policy also has these provisions:

"14. FRAUD AND MISREPRESENTATION

"This policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof or in case of any fraud, attempted fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

"16. Declarations

"By acceptance of this policy the insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance."

And within the period covered by the policy the automobile therein described was involved in collision near the town of Corbin, Kentucky, and was damaged.

Defendant, answering the complaint of plaintiff, admits that it issued the said policy of insurance. And, for further answer and defense, averred that it was induced to do so, relying upon the representations made by plaintiff that the automobile had "shortly theretofore been purchased for cash at a total cost $2794.00," and that "said vehicle was new, not having been previously owned by anyone other than the manufacturer and seller;" that these representations were false, and materially affected the transaction; and that by reason of such misrepresentation of material facts by plaintiff, said policy of insurance is void, and, hence, plaintiff is not entitled to recover in this action.

Plaintiff, replying, denies in material aspect the averments of defendant, and alleges the immateriality of the matters of defense so set up by defendant.

Both plaintiff and defendant offered evidence in respect of their respective contentions.

The case was submitted to the jury on these issues:

"1. Did the plaintiff falsely misrepresent to the defendant, in applying for the insurance policy on the Kaiser automobile described in the Complaint, that said automobile was new and/or that he had paid $2,794.00 for said car?

"2. If so, was such misrepresentation a material one, or fraudulently made?

"3. What was the reasonable cost of repairs of the automobile of the plaintiff, occasioned by the collision referred to in the complaint?"

Defendant excepted to the submission of these issues.

The jury answered the first issue in the negative, and the third in a stated amount.

To the signing of judgment in favor of plaintiff, on verdict returned, defendant excepted, and appeals to the Supreme Court and assigns error.

Jones & Small for plaintiff, appellee.

Smathers & Carpenter and James L. DeLaney for defendant, appellant.

WINBORNE, J. Defendant's assignments of error based on exceptions to denial of its motion, aptly made, for judgment as of nonsuit are not well taken. Defendant, having (1) admitted the issuance of the policy of insurance on which plaintiff bases his action, and (2) set up in avoidance the defense that the issuance of the policy was procured by the false representations of plaintiff in the respects averred, has the burden of proof on the issues thereby raised. The burden of proof is on the party holding the affirmative. *Wilson v. Casualty Co.*, 210 N.C. 585, 188 S.E. 102; *In re Atkinson*, 225 N.C. 526, 35 S.E. 2d 638. And judgment of nonsuit will not be granted in favor of one on whom rests the burden of proof. Moreover, in the record on the appeal, there is no request for a directed verdict.

But the first issue submitted to the jury in the trial court is, in the use of the term "and/or," ambiguous and uncertain, and, hence, the verdict thereon is insufficient to support the judgment rendered.

While defendant's exception to the issues is general, and does not point to the use of the term "and/or" so used, its exception No. 21 to a portion of the charge does bring it into focus. The following is the portion of the charge to which this exception No. 21 relates:

"If the defendant has failed to satisfy you that the plaintiff falsely misrepresented to the defendant, in applying for the insurance policy, that such automobile was new and/or that he paid $2794.00 for the car, it would be your duty to answer the issue No."

Moreover, the exception to the judgment rendered raises the question as to whether error in law appears upon the face of the record, *Culbreth v. Britt*, 231 N.C. 76, 56 S.E. 2d 15, and cases there cited. See also *Greensboro v. Black, ante*, 154; *Hoover v. Crotts, ante*, 617. Indeed, the appeal itself is considered an exception to the judgment and any other matters appearing upon the face of the record. *Dixon v. Osborne*, 201 N.C. 489, 160 S.E. 579; *Russos v. Bailey*, 228 N.C. 783, 47 S.E. 2d 22, and numerous other cases. And the record, in the sense here used, refers to the essential parts of the record, such as the pleadings, verdict and judgment. See *Thornton v. Brady*, 100 N.C. 38, 5 S.E. 910, and citations of it as shown in Shepard's North Carolina Citations. And where error is manifest on the face of the record, even though it be not the subject of an exception, it is the duty of the Court to correct it, and it may do so of its own motion, that is *ex mero motu*. G.S. 7-11, formerly C.S. 1412, Rev. 1542, Code 957, and R.C. Ch. 33, sec. 6. *Thornton v. Brady, supra. Carter v. Rountree*, 109 N.C. 29, 13 S.E. 716; *S. v. Ashford*, 120 N.C. 588, 26 S.E. 915; *Appomattox Co. v. Buffaloe*, 121 N.C. 37, 27 S.E. 999; *S. v. Truesdale*, 125 N.C. 696, 34 S.E. 646; *Griffith v. Richmond*, 126 N.C. 377, 35 S.E. 620; *Wilson v. Lumber Co.*, 131 N.C. 163, 42 S.E. 565; *Ullery v. Guthrie*, 148 N.C. 417, 62 S.E. 552; *Moreland v. Wam-*

boldt, 208 N.C. 35, 179 S.E. 9; *In re Will of Roediger,* 209 N.C. 470, 184 S.E. 74; *Smith v. Smith,* 223 N.C. 433, 27 S.E. 2d 137.

A judgment, in its ordinary acceptation, is the conclusion of the law upon facts admitted or in some way established, and, without the essential fact, the Court is not in a position to make final decision on the rights of the parties. *Sedbury v. Express Co.,* 164 N.C. 363, 79 S.E. 288; *Durham v. Hamilton,* 181 N.C. 232, 106 S.E. 825, 30 Am. Jur. 821, Judgments, sec. 2. A judgment must be definite. 49 C.J.S. 51. And while a verdict is not a judgment, it is the basis on which a judgment may or may not be entered. 49 C.J.S. 28, Judgments 4. Hence a verdict should be certain and import a definite meaning free from ambiguity. *Wood v. Jones,* 198 N.C. 356, 151 S.E. 732. See also *In re Will of Roediger, supra; Edge v. Feldspar Corp.,* 212 N.C. 246, 193 S.E. 2; *Cody v. England,* 216 N.C. 604, 5 S.E. 2d 833.

In the *Edge case, supra,* the issue as framed was whether a certain provision was omitted from the deed in suit "by material mistake or by the fraud of the grantee." The jury answered "yes." And this Court held that the verdict is uncertain or ambiguous; that it is in the alternative; and that its inconclusiveness necessitated another trial. Compare *S. v. Williams,* 210 N.C. 159, 185 S.E. 661. Moreover, the use of the term "and/or" has not escaped the attention of this Court. *Freeman v. Charlotte,* 206 N.C. 913, 174 S.E. 453; *S. v. Ingle,* 214 N.C. 276, 199 S.E. 10; *S. v. Mitchell,* 217 N.C. 244, 7 S.E. 2d 567.

In the *Freeman case, supra,* on appeal from an order restraining a special election, the Court, in affirming the order, had this to say:

"It is observed that the approval of the State School Commission, as provided by Section 17, Chapter 562, Public Laws of 1933, nowhere appears of record; and further that the use of words 'and/or' in said section adds nothing to its clarity if it does not create an ambiguity as to who shall request the tax levying authorities to call the election."

S. v. Ingle, supra, is an appeal by the State from a special verdict finding defendant "not guilty" of the charge of "carrying on the Plumbing and/or Heating Contracting business, without having obtained a license to carry on the business of Plumbing and Heating Contracting in this State." In finding no error, this Court said: "While there was no motion to quash the warrant, it may not be amiss to observe that it charges the defendant with 'carrying on the Plumbing and/or Heating Contracting business'—(citing cases). The use of 'and/or' in the warrant adds nothing to its clarity." Citing *Freeman v. Charlotte, supra.*

And in *S. v. Mitchell, supra,* reversing a special verdict finding defendant guilty "of practicing or offering to practice, entering into or carrying on the plumbing and/or heating contracting business" the Court con-

cluded with the piercing question, "Of what crime does he stand convicted?", citing *S. v. Ingle, supra.*

Thus the Court has inferentially condemned the use of the term "and/or" in statutes, and in verdicts in judicial proceedings.

Moreover, the annotators of reported cases, and the text writers indicate that much has been written in condemnation of the term "and/or." It is declared, in effect, that the courts generally hold that the term "and/or" has no place in judicial proceedings,—pleadings, verdict or judgment. See Annotations 118 A.L.R. 1367, and 154 A.L.R. 866, on subject "And/or"; also, 3 C.J.S. 1069, and Words and Phrases, Perm. Ed. 3, p. 450.

In fine, issues should be couched in words of clear and certain meaning.

For error indicated, let there be a

New trial.

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

STATE v. CLYDE EARLY.

(Filed 29 November, 1950.)

1. Homicide § 25—

The State's evidence tending to show that defendant intentionally shot deceased, inflicting injury causing his death, while attempting to hold him for officers of the law because he had stolen defendant's shirt, even though defendant did not intend to inflict fatal injury, *is held* sufficient to overrule nonsuit in a homicide prosecution.

2. Homicide § 8a—

Culpable negligence in the law of crimes is more than actionable negligence in the law of torts, and 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 or rights of others.

3. Same—

Upon defendant's plea of an accidental killing, an instruction to the effect that defendant would be guilty if the shooting resulted from negligence must be held for prejudicial error in making the defense unavailing if defendant were guilty of mere negligence rather than culpable negligence.

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

APPEAL by defendant from *Phillips, J.*, at 10 July, 1950, Extra Criminal Term of MECKLENBURG.

Criminal prosecution upon bill of indictment charging defendant with the murder of one Roy McLain.

The solicitor for the State announced at the beginning of the trial that the State would not seek a verdict of murder in the first degree, but a verdict of murder in the second degree, or manslaughter as the facts may warrant.

Defendant entered a plea of not guilty.

Upon the trial in Superior Court the State offered evidence tending to show that on the afternoon of 28 February, 1950, on Seventh Street in the city of Charlotte, North Carolina, about 100 feet from the home of defendant, Roy McLain received two bullet wounds from a pistol in the hands of defendant,—one through his fingers, and the other in the small of his back; that he died about 8 March, 1950; that his death, in the opinion of medical experts, was the result of a blood clot lodging in the large blood vessel which supplied blood to his lungs; and that the blood clot was formed as a result of trauma of the blood vessels caused either by the bullet wound in his back or by the operation performed in connection with the said wound.

The State also offered in evidence declaration of Roy McLain made in the hospital at time he had expressed belief that he was going to die, as to how the shooting occurred. His brother, testifying, quotes him as saying: "I was coming down the sidewalk and my shoes got muddied up, and I saw an old shirt hanging over a garbage can . . . on a line, and I reached up and got it to brush my shoes off. I heard a man running behind me; I turned around and he had a pistol in his hand. He said, 'Old man, you got my shirt.' 'I didn't mean no harm,' and handed it back to him. When I went to hand it back to him, he shot me through the fingers. I asked him not to shoot again, and I ran to get away from him, and he ran after me and shot me in the back."

Another witness, Mr. Dixon, who resided nearby, and ran to the scene of the shooting, testified that defendant said he shot him because he stole his shirt, that he tried to shoot him in the leg and that he didn't mean to hit him in the body.

This witness, on cross-examination, testified that defendant said he watched him (the man) for quite a while and that he went out and shot at him one time; that he also said the man knocked him down and the gun went off, the first shot; that the man hit him and knocked him on the ground, and that the gun went off; that when he fell the gun went off the second time, and that it was the second time that the bullet went into the man's back; and that he said he did not intend to shoot him.

On the other hand, defendant, as a witness for himself, gave this narrative of the occurrence: That as he was in his kitchen shaving, he looked out of the window and saw a man on the sidewalk,—slowly walk-

ing up and down; that he finished shaving, and looking again, saw this man on a rock wall bordering his lot, reaching over his fence to the clothes lines; that as he watched, the man took his shirt off the line; that he said to his wife, "This man is getting my shirt. Call the police—I'll catch him and hold him till they get here"; that he went through the bedroom, picking up his pistol off the chest of drawers, and went out the front door on Pine Street, and around the corner and down Seventh Street, and caught up with this man approximately 100 feet from the corner of his lot; that he stopped the man and told him he had seen him take his shirt, and he would have to stay with him until the police came; that his wife was calling the police; that when he told the man the police were coming, he stuck his left hand in the waist band of his pants, where he, the defendant, noticed a bulge, and was looking to see if the man pulled anything out; that then the man hit him with his right hand, on the left cheek bone,—knocking him down; that the man started on him, striking at him,—down with his back against the building; that he pulled the gun out of his pocket and shot right up, between them, to scare him; that the man turned and ran, and he, the defendant, made a lunge and one step, and on the second step he stumbled over the curbing and fell into the street, directly behind this man, when the gun went off; that he was trying to catch himself and did not see the man fall; but that when he jumped up, he saw the man lying in the street approximately five steps away; that he ran and picked him up with one arm (the other being hurt in the fall), and carried him across the sidewalk, and asked him where he was shot; and started "undoing" his clothes when Mr. Dixon came over and asked what happened; that he told him that he had fallen and accidentally shot the man; that he, the defendant, had no intention whatever of firing the gun when it fired the second time; that the gun was a "lemon-squeezer" type of revolver, and in the commotion of falling, he accidentally squeezed the handle or pulled the trigger, and it went off; that when he unfastened the man's clothes he found out the bulge in his waist band was a rupture truss.

And, on cross-examination, defendant stated that the shirt was worth about $3.00; that he did not tell Mr. Dixon that he shot the man because he took his shirt; that he shot between them, to keep him off; and that the place he shot the second time was two steps from the place where he shot the first time.

Verdict: Guilty of involuntary manslaughter.

Judgment: Confinement in the State Prison for a term of not less than eighteen (18) and not more than thirty-six (36) months.

Defendant appeals therefrom to Supreme Court and assigns error.

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

G. T. Carswell, Henry E. Fisher, and Carl Horn, Jr., for defendant, appellant.

WINBORNE, J. The evidence shown in the record on this appeal, when considered in the light most favorable to the State, is sufficient to take the case to the jury. Hence the assignments of error based on exceptions to the denial of defendant's motions, aptly made, for judgment as of nonsuit are not sustained.

But the exception upon which assignment of error No. 28 is based is well taken. It has its setting in this portion of the charge of the trial court to the jury: "Now, the defendant interposes the plea of an accident. The court will give you the legal definitions of an accident which would relieve one charged with criminal offense—if the jury finds that it was an accident: An accident is an event from an unknown cause, or an unusual and unexpected event from a known cause (such as) chance, casualty. By "accident" is meant an event causing damage happening unexpectedly and without fault. (s) Where a man, doing a lawful act in a careful and lawful manner, and without an unlawful intent, accidentally kills another, it is excusable homicide. But these facts must occur, and the absence of any one of them will involve guilt: When it appears that a killing was unintentional; that the perpetrator acted with no wrongful purpose in doing the homicidal act; that it was done while he was engaged in a lawful enterprise, and that it must not be the result of negligence, the homicide will be excused, on the score of an accident" (t). The exception relates to that portion between the letters (s) and (t).

The vice in this charge, as defendant contends, is that defendant's plea of an accidental killing is made unavailable to him if in the handling of the pistol he were merely negligent, rather than culpably negligent as the term is used in the law of crimes.

"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." *S. v. Cope,* 204 N.C. 28, 167 S.E. 456; *S. v. Miller,* 220 N.C. 660, 18 S.E. 2d 143; *S. v. Wooten,* 228 N.C. 628, 46 S.E. 2d 868; *S. v. Blankenship,* 229 N.C. 589, 50 S.E. 2d 724, and numerous others. And defendant was entitled to have the court so declare in connection with his plea that the killing was accidental.

For error in this respect, defendant is entitled to a new trial.

The exceptions covered by the remaining assignments of error need not be considered and treated, as they may not recur on another trial.

New trial.

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

STATE v. LARK ARDREY.

(Filed 29 November, 1950.)

1. Assault § 14c: Criminal Law § 53g—

Where in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, verdicts of guilt of less degrees of the crime are permissible under the evidence dependent upon the variant facts as the jury may find them to be, the failure of the court to submit the question of defendant's guilt of such less degrees is erroneous and constitutes a failure to explain the law arising upon the facts in evidence as required by G.S. 1-180.

2. Criminal Law § 53d—

The court is required to charge the jury as to the law upon all substantial features of the case arising upon the evidence, and this without special request. G.S. 1-180.

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

APPEAL by defendant from *Phillips, J.*, July Term, 1950, of MECKLENBURG.

Criminal prosecution on indictment charging the defendant with assaults on Bill Baucom and E. T. Baucom with a deadly weapon, with intent to kill, inflicting serious injury, not resulting in death.

By consent, the two indictments were heard together and tried as different counts in the same bill, as they both arose out of the same state of facts. At an early morning hour on 3 June, 1950, the two Baucom brothers, Wm. F. and E. T. Jr. (the Jr. not used in indictment) were riding in an automobile on North McDowell Street, Charlotte, when the defendant, Lark Ardrey, traveling in the same direction, passed them in his automobile, immediately applied his brakes and skidded his car sideways in front of the Baucom car. The Baucom car then passed the Ardrey car with some difficulty and was later run into from the rear by the Ardrey car. From this point the Ardrey car seems to have led a chase across town, about 17 blocks, with the Baucom car in pursuit. The two cars came to a halt at First and Davidson Streets. The occu-

pants alighted and a fight ensued. The defendant using a knife, inflicted serious injuries on both the Baucoms, requiring six days hospitalization.

The defendant testified that he fought only in self-defense.

Verdict: Guilty as charged.

Judgment: Imprisonment in State's Prison for a term of not less than two nor more than four years.

Defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorney-General Rhodes for the State.

Brock Barkley for defendant.

STACY, C. J. In a charge covering fourteen pages of the record, the court nowhere tells the jury what verdicts are permissible under the evidence depending upon the variant facts as they may find them to be. Nor is there any suggestion of the lesser degrees of the crime charged, except that of an assault with a deadly weapon. Indeed, in respect of the permissible verdicts, only the contentions of the parties are given, ending with the following paragraphs, which fairly epitomize the whole charge:

"The State insists and contends that you should convict the defendant, in each case, of assault with a deadly weapon, with intent to kill, inflicting serious injury not resulting in death—or if you do not find him guilty of that offense, then, in any event, the State insists and contends, you should find him guilty of assault with a deadly weapon, in each case.

"The defendant insists and contends that your verdict should be not guilty, as to the charges in both cases—first, that your verdict should be not guilty of assault with a deadly weapon, with intent to kill, inflicting serious injury not resulting in death, and also not guilty of assault with a deadly weapon.

"It is a question of fact for you; give to the State and the defendant a fair and impartial trial, and let your verdict be a fair determination between the State and the defendant, upon the charges contained in the Bill of Indictment."

Not only was there no reference to the lesser degrees of the principal crime, save one, *S. v. Burnette,* 213 N.C. 153, 195 S.E. 356; *S. v. High,* 215 N.C. 244, 1 S.E. 2d 563; *S. v. Bentley,* 223 N.C. 563, 27 S.E. 2d 738, but the charge also fails to explain the law arising upon the facts in evidence as required by G.S. 1-180; *S. v. Sutton,* 230 N.C. 244, 52 S.E. 2d 921; *S. v. Fain,* 229 N.C. 644, 50 S.E. 2d 904; *S. v. Jackson,* 228 N.C. 656, 46 S.E. 2d 858; *S. v. Friddle,* 223 N.C. 258, 25 S.E. 2d 751; *Williams v. Coach Co.,* 197 N.C. 12, 147 S.E. 435; *Wilson v. Wilson,* 190 N.C. 819, 130 S.E. 834; *Nichols v. Fibre Co.,* 190 N.C. 1, 128 S.E. 471;

Bowen v. Schnibben, 184 N.C. 248, 114 S.E. 170. In *S. v. Friddle, supra, Barnhill, J.,* says: "The chief object contemplated in the charge is to explain the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring into view the relation of the particular evidence adduced to the particular issue involved."

It is provided by G.S. 1-180, rewritten, Chap. 107, S.L. 1949, that in jury trials, the judge "shall declare and explain the law arising on the evidence given in the case," and this without expressing any opinion upon the facts. *Thompson v. Angel,* 214 N.C. 3, 197 S.E. 618; *S. v. Jackson, supra; S. v. Merrick,* 171 N.C. 788, 88 S.E. 501. In interpreting this statute the authoritative decisions are to the effect that it "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 statute "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; *S. v. Groves,* 121 N.C. 563, 28 S.E. 262. "The statement of the general principles of law, without an application to the specific facts involved in the issue, is not a compliance with the provisions of the statute." *Nichols v. Fibre Co., supra.*

The purport of the decisions may be gleaned from the following excerpts: "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 instruction to that effect." *Spencer v. Brown,* 214 N.C. 114, 198 S.E. 630. "On the substantive features of the case arising on the evidence, the judge is required to give correct charge concerning it." *School District v. Alamance County,* 211 N.C. 213, 189 S.E. 873. "A judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect." *S. v. Merrick, supra.* "When the evidence is susceptible of several interpretations a failure to give instructions which declare and explain the law in its application to the several phases of the evidence is held for reversible error." *Williams v. Coach Co., supra.*

There are other exceptions appearing on the record worthy of consideration, however as they are not likely to occur on the further hearing, we pretermit them now.

The defendant is entitled to another jury. It is so ordered.

New trial.

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

HARRY COLLINGWOOD v. WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY.

(Filed 29 November, 1950.)

1. Railroads § 4—

Where, in an action to recover for a collision at a railroad grade crossing, there is no evidence that either party had the last clear chance, that the view at the crossing was obstructed, or that the crossing was unusually hazardous, it is error for the court to charge the jury on such principles of law which do not arise upon the evidence.

2. Trial § 31b—

It is prejudicial error for the court to charge the jury as to principles of law in no way arising upon the evidence.

3. Same—

The court is required to charge the law arising on the evidence given in the case, and a charge containing declarations of abstract principles of law without relating them to the evidence, is insufficient. G.S. 1-180.

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

ERVIN, J., dissenting.

DEVIN, J., concurs in dissent.

PETITION to rehear case reported *ante*, 192, 59 S.E. 2d 584.

R. L. Smith & Son, Craige & Craige, and Kerr Craige Ramsey for petitioners.

H. C. Turner for respondent.

WINBORNE, J. This case relates to a collision between plaintiff's car and an engine and tender of defendant at a road crossing over defendant's railroad.

The grounds upon which the present petition to rehear is based are that the opinion reported *ante*, 192, fails to recognize as meritorious exceptions to portions of the charge of the court as given to the jury, and to failure of the court to charge the jury as required, and assigned as error on the appeal, and supported by principles of law declared in decisions of this Court.

It is pointed out that in specific portions of the charge to which exceptions assigned as error relate, the court charged the jury on principles of law in reference, and applicable to (1) last clear chance, (2) obstructed view, and (3) unusually hazardous crossings, when there is no evidence in the record that either party had the last clear chance, that the view was obstructed, or that the crossing was unusually hazardous. In the light of the acts of negligence alleged in the complaint, and of the evi-

dence shown in the record, we are constrained to hold that these exceptions are meritorious and show prejudicial error. Similar charges in *Carruthers v. R. R.*, 215 N.C. 675, 2 S.E. 2d 878, and in *Lunsford v. Marshall,* 230 N.C. 610, 55 S.E. 2d 194, were held for error, for which new trials were ordered.

It is also pointed out in the petition that exceptions are taken to the failure of the court, in charging the jury, to declare and explain the law arising on the evidence given in the case, as required by the provisions of G.S. 1-180, as amended by Chapter 107 of 1949 Session Laws of North Carolina. It is true that the charge contains declarations of abstract principles of law found in reported cases. Nevertheless, the exceptions appear to be well taken.

Other assignments of error based upon exceptions to the charge need not be treated since there must be a new trial for error above indicated. These may not recur on such new trial.

Petition allowed.

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

ERVIN, J., dissenting: My interpretation of the record compels me to disagree with the majority opinion, which now overrules the decision handed down in this cause on 24 May, 1950. As I see it, the principles of law applicable to this appeal are rightly expounded in the opinion written by *Justice Devin* for this Court at that time. As a consequence, I vote to adhere to the former decision.

DEVIN, J., concurs in dissent.

SUSAN CHERRY v. MARY WALKER.

(Filed 29 November, 1950.)

1. Deeds § 16c—

Grantor is not entitled to cancellation of a deed for breach of covenant constituting the consideration therefor that grantee support and maintain grantor for the remainder of grantor's life.

2. Pleadings §§ 3a, 19c—

Each cause of action should be stated separately without reference to any other cause, and allegations of one cause should not be considered in passing upon a demurrer *ore tenus* to another cause.

3. Ejectment § 13—

Allegations to the effect that plaintiff is the owner of certain land described by reference to a deed, and that defendant is in the wrongful possession thereof and refuses to surrender same, is sufficient to overrule demurrer.

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

APPEAL by plaintiff from *Phillips, J.*, July Term, 1950, of GASTON.

This action was instituted for the purpose of having a deed canceled for failure of consideration and to recover the possession of the premises.

It is alleged in the first cause of action that the premises involved were conveyed to the plaintiff and her husband, William Cherry, as tenants by the entirety, on 10 November, 1908; that the conveyance is recorded in the office of the Register of Deeds of Gaston County, in Book 75, page 150; that she survived her husband and became the owner of the property in fee simple; that on 24 April, 1943, she conveyed the property to the defendant, by deed which is recorded in Book 438, page 370, in the office of the Register of Deeds for Gaston County; and that the defendant has failed and refused to pay any part of the consideration.

For a second cause of action, the plaintiff alleged she is the owner of a tract of land described in that certain deed, recorded in Book 438, page 370, in the office of the Register of Deeds for Gaston County, reference to which is made for a description of the land, and that the defendant is in the wrongful possession thereof and refuses to surrender the same to the plaintiff.

When the case was called for trial below, the defendant interposed a demurrer *ore tenus* to the first and second causes of action. The court overruled the demurrer to the first cause of action, but sustained it as to the second. Exception.

At the close of plaintiff's evidence on the first cause of action, the defendant moved for judgment as of nonsuit. The motion was allowed and judgment so entered. Plaintiff appeals, assigning error.

J. L. Hamme for plaintiff.

S. B. Dolley for defendant.

DENNY, J. The deed involved herein was executed "in consideration of one dollar cash in hand paid together with the further consideration of the support and maintenance of party of first part, by party of second part with any and all medical care necessary for her health and comfort, paid by the party of the second part and to be performed as long as said party of the first part may live."

In view of the above provisions, the judgment as of nonsuit on the first cause of action is affirmed, on authority of *Minor v. Minor, ante,* 669, and cited cases.

Under our system of pleading, each cause of action should be stated separately and without reference to any other causes. McIntosh—N. C. Practice and Procedure, Section 433, p. 442. And the allegations contained in one cause of action should not be considered in passing upon a demurrer *ore tenus* to another cause of action.

In considering the second cause of action herein, the allegations to the effect that the plaintiff is the owner of certain land described in a deed, reference to which is made for a complete description thereof, and that the defendant is in the wrongful possession of the land and refuses to surrender the possession to plaintiff, would seem to be sufficient to withstand a demurrer *ore tenus.* McIntosh—N. C. Practice and Procedure, Section 382, p. 392; *Johnston v. Pate,* 83 N.C. 110; *Tyson v. Shepherd,* 90 N.C. 314.

It might be the part of wisdom for the plaintiff, if so advised, to recast her pleadings, in this cause of action, so as to allege that she reserved a life estate in the premises conveyed to the defendant, and that she is the owner thereof and entitled to the possession of the premises by virtue of such reservation.

Appeal on first cause of action, Affirmed.

Appeal on second cause of action, Reversed.

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

STATE v. OSCAR ABERNETHY ARMSTRONG.

(Filed 29 November, 1950.)

Criminal Law § 42e—

Defendant may show by competent evidence that a witness for the State is an imbecile or moron for the purpose of challenging the credibility of such witness.

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

APPEAL by defendant from *Bennett, Special Judge,* March Term, 1950, of GASTON.

Criminal prosecution on indictment charging the defendant with the murder and slaying of his wife, Lucille Armstrong.

It is in evidence that the defendant slew his wife on the night of 30 August, 1949, by striking her several times over the head with a piece of iron.

The only eye-witness to the slaying was Betty Clinton, who also went by the name of Betty Roberson. As the State's principal witness, she testified that she saw the defendant approach his wife from behind and strike her over the head three times with a rusty piece of iron about as long as one's arm. The defendant's wife died in the hospital about four hours later.

On cross-examination, the witness seemed to get confused about where she was when she witnessed the assault and the visibility of the night. At one place in the record she says: "It was awfully dark and I was about three blocks from her." At another place she says, "The moon was shining that night."

Dr. T. H. Williston, who saw the deceased on the night of the homicide, testified for the prosecution, and stated on cross-examination that Laura Clinton (presumably Betty Clinton) had been a patient of his, and if allowed to testify, would have said: "I would classify her as a low-class moron, equivalent of a nine-year-old child." Exception to exclusion.

Robert Burrus, another witness for the State, if permitted, would have testified on cross-examination: "I would say she (Betty Roberson or Betty Clinton) is a moron or imbecile, has the mind of a child, say about 10 or 12 years old." Exception to exclusion.

Verdict: Guilty of manslaughter.

Judgment: Imprisonment in the State's Prison for a term of not less than 12 nor more than 14 years.

The defendant appeals, assigning errors.

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

Ernest R. Warren and O. A. Warren for defendant.

STACY, C. J. The denial of any impeachment of the State's only eye-witness to the fatal assault necessitates another hearing. It is always open to a defendant to challenge the credibility of the witnesses offered by the prosecution who testify against him. *S. v. Beal,* 199 N.C. 278, 154 S.E. 604.

What could be more effective for the purpose than to impeach the mentality or the intellectual grasp of the witness? If his interest, bias, indelicate way of life, insobriety and general bad reputation in the community may be shown as bearing upon his unworthiness of belief, why not his imbecility, want of understanding, or moronic compre-

hension, which go more directly to the point? *S. v. Ham,* 224 N.C. 128, 29 S.E. 2d 449; *S. v. Witherspoon,* 210 N.C. 647, 188 S.E. 111; *S. v. Vernon,* 208 N.C. 340, 180 S.E. 590; *S. v. Rollins,* 113 N.C. 722, 18 S.E. 394; *Isler v. Dewey,* 75 N.C. 466; *S. v. Ketchey,* 70 N.C. 621; *Bailey v. Poole,* 35 N.C. 404; Stansbury's N. C. Evidence, sec. 127, p. 245, note 66. That which may be shown indirectly may also be shown directly. The law favors directness over indirectness; simplicity over complexity; brevity over prolixity; clarity over obscurity; substance over form. There is no virtue in the long phrase when a short one will do just as well. The courtroom is not the home of redundancy or circumlocution. Conciseness is the keynote there.

When a witness goes upon the stand he subjects himself to cross-examination which may take the form of self-depreciation or the depreciation of other witnesses. *S. v. Beal, supra,* and cases there cited. Here, there was no suggestion of any claim of professional privilege or immunity in respect of Dr. Williston's proposed testimony; and none could be made in respect of the proposed testimony of the witness Robert Burrus. It follows that error was committed in excluding the proposed evidence.

New trial.

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

V. COPELAND CRAIG, EXECUTRIX UNDER THE WILL OF DAVID J. CRAIG, AND V. COPELAND CRAIG, INDIVIDUALLY, *v.* DAVID J. CRAIG, JR., J. THOMAS CRAIG, FRANCES CRAIG CHERRY, AND JAMES C. CRAIG.

(Filed 29 November, 1950.)

Executors and Administrators § 15k—

In the absence of testamentary provision to the contrary, the Federal Estate Tax is chargeable to the residuary estate and not against the specific legacies or devisees.

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

APPEAL by defendants from *Patton, Special Judge,* October Term, 1950, of MECKLENBURG. Affirmed.

F. Grainger Pierce for plaintiffs, appellees.

David J. Craig, Jr., for defendants, appellants.

PER CURIAM. Defendants appealed from the ruling of the court below on facts agreed that the Federal Estate tax paid by the executrix of David J. Craig was chargeable to the residuary estate, and that the executrix had no right to reimbursement from the beneficiaries under the will for their proportionate part of the tax so paid.

This ruling is supported by the holding of this Court in *Buffaloe v. Barnes,* 226 N.C. 313, 38 S.E. 2d 222, and is in accord with the weight of authority in other jurisdictions. 28 A.J. 136; 142 A.L.R. 1137. No contrary testamentary provision appears in the will. In *Y.M.C.A. v. Davis,* 264 U.S. 47, it was said: "What was being imposed here (by Congress) was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death."

Judgment affirmed.

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

SOUTHERN BUTANE GAS CORPORATION v. FRANK BULLARD.

(Filed 29 November, 1950.)

Judgments § 27a: Appeal and Error § 6c (2)—

Where the court sets aside a judgment upon its findings of excusable neglect and meritorious defense, a sole exception to the signing of the judgment does not present the findings for review, and the judgment, being supported by the findings, will be affirmed.

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

APPEAL by plaintiff from *Frizzelle, J.,* May Term, 1950, of NEW HANOVER. Affirmed.

Stevens, Burgwin & Mintz for plaintiff, appellant.

Isaac C. Wright and Alton A. Lennon for defendant, appellee.

PER CURIAM. For want of an answer judgment by default final was rendered by the Clerk in favor of the plaintiff. Subsequently, defendant's motion to set aside the judgment on the ground of excusable neglect was denied by the Clerk, but on an appeal to the Superior Court

it was found by the Judge "that the judgment was obtained on account of the defendant's excusable neglect, and that the judgment was irregular . . . and that defendant has a meritorious defense." Thereupon it was ordered that the judgment be vacated. G.S. 1-220.

From the record it appears that "to the above judgment the plaintiff excepts and appeals to the Supreme Court," and assigns as error "that the court erred in signing the judgment." As there is no exception to the finding that defendant's failure to answer in due time was attributable to his excusable neglect or that defendant has a meritorious defense, the questions debated by appellant are not presented. The exception to the judgment brings up only the question whether the facts found support the judgment. No error appears on the face of the record. *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; *Brown v. Truck Lines*, 227 N.C. 65, 40 S.E. 2d 476; *Roach v. Prichett*, 228 N.C. 747, 47 S.E. 2d 20; *Simmons v. Lee*, 230 N.C. 216, 53 S.E. 2d 79.

Judgment affirmed.

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

STATE v. D. M. JAMIESON.

(Filed 29 November, 1950.)

Criminal Law §§ 17c, 60b—

A plea of *nolo contendere* has the same effect as a plea of guilty and supports the imposition of judgment, and defendant may not complain of such judgment on the ground that the plea was entered in order that the judge should hear the evidence, find the facts, and render such verdict as the testimony indicated.

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

APPEAL by defendant from *Phillips, J.*, at May Term, 1950, of UNION.

Criminal prosecution upon warrant charging that defendant "unlawfully and willfully, did possess, transport, sell, offer for sale, and place in Union County, for the purpose of being operated numerous illegal punch boards, contrary to the form of the statute in such case made and provided," etc.

The minute docket of Superior Court of Union County contains these entries: "The defendant D. M. Jamieson, through his counsel, tenders to the State a plea of *nolo contendere* to the charge" described verbatim as

in the warrant above, "which plea is accepted by the State," and that thereupon the court entered judgment imposing sentence as specified.

On the other hand, the case on appeal states that the defendant entered a plea of *nolo contendere* and agreed that the judge should hear the evidence, find the facts, and render such verdict as the testimony indicated.

From judgment pronounced defendant appeals to Supreme Court and assigns error.

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

Elbert E. Foster and J. F. Flowers for defendant, appellant.

PER CURIAM. Defendant, having entered plea of *nolo contendere* to the charge against him, finds himself in like situation to that of defendant in *S. v. Shepherd,* 230 N.C. 605, 55 S.E. 2d 79. His plea, for purposes of judgment and disposition, has the same effect as a plea of guilty. Hence as in the Shepherd case the judgment must be, and it is

Affirmed.

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

STATE v. BILLIE MAPLES.

(Filed 29 November, 1950.)

1. Criminal Law § 63—

No appeal lies from an order that a suspended judgment be executed upon findings that defendant had violated one of the conditions of suspension.

2. Criminal Law § 67a—

Where the Superior Court has no jurisdiction of an attempted appeal from the Recorder's Court, the Supreme Court can acquire no jurisdiction by further appeal.

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

APPEAL by defendant from *Phillips, J.,* May Term, 1950, of MOORE. Appeal dismissed.

Defendant was convicted in the Recorder's Court of Moore County for a violation of the Motor Vehicle Law. The judgment pronounced was suspended on specified conditions. Thereafter the judgment was invoked for breach of one of the conditions imposed. Defendant appealed

to the Superior Court. The court below dismissed the appeal for want of jurisdiction and defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Moody, and Walter F. Brinkley, Member of Staff, for the State.

Seawell & Seawell for defendant, appellant.

PER CURIAM. The judgment of the court below dismissing defendant's purported appeal from the county court must be affirmed on authority of *S. v. King,* 222 N.C. 137, 22 S.E. 2d 241; *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143; and *S. v. Farrar,* 226 N.C. 478, 38 S.E. 2d 193. Since the court below had no jurisdiction to hear the appeal, we have none. *Shepard v. Leonard,* 223 N.C. 110, 25 S.E. 2d 445. Therefore, we have no authority, on this appeal, to entertain defendant's motion in arrest of judgment.

Appeal dismissed.

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

JOHN MARTIN v. R. E. CAPEL.

(Filed 29 November, 1950.)

1. Appeal and Error § 24—

Assignments of error not supported by exceptions are ineffective.

2. Appeal and Error § 6c (2)—

An exception to the signing of the judgment presents only whether error appears on the face of the record.

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

APPEAL by defendant from *Phillips, J.,* at June Term, 1950, of ANSON.

Civil action by tenant to recover of landlord his portion of 1948 crops cultivated under "share-cropper" agreement.

There was a consent reference in the case to state the landlord-tenant account, which resulted in an award to the plaintiff of $340.31 with interest as prayed in the complaint.

Exceptions were duly filed to the referee's report by defendant which came on for hearing at the June Term, 1950, Anson Superior Court. The exceptions were overruled, "the same being separately considered," and the report of the referee was adopted and approved.

From the judgment entered, the defendant appeals.

Enos T. Edwards for plaintiff, appellee.
Taylor, Kitchin & Taylor for defendant, appellant.

PER CURIAM. The only exception appearing on the record is "To the signing of the judgment," which is also assigned as error. There are eleven other assignments of error, following the case on appeal, but these are non-exceptive. Hence, the only question presented is whether error appears on the face of the record. *Terry v. Capital Ice & Coal Co.*, 231 N.C. 103, 55 S.E. 2d 926. We find none.

Judgment affirmed.

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

BESSIE B. KELLY v. J. P. KELLY.

(Filed 29 November, 1950.)

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.

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

APPEAL by plaintiff from *Phillips, Resident Judge* of the 13th Judicial District, at Chambers, 30 September, 1950.

Civil action for alimony without divorce under statute codified as G.S. 50-16.

Carroll & Steele for plaintiff, appellant.
Boggan, Page, Lee & Page for defendant, appellee.

PER CURIAM. The appeal is from an order denying the application of the *feme* plaintiff for an allowance out of the estate or earnings of her husband, the defendant, for subsistence and counsel fees pending the trial of the issues involved in the action. Since *Justice Johnson* does not sit in this cause and the remainder of the Court are evenly divided in opinion, the order of the Superior Court is affirmed without becoming a precedent. *Hinson v. Comrs. of Yadkin*, 216 N.C. 806, 6 S.E. 2d 504.

Affirmed.

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

CITY OF WILMINGTON v. THOMAS H. WRIGHT.

(Filed 29 November, 1950.)

Appeal and Error § 40f—

Denial of motion to strike certain portions of complaint upheld upon authority of *Buchanan v. Dickerson, Inc., ante,* 421.

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

APPEAL by defendant from *Grady, Emergency Judge,* September Term, 1950, of NEW HANOVER.

This action was instituted by the plaintiff to recover damages, alleged by it to have been sustained by reason of the negligence of the defendant, his agents, servants and employees, by causing spoil from a dredging operation to be placed on and upon one of its sanitary sewer lines to such an extent and in such a manner as to damage and destroy the line.

The defendant in apt time moved to strike certain portions of the complaint. The motion was denied. The defendant excepted and appealed.

Wm. B. Campbell for plaintiff.

Robert D. Cronly, Jr., and Varser, McIntyre & Henry for defendant.

PER CURIAM. We concur in his Honor's ruling on the motion to strike. It is supported by our recent decisions. *Buchanan v. Dickerson, Inc.,* 232 N.C. 421, 61 S.E. 2d 187; *Hinson v. Britt,* 232 N.C. 379, 61 S.E. 2d 185; *Parker v. Duke University,* 230 N.C. 656, 55 S.E. 2d 189.

The judgment is

Affirmed.

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

MEMORANDUM ORDER FILED 24 MAY, 1950

S. v. Melton. Appeal by defendant-petitioner from *Pless, J.,* May Term, 1950, of BUNCOMBE. Petition for writ of *certiorari* denied for want of showing of merit. See *S. v. Bowers,* 94 N.C. 910; *Albertson v. Albertson,* 207 N.C. 547; *S. v. Horne,* 191 N.C. 375; *Provision Co. v. Daves,* 190 N.C. 7; *In re Wingler,* 231 N.C. 560.

APPENDIX

Remarks of *Chief Justice Stacy* from the Bench Tuesday, October 17, 1950, concerning the death of *Justice Aaron Ashley Flowers Seawell:*

Before proceeding with the usual work of the Court, we pause to express the sense of loss which has come to us in common with the people of North Carolina in the death of a member of this Court, *Associate Justice Aaron Ashley Flowers Seawell.*

For more than 12 years he has labored here, and his opinions written for the Court are to be found in 20 volumes of our Reports, beginning with the 213th and ending with the 232nd. They speak for themselves.

He was fond of the polished phrase, often used it, and at times employed a bit of rhetoric in his opinions. They will stand at once as his contribution to the judicial thought of his day, and likewise as his own memorial.

The members of the Court will miss his wise counsel and loyal friendship. In the hearts of those who knew him best, his immortality will abide.

In recognition of his services the Court when it adjourns today will take its adjournment in respect of his memory.

APPENDIX

IN RE ADVISORY OPINION IN RE TIME OF ELECTION TO FILL VACANCY IN OFFICE OF ASSOCIATE JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA.

Elections § 9—

An election to fill the vacancy in the office of Associate Justice of the Supreme Court of North Carolina must be held at the next regular election for members of the General Assembly. Art. IV, Sec. 25, of the Constitution of North Carolina.

On 17 October, 1950, the following communication was received from his Excellency, W. Kerr Scott, Governor of North Carolina:

STATE OF NORTH CAROLINA
GOVERNOR'S OFFICE
RALEIGH

W. KERR SCOTT
Governor

October 17, 1950

HONORABLE W. P. STACY
Chief Justice
HONORABLE W. A. DEVIN
HONORABLE M. V. BARNHILL
HONORABLE J. WALLACE WINBORNE
HONORABLE E. B. DENNY
HONORABLE S. J. ERVIN, JR.
Associate Justices
Of the Supreme Court of North Carolina
Raleigh, North Carolina

MY DEAR SIRS:

A question of great public importance has arisen in connection with the performance of my duties as Governor of North Carolina, upon which I find it necessary to request an opinion of the Chief Justice and the Associate Justices of the Supreme Court of North Carolina.

In conference with Attorney-General Harry McMullan, I have requested his opinion as to whether or not the person appointed by me to fill the vacancy caused by the death of Associate Justice A. A. F. Seawell would be appointed to hold the position until the next general election to be held November 7, 1950, or the succeeding general election in 1952. If an election must be held on November 7, 1950, it will be necessary for the State Board of Elections to be so informed in order that they may take the steps required to prepare for this election, including the printing and distribution of ballots. It will also be necessary, if an election is to

be held, that the officials of the political parties of the State be informed in order that legal nominations of the respective parties for the position might be made.

I am enclosing to you a letter received by me from the Attorney-General in which he advises me that the question presented has never been decided by the Supreme Court, and that in view of the uncertainties arising in connection therewith, he recommends that I request from you an advisory opinion upon the following question.

Under the provisions of the Constitution of North Carolina, Article IV, Section 25, should an election be held on November 7, 1950, to fill the vacancy in the office of Associate Justice of the Supreme Court of North Carolina occasioned by the death of Associate Justice A. A. F. Seawell on October 14, 1950?

The answer to this question will enable the Attorney-General to advise the State Board of Elections and me as to our duty in the premises. I respectfully request the members of the Court to furnish this advisory opinion at the earliest possible time on account of the urgency of the matter if an election must be held to fill this vacancy on November 7, 1950.

Respectfully submitted,

W. KERR SCOTT,

Governor.

Enclosure.

17 October, 1950

SUBJECT: Article IV, Section 25, North Carolina Constitution; Vacancy Appointment of Justice of the Supreme Court; Length of Time for which Appointment by Governor can be made.

HONORABLE W. KERR SCOTT
Governor of North Carolina
Raleigh, North Carolina

DEAR GOVERNOR SCOTT:

In conference with you on yesterday you requested my opinion as to the proper construction of Section 25 of Article IV of the Constitution of North Carolina with respect to the filling of the vacancy of a Justice of the Supreme Court of North Carolina caused by the death of Associate Justice A. A. F. Seawell on October 14, 1950. The precise question which has arisen is as to whether, under the authority of this constitu-

tional provision, the appointment by you to fill this vacancy would be for a term which would terminate when the General Election for members of the General Assembly is held on November 7, 1950, or whether the person appointed by you would hold said position until the succeeding General Election for members of the General Assembly in 1952.

A subsidiary question arises as to whether if the appointment by you to this office would hold only until the General Election of 1950 relates to whether the State Board of Elections should take the necessary steps for holding an election on November 7, 1950, for the purpose of filling the vacancy in said office caused by the death of the late Justice Seawell. The additional question arises as to how the nominations may be made for candidates who may run in said elections by the political parties of the State in the event such election has to be held.

Careful consideration has been given to these very important questions, and I greatly regret to advise you that after having made a careful investigation of the constitutional provision, applicable North Carolina Statutes and decided cases in this State, I am unable to furnish you with any opinion upon which you could safely rely.

The Constitution, Section 25, Article IV, provides as follows:

"All vacancies occurring in the offices provided for by this article of the Constitution shall be filled by the appointment of the Governor, unless otherwise provided for, and the appointees shall hold their places until the next regular election for members of the General Assembly, when elections shall be held to fill such offices. If any person elected or appointed to any of said offices, shall neglect or fail to qualify, such offices shall be appointed to, held and filled as provided in case of vacancies occurring therein. All incumbents of said offices shall hold until their successors are qualified."

Section 13 of Article III of the Constitution provides as follows:

"The respective duties of the Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, and Attorney-General shall be prescribed by law. If the office of any of said officers shall be vacated by death, resignation, or otherwise, it shall be the duty of the Governor to appoint another until the disability be removed or his successor be elected and qualified. Every such vacancy shall be filled by election at the first general election that occurs more than thirty days after the vacancy has taken place, and the person chosen shall hold the office for the remainder of the unexpired term fixed in the first section of this article."

Section 25, Article IV of the Constitution was formerly Section 31 of the Constitution of 1868 and was amended by the constitutional con-

vention of 1875 by adding to the section following the words "the next regular election" the words "for members of the General Assembly."

Prior to this constitutional amendment, the Supreme Court of this State held in the case of *Cloud v. Wilson,* 72 N.C. 155, that the language "next regular election" had reference to the next regular election for the office in which the vacancy occurred which, in the case of a Justice of the Supreme Court, might have postponed the election for as much as almost eight years and in the case of other state offices for as much as almost four years. The amendment in 1875 evidently intended to override the Court's decision in the case above mentioned.

The General Assembly of 1876-77 enacted Chapter 275 of the Public Laws of that Session and Section 65 of this Act was brought forward as Section 2736 of the Code of North Carolina of 1883. This section provides as follows:

"Whenever any vacancies shall exist by reason of death, resignation or otherwise, in any of the following offices, to wit: secretary of state, auditor, treasurer, superintendent of public instruction, attorney general, solicitor, justices of the supreme court, and judges of the superior court, the same shall be filled by elections, to be held in the manner and places, and under the same regulations and rules as prescribed for general elections, at the next regular election for members of the general assembly which shall occur more than thirty days after such vacancy, except as otherwise provided for in the constitution."

The Act of 1876-77, Code Section 2736 above referred to, was cited in the advisory opinion of the Court found in Appendix A, page 577, 114 North Carolina Reports, which was handed down on May 11, 1894. This advisory opinion, however, had to do only with the question as to the length of term for which a vacancy appointment of the provision on the Statute reading as follows:

". . . at the next regular election for members of the General Assembly which shall occur more than thirty days after such vacancy, except as otherwise provided for in the Constitution."

The Statute above referred to was re-enacted by Chapter 89 of the Public Laws of 1901 in Section 4 and Sections 4 and 73 and was brought forward in the revisal as Section 4299 and in the consolidated Statutes as Section 5920. It now appears as G.S. 163-7 and reads as follows:

"Whenever any vacancy shall exist by reason of death, resignation, or otherwise, in any of the following offices, to wit, secretary of state, auditor, treasurer, superintendent of public instruction, attorney-general, solicitor, justices of the supreme court, judges of the superior court, or

any other state officer elected by the people, the same shall be filled by elections, to be held in the manner and places and under the same regulations, at the next regular election for members of the general assembly which shall occur more than thirty days after such vacancy, except as otherwise provided for in the constitution."

Another Statute affecting this matter is G.S. 7-48, which reads as follows:

"All vacancies occurring by death, resignation or otherwise in the offices of justice of the supreme or judge of the superior court of the state shall be filled for the unexpired term at the next general election for members of the general assembly held after such vacancy is created. The persons elected at such election shall be commissioned by the governor immediately after the ascertainment of the result in the manner provided by law, and shall qualify and enter upon the discharge of the duties of the office within ten days after receiving such commission."

A third Statute having a bearing on the question is G.S. 163-145. This statute relates to filling vacancies among candidates nominated in primary elections but contains the following language:

"Provided, that should a vacancy occur in any office after the primary has been held, a nomination shall be made in like manner as above provided, and the name of the person so nominated shall be placed on the official ballot."

As to a state office, the statute provides that the nomination to fill a vacancy as a candidate be made by the State Executive Committee of the political party in which the vacancy occurs.

Apparently the exact question with which we are concerned has never been presented for determination by our Supreme Court. I am unable to find any case in which this question has been raised and settled.

In the case of *Rodwell v. Rowland,* 137 N.C. 618, which involved a question as to the time when a vacancy appointment in the office of the Clerk of the Superior Court had to be filled under the constitutional provision relating to that office, the Court makes reference to Article IV, Section 25, of the Constitution and Chapter 89, Section 4, of the Laws of 1901 but did not consider and pass upon the questions involved in this matter.

In view of the uncertainty which exists as to the proper answer to the question, I recommend that you request from the Chief Justice and Associate Justices of the Supreme Court of North Carolina an advisory opinion in order that you may be able to inform the State Board of Elections as to their duty in the premises and in order that you may be

informed as to the length of time when a vacancy appointment may be made by you. I feel quite confident that the members of the Court will be willing to render an advisory opinion in this very urgent and important matter.

Respectfully yours,
HARRY MCMULLAN,
Attorney-General.

HMcM:rd
/am

The following response was made by the *Chief Justice* and *Associate Justices* of the Supreme Court of North Carolina:

RALEIGH, N. C.
Oct. 18, 1950

HONORABLE W. KERR SCOTT,
Governor of North Carolina.

DEAR GOVERNOR:

Your communication of the 17th inst., requesting an advisory opinion from the members of the Supreme Court as to whether "under the provisions of the Constitution of North Carolina, Article IV, section 25, an election should be held on November 7, 1950, to fill the vacancy in the office of Associate Justice of the Supreme Court of North Carolina occasioned by the death of Associate Justice A. A. F. Seawell," has been received and considered by the members of the Court.

In the opinion of the Chief Justice and the undersigned Associate Justices, Article IV, section 25, of the Constitution requires that vacancies in the office of Associate Justice of the Supreme Court shall be filled by the appointment of the Governor, and that "the appointees shall hold their places until the next regular election for members of the General Assembly, when elections shall be held to fill such offices."

The provisions of the quoted section of the Constitution are clear and unambiguous, and you are advised the question you propound is answered in the affirmative.

Respectfully,
Signed W. P. STACY
Chief Justice.
W. A. DEVIN
Associate Justice.
J. WALLACE WINBORNE
Associate Justice.
EMERY B. DENNY
Associate Justice.
S. J. ERVIN, JR.
Associate Justice.

October 18, 1950

HONORABLE W. KERR SCOTT
Governor of North Carolina

DEAR GOVERNOR:

Your letter of the 17th, requesting an advisory opinion from the members of the Supreme Court as to whether, under the provisions of the Constitution of North Carolina, Art. IV, sec. 25, an election should be held on November 7, 1950, to fill the vacancy in the office of Associate Justice of the Supreme Court of North Carolina occasioned by the death of Associate Justice A. A. F. Seawell, has been received and considered.

Under our Constitution the Attorney-General is the legal adviser to the Governor and the several State departments and agencies. We do not lightly assume his prerogative in this respect. Indeed, ordinarily, we interpose advisory opinions only in the event of an emergency gravely affecting the public interest. No such emergency is presented by the situation you outline.

However, you present this situation: the Attorney-General is reluctant to give you an unqualified answer, but, instead, advises you to seek an opinion from us. You are compelled by the circumstances to act promptly, and, yet, you should not be required to do so without competent legal advice. In the light of these conditions, I feel constrained to join my associates in complying with your request.

From a legal standpoint the question you pose presents no difficulty. The pertinent section of our Constitution, Art. IV, sec. 25, provides that a vacancy on the Supreme Court shall be filled by appointment of the Governor and that his appointee shall hold the office to which he is appointed until the next regular election for members of the General Assembly, at which election his successor shall be elected.

The language of this section is so clear and unambiguous it does not require interpretation. You appoint a successor to Justice Seawell. The successor of your appointee must be elected at the election to be held November 7, 1950.

Of course the General Assembly has no power to modify the provisions of the Constitution. Therefore, on the question you present, Chap. 89, P.L. 1901, now G.S. 163-7, is without force and effect.

Respectfully yours,
M. V. BARNHILL,
Associate Justice.

APPENDIX

CORA VEAZEY v. CITY OF DURHAM.

(Filed 24 May, 1950.)

Municipal Corporations § 15b—

Permanent damage may be awarded against a city for the taking of an easement incident to the operation of its sewage disposal plant and at the same time the municipality may be required to keep its plant in proper repair and be enjoined from emptying untreated sewage into the open channel of the creek flowing across plaintiff's land. G.S. 130-117.

PETITION by defendant to rehear this case reported in 231 N.C. 357.

The *Justices* to whom the petition was referred filed the following memorandum in passing upon the petition.

Claude V. Jones and Egbert L. Haywood for petitioner.

DEVIN and DENNY, JJ., considering the petition to rehear.

The defendant filed petition to rehear on the ground that the judgment below, which was affirmed by this Court, awarded plaintiff permanent damages for injury to plaintiff's land caused by the discharge of sewage into streams flowing through it under the system of disposal then in use, and at same time required the City to remedy the conditions found to constitute a nuisance, and to prevent discharge of raw sewage into those streams, and to repair its pipe line from disposal plant to Neuse River.

After careful consideration of the matters set out in the petition, we are of opinion that there was no error in awarding permanent damages on the verdict of the jury, and that upon payment of such damages the defendant will acquire permanent right to operate its present sewage disposal plant on Ellerbe Creek so long as it is kept in proper repair, but we think the defendant has no just cause to complain of the provisions of the judgment prohibiting it from discharging raw and untreated sewage into the waters of Ellerbe Creek, and that these portions of the judgment are designed to prevent the infliction of additional injury on plaintiff's property in the future. In accord with the verdict the Court properly required the defendant to keep in repair the pipeline which it installed pursuant to the easement heretofore acquired.

We do not understand that the City of Durham has ever acquired an easement which gives it the right to empty untreated sewage from its North Side Disposal Plant into the open channel of Goose Creek or Ellerbe Creek. And certainly the City of Durham does not have the right to dump raw sewage into Neuse River or any other stream from which a public drinking-water supply is taken at a point below where such sewage is discharged. G.S. 130-117.

Petition to rehear is denied.

APPENDIX

CHARLIE E. BATCHELOR v. WILLIAM M. BLACK AND ALDERT S. ROOT, JR.

1. Automobiles § 18h (3)—Evidence held not to show contributory negligence as a matter of law in entering intersection with through highway.

Evidence tending to show that plaintiff stopped his car and looked in both directions before entering an intersection with a through highway, that, observing no vehicle approaching within the range of his vision, which was between 175 and 200 feet to his right, he drove upon the highway and had virtually cleared the portion of the intersection appropriated by law for travel in the direction in which defendants were proceeding, when he was struck by defendants' vehicle which approached the intersection from plaintiff's right at a speed of between 75 and 80 miles per hour and proceeded into the intersection at unabated speed, *is held* not to show contributory negligence as a matter of law on the part of plaintiff.

2. Appeal and Error § 43—

Inadvertences in the recapitulation of the evidence in a decision of the Supreme Court do not justify the granting of a petition to rehear when such inadvertences in no way impair the validity of the decision.

PETITION by defendants to rehear this cause.

Basil M. Watkins and Charles W. White for petitioners.

WINBORNE and ERVIN, JJ. The case is reported *ante*, 314, 59 S.E. 2d 817.

The burden of the petition to rehear is that the court misconstrued the evidence adduced by the plaintiff, and by reason thereof erroneously adjudged that the plaintiff was not guilty of contributory negligence as a matter of law. A painstaking examination of the record reveals two inaccuracies in an otherwise perfect recapitulation of the testimony. The court states that the plaintiff testified "that he could see down Highway 54 in a westerly direction 'a couple hundred yards,' " whereas he deposed as follows: "I could see down Highway 54 in a westerly direction that night between 175 and 200 feet. I could see a couple of hundred yards east." The court states that the plaintiff's witness, R. H. Morgan, Jr., testified, in substance, that the hedge bordered Alston Avenue Road, whereas he deposed, in effect, that the hedge was parrallel to Highway 54.

These inadvertencies do not impair the validity of the decision in any way. When the testimony in the record is appraised in the light most favorable to plaintiff, it warrants these inferences: The plaintiff brought his automobile to a complete stop on Alston Avenue Road before entering its intersection with Highway 54 in obedience to the stop sign. The range of his vision along Highway 54 was 175 or 200 feet to the west, and "a couple of hundred yards" to the east. He looked along Highway

No. 54 in both directions, observed that no motor vehicle was approaching the intersection within the range of his vision, ascertained that he could cross the intersection without danger of collision with any motor vehicle moving along Highway 54 at a lawful rate of speed, put his automobile in motion, and undertook to cross the intersection. After the automobile of the plaintiff had completely entered the intersection, the motor vehicle of the defendants hove into sight from the west moving along Highway 54 at a speed "between 75 and 85 miles per hour," proceeded onto the intersection at unabated speed, and crashed into the automobile of the plaintiff, which had virtually vacated the portion of the intersection appropriated by law for travel in the direction in which the defendants were proceeding.

This being true, the court rightly adjudged that the evidence at the trial was sufficient to sustain a finding that the plaintiff was free from contributory negligence. Michie: The Law of Automobiles, (3rd Ed.), section 121; 60 C.J.S., Motor Vehicles, section 362.

For these reasons, the petition to rehear is

Denied.

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ANALYTICAL INDEX.

ABATEMENT AND REVIVAL.

§ 6½. Pending Action—Nature and Effect of Plea in Abatement for Pendency of Action.

Where the pendency of a prior separate proceeding is pleaded in bar, the trial judge must first determine the plea in bar before considering other matters in issue, since if there be a prior separate proceeding pending between the same parties on substantially the same subject matter in which all material questions and rights may be determined, the second proceeding must be dismissed. *Seawell v. Purvis*, 194.

Plea applies to special proceedings as well as to actions. *Ibid.*

§ 7. Priority of Institution of Actions.

Where the original process is kept alive by the proper issuance of *alias* and *pluries* summonses, a plea in abatement in a second action instituted subsequent to the issuance of the original process in the first is properly denied notwithstanding that process in the subsequent action is actually served prior to the service of *pluries* summons in the first. *McIntyre v. Austin*, 189.

ABORTION.

§ 9. Relevancy and Competency of Evidence.

In a prosecution for abortion, testimony of the woman that she went to defendant by reason of newspaper articles stating that defendant had performed abortions, *is held* incompetent as hearsay and extremely prejudicial to defendant, entitling her to a new trial. *S. v. Gavin*, 323.

ACTIONS.

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ADMINISTRATIVE LAW.

§ 2. Powers and Functions of Administrative Boards in General.

Statute may not authorize board to use arbitrary discretion. *Gore v. Columbus County*, 636.

§ 3. Rules and Regulations of Administrative Boards.

Courts will not interfere with the exercise of discretionary powers conferred on local administrative boards for the public welfare except in cases of manifest abuse of discretion. *Paper Co. v. Sanitary District*, 421.

§ 5. Exclusiveness of Statutory Remedy.

Where a statute provides a procedure before an administrative body for the recovery of a tax or assessment levied under the act, the asserted defense of

ADMINISTRATIVE LAW—*Continued.*

the unconstitutionality of the statute under which the assessment was made cannot be heard by the courts until the procedure before the administrative body is exhausted. *Employment Security Com. v. Kermon*, 342.

ADOPTION.

§ 4. Nature of Proceedings, and Construction and Operation of Adoption Statutes.

Adoption is solely statutory and is a judicial declaration of the status of a child in relation to the adopting parent in the exercise of a prerogative exclusive to the State. *Wilson v. Anderson*, 212.

Statutes relating to adoption should be construed *in pari materia* as constituting one law. *Ibid.*

The successive amendments to and rewritings of the adoption statutes reveal plainly a legislative intent that each shall have prospective effect, and therefore child adopted in 1919 is not entitled to inherit from collateral kin of adopting parent under 1947 amendment to inheritance statute. *Ibid.*

§ 10. Conclusiveness and Effect of Final Decree.

Decree of adoption has same force and effect of any other judgment, and when it prescribes and limits child's right to inherit under law then in effect, such right is not changed by later amendment to inheritance statute. *Wilson v. Anderson*, 212.

ADVERSE POSSESSION.

§ 3. Hostile Character of Possession in General.

Where there is a lappage in the specific descriptions in respective deeds to adjacent lots derived from a common source, testimony of respondent, claiming under the subsequently executed deed, that she did not intend to claim anything except what she owns and that she did not want the lappage if it were not hers, but that she had bought and paid for the land, does not negate the hostile character of her possession, but at most is to be considered by the jury in passing upon whether her possession was adverse. *Whiteheart v. Grubbs*, 236.

§ 4i. Hostile Character of Possession—Life Tenants and Remaindermen.

Plaintiffs claimed under foreclosure of a tax sale certificate in a proceeding instituted solely against the life tenant and in which the remaindermen were neither parties nor brought before the court in any manner sanctioned by law. *Held:* While commissioner's deed of foreclosure did not affect the interest of the remaindermen, it did convey the interest of the life tenant, and plaintiffs' were entitled to possession during the continuance of the life estate, which possession could not be adverse to the remaindermen until the death of the life tenant gave them legal power to sue. G.S. 1-38. *Eason v. Spence*, 579.

§ 8. Adverse Possession of Lappage and Constructive Possession to Outermost Boundaries.

Where there is a lappage in the specific descriptions in respective deeds to adjacent lots derived from a common source, each deed constitutes color of

ADVERSE POSSESSION—*Continued.*

title as to the lappage under the lines and boundaries called for in the deed, and seven years use and occupancy of the lappage by respondent or those under whom she claims, ripens title in her, G.S. 1-38, even though her deed was executed subsequent to the deed for the adjacent lot, there being no evidence of actual occupation of any part of the lappage by the owner of the adjacent lot. *Whiteheart v. Grubbs*, 236.

While the possession of one entering upon lands under a deed describing same by metes and bounds is constructively extended to the outermost bounds set out in the deed, such constructive possession does not cover that portion of the land in the actual adverse possession of another, and therefore possession of a part of the boundary described in a deed for more than twenty years does not preclude a claim of adverse possession of a part of the tract by the owner of contiguous lands who has introduced evidence of actual, continuous and hostile possession of such part under known and visible lines and boundaries for more than twenty years. *Wallin v. Rice*, 371.

Where there is a lappage in deeds to contiguous tracts from a common source, the grantee in the deed first executed by the common grantor has the better title, and the constructive possession of the lappage is in him and those claiming under him by *mesne* conveyances, there being no question of actual adverse possession of the lappage by either party. *Bostic v. Blanton*, 441.

Plaintiff went into possession under a deed conveying a particular tract under belief that the deed conveyed also a contiguous tract. Years later, upon discovering that the contiguous tract was not included in the description of this deed, he obtained a quitclaim deed to the contiguous tract, and continued in possession thereafter for more than seven years. *Held:* There was no entry upon the land under color of the quitclaim deed, and therefore plaintiff is not entitled to the benefit of presumptive possession to the outermost boundary described in the quitclaim deed as an aid in establishing his claim to the contiguous tract by adverse possession. *Price v. Whisnant*, 653.

§ 10. Adverse Use by Railroad Companies.

G.S. 1-51 has no application to an action in ejectment by the owner of the fee to recover that part of the right of way no longer used by the railroad company or its lessee for railroad purposes. *Sparrow v. Tobacco Co.*, 589.

§ 13a. Accrual of Right of Action and Time from Which Possession is Adverse.

Adverse possession does not begin to run in favor of a person taking actual possession under color of title or claim of right until such possession gives rise to a cause of action in favor of the true owner. *Eason v. Spence*, 579.

Persons in possession pursuant to foreclosure of a tax sale certificate conveying only the title of the life tenant may not maintain that their possession is adverse to the remaindermen on the ground that the life tenant's failure to pay taxes forfeited her estate to the remaindermen and thus gave them immediate right to possession, since such forfeiture under G.S. 105-410 is not automatic but must be judicially determined in an appropriate proceeding. G.S. 1-38. *Ibid.*

ADVERSE POSSESSION—*Continued.*

§ 13b. Titles Governed by Twenty Year Statute.

The owner of the fee is not barred from maintaining an action in ejectment against a railroad company or its lessee to recover that part of the right of way no longer used for railroad purposes until the expiration of twenty years. G.S. 1-40. *Sparrow v. Tobacco Co.*, 589.

APPEAL AND ERROR.

§ 1. Nature and Grounds of Appellate Jurisdiction in General.

The function of the Supreme Court is to correct errors of law or legal inference and not to approve judgments *pro forma*, and therefore where there are no exceptions in the record and appellant in his brief admits that there is no merit in any of his assignments of error, the brief fails to present any question of law or legal inference and the appeal will be dismissed. *Fuquay v. Fuquay*, 692.

§ 3. Parties.

An appeal from a judgment affecting a ward's estate in an action in which the ward is represented by a guardian *ad litem* should be prosecuted in the name of the guardian. *Fuquay v. Fuquay*, 692.

§ 6c (1). Form and Sufficiency of Exceptions in General.

Where there are no exceptions noted in the record but only a grouping of assignments of error with a notation after each that it constituted appellant's exception of corresponding number, there are no exceptive assignments of error. *Fuquay v. Fuquay*, 692.

§ 6c (3). Form and Sufficiency of Objections and Exceptions—Exceptions to Findings of Fact or to Judgment.

The want of exception to the findings of fact renders them conclusive, but the court's characterization of a subpoena, made a part of the record, as "process lawfully issued" is a question of law presented by exception to the signing of the judgment. *Greensboro v. Black*, 154.

A sole assignment of error to the signing of the judgment presents only whether the facts found support the judgment and whether error of law appears on the face of the record. *Greensboro v. Black*, 154; *Paper Co. v. Sanitary District*, 421.

A sole exception to the signing of the judgment presents only whether the court correctly applied the law to the facts found. *Rice v. Trust Co.*, 222; *Johnson v. Barham*, 508.

Where appellant excepts to the trial court's allowance of a motion to dismiss, but does not except to the findings upon which the court's ruling was based, only the correctness of the ruling upon the facts found is presented for review. *Smith v. Furniture Co.*, 412.

Exceptions and assignments of error to the findings of fact must point out specifically and distinctly the alleged errors, and an exception "to the foregoing findings of fact" is a broadside exception and is insufficient to challenge

APPEAL AND ERROR—*Continued.*

the sufficiency of the evidence to support the findings or any one of them. *Hoover v. Crotts*, 617; *Weaver v. Morgan*, 642.

An exception to the judgment presents the single question whether the facts found and admitted are sufficient to support the judgment, and does not bring up for review the findings of fact or the evidence upon which they are based. *Hoover v. Crotts*, 617; *Weaver v. Morgan*, 642.

An appeal is in itself an exception to the judgment and any other matters appearing in essential parts of the record, such as the pleadings, verdict, and judgment, and therefore presents the question whether the judgment is supported by the verdict, *a fortiori* where there is an exception to the judgment. *Gibson v. Ins. Co.*, 712.

Where the court sets aside a judgment upon its findings of excusable neglect and meritorious defense, a sole exception to the signing of the judgment does not present the findings for review, and the judgment, being supported by the findings, will be affirmed. *Gas Corp. v. Bullard*, 730.

An exception to the signing of the judgment presents only whether error appears on the face of the record. *Martin v. Capel*, 733.

§ 6c (5½). Exceptions to Issues.

A general exception to the issues when taken in connection with an exception to a portion of the charge which points out the deficiency in one of the issues, *is held* sufficient to present the matter for review. *Gibson v. Ins. Co.*, 712.

§ 8. Theory of Trial.

Appellant's exceptions will be considered in the light of the theory of trial in the lower court. *Fleming v. Light Co.*, 457.

§ 10b. Duty to Make Out and Serve Case on Appeal.

Where the trial court fixes case on appeal at the time judgment is entered, service of case on appeal is not required. *Jones v. Jones*, 518.

§ 14. Powers of and Proceedings in Lower Court Pending Appeal.

Pending an appeal from order sustaining demurrer to cross-action of original defendants against additional defendants, trial court may not allow plaintiff to amend. *Harris v. Fairley*, 555.

§ 16. Term and Time Within Which Appeal Must Be Docketed.

Where judgment is entered in the trial court prior to the beginning of the Spring Term of the Supreme Court, the appeal must be brought to the Spring Term and docketed fourteen days before the call of the docket of the district to which the case belongs. Rule of Practice in the Supreme Court No. 5. *Jones v. Jones*, 518.

The rule regulating the time appeals must be docketed in the Supreme Court is mandatory and cannot be abrogated by consent or otherwise, and failure to docket as required by the rule requires dismissal of the appeal. *Ibid.*

§ 22. Conclusiveness and Effect of Record.

The record imports verity and the Supreme Court is bound thereby. *Bame v. Stone Works*, 267.

APPEAL AND ERROR—*Continued.*

§ 23. Form and Requisites of Assignments of Error.

Where the exceptions are separately numbered and only one of them is necessary to be considered in disposing of the appeal, the Supreme Court in its discretion may dispose of the case on its merits notwithstanding failure of appellant to separately assign the exceptions as error. Rule of Practice in the Supreme Court 19 (3). *Aydlett v. Keim*, 367.

§ 24. Necessity of Exceptions to Support Assignments of Error.

Assignments of error not supported by exceptions are ineffective. *Martin v. Capel*, 733.

§ 28. Form and Requisites of Briefs.

The grouping of cases cited in the brief does not authorize the use of the names of such cases throughout the brief without giving the citation of such cases. Rule 28. *Weaver v. Morgan*, 642.

§ 29. Abandonment of Exceptions by Failure to Discuss in Briefs.

Exceptions in the record not set out in appellant's brief are deemed abandoned. Rule 28. *Weaver v. Morgan*, 642.

§ 31e. Dismissal for That Question Has Become Moot or Academic.

Where the election sought to be restrained has been held pending the appeal, the appeal will be dismissed. *Saunders v. Bulla*, 578; *Betts v. Bulla*, 579.

§ 37. Scope and Extent of Review—Cognizance of Matters Ex Mero Motu.

Where error is manifest on the face of the record, even though it be not the subject of an exception, the Supreme Court may correct it *ex mero motu*. G.S. 7-11. *Gibson v. Ins. Co.*, 712.

§ 38. Presumptions and Burden of Showing Error.

The burden is on appellant not only to show error but also that the error complained of was material with resulting harm to its cause. *Collingwood v. R. R.*, 192; *Call v. Stroud*, 478.

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. *Kelly v. Kelly*, 734.

§ 39b. Error Cured by Verdict.

Where the jury answers the issue of negligence in the negative, plaintiff's exceptions to the charge relating to the issue of contributory negligence need not be considered. *Metcalf v. Foister*, 355.

The submission to the jury of an issue of fact not warranted by both the pleadings and the evidence, even though error, will not entitle appellant to a new trial when it appears that the answer to a previous issue determined the rights of the parties and that the jury did not answer the issue objected to because the answer to the previous issue had rendered it immaterial. *Call v. Stroud*, 478.

APPEAL AND ERROR—*Continued.*

§ 39e. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The exclusion of testimony cannot be held prejudicial when the record does not show what the answer of the witness would have been. *Carruthers v. R. R.*, 183; *Whiteheart v. Grubbs*, 236.

The admission of evidence over objection cannot be held prejudicial when the same evidence is thereafter or theretofore admitted without objection. *White v. Disher*, 260; *Spivey v. Newman*, 231; *Fleming v. Light Co.*, 457; *Price v. Whisnant*, 653.

The exclusion of testimony that defendant's employee was heard to "grunt" upon observing the conditions existing at the *locus* cannot be held for error when it is not made to appear what meaning or significance, if any, was to be attributed to this gutteral noise. *Fleming v. Light Co.*, 457.

§ 39f. Harmless and Prejudicial Error in Instructions.

Charge *held* prejudicial in failing to give complete instruction on question of good faith constituting focal point of controversy. *Cotton Mills v. Cotton Co.*, 186.

Charge *held* not to contain prejudicial error. *Collingwood v. R. R.*, 192.

Exceptions to the charge will not be sustained if the charge, when read contextually, does not contain prejudicial error. *Whiteheart v. Grubbs*, 236; *Batchelor v. Black*, 314; *Metcalf v. Foister*, 355.

§ 39g. Harmless and Prejudicial Error in Issues or Verdict.

Where, in a suit to recover double the amount of usurious interest paid, the jury answers the issue as to the amount plaintiff is entitled to recover in a sum less than double the amount of interest it found was paid on the loan, the verdict is not prejudicial to defendant and it may not complaint thereof. *White v. Disher*, 260.

§ 39l. Harmless and Prejudicial Error in Course or Conduct of Trial.

On the issues submitted to the jury the court inadvertently left notations made by it which the court had placed thereon to guide it in its charge, the words noted being "burden," "negligence," "proximate cause," "contributory negligence," and the like. Upon poll, each juror asserted that the notations did not affect his determination of the issues. *Held:* The matter did not constitute prejudicial error. *Call v. Stroud*, 478.

§ 40c. Review of Injunction Proceedings.

Upon an appeal from an order granting or refusing an interlocutory injunction, the Supreme Court may review both the findings of fact and the conclusions of law. *Avey v. Lemons*, 531.

§ 40d. Review of Findings of Fact.

While findings of fact supported by the evidence are conclusive on appeal, inferences or conclusions of law therefrom are reviewable. *Radio Station v. Eitel-McCullough*, 287.

APPEAL AND ERROR—*Continued.*

Findings of fact of the trial judge are conclusive on appeal when supported by competent evidence. *Mitchell v. Barfield*, 325.

In the trial of a case by the court under agreement of the parties, G.S. 1-184, exceptions to the court's refusal to find certain facts requested are untenable when the court makes findings supported by evidence diametrically opposed to those requested, the court's refusal of the request being tantamount to an affirmative finding that the matters and things embodied in the request do not exist. *Ibid.*

Where the testimony offered at the hearing is not brought forward in the record, it will be presumed that the findings of fact are supported by competent evidence. *Carter v. Carter*, 614.

§ 40f. Review of Orders Relating to Pleadings.

The refusal of the trial court upon apt motion to strike irrelevant matter from a pleading will not be disturbed on appeal when the retention of the matter in the pleading will not cause harm or injury to the moving party, since movant's rights may be protected by objection to testimony offered to prove the irrelevant matter or by proper request for instructions as to the legal effect of such testimony. *Hinson v. Britt*, 379.

Denial of motion to strike upheld. *Buchanan v. Dickerson, Inc.*, 421: *Wilmington v. Wright*, 735.

§ 40i. Review of Judgments on Motions to Nonsuit.

In reviewing the trial court's ruling on motion to nonsuit, the Supreme Court will consider the evidence in the light most favorable to plaintiff, giving her every reasonable inference properly deducible therefrom. *Wilson v. Hospital*, 362.

Nonsuit will not be granted on appeal notwithstanding that the evidence relied upon by plaintiff is incompetent and was erroneously admitted, since plaintiff might have offered other proof if the incompetent evidence had been excluded at the trial. *Supply Co. v. Ice Cream Co.*, 684.

§ 43. Petition to Rehear.

A petition to rehear will be dismissed where the members of the Supreme Court are equally divided in opinion, one Justice having died since the petition was filed. *Samuels v. Bowers*, 522.

Inadvertences in the recapitulation of the evidence in a decision of the Supreme Court do not justify the granting of a petition to rehear when such inadvertences in no way impair the validity of the decision. *Batchelor v. Black*, 745.

§ 51a. Force and Effect of Decision—Law of the Case.

Where it is decided on a former appeal that defendant was not entitled to maintain a counterclaim on the facts alleged, the decision becomes the law of the case, and the trial court correctly strikes from a subsequently filed pleading and asserted counterclaim on the same facts. *Credit Corp. v. Roberts*, 384.

Decision of the Supreme Court holding that the trial court was in error in overruling a demurrer for misjoinder of parties and causes of action does not have the effect of sustaining the demurrer or of entering judgment dismissing the action, but is merely a direction to the court below to reverse its ruling. *Teague v. Oil Co.*, 469.

ARREST AND BAIL.

§ 6. Proceedings to Secure Bail.

The clerk of the Superior Court has power to take bail in criminal cases only in those instances authorized by statute, and where he allows bail to prevent imprisonment upon the issuance of a *mittimus* after receipt of certificate of opinion of the Supreme Court affirming judgment of conviction, such bail bond is void. *S. v. Bowser*, 414.

§ 8. Liabilities on Bail Bonds.

A bail bond which is void because taken without authority binds neither the principal nor his surety. *S. v. Bowser*, 414.

The fact that defendant has secured his release on bail will not estop him or his surety from asserting the invalidity of the bond when the threatened imprisonment was unlawful. *Ibid.*

ASSAULT.

§ 14c. Instructions on Less Degrees of Offense Charged.

Where in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, verdicts of guilt of less degrees of the crime are permissible under the evidence dependent upon the variant facts as the jury may find them to be, the failure of the court to submit the question of defendant's guilt of such less degrees is erroneous and constitutes a failure to explain the law arising upon the facts in evidence as required by G.S. 1-180. *S. v. Ardrey*, 721.

ASSOCIATIONS.

§ 5. Actions, Parties and Process.

Since an unincorporated fraternal association is given power to acquire and hold property in its common name, G.S. 39-24. G.S. 39-25, and may be served with summons and sued in the manner provided by G.S. 1-97 (6), *it is held* that such association has capacity to sue in its common name. *Ionic Lodge v. Masons*, 252.

The common law rule that an association is without power to sue in its common name has been modified by statute in this State only to the extent of permitting an association to sue in its common name in an action concerning a certificate or policy of insurance issued by it, and in other cases permitting one or more members of an association to sue for the benefit of all when its members are so numerous that it is impractical to bring them all before the court, G.S. 1-70, and provisions of this statute are controlling and preclude an association from suing in its common name on a cause of action unrelated to insurance. *Ionic Lodge v. Masons*, 648.

ATTORNEY AND CLIENT.

§ 8. Duration and Termination of Employment.

Nothing else appearing, an attorney of record continues in this relationship not only until final judgment, but also as long as the opposing party has the right, by statute or otherwise, to move in the cause to set aside the judgment. *Henderson v. Henderson*, 1.

AUTOMOBILES.

§ 1. Licensing and Regulation of Drivers.

The operation of a motor vehicle upon the public highways of the State is a privilege which can be exercised only in accordance with legislative restrictions. *S. v. Correll*, 696.

§ 8a. Due Care and Attention to Road in General.

Motorist has right to assume, nothing else appearing, that others will exercise due care for their own safety. *Aydlett v. Keim*, 367.

Where all the evidence shows that a motorist saw plaintiff's intestate who was riding a motorcycle in front of him traveling in the same direction, and gave repeated warnings by sounding his horn of his approach to the cyclist, the evidence fails to sustain an allegation that the motorist failed to keep a proper lookout as an element of negligence in plaintiff's action to recover for the death of the cyclist, killed in a collision with the motorist's vehicle. *Maddox v. Brown*, 542.

§ 8c. Turning.

The mere fact that a motorcyclist traveling on his right lane of a four lane highway veers to his left to the inside or passing lane, without any signal whatever, is insufficient to indicate or give notice of his assumed intention to make a left turn. *Maddox v. Brown*, 542.

§ 8d. Parking.

Whether defendant's act in parking on bridge 40 feet wide, constituting part of city street, constituted proximate contributory cause of accident *held* for jury. *Boles v. Hegler*, 327.

§ 8i. Intersections.

A private driveway is not an intersecting highway within the meaning of G.S. 20-150 (c). *Levy v. Aluminum Co.*, 158.

Evidence that defendant approached intersection at rate of 75 to 80 miles per hour, and that plaintiff, though he had had a drink some five hours before, approached crossing in careful and lawful manner, *held* to take case to jury on issues of negligence and contributory negligence. *Batchelor v. Black*, 314; *Batchelor v. Black*, 745.

Evidence *held* not to show an intersection accident case. *Maddox v. Brown*, 542.

§ 14. Passing Vehicles Traveling in Same Direction.

Overtaking and passing vehicle on its right *held* not contributory negligence as matter of law under circumstances. *Levy v. Aluminum Co.*, 158.

Where a motorist follows a motorcyclist on the inside or passing lane of a four lane highway, the motorist is under duty to refrain from any effort to pass the motorcycle so long as it continues to travel in the passing lane, notwithstanding the cyclist may refuse to yield the right of way. *Maddox v. Brown*, 542.

Where a cyclist is traveling on the right or slow traffic lane of a four lane highway, and a motorist traveling on the inside or passing lane signals by horn his intention to pass, the act of the cyclist in suddenly cutting his vehicle to the left and colliding with the right front portion of the motorist's vehicle, is negligence constituting at least a proximate cause of the collision. *Ibid.*

AUTOMOBILES—*Continued.*

§ 15. Bicycles and Motorcycles.

Contributory negligence of motorcyclist *held* for jury. *Maddox v. Brown*, 244; *Maddox v. Brown*, 542.

Contributory negligence of bicyclist *held* for jury. *Williams v. Kirkman*, 609.

§ 16. Pedestrians.

An open space in a square used for parking is not an intersection within the contemplation of statutes relative to the right of way of pedestrians. *Metcalf v. Foister*, 355.

Nothing else appearing, a motorist is entitled to assume that a person on the highway will exercise ordinary care for his own safety. *Aydlett v. Keim*, 367.

Evidence of excessive speed under circumstances as proximate cause of striking pedestrian *held* for jury. *Brafford v. Cook*, 699.

§ 17. Degree of Care in Regard to Children on or Near Highway.

The charge of the court in this case as to the duty of a motorist to avoid injuring children whom he sees, or by the exercise of reasonable care should see, on or near the highway, *held* without error. *Call v. Stroud*, 478.

§ 18b. Negligence and Proximate Cause.

Whether driver should have anticipated that injury might result from driving at high speed over loose stone on highway *held* for jury. *Howard v. Bell*, 611.

§ 18c. Contributory Negligence. (Nonsuit on ground of contributory negligence, see below, § 18h (3)).

Where a railroad employee, notwithstanding he might have chosen a safe place, chooses to ride on the pilot platform of the engine, he is under duty to anticipate injuries which might naturally and proximately result therefrom, such as the risk of being thrown from the platform by the sudden starting, stopping, or other negligent operation of the train, but he is not under duty to anticipate that a motorist will negligently operate his vehicle so as to collide with the train at a grade crossing and cause him injury, but to the contrary is entitled to assume that motorists approaching a grade crossing will exercise due care and obey the rules of the road. *Holderfield v. Trucking Co.*, 623.

§ 18e. Last Clear Chance.

Evidence tending to show that defendant turned to his left to avoid a car standing stationary in front of him on his right side of the highway at night, that a man suddenly appeared some three or four feet to the left of the parked car as defendant was passing it, that defendant swerved to his left, but that the man stumbled or walked into the side of defendant's car, causing injuries resulting in death, without evidence as to how long he had been in this position of peril, *is held* insufficient to support the submission of the issue of last clear chance, since there is no evidence that defendant was put on notice that intestate was drunk, ill, or otherwise incapacitated, or, even so, that defendant could or should have discovered the peril in time to have avoided the injury. *Aydlett v. Keim*, 367.

§ 18g (2). Evidence as to Speed.

Estimate of witnesses as to the speed of a locomotive, based upon the result of the impact, is properly excluded when it appears that the witnesses had not

AUTOMOBILES—*Continued.*

observed the train and had formed no opinion as to its speed. *Carruthers v. R. R.*, 183.

§ 18h (2). Nonsuit on Issue of Negligence.

Evidence tending to show that defendant's bus was following closely behind the motorcycle ridden by intestate on the inside or passing lane of a four lane highway, that the bus, traveling 35 or 40 miles per hour in approaching an intersection with a paved highway, was overtaking the motorcycle and continuously and repeatedly sounded its horn and pulled to its left in an attempt to pass, and that, without slackening speed, the curving front on the right side of the bus struck the rear of the motorcycle on its left side, *is held* sufficient to be submitted to the jury on the issue of negligence of the bus company. *Maddox v. Brown*, 244.

Evidence that defendant approached crossing at rate of 70 to 85 miles per hour *held* to take case to jury on issue of negligence. *Batchelor v. Black*, 314.

Conflicting evidence as to whether cyclist was traveling on inside or passing lane of four lane highway, or was traveling on the right or slow traffic lane, when he veered to left and struck bus *held* to take case to jury on appropriate issues. *Maddox v. Brown*, 542.

Plaintiff's evidence tended to show that defendant's truck was being operated at excessive speed on a sand-clay-gravel road upon which crushed stone had been newly spread, with two lanes of travel worn therein and a slight ridge of gravel and crushed stone left by traffic in the center, and that as defendant's truck swerved to its right to pass plaintiff's approaching car, the dual left rear wheel of the truck passed over the center ride of gravel and threw small stones which broke plaintiff's windshield and struck him, inflicting serious injury. On cross-examination the truck driver admitted that such "loose rock is damaging to that speed of 50 miles an hour." *Held:* The evidence is sufficient to be submitted to the jury upon the issue of actionable negligence notwithstanding defendant's evidence in contradiction as to the speed of the truck and the condition of the road. *Howard v. Bell*, 611.

Plaintiff's evidence tending to show that defendant was driving his truck on the extreme right lane of a four lane highway following an automobile, that he came from behind the car into the passing lane at a terrific speed and struck plaintiff, who was a pedestrian attempting to cross the highway some 400 feet beyond an intersection, and knocked plaintiff some 15 yards and was unable to stop his truck under 75 yards from the impact, *is held* sufficient to be submitted to the jury upon the issue of negligence notwithstanding that the testimony of plaintiff's witnesses as to the speed of the truck was weakened somewhat on cross-examination, defendant's evidence in conflict with that of plaintiff as to the speed of the truck not being considered. G.S. 20-141 (a). *Brafford v. Cook*, 699.

§ 18h (3). Nonsuit on Ground of Contributory Negligence.

The evidence tended to show that plaintiff's vehicle was following that of defendant, that defendant's truck slowed down and pulled to its left of the highway, that a person in the rear of the truck motioned plaintiff's driver to go ahead, and that as plaintiff's vehicle started to pass defendant's vehicle on its right, the driver of defendant's truck turned right to enter a private driveway, and the two vehicles collided. *Held:* Nonsuit on the ground of contributory negligence was erroneously entered, since, whether defendant's driver was guilty of contributory negligence in attempting to pass defendant's vehicle on

AUTOMOBILES—*Continued.*

the right is a question for the determination of the jury under the circumstances. G.S. 20-149 (a). *Levy v. Aluminum Co.*, 158.

The evidence tended to show that intestate was riding his motorcycle in the second or passing lane of a four lane highway, followed by defendant's bus, that the vehicles were approaching an intersection with a paved highway, and that the bus, overtaking the motorcycle, repeatedly blew its horn and bore to its left in attempting to pass the motorcycle, and that the curving front of the right side of the bus hit the left rear of the motorcycle. *Held:* While the evidence may establish contributory negligence on the part of intestate, it does not establish as a matter of law that such contributory negligence proximately concurred in producing the injury, and nonsuit on the ground of contributory negligence is properly denied. *Maddox v. Brown*, 244.

Evidence that plaintiff had had a drink some five hours before collision, but that he approached intersection in careful and lawful manner, *held* for jury on issue of contributory negligence. *Batchelor v. Black*, 314.

Whether defendant's act in parking on bridge 40 feet wide, constituting part of city street, was proximate contributing cause *held* for jury. *Boles v. Hegler*, 327.

Conflicting evidence as to whether a cyclist was traveling on the inside or passing lane of a four lane highway, or was traveling on the right or slow traffic lane, and turned to his left and collided with a vehicle traveling on the inside or passing lane, which had given signal by horn of intention to pass, *is held* to require the submission of appropriate issues to the jury. *Maddox v. Brown*, 542.

Plaintiff's evidence to the effect that defendant, who was traveling on a hard surface highway, approached an intersection with a dirt road at excessive speed and collided with the bicycle ridden by plaintiff as it entered the intersection from the dirt road, *is held* not to establish contributory negligence as a matter of law on the part of plaintiff and nonsuit on that ground was properly denied, notwithstanding conflicting evidence introduced by defendant or even contradictions and discrepancies in plaintiff's own evidence. *Williams v. Kirkman*, 609.

Plaintiff, a railroad employee, chose to ride on the pilot platform of the engine instead of a safe place afforded him by his emloyer. Defendant's emloyee collided with the engine at a grade crossing as the result of his negligent operation of defendant's truck. *Held:* Whether plaintiff's selection of the position of peril on the engine was one of the proximate causes of his injury or whether his position simply afforded an opportunity for defendant's negligence to cause the injury, but which was not in itself a contributing cause, is a question for the jury, and the granting of nonsuit on the ground of contributory negligence was error. *Holderfield v. Trucking Co.*, 623.

Evidence tending to show that plaintiff stopped his car and looked in both directions before entering an intersection with a through highway, that, observing no vehicle approaching within the range of his vision, which was between 175 and 200 feet to his right, he drove upon the highway and had virtually cleared the portion of the intersection appropriated by law for travel in the direction in which defendants were proceeding, when he was struck by defendants' vehicle which approached the intersection from plaintiff's right at a speed of between 75 and 80 miles per hour and proceeded into the intersection at unabated speed, *is held* not to show contributory negligence as a matter of law on the part of plaintiff. *Batchelor v. Black*, 745.

AUTOMOBILES—*Continued.*

§ 18i. Instructions in Auto Accident Cases.

Where there is evidence that plaintiff had drunk a small quantity of intoxicating liquor some time before the collision, but no evidence that his alleged intoxication was the proximate cause of the collision, a charge giving the defendants the full benefit of such evidence is sufficient, and the court is not required to enter into a speculative discussion on the law of drunken driving. *Batchelor v. Black*, 314.

Where plaintiff's evidence discloses that he was standing in an open space of a park used for parking, and not within any marked cross-walk located therein, he is not entitled to instructions as to the right of way of a pedestrian upon entering an intersection or marked cross-walk between intersections. *Metcalf v. Foister*, 355.

Where the court charges the duty of a motorist to maintain a safe distance behind another traveling in the same direction, G.S. 20-152, it is error for the court to fail to charge also as to the right of a motorist in overtaking and passing another as authorized by G.S. 20-149 or the right of a motorist traveling on the inside or passing lane of a four lane highway to overtake and pass a vehicle traveling in the right or slow lane traffic, when such qualifications of the general rule are made pertinent by the evidence adduced. *Maddox v. Brown*, 542.

Where there is no evidence that a motorist intended or gave any notice of intention to make a left turn, it is error for the court to charge the law as to the duties of a motorist following in the same direction who has been given the statutory left turn signal by the preceding motorist. *Ibid.*

§ 19a. Liability of Driver to Guest.

While the driver of a car is not an insurer of the safety of his guests, he is liable for an injury to a guest proximately resulting from his negligence in the operation of the automobile. *Spivey v. Newman*, 281.

Evidence to the effect that as plaintiff, an invited guest, was in the act of seating himself and closing the door, defendant suddenly put the car in motion, causing the door to swing violently back and hit plaintiff on the forehead, *is held* sufficient to be submitted to the jury on the question of the actionable negligence of defendant in failing to ascertain whether the plaintiff was in a position of safety before she put the car in motion. *Ibid.*

§ 20a. Negligence of Guest or Passenger.

Where the driver of a car persistently operates it at a dangerous and excessive speed, the duty devolves upon a gratuitous passenger, in the exercise of that degree of care for his own safety which a reasonably prudent person would employ under similar circumstances, to caution the driver, and if his warning is disregarded, to request that the automobile be stopped and that he be permitted to leave the car, but his failure to do so will not be held contributory negligence as a matter of law if conflicting inferences can be drawn from the circumstances, the question being, ordinarily, for the jury to determine. *Samuels v. Bowers*, 149.

Gratuitous passenger *held* not contributorily negligent as matter of law in failing to refuse to continue trip. *Ibid.*

Opposing inferences as to whether plaintiff was contributorily negligent in the manner in which he attempted to board defendant's automobile as an invited guest, *held* permissible upon plaintiff's evidence, and therefore nonsuit

AUTOMOBILES—*Continued.*

on the ground of contributory negligence was properly denied. *Spivey v. Newman*, 281.

§ 20b. Negligence of Driver Imputed to Guest or Passenger.

Where the driver of a car is under the control and direction of a passenger who is the employee driver's superior, any negligence of the driver is imputable to the passenger and bars any action by the passenger against him, and therefore in an action by the passenger against the owner of the other vehicle involved in the collision, the employee driver is improperly joined as an additional defendant on motion of the original defendant for the purpose of contribution as a joint tort-feasor. *Bass v. Ingold*, 295.

§ 29a. Reckless Driving and Speeding—Element of Offense.

It is a misdemeanor to operate a motor vehicle upon a public highway in this State at a speed in excess of 55 miles per hour. *S. v. Sumner*, 386.

§ 29b. Reckless Driving and Speeding—Prosecutions.

A warrant charging defendant with operating a motor vehicle upon a public highway in the State in a reckless manner and at a speed of 90 miles per hour is sufficient to sustain judgment upon conviction, since defendant must have understood the charge to be operating a motor vehicle in this State at an unlawful speed, and therefore the warrant informs the defendant of the charge he must answer, enables him to prepare his defense, and sustains the judgment. *S. v. Sumner*, 386.

§ 30d. Prosecutions for Drunken Driving.

Circumstantial evidence tending to identify defendant as the driver of the car which was driven in a reckless manner, *held* sufficient to be submitted to the jury. G.S. 20-140. *S. v. Dooley*, 311.

§ 34d. Driving Without License.

The operation of a motor vehicle upon the highways of the State by a person whose driver's license has been revoked is unlawful, regardless of intent, since the specific performance of the act forbidden constitutes the offense itself. G.S. 20-28. *S. v. Correll*, 696.

BANKRUPTCY.

§ 10. Debts Discharged.

A discharge in bankruptcy, while not constituting payment, bars all civil remedies for the collection of a dischargeable debt as a personal obligation of the debtor. *Trust Co. v. Parker*, 512.

The character of a debt as one dischargeable in bankruptcy is not affected by the fact that it may have been reduced to judgment, since the rendition of judgment does not change the character of the indebtedness. *Ibid.*

A judgment *in personam* upon the debtor's liability upon an unsecured note, no fraud being alleged and no specific lien being created by the judgment, is a dischargeable debt, and the debtor's discharge in bankruptcy proceedings in which the judgment is listed as a provable debt, bars all civil remedies for the collection of the judgment as a personal obligation of the debtor. *Ibid.*

BASTARDS.

§ 1. Willful Failure to Support—Elements of Offense.

A defendant's willful failure and refusal to support his illegitimate child means an intentional neglect or refusal. G.S. 49-2. *S. v. McDay*, 388.

§ 6½. Willful Failure to Support—Instructions.

In a prosecution under G.S. 49-2 an instruction defining willfully as "wrongfully and unjustifiably, without valid and good excuse" instead of an intentional neglect or refusal, must be held for reversible error. *S. v. McDay*, 388.

§ 7. Verdict and Judgment.

Court has plenary power to suspend execution of judgment on condition that defendant pay stipulated sums into court monthly for support of illegitimate child. *S. v. Bowser*, 414.

BILLS AND NOTES.

§ 18. Bona Fide Holders.

In order for the transferee of warehouse receipts to be a *bona fide* holder within the meaning of G.S. 27-51 it is necessary not only that he acquire same before maturity for value and without notice of fraud but also that he take same in good faith, which means honestly and without knowledge of facts which would negative good faith, particularly where he knows his transferer occupied a relationship of trust. G.S. 27-2. *Cotton Mills v. Cotton Co.*, 186.

But where transferee takes before maturity for value without notice and in good faith, such negotiation is not impaired by the fact that it was in breach of duty on the part of the person making the negotiation. *Harris v. Fairley*, 551.

§ 35. Instructions.

An instruction to the effect that the burden is upon the transferee to show that he took the warehouse receipts in controversy for value and without notice of any defect, must be held for reversible error for omitting the element of good faith, notwithstanding a prior correct instruction, when the question of good faith is the focal point of the controversy upon plaintiff's evidence that the transferer was its agent and transferred the receipts in discharge of his personal liability to the transferee on an unpaid check. *Cotton Mills v. Cotton Co.*, 186.

BOUNDARIES.

§ 1. General Rules for Ascertainment of Boundaries.

The boundary called for in a deed is a question of law for the court, and the location of the boundary on the land is a question of fact for the jury upon conflicting evidence, but when the location is admitted or the evidence in regard thereto is not conflicting, the location of the boundary is also a question for the court. *Brown v. Hodges*, 537.

§ 2. General and Specific Descriptions.

Ordinarily, the specific description prevails over the general, and it is only when the specific description is ambiguous or insufficient, or reference is made to a fuller and more accurate description, that the general description is allowed to control or is given significance. *Whiteheart v. Grubbs*, 236.

A specific description by courses and distances which is clear and complete prevails over the general description of the land conveyed as being "a 25 foot strip off the west side" of a designated lot. *Ibid.*

BOUNDARIES—*Continued.*

§ 3a. Courses and Distances.

The courses and distances set out in a deed control unless the deed contain a more certain description. *Brown v. Hodges*, 537.

Courses and distances are controlled by monuments of boundary. *Bostic v. Blanton*, 441; *Brown v. Hodges*, 537.

§ 3b. Calls to Natural or Artificial Objects.

A call in a deed specified the course, with additional direction that it ran with the center of a wall 115.5 feet to a stake. The wall exists only for the last 50 feet of the distance. The wall is not plumb with the course specified, so that while its end on the corner coincides with the corner, its other end encroaches on the course about a foot. *Held:* The course as specified controls until reaching the wall, at which point the artificial object controls, resulting in a one foot offset in the line. *Bostic v. Blanton*, 441.

A stake is not a monument, and therefore oral evidence of the erection of a stake as a corner, or oral evidence that a line is surveyed along a line of stakes, cotemporaneously with the execution of the deed, is not admissible to control the course and distance or a natural boundary called for in the deed. *Brown v. Hodges*, 537.

A highway is of such permanent character as to become a monument of boundary, and when called for in a deed, the highway as it existed at the time of the execution of the deed controls course and distance as set out in the instrument. *Ibid.*

§ 3c. Reversing Calls.

The rule permitting the reversal of a call in a deed for the purpose of ascertaining a corner can have no application, even in regard to the senior title of one of two contiguous tracts derived from a common grantor, when the lines and corners may be ascertained by following the calls in their regular order as set forth in the senior deed. *Bostic v. Blanton*, 441.

§ 5a. Competency of Evidence Aliunde to Establish Boundary.

Where there is no dispute as to the location of the highway as it existed at the time of the execution of the deeds in question, calls in the deeds to the highway control, and parol evidence that the courses and distances as set out in the deeds ran along a line of stakes where the parties anticipated the highway would be located, is incompetent. *Brown v. Hodges*, 537.

§ 5b. Location of Corners of Contiguous Tracts.

Where the owner of land sells successively a part thereof to separate parties, the calls in the secondly executed deed cannot be used to locate a call in the deed first executed. *Bostic v. Blanton*, 442.

§ 10. Directed Verdict in Processioning Proceedings.

Where the location of a highway as it existed at the time of execution of the deeds is not in dispute, and the deeds call for the highway as the dividing line between the contiguous tracts, the location of the dividing line is the center of the highway as it then existed, as a matter of law, and the court should direct a verdict to this effect in a processioning proceeding. *Brown v. Hodges*, 537.

BROKERS.

§ 11. Right to Commissions Where Sale Is Not Consummated.

Where the vendor contends upon supporting evidence that he was at all times ready and willing to execute deed, but that his wife would not join in its execution and that the purchaser would not accept deed without her joinder, and further, that plaintiff broker knew these circumstances at the time he procured the purchaser, *held* the submission of the single issue as to whether plaintiff procured a purchaser ready, able, and willing to pay the stipulated amount for the land is insufficient to afford vendor opportunity to present his contentions to the jury, and judgment on the verdict in the broker's favor must be set aside. *Turnage v. McLawhon*, 515.

BURGLARY AND UNLAWFUL ENTRY.

§ 4. Breaking and Entering Otherwise Than Burglariously.

It is unlawful to enter a dwelling with intent to commit a felony therein even though there be no breaking. *S. v. Best*, 575.

§ 11. Sufficiency of Evidence and Nonsuit.

It is unlawful to enter a dwelling with intent to commit a felony therein even though there be no breaking, and therefore while evidence of a breaking, when available, is always relevant, absence of such evidence does not constitute a fatal defect of proof. *S. v. Best*, 575.

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 2. For Fraud.

Allegations and evidence to the effect that plaintiffs were induced to purchase property from defendants and execute a purchase money mortgage for the balance of the purchase price because of false representations of defendants knowingly made as to the character and permanency of the tenants and amount of rents received by defendants from the property during the prior year, and that plaintiffs relied upon such misrepresentations and were induced thereby to purchase the property, *is held* sufficient to overrule defendants' demurrer to the complaint and motion to nonsuit on the evidence, since the permanency of the tenants and the amount of rents were facts within the personal knowledge of defendants, and whether they were of such character and were made under such circumstances as were calculated to deceive a person of ordinary prudence, and whether plaintiffs reasonably relied thereon, are questions for the jury. *Gray v. Edmunds*, 681.

§ 8. Parties Entitled to Sue.

The right to attack a conveyance on the ground that its execution was procured by fraud or undue influence rests in the grantor and, upon his death with the cause of action still extant, in his heirs in case of intestacy and in his devisees in case the grantor leaves a will or, if the property be personalty, in his personal representative or, if the personal representative refuses to sue, in his legatees or distributees. *Holt v. Holt*, 498.

Where heirs at law, seeking to set aside conveyances executed by their ancestor on the ground of fraud and undue influence, introduce in evidence a paper writing probated in common form as the last will and testament of their ancestor, which is sufficient in form to vest in the grantees in the conveyances attacked all the interest of the ancestor, *held* compulsory nonsuit is proper,

CANCELLATION AND RESCISSION OF INSTRUMENTS—*Continued.*

since plaintiffs may not collaterally attack the paper writing probated in common form, and the will precludes any interest in plaintiffs entitling them to maintain the action as heirs or next of kin of the grantor. *Ibid.*

CARRIERS.

§ 5. Licensing and Franchise.

Verified petition and exhibits attached may be considered as evidence in passing upon application under G.S. 62-121.11. *Utilities Com. v. Motor Express*, 174.

The phrase "in *bona fide* service as a common carrier" as used in G.S. 62-121.11 means one who was rendering substantial service as a common carrier in good faith, actively, openly, and honestly. *Ibid.*

The fact that an applicant under G.S. 62-121.11, which had been conducting trucking operations extending over a radius of 150 miles, held a previously issued franchise certificate authorizing transportation within a radius of seven miles only, does not preclude a finding that its operations were *bona fide* within the meaning of the act, there having been no effort made by the State to exclude or curtail its operations and there being no evasion, deceit, or defiance of authority. *Utilities Com. v. Motor Express*, 178.

Where application is filed within the time allowed under G.S. 62-121.11, and in the report of operations for a month prior to 1 January, 1947, selected by applicant as typical, applicant asks opportunity, if necessary, to offer proof of operations for other months, the Commission has power to permit an amendment to show operations for other months and to consider the addenda thus filed in passing upon the application. *Utilities Com. v. Motor Express*, 180.

In an application under G.S. 62-121.11, the Utilities Commission must act within the authority conferred by the statute, yet the findings from the evidence and the exercise of judgment thereon within the scope of its powers are matters for the Commission, and its order will not be disturbed when sustained by its findings upon competent, material and substantial evidence. *Ibid.*

§ 10. Carriage of Goods—Damage in Transit.

Evidence tending to show that two horses and nineteen mules were delivered to initial carrier in good condition, that upon arrival at destination one of the mules was dead and the rest of the animals were in a bad and weakened condition with cuts and bruises, is sufficient to raise a *prima facie* case of negligence in the shipper's action against the terminal carrier to recover the damages, and the carrier's motion for nonsuit should have been denied. *Bennett v. R. R.*, 144.

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§ 8b. Lien of Chattel Mortgage or Conditional Sale Executed in Another State.

Statute protects only those purchasers who deraign title from conditional vendee, and therefore lien of conditional sale executed in another state which does not require registration will be enforced here as against purchaser in this State who does not show he acquired title directly or by *mesne* conveyances from vendee. *Finance Corp. v. Quinn*, 407.

CHATTEL MORTGAGES AND CONDITIONAL SALES—*Continued.*

§ 10c. Creditors and Purchasers for Value Within Protection of Registration Statutes.

Statute protects only those purchasers who deraign title from conditional vendee and not strangers to that title. *Finance Corp. v. Quinn*, 407.

§ 10f. Waiver and Estoppel.

The assertion that the vendor in a conditional sale contract executed in another state should not be permitted to assert his lien as against an innocent possessor of the property in this State because the vendor had put his vendee in position to cause loss, *held* feckless when it is not shown that the vendee willingly parted with title to or possession of the automobile. *Finance Corp. v. Quinn*, 407.

The vendor in a conditional sale contract has no duty to third persons who are strangers to his title to exercise due diligence to protect them from loss occasioned by reason of his lien. *Ibid.*

CLERKS OF COURT.

§ 3. Jurisdiction in General.

While the clerk of the Superior Court is a court of very limited jurisdiction, within his jurisdiction the clerk has the same power as courts of general jurisdiction to open, vacate, modify, set aside or enter as of a former time, decrees or orders of his court, and to fix time for hearings. *Russ v. Woodard*, 36.

The clerk of the Superior Court has jurisdiction to grant appropriate relief when it is made to appear that a surviving partner has failed or refused to file the bond and inventory required by statute, and the Superior Court acquires jurisdiction of the entire matter by an appeal, and may appoint a receiver even though this relief is beyond the jurisdiction of the clerk and even though the clerk's order appealed from be erroneous. *In re Estate of Johnson*, 59.

§ 4. Probate Jurisdiction.

The clerk of the Superior Court has exclusive original jurisdiction of proceedings for the probate of wills, G.S. 2-16, G.S. 28-1, G.S. 31-12 through 31-27, and the Superior Court has no jurisdiction to determine whether a paper writing is or is not a will except upon the issue of *devisavit vel non* duly raised by a caveat filed with the clerk, G.S. 31-32 through 31-37. *Brissie v. Craig*, 701.

COMMON LAW.

The common law rule that the title of the mortgagee or the conditional vendor is good as against any person in possession has been altered by statute in this State only to the extent of protecting against an unregistered lien creditors and those purchasers who deraign title from the mortgagor or conditional vendee, and the statute does not extend its protection to purchasers who are strangers to the vendor's title. *Finance Corp. v. Quinn*, 407.

The common law rule that an unincorporated association has no legal entity and can neither sue nor be sued in its own name obtains in this State except to the extent it has been modified by statute. G.S. 4-1. *Ionic Lodge v. Masons*, 648.

COMPROMISE AND SETTLEMENT.

§ 2. Operation and Effect of Agreements.

The acceptance of a lesser sum in full payment of a larger sum constitutes a settlement, but only as to those items of liability embraced in the settlement. *Lochner v. Sales Service*, 70.

Whether claim sued on was included in checks accepted by plaintiff in discharge of liability *held* for jury. *Ibid.*

CONSPIRACY.

§ 1. Elements of Cause of Action for Civil Conspiracy.

To create civil liability for conspiracy there must be a tort committed by one or more of the conspirators pursuant to the common scheme and in furtherance of the common object. *Holt v. Holt*, 497.

Child not devised property cannot maintain action for conspiracy whereby defendants obtained deeds to property from father by fraud and undue influence. *Ibid.*

§ 3. Nature and Elements of the Crime.

A conspiracy is an unlawful combination or agreement of two or more persons to do an unlawful thing or to do a lawful thing in an unlawful manner or by unlawful means. *S. v. Summerlin*, 333.

§ 5. Competency of Evidence.

The State's evidence tended to show an agreement to rob, successively, three separate places. *Held:* Evidence of the agreement to rob the place first on their list, and change of plans to first rob one of the other places, the one named in the indictment, which agreement was actually executed, is competent against defendant conspirator even though he was not present when the plans were changed and was not charged in the indictment with any offense in connection with the agreement to rob the place first agreed upon by the conspirators, since all acts or declarations by any of the conspirators in furtherance of the common design is competent against each of the others. *S. v. Summerlin*, 333.

Where the indictment charges conspiracy to rob named persons of rings, and other valuable property, and the evidence shows an agreement to commit the offense charged together with agreement as to the disposition of the loot, *held* acts and conversations among the conspirators with reference to the disposition of the rings taken pursuant to the robbery is competent against other conspirators even though they did not actually participate in the efforts to dispose of the rings, since the disposition of the property was a part of the proven unlawful design. *Ibid.*

§ 6. Sufficiency of Evidence and Nonsuit.

Evidence *held* sufficient on charge of conspiracy to assault and rob. *S. v. Cottle*, 567.

CONSTITUTIONAL LAW.

§ 11. Police Power in General.

The police power is that power inherent in the State to prohibit things hurtful to the health, morals, safety, and welfare. This power cannot be contracted away or lost by estoppel or by any other mode. *Raleigh v. Fisher*, 629.

CONSTITUTIONAL LAW—*Continued.*

§ 21. Due Process of Law and Law of the Land—Notice and Hearing.

An order of the Superior Court adjudging that the claim of a particular creditor constituted a preferred claim and ordering the receiver to pay such claim, made without notice, either actual or constructive, to other claimants, is contrary to the established rules of practice and procedure in receivership proceedings, G.S. 55-153, and is in contravention of due process of law in failing to give other claimants notice and an opportunity to be heard, Constitution of N. C., Art. I, Sec. 17, and must be held for error on appeal. *Surety Corp. v. Sharpe*, 98.

No person can be deprived of his property except by his own consent or the law of the land, which term is synonymous with due process of law. *Eason v. Spence*, 579.

Due process of law imports notice and an opportunity to be heard or defend in a regular proceeding before a competent tribunal. *Ibid.*

§ 22. Right to Jury Trial.

It is error for the trial court to determine issues of fact raised by the pleadings in the absence of waiver of the constitutional and statutory right to a trial by jury. *Sparks v. Sparks*, 492.

CONTEMPT OF COURT.

§ 2b. Willful Disobedience of Court Order.

Willful disobedience of process cannot be made the basis for contempt proceedings when the process is a nullity because beyond the powers of the issuing court. *Greensboro v. Black*, 154.

CONTRACTS.

§ 5. Consideration.

An asserted promise by the owners to pay materialmen the amount due them by the contractor is unenforceable for want of consideration. *Lumber Co. v. Horton*, 419.

§ 7a. Contracts in Restraint of Trade.

Contract relating to sale of petroleum products *held* void as contrary to monopoly statute. *Arey v. Lemons*, 531.

§ 24. Instructions in Actions on Contract.

Where a defendant categorically admits nonperformance, and bases his defense solely upon the denial of the existence of the contract, he may not complain of the failure of the court to charge that the burden of proving nonperformance was on plaintiff. *Crouse v. Vernon*, 24.

CONVERSION.

§ 3. Reconversion.

Where a will provides for the sale of land and the distribution of the proceeds of sale, the beneficiaries must ordinarily take in the character which the will impresses upon the property, but they may by unanimous consent, including remaindermen and other holders of future interest, elect to reconvert and take the property as land, in which case the executor's power of sale is extinguished. *Trust Co. v. Allen*, 274.

CORPORATIONS.

§ 48. Rights of Creditors Upon Suspension of Charter—Right to Sue Corporation.

A corporation which has had its charter suspended by the Secretary of State on certificate of the Commissioner of Revenue that it had not reported or paid its tax, Sec. 801, Revenue Act of 1937, is deprived of the power of engaging in its ordinary business, but is not deprived of the capacity to be sued and defend suits against it. *Ionic Lodge v. Masons*, 252.

COURTS.

§ 1. Nature and Functions of Courts in General.

It is the province of the courts to declare the law, not to make it. *S. v. Welch*, 77.

§ 2. Jurisdiction in General.

In this State actions for civil penalties are assimilated to actions founded on contracts for jurisdictional purposes. *Williams v. Gibson*, 133.

The jurisdiction of a court is determined by the amount demanded in good faith by the plaintiff, or by the character of the relief sought by him. *Ibid.*

A party may confer jurisdiction on a court by waiving the amount of his claim in excess of such court's jurisdiction provided he does not split a single cause of action into several actions for this purpose. *Ibid.*

Parties may not confer jurisdiction on court by consent. *Brissie v. Craig*, 701.

In order for a court to have jurisdiction to determine a particular issue it must be brought before it in a proper proceeding. *Ibid.*

§ 4c. Jurisdiction of Superior Court on Appeals from Clerk.

On appeal from order of the clerk of Superior Court removing an administrator and appointing a successor, the jurisdiction of the Superior Court is solely derivative; but on appeal from orders of the clerk requiring a surviving partner to file bond and inventory, the Superior Court acquires jurisdiction of the entire matter and may appoint a receiver, even though the clerk's order is erroneous, since the clerk had jurisdiction to grant appropriate relief. *In re Estate of Johnson*, 59.

§ 4e. Appeals from State Commissions and Certiorari.

Certiorari is the appropriate process to review the proceedings of boards and officers exercising judicial or *quasi*-judicial functions in cases where no appeal is provided by law. G.S. 1-269. *Russ v. Board of Education*, 128.

§ 11. Jurisdiction of County and Municipal Courts.

Municipal-County Court of Greensboro has jurisdiction of action for penalty of $90, under Federal Rent Control Act. *Williams v. Gibson*, 133.

A municipal-county court is a creature of the General Assembly, and has only such jurisdiction and powers as are given it by statute, which cannot be enlarged by implication, and the Greensboro Municipal-County Court has power to issue process outside the county only when attested by the seal of said court, and such process without seal, served outside the county, is a nullity. *Greensboro v. Black*, 154.

COURTS—*Continued.*

§ 13. Administration of Federal Acts in State Courts.

When Congress expressly vests the State courts with power to enforce valid Federal penal laws, State courts, which have jurisdiction adequate and appropriate for the purpose under established local law, are required by the supremacy clause of the Federal Constitution to enforce claims arising under such Federal penal laws. *Williams v. Gibson*, 133.

§ 14. Conflict of Laws and Comity in General.

Under the rule of comity, the lien of a chattel mortgage or conditional sale executed in another state will be enforced here in accordance with its laws except to the extent to which the common law has been modified by statute in this State. *Finance Corp. v. Quinn*, 407.

The validity and administration of a testamentary trust in personalty is to be determined by the laws of the state of testator's domicile unless the will affirmatively shows an intention that the trust be administered elsewhere, but when the court of another state has jurisdiction of all the interested parties, the decree of such court terminating the trust is effective here, since equity acts *in personam*. *Johnson v. Salsbury*, 432.

CRIMINAL LAW.

§ 1b. Nature and Elements of Crime—Intent.

A person is presumed to intend the natural consequences of his act and therefore, where a specific intent is not an element of the crime, proof of the commission of the unlawful act is sufficient to support a verdict; but such presumption is not conclusive but merely establishes a *prima facie* case in respect to intent. *S. v. Elliott*, 377.

Where statute proscribes particular act, the commission of the act is the offense notwithstanding absence of specific intent. *S. v. Correll*, 696.

§ 1c. Nature and Elements of Crime—Statutory Offenses.

Where the definition and prohibition of a specified transaction is within the legislative power, the Legislature may prescribe that each step leading to the commission of such act shall constitute a separate offense. *S. v. Chavis*, 83.

§ 3. Distinction Between Crimes and Penalties.

Federal Housing and Rent Act is a penal law. *Williams v. Gibson*, 133.

§ 5a. Mental Responsibility for Crime in General.

The test of responsibility of a person charged with a criminal offense is the capacity to distinguish between right and wrong at the time and in respect of the matter under investigation. *S. v. Shackleford*, 299; *S. v. Lamm*, 402.

§ 6a. Entrapment.

In those offenses in which want of consent of the person affected is an element, entrapment by the person affected is a defense, since in such instance there is no want of consent. *S. v. Nelson*, 602.

§ 8b. Aiders and Abettors.

A person present, aiding and abetting another in the commission of a crime is guilty as a principal. *S. v. Best*, 575.

CRIMINAL LAW—*Continued.*

§ 14. Appeals to Superior Court.

Certiorari will not lie from the Superior Court to the Recorder's Court when judgment has been entered in the Recorder's Court upon defendant's plea of guilty. G.S. 1-269. *S. v. Barber*, 577.

§ 17c. Plea of Nolo Contendere.

A plea of *nolo contendere* has the same effect as a plea of guilty for the purpose of judgment and sentence. *S. v. Jamieson*, 731.

§ 29b. Evidence of Guilt of Other Offenses.

Evidence of guilt of a crime other than that charged in the indictment is competent when such evidence tends to show *quo animo*, intent, design, guilty knowledge or *scienter*, or to make out the *res gestæ*, or to exhibit a chain of circumstantial evidence in respect to the matter charged. *S. v. Summerlin*, 333.

§ 29d. Evidence That Defendant Was "Framed" or Entrapped.

In those offenses in which want of consent is an element of the offense, defendant is entitled to introduce evidence tending to show that he was entrapped by the prosecuting witness. *S. v. Nelson*, 602.

§ 31h. Opinion Evidence—Sanity and Mental Capacity.

Testimony of an expert psychiatrist as to his opinion in regard to defendant's psychopathic personality, which the expert testifies has nothing to do with defendant's ability to distinguish between right and wrong, is immaterial, irrelevant and incompetent, and is properly excluded. *S. v. Shackleford*, 299.

§ 33. Confessions.

Testimony of a statement made by defendant to the sheriff which is entirely consistent with defendant's contention that she did not administer poison to her husband is not a confession of guilt and is insufficient evidence to overrule defendant's motion to nonsuit. *S. v. Hendrick*, 447.

§ 34e. Silence as Implied Admission of Guilt.

In order for defendant's silence in the face of an accusation of guilt to be competent as an implied admission, the record must show what the defendant said or did at the time. *S. v. Hendrick*, 447.

Testimony not objected to tending to show that while suffering from arsenic poisoning, defendant's husband made a statement late at night some three hours prior to his death in the presence of his wife to the effect that she was the cause of his suffering, and that his wife made no reply but turned around and went downstairs, while a circumstance to be considered by the jury for what it is worth, *it is held* doubtful whether the attending circumstances called for a denial, and *held further*, its weight as an implied admission that she administered poison to him is rendered attenuate by the fact that at the time of the accusation there had been no suggestion that the husband was suffering from poisoning. *Ibid.*

§ 35. Hearsay Evidence.

Testimony of prosecutrix that she went to defendant because of newspaper articles stating defendant had performed abortions *held* incompetent as hearsay. *S. v. Gavin*, 323.

CRIMINAL LAW—*Continued.*

§ 42e. Evidence Competent to Impeach Witness.

Defendant is not entitled to attack the credibility of a witness for the prosecution by showing specific acts of misconduct by her. *S. v. Bowman*, 374.

Defendant may show by competent evidence that a witness for the State is an imbecile or moron for the purpose of challenging the credibility of such witness. *S. v. Armstrong*, 727.

§ 42f. Rule That Party is Bound by Statement of His Own Witness.

Where the State introduces testimony of a statement of the defendant to the sheriff, it thereby presents it as worthy of belief, and defendant is entitled to the benefit of any exculpatory statements contained therein, although the State is at liberty to show that the facts were otherwise. *S. v. Hendrick*, 447.

§ 48c. Evidence Competent for Restricted Purpose.

Where testimony incompetent as to one defendant is admitted without objection and without request that its admission be limited, an exception thereto will not be sustained. *S. v. Summerlin*, 333.

§ 48d. Withdrawal of Evidence.

The court's action in striking incompetent evidence and instructing the jury not to consider it cannot be held to have rendered its admission harmless when the court thereafter by its own question elicits the same incompetent testimony from the witness and refers to such testimony in its charge. *S. v. Gavin*, 323.

The court has the power to withdraw incompetent testimony theretofore admitted when no prejudice results to defendant. *S. v. Summerlin*, 333.

§ 50f. Argument and Conduct of Solicitor.

During his argument to the jury, the action of the solicitor in throwing defendant's gun to the floor several times to demonstrate that it would not fire accidentally, even if amounting to the introduction of experimental evidence upon dissimilar conditions, *held* an incident of the trial to be dealt with by the trial court in its sound discretion, and an exception thereto cannot be sustained when no abuse of discretion appears of record. *S. v. Holbrook*, 503.

§ 52a (1). Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit the evidence must be taken in the light most favorable to the State. *S. v. Fulk*, 118; *S. v. Hendrick*, 447.

§ 52a (2). Sufficiency of Evidence to Overrule Nonsuit in General.

Where the evidence for the prosecution is sufficient to make out a case, nonsuit on the ground that the defendant's evidence tends to establish a defense is properly denied. G.S. 15-173. *S. v. Werst*, 330.

Nonsuit may not be granted on the ground that the testimony of the State's witnesses was incredible and unworthy of belief, the credibility of the witnesses being for the jury and not the court. *S. v. Bowman*, 374.

§ 52a (3). Sufficiency of Circumstantial Evidence to Overrule Nonsuit.

In order for circumstantial evidence to be sufficient to sustain conviction of a felony the circumstances 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. *S. v. Fulk*, 118; *S. v. Hendrick*, 447.

CRIMINAL LAW—*Continued.*

Circumstantial evidence *held* sufficient to be submitted to jury on charge of conspiracy. *S. v. Cottle*, 567.

§ 53b. Charge on Presumptions and Burden of Proof.

While reasonable doubt may arise from lack of evidence or want of it or its deficiency, as well as "out of the evidence," the court's instruction on this point *is held* not prejudicial upon the facts and circumstances of this case. *S. v. Holbrook*, 503.

The failure of the court to repeat the *quantum* of proof resting upon the State each time a finding is to be made from the evidence will not be held for error when the *quantum* of proof is repeatedly and correctly stated and the jury could not have been misled. *Ibid.*

§ 53d. Statement of Evidence and Application of Law Thereto.

It is insufficient for the court to merely state the contentions of a party without declaring and explaining the law applicable to his version of the occurrence as supported by his evidence. *S. v. Herbin*, 318.

Charge *held* for error in failing to state law on substantive feature case raised by evidence. *S. v. Elliott*, 377.

The court is required to charge the jury as to the law upon all substantial features of the case arising upon the evidence, and this without special request. *S. v. Ardrey*, 721.

§ 53f. Expression of Opinion by Court on Weight or Credibility of Evidence.

Charge that jury should consider interest of defendant's witnesses in passing upon credibility *held* error as expression of opinion when there was no evidence of record that defendant's witnesses were interested. *S. v. Dooley*, 311.

A charge to the effect that certain evidence was offered solely as bearing upon the credibility of a witness "if in fact it does corroborate him" will not be held as an expression of opinion that the evidence did corroborate the witness when later in the charge the court specifically instructs the jury that it should be the sole judge of whether the testimony did in fact corroborate the witness. *S. v. Summerlin*, 333.

The charge of the court, construed as a whole, *held* not objectionable as giving undue prominence to the contentions of the State. *S. v. Bowman*, 374.

§ 53g. Instructions on Less Degree of Crime.

Even when conviction of less degree of the crime is permissible under the bill of indictment, the court is required to submit the question of defendant's guilt of such less degree only if there is evidence to support the milder verdict. *S. v. Lamm*, 402.

The court's charge as to the permissible verdict which the jury could return *held* in accord with G.S. 15-170, relating to conviction of less degrees of the same crime. *S. v. Lambe*, 570.

Charge *held* for error in failing to submit question of defendant's guilt of less degrees of the crime charged dependent upon the variant facts as the jury might find them to be upon the evidence. *S. v. Ardrey*, 721.

§ 53i. Charge on Credibility of Defendant as Witness in Own Behalf.

An instruction to the effect that the State's evidence of defendant's bad character should not be considered as substantive evidence but only as bearing

upon the credibility of defendant as a witness in his own behalf, *is held* without prejudicial error. *S. v. Worrell*, 493.

An instruction to the effect that testimony of defendant should be taken with some allowance but that the law does not reject or impeach his testimony, with further instruction that if the jury should believe defendant has sworn to the truth and find him worthy of belief, it should give his testimony as full credit as that of any other witness notwithstanding his interest, *is held* wihout prejudicial error. *Ibid.*

§ 53j. Charge on Credibility of Witnesses in General.

Charge that jury should consider interest of defendant's witnesses in passing upon the credibility *held* error as expression of opinion when there was no evidence in record that any of defendant's witnesses were interested. *S. v. Dooley*, 311.

An instruction that the law regards with suspicion the testimony of accomplices and other interested parties, will not be held for error when the court follows such instruction with a full and accurate instruction as to the credibility of such testimony. *S. v. Summerlin*, 333.

§ 53k. Statement of Contentions.

In this prosecution for drunken driving the State contended that defendant's repeated denials that he was driving, made immediately after he left the car, raised an implication of guilt. *Held:* A charge that defendant contended that such statements purportedly made by him were unworthy of belief, in stating his contention that his denial should not be interpreted to imply guilt, must be held for prejudicial error. *S. v. Dooley*, 311.

Charge amounting to expression of opinion on credibility of witness must be held for prejudicial error even though contained in statement of contentions. *Ibid.*

§ 53l. Requests for Instructions.

While the trial court is bound to give a special instruction duly requested when it is correct in itself and supported by evidence, the court is not required to adopt the precise language of the prayer but it is sufficient if the court gives the requested instruction in substance either in response to the prayer or in other portions of the charge. *S. v. Pennell*, 573.

§ 57d. Writ of Error Coram Nobis.

The writ of error *coram nobis* obtains in this State only by virtue of the common law and is attended with its common law limitations. *S. v. Daniels*, 196.

The writ of error *coram nobis* is not a substitute for appeal and will lie only for matters extraneous to the record. *Ibid.*

§ 60b. Conformity of Sentence and Judgment to Verdict or Plea.

A plea of *nolo contendere* has the same effect as a plea of guilty and supports the imposition of judgment, and defendant may not complain of such judgment on the ground that the plea was entered in order that the judge should hear the evidence, find the facts, and render such verdict as the testimony indicated. *S. v. Jamieson*, 731.

CRIMINAL LAW—*Continued.*

§ 62a. Severity of Sentence.

A punishment which is within the limits authorized by statute cannot be held cruel or unusual in the constitutional sense. *S. v. Welch*, 77.

§ 62f. Suspended Judgments and Executions.

Upon defendant's conviction of willful failure to support his illegitimate child, the trial court has plenary power to suspend execution on condition that defendant pay specified sums of money into court for support of his child. G.S. 49-7, G.S. 49-8. *S. v. Bowser*, 414.

A valid suspension of execution remains effective until revoked and the enforcement of sentence by commitment is ordered by the judge of the Superior Court for breach of condition duly established by pertinent testimony in an appropriate proceeding in open court, and neither the clerk nor his deputy has the power to ignore the valid order of suspension. *Ibid.*

Where defendant appeals notwithstanding the suspension of execution of the judgment, neither the clerk nor his deputy has authority to issue a *mittimus* upon receipt of certificate of opinion of the Supreme Court affirming the judgment. Manifestly G.S. 15-186 does not apply where there has been a valid suspension of execution. *Ibid.*

Where upon conviction of abandonment, prayer for judgment is continued upon condition that defendant pay costs and "a sum equal to the amount he receives from the Veterans Administration pursuant to the G.I. Bill of Rights on account of his dependents," the failure of defendant to make further payments after his receipt of benefits from the Veterans Administration has terminated cannot be held a violation of the conditions of the suspension of judgment and cannot justify order of execution. *S. v. Robinson*, 418.

No appeal lies from an order that a suspended judgment be executed upon findings that defendant had violated one of the conditions of suspension. *S. v. Maples*, 732.

§ 67a. Appellate Jurisdiction.

Where the Superior Court has no jurisdiction of an attempted appeal from the Recorder's Court, the Supreme Court can acquire no jurisdiction by further appeal. *S. v. Maples*, 732.

§ 67c. Matters Reviewable on Appeal.

Where defendant appellant merely requests that the judgment against him be modified solely on the ground that it was harsh, unreasonable, and excessive, the appeal presents no legal question for decision and will be dismissed. *S. v. Hicks*, 520.

§ 75. Filing Record and Docketing Appeal.

Transcript of record on appeal is required to be filed fourteen days before the call of the district to which the case belongs. Rule of Practice in the Supreme Court, No. 5. *S. v. Scriven*, 198.

§ 78e (1). Exceptions to Charge.

Where the evidence upon which the charge is based does not appear of record, excerpts from the charge cannot be held for prejudicial or reversible error unless inherently and patently so. *S. v. Ray*, 496.

CRIMINAL LAW—*Continued.*

Where the charge as a whole is not contained in the record it will be presumed that the trial court correctly charged the jury, and an exception to an excerpt from the charge will not be sustained, even though it contained an apparent *lapsus linguæ* which might have been harmful if not corrected in other portions of the charge. *S. v. White*, 385.

In regard to the trial court's instructions as to applicable law and as to the contentions of the parties with respect to such law, a party is not required to except at the trial but may set out exceptions for the first time in his case on appeal. *S. v. Lambe*, 570.

An exception to the charge must point out some specific part thereof as erroneous, and an exception to a portion of the charge embracing a number of propositions is insufficient if any of the propositions are correct. *Ibid.*

§ 78e (2). Necessity for Calling Court's Attention to Misstatement of Contentions or Evidence.

A misstatement of the contentions must be brought to the trial court's attention in apt time in order for an exception thereto to be considered on appeal. *S. v. Shackleford*, 299.

Misstatements of the evidence or the contentions of the parties arising on the evidence must be called to the trial court's attention in time to afford opportunity for correction, and in event the request for correction is refused, appellant must note an immediate exception to such ruling in order to present the matter for review on appeal. *S. v. Lambe*, 570.

§ 79. Briefs.

Assignments of error not set out in appellant's brief and in support of which no reason or argument is stated or authority cited are deemed abandoned. Rule of Practice in the Supreme Court, No. 28. *S. v. Shackleford*, 299; *S. v. Wiggins*, 619.

§ 80b (4). Dismissal of Appeal for Failure to Prosecute Same.

Where appellant does not docket the appeal or file transcript of the record on appeal within the time allowed, and fails to comply with mandatory rules of practice in the Supreme Court (Rules 5, 22, 21, 19 (3)) motion of the Attorney-General to docket and dismiss will be allowed, but in a capital case this will be done only after a careful examination of the whole record fails to disclose error. *S. v. Scriven*, 198.

Where the case on appeal contains no exceptions or assignments of error, motion to dismiss for failure to comply with Rules of Practice in the Supreme Court will be allowed, but where defendant has been convicted of a capital felony this will be done only after examination of the record fails to disclose error. *S. v. Liles*, 622.

§ 81c (2). Harmless and Prejudicial Error in Instructions.

An exception to the charge will not be sustained when the charge, read contextually, could not have misled the jury. *S. v. Shackleford*, 299; *S. v. Werst*, 330; *S. v. Summerlin*, 333; *S. v. Worrell*, 493.

An inadvertence in the charge cannot be held for reversible error on defendant's appeal when such inadvertence is favorable to defendant. *S. v. Holbrook*, 503.

Where an instruction is in error in defining an essential element of the crime charged, a new trial must be awarded regardless of speculation as to whether

CRIMINAL LAW—*Continued.*

the instruction as given was favorable or harmful to defendant. *S. v. McDay*, 388.

§ 81c (3). Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Any error in the exclusion of testimony is rendered harmless when the witness is later permitted to give the testimony. *S. v. Werst*, 330.

The admission of evidence over objection cannot be held prejudicial when evidence of similar import is admitted without objection. *S. v. Summerlin*, 333.

Error in permitting a witness to testify that statements made to the witness by defendant were to the same effect as the testimony theretofore adduced, is rendered harmless when the witness thereafter testifies in detail as to what the witness had told him. *Ibid.*

Where no relative of the appealing defendant testified at the trial, such defendant cannot be prejudiced by the court's instruction as to credibility to be given the testimony of relatives. *Ibid.*

§ 81c (4). Harmless and Prejudicial Error—Error Relating to One of Several Counts.

Where judgment is pronounced upon a general verdict of guilty on an indictment containing several counts, defendant's exception to the refusal of his motion to nonsuit cannot be sustained if there is sufficient evidence to support any one of the counts in the bill. *S. v. Best*, 575.

§ 85c. Proceedings in Lower Court After Affirmance.

Where defendant appeals notwithstanding the suspension of execution of the judgment, neither the clerk nor his deputy has authority to issue a *mittimus* upon receipt of certificate of opinion of the Supreme Court affirming the judgment. Manifestly G.S. 15-186 does not apply where there has been a valid suspension of execution. *S. v. Bowser*, 414.

DAMAGES.

§ 13a. Instructions on Issue of Damages.

An instruction on the issue of damages will not be held for error in using the terms "cash value" and "market value" as interchangeable terms, and the court is not required to explain the meaning of the rule without a special request. *Crouse v. Vernon*, 24.

DEDICATION.

§ 5. Titles and Rights Acquired.

Where the owner of lands subdivides and sells same by block and lot number with reference to a plat showing streets therein, a purchaser of lots acquires only an easement in the streets notwithstanding that he may purchase all the lots on both sides of a particular street and notwithstanding that a deed in *mesne* conveyances from the original owner purports to convey the fee to the center of one of the streets. *Russell v. Coggin*, 674.

§ 6. Revocation of Dedication.

Where individual owners of lands subdivide and sell same by block and lot number with reference to a plat showing streets therein, they retain the fee in the streets subject to the easement thus dedicated to the public in general and

to the private owners of adjacent lots in particular, and are the only parties entitled to withdraw the streets from dedication when the streets have not been used for twenty years subsequent to such dedication and are not necessary for ingress and egress to any of the lots sold. *Russell v. Coggin*, 674.

The only instance in which owners of adjacent lots may be deemed to have anything more than an easement in abandoned streets sought to be withdrawn from dedication is when such streets were dedicated by a corporation which has become nonexistent. G.S. 136-96. *Ibid.*

DEEDS.

§ 11. General Rules of Construction of Deeds.

In the interpretation of a deed, the intention of the grantor must be gathered from the four corners of the instrument and every part thereof given effect, unless it contains conflicting provisions which are irreconcilable, or a provision which is contrary to public policy or runs counter to some rule of law. *Dull v. Dull*, 482.

The granting clause in a deed ordinarily controls whenever it is repugnant to the proceeding or succeeding recitals. *Ibid.*

Ordinarily the premises and granting clauses designate the grantee and the thing granted, while the *habendum* relates solely to the *quantum* of the estate, and the granting clause is the very essence of the contract and controls when in conflict with the *habendum*. *Johnson v. Barham*, 508.

§ 13a. Estates and Interests Created by Construction of Instrument.

A conveyance to a man and his wife by name for life or during the widowhood of the named wife, then to their bodily heirs equally "including the two illegitimate children as above named" in the premises, *is held* to convey the estate to the husband and the wife named and the children of that marriage, to the exclusion of a subsequent wife and children of the second marriage of the husband. *Dull v. Dull*, 482.

A deed was executed by a tenant by the curtesy and one heir and her spouse. Following the granting clause and the description, the deed stated that the heir and her husband were conveying a one-third undivided interest "in the above described tract" followed by another paragraph in which it stated the widower conveyed his curtesy "in the above described tract." *Held:* The granting clause, *habendum*, and warranty all relating to a conveyance in fee simple, the tenant by the curtesy conveyed his interest in the entire tract described and not his curtesy in a one-third undivided interest therein, and *held further* the only interlocking relationship in the paragraph is in the description of the land, and therefore there is no latent ambiguity arising from the two paragraphs immediately following the description so as to permit the introduction of evidence *aliunde*. *Johnson v. Barham*, 508.

§ 16b. Restrictive Covenants and Conditions.

Where the owner of lands subdivides same and sells separate parcels with restrictions pursuant to a general plan of development, each grantee and also each owner of a lot by *mesne* conveyances from such grantee, may enforce the restrictions against any other owner who took title with notice of the restrictions. *Sedberry v. Parsons*, 707.

A purchaser of land is chargeable with notice of restrictive covenants if such covenants are contained in any recorded deed or other instrument in his

DEEDS—*Continued.*

line of title, even though it does not appear in his immediate deed, since he is charged with notice of every fact affecting his title which an examination of his record chain of title would disclose. *Ibid.*

The primary test of the existence of a general plan for the development or improvement of a tract of land divided into a number of lots is whether substantially common restrictions apply to all lots of like character or similarly situated. *Ibid.*

Where a block comprising twenty-one lots is developed as a single subdivision and all the deeds to lots therein contain general restrictive covenants, but the deeds to only eleven of them contain provision against subdivision of any lot so as to result in a plot having less than one-half an acre, *held*, there is no substantial uniformity in the restrictions as to the size of the lots in the block, and the owner of a lot by *mesne* conveyances from the original purchaser, whose deed alone contained the restriction as to size, may sell same free of such restrictions. *Ibid.*

The fact that lots in a block developed as a single subdivision are sold with reference to a map showing each lot to be at least one-half an acre in size cannot create a covenant by implication that the lots should not be changed in size. *Ibid.*

§ 16c. Agreements to Support Grantor.

Agreement by the grantee to support the grantors for the rest of their lives is a valuable consideration for the transfer of the property by grantors. *Minor v. Minor*, 669.

A provision in a deed that grantee should support grantors for the remainder of the grantors' lives may be a condition precedent to the vesting of title, a condition subsequent, or a covenant, depending upon the wording of the agreement in the instrument. *Ibid.*

A covenant by grantee to support grantors for the balance of their lives may impose a mere personal obligation on the grantee, or may make the obligation a charge or lien on the rents and profits from the land conveyed, or may make such obligation a lien on the land itself, depending on the wording of the agreement. *Ibid.*

An agreement in a deed that the grantee support grantors for the remainder of their lives will be construed as a mere covenant rather than a condition if the langauge will reasonably admit of such interpretation since the law does not favor conditions precedent or subsequent. *Ibid.*

It was judicially admitted by the parties that the male defendant agreed to support plaintiffs for the rest of their lives as consideration for a deed executed by plaintiffs to defendants, and that this agreement was omitted from the instrument through the mutual mistake of the parties. *Held:* There being no understanding that the promise was to operate as a condition precedent and all indicia of a condition subsequent being lacking, the agreement is construed as a covenant making the obligation a charge or lien on the land. *Ibid.*

Where the grantee breaches a covenant to support grantors which obligation constitutes a charge or lien on the land, grantors are not entitled to a cancellation of the instrument for condition broken but are remitted to an action for damages to be measured by the value of the promised support lost by grantors. *Ibid.*

Grantor is not entitled to cancellation of a deed for breach of covenant constituting the consideration therefor that grantee support and maintain grantor for the remainder of grantor's life. *Cherry v. Walker*, 725.

DESCENT AND DISTRIBUTION.

§ 1. Nature of Right to Inherit in General.

While the General Assembly has power to make or change statutes of descent and distribution, and ordinarily the law in effect at the time the person dies intestate governs the descent and distribution of his property, such statutes are subject to general rules of statutory construction and, when necessary, should be construed in connection with other statutes relating to the same subject matter. *Wilson v. Anderson*, 212.

A child possesses no interest whatever in the property of his parent during the lifetime of the latter, and therefore has no ground to attack any conveyance made by the parent for want of consideration or as being in deprivation of his right of inheritance, since the right to inherit arises only on the parent's death and entitles the child to take as heir or distributee only the property owned by the parent at death which the parent does not dispose of by testamentary provision. *Holt v. Holt*, 497.

§ 6. Right of Adopted Children to Inherit.

Ordinarily an adopted child cannot inherit from relatives of the parent by adoption in the absence of express statutory provision. *Wilson v. Anderson*, 212.

G.S. 21-1 (14) and G.S. 128-149 (10) have prospective effect only, and therefore a child adopted in 1919 under the law prescribing that such child should be entitled to inherit only from the adopting parent, is not entitled to inherit either realty or personalty from the brother of her deceased father by adoption, even though the brother dies subsequent to the effective date of the 1947 amendments to the statutes of descent and distribution. *Ibid.*

The right of an adopted child to inherit vests as of the death of her adoptive parent, and therefore where the parent dies prior to the effective date of the Act of 1947 creating a new rule of descent and distribution, the Act is not applicable. G.S. 29-1 (14), G.S. 28-149 (10). *Wilson v. Anderson*, 521.

§ 12. Title and Rights of Heirs and Distributees.

The law presumes that every decedent leaves heirs or next of kin capable of inheriting his property, and where this presumption has not been rebutted in an action, the rights of the heirs may not be precluded therein unless they are brought in and made parties in some way sanctioned by law. *Pack v. Newman*, 397.

The fact that a suit by the University against an administrator to declare an escheat, in which the unknown heirs at law are served by publication, is consolidated for judgment with an independent action by a claimant against the estate *held* not to constitute the heirs at law parties to the claimant's action, and a consent judgment entered in claimant's favor is not binding upon the heirs, since in respect to claimant's action they were not brought into court in any way sanctioned by law. *Ibid.*

An administrator has no inherent interest in, title to, or control over the realty of his intestate, and therefore has no authority to enter a consent judgment adjudicating that a claimant against the estate is the owner of the fee of the lands of the estate. *Ibid.*

A suit by the University against an administrator to declare an escheat, in which the heirs at law were served by publication, was consolidated for judgment with a suit brought by a claimant against the estate for a monetary judgment, and a consent judgment was entered therein that claimant was the

DESCENT AND DISTRIBUTION—*Continued.*

owner in fee of all the real estate left by deceased and that the University was entitled to all the other property by escheat. *Held:* Even conceding that the heirs at law were parties to the action, they are not bound by the consent judgment, since they were not parties to the agreement between the University, the claimant, and the administrator, entered upon the records of the court with its approval. *Ibid.*

DIVORCE AND ALIMONY.

§ 4. Jurisdiction and Conditions Precedent.

That plaintiff in an action for divorce on the ground of two years separation should have lived separate and apart from his spouse for two years and should have resided in the State of North Carolina for a period of one year prior to the commencement of the action are jurisdictional requirements, and a decree on this ground is void if either of these requirements is lacking. *Henderson v. Henderson*, 1.

§ 5d. Pleadings in Actions for Alimony Without Divorce.

In an action for alimony without divorce, G.S. 50-16, on the ground of mistreatment constituting constructive abandonment, the absence of an allegation that defendant's misconduct was without adequate provocation, is fatal, and judgment in plaintiff's favor will be set aside on appeal, and the cause remanded for dismissal unless plaintiff moves in apt time to amend. *Barker v. Barker*, 495.

Allegations in an action for alimony without divorce to the effect that defendant constantly mistreated plaintiff and offered such indignities to her person as to endanger her health and safety, and forced her to separate herself from defendant, that defendant drank excessively and failed to provide for her support, and that plaintiff had at all times been a dutiful wife to the defendant, *is held* sufficient to state a cause of action for alimony without divorce, and defendant's demurrer thereto was properly overruled. G.S. 50-16. *Bateman v. Bateman*, 659.

In an action for alimony without divorce plaintiff must allege and prove with particularity not only the acts constituting grounds for divorce from bed and board relied on, but also that such acts were without adequate provocation on her part. *Ibid.*

§ 10. Verdict and Judgment in Action for Alimony Without Divorce.

A verdict establishing that defendant did not separate himself from his wife and fail to provide her with necessary subsistence according to his condition and means in life and did not wrongfully abandon plaintiff *is held* to preclude plaintiff's right to alimony without divorce notwithstanding the jury's finding on a subsequent issue that defendant offered such indignities to her person as to render her condition intolerable and life burdensome, since the verdict establishes that plainitff was not free from fault and therefore that the acts complained of were not without legal provocation. *Bateman v. Bateman*, 659.

§ 12. Alimony Pendente Lite and Attorneys' Fees.

A proper order for reasonable subsistence and counsel fees *pendente lite* may be enforced against a nonresident or absconding husband by attachment against his property without notice, and in such case the court may also appoint a receiver to collect the income from the husband's property. *Perkins v. Perkins*, 91.

DIVORCE AND ALIMONY—*Continued.*

The right to subsistence pending trial in a wife's action under G.S. 50-16, does not exist in favor of a wife who has abandoned her husband without just cause. *Ibid.*

Motion for alimony *pendente lite* in the wife's action for divorce from bed and board is properly denied upon the court's findings supported by evidence negativing each of the allegations in plaintiff's complaint upon which her action is based and upon which the motion for alimony *pendente lite* is made. *Cameron v. Cameron*, 686.

The amount to be allowed as counsel fees to plaintiff's attorneys in her action for divorce *a mensa et thoro* is within the sound discretion of the trial judge, but such award does not preclude plaintiff from thereafter seeking an increased award upon a showing of additional facts. *Ibid.*

The trial court denied plaintiff's motion for alimony *pendente lite* in her action for divorce *a mensa et thoro* upon supporting findings, but declined to find that she had been guilty of adultery. *Held:* The denial of alimony *pendente lite* in her suit for divorce *a mensa* does not preclude her, in the husband's cross-action for divorce *a vinculo* on the ground of adultery, from moving under the common law for subsistence pending the action, when the husband is a man of wealth and she is without means to defray the necessary and proper expenses of presenting her defense that she had not committed adultery and she has expressed her desire to contest the issue. *Ibid.*

When the trial court's determination of a motion for alimony *pendente lite* is predicated upon proper findings supported by competent evidence, the order will not be disturbed because of the general admission of evidence competent for a restricted purpose, or the admission of incompetent evidence, since it will be presumed that the judge in making the findings considered only that testimony properly tending to prove the facts to be found. *Ibid.*

§ 17. Jurisdiction and Procedure to Require Support of Minor Children.

G.S. 49-12 and G.S. 50-13 must be construed *in pari materia*, and therefore where the reputed father of a child marries the child's mother after its birth, such child is deemed legitimate just as if it had been born in lawful wedlock, G.S. 49-12, and such child is a minor child of the marriage within the purview of G.S. 50-13, and the father may be required to furnish support for such child upon motion made either before or after decree of divorce. *Carter v. Carter*, 614.

Whether a child is a "minor child of the marriage" within the purview of G.S. 50-13 may be a question of fact rather than an issue of fact, but even so, the trial court may call a jury to its aid to hear the evidence and determine the question. *Ibid.*

§ 19. Awarding Custody of Children.

The court's order awarding the custody of the children to their father, with provision that their mother should see them at reasonable times, will be upheld where the evidence supports the court's findings that the father is a fit, proper, and suitable person to have their custody and that their mother is not a fit and suitable person, and that the best interests of the children would be served by such award of their custody. *Cameron v. Cameron*, 686.

§ 22. Validity and Attack of Domestic Decrees.

It appeared from the findings of the court that plaintiff obtained decree of divorce by fraud upon the jurisdiction of the court, that thereafter plaintiff

DIVORCE AND ALIMONY—*Continued.*

continued to live with defendant as husband and wife and concealed from defendant information as to the divorce decree for over five years, and that defendant moved to set aside the decree within two years after knowledge that it had been rendered. *Held:* Defendant's right to move in the cause to set aside the divorce decree on the ground of fraud perpetrated upon the jurisdiction of the court is not barred by laches. *Henderson v. Henderson*, 1.

DRAINAGE DISTRICTS AND CORPORATIONS.

§ 6. Levy of Assessments.

In a proceeding by drainage corporations to have lands of respondents assessed for improvements upon allegations that respondents are not members of the corporation but that nevertheless their lands drain into the canals and would be materially benefited by the improvements, *held:* Respondents' contention that the sole remedy of petitioners is under the provisions of G.S. 156-51 to construct dams to prevent water draining from respondents' lands into the canals is untenable, since the provisions of the statute are inapplicable to such proceeding, the statute being applicable solely as a remedy where incorporators fail and refuse to pay assessments duly levied. *Canal Co. v. Keys*, 664.

In this proceeding by drainage corporations to levy assessments against the lands of respondents for the proportionate part of the expense of making necessary improvements upon allegations that such lands drained into the corporations' canals and would be greatly benefited by the improvements, it appeared that respondents' predecessor in title cut a large canal through his lands draining into the lands of the corporation. *Held:* It will be presumed that respondents' predecessor in title acquired the right to cut into the canal of plaintiff pursuant to G.S. 156-10, and the petition should be considered as a motion in that cause for the proper adjudication of the rights of the parties. *Ibid.*

EASEMENTS.

§ 5. Extent of Right.

An easement for a railroad right of way is solely for the purposes of the railroad as a common carrier, and the owner of the fee may recover that part of the right of way leased by the railroad to a private business for nonrailroad purposes. *Sparrow v. Tobacco Co.*, 589.

EJECTMENT.

§ 5½. Summary Ejectment—Right to Dismissal Upon Tender of Rent.

Where, in an action in ejectment against a tenant for nonpayment of rent, the answer denies default and pleads tender of the rent under G.S. 42-33, judgment on the pleadings in plaintiff's favor is properly denied, and the term not having expired, the tender of rent in arrears before judgment would bar the cause. *Hoover v. Crotts*, 617.

§ 10. Nature and Essentials of Actions in Ejectment.

Action *held* one to establish parol trust and for accounting by defendant as mortgagee in possession, and not strictly action in ejectment. *Bryant v. Strickland*, 389.

EJECTMENT—*Continued.*

§ 13. Complaint.

Allegations to the effect that plaintiff is the owner of certain land described by reference to a deed, and that defendant is in the wrongful possession thereof and refuses to surrender same, is sufficient to overrule demurrer. *Cherry v. Walker*, 725.

§ 14. Answer and Bond.

Since action was not one strictly in ejectment, but to establish parol trust and for accounting, defense bond was not required. *Bryant v. Strickland*, 389.

ELECTIONS.

§ 1. Right to Call Election or Submit Question to a Vote.

Where a city has no authority to inaugurate its own retirement system for its employees, there is no authority for the submission of such question to its voters, and a majority vote in favor of such municipal system amounts to no more than an expression of popular opinion on a subject not legally presented. *Laughinghouse v. New Bern*, 596.

Mandamus to compel the county board of elections to review the sufficiency of a petition for an election on the question of establishing liquor control stores in the county, *held* properly denied upon the facts found without exception. *Hancock v. Bulla*, 620.

The requirement that a petition for an election on the question of prohibiting the sale of beer and wine in a county shall be signed by 15% of the registered voters of the county who voted for Governor in the last general election, *is held* to refer to the total number of votes cast for Governor in such election and does not require that each signer of the petition should have personally voted for a gubernatorial candidate in such election. G.S. 18-124 (b). *Weaver v. Morgan*, 642.

§ 9. Time of Holding Election.

An election to fill the vacancy in the office of Associate Justice of the Supreme Court of North Carolina must be held at the next regular election for members of the General Assembly. Art. IV, Sec. 25, of the Constitution of North Carolina. *In re Advisory Opinion*, 737.

ELECTRICITY.

§ 8. Regulation of Amount of Current and Fires.

Mere allegation that defendant electric company permitted current to pass through its wires in such volume as to set fire to plaintiff's property is insufficient to allege negligence on the part of the power company in this respect, since an electric company necessarily permits current to flow through its wires in sufficient volume to cause fires under some conditions. *Fleming v. Light Co.*, 457.

Where the case is tried upon the allegations and evidence on the theory that defendant power company was negligent in failing to cut off the electricity after notice of dangerous conditions at the *locus*, and there is no allegation that the fire resulted from an excessive or unusual flow of electric current under defendant's control through the wires into plaintiff's property, the trial court's submission of the case to the jury upon the theory of negligence alleged

ELECTRICITY—*Continued.*

in the complaint, without the submission of the question of defendant's liability under the doctrine of *res ipsa loquitur*, will not be held for error. *Ibid.*

EMINENT DOMAIN.

§ 26. Nature and Extent of Title or Rights Acquired.

A railroad company's power to condemn a right of way is for the benefit of the general public, and the easement thus acquired is limited to use for any purpose in furtherance of or incidental to its business as a common carrier, but its use of the land for nonrailroad purposes is outside the scope of its easement and imposes an additional burden for which the owner of the fee has not been compensated. *Sparrow v. Tobacco Co.*, 589.

The extent and method which its right of way is necessary to be used for railroad purposes rests in the sound discretion of the railroad company, but a declaration by the company that a proposed private use is necessary for railroad purposes does not make it so. *Ibid.*

A railroad company may permit third persons to use its right of way when such use is primarily for the benefit of the railroad company as a common carrier, even though incidental benefits flow to the private user, but it may not lease a part of its right of way to a private business for a nonrailroad use merely because such business is a customer, or potential customer, and such use tends incidentally to enhance the expectation of additional freight business. *Ibid.*

A railroad company leased a part of its right of way to a tobacco company for the purpose of conducting a general tobacco storage and curing business, without contractual obligation on the part of the lessee to ship over the line of the railroad company. The tobacco company used the land to extend its storage facilities in furtherance of its business. Its buildings did not afford shipping facilities, but it trucked its merchandise from its warehouse to the railroad loading platform. *Held:* The use of the leased property was not in furtherance of the railroad's business as a common carrier. *Ibid.*

ESCHEAT.

§ 2. Failure of Heirs.

The law presumes that every decedent leaves heirs at law or next of kin capable of inheriting. *Pack v. Newman*, 397.

ESTATES.

§ 4. Merger of Estates.

A merger of estates occurs when two distinct estates of greater and lesser rank meet in the same person or class of persons at the same time, without any intermediate estate. *Elmore v. Austin*, 13.

There can be no merger of a fee simple determinable with the possibility of reverter. *Ibid.*

§ 9d. Life Estates—Liability for Taxes.

While it is the duty of the life tenant to pay the taxes assessed upon the land, the taxes constitute a lien upon the entire fee, and the interest of the remaindermen as well as that of the life tenant is subject to sale for the satisfaction of the lien. *Eason v. Spence*, 579.

ESTATES—*Continued.*

§ 9f. Life Estates—Forfeiture for Nonpayment of Taxes.

The forfeiture of a life estate for nonpayment of taxes, G.S. 105-410, is not automatic, but the statute contemplates an adjudication of forfeiture by a court of competent jurisdiction in a proceeding in which the alleged delinquent life tenant has notice and an opportunity to be heard in order to satisfy the requirements of due process of law. *Eason v. Spence*, 579.

ESTOPPEL.

§ 6c. Estoppel by Silence.

Mere knowledge and observation by the owner of the unauthorized use of his land by third parties in erecting and maintaining buildings thereon does not estop the owner on the ground of laches from maintaining an action in ejectment. *Sparrow v. Tobacco Co.*, 589.

EVIDENCE.

§ 3. Judicial Knowledge of Judicial and Legislative Acts of Other States.

Our courts will take judicial notice of the laws of another state, and therefore will judicially know the jurisdiction of a court of another State which has rendered a decree involved in the litigation here. G.S. 8-4. *Johnson v. Salsbury*, 432.

§ 7e. Prima Facie Case and Burden of Going Forward with Evidence.

The showing of a *prima facie* case entitles plaintiff to go to the jury and shifts the burden of going forward with the evidence to defendant, but defendant is not bound to rebut the *prima facie* case but merely assumes the risk of an adverse verdict if he fails to do so. *Price v. Whisnant*, 653.

§ 19. Evidence Competent to Impeach or Discredit Witness.

Printed matter is not competent to contradict or impeach the testimony of a witness when there is no evidence indicating that the witness had any connection whatever with such matter. *Lochner v. Sales Service*, 70.

§ 21. Direct Examination.

Court may limit repetition of same question even though competent when testimony in answer is already elicited. *Spivey v. Newman*, 281.

§ 22. Cross-Examination.

The court has discretionary power to limit the cross-examination of a witness for the purpose of impeaching her character in regard to matters irrelevant to the issue and unrelated to her testimony in chief. *Crouse v. Vernon*, 24.

§ 22½. Re-direct Examination.

Where defendant, on cross-examination of plaintiff, has elicited matter irrelevant to the issue, but calculated to impeach plaintiff as morally unfit to be believed as a witness, the court has discretionary power to permit plaintiff on re-direct examination to testify in explanation or repair of the matter elicited on cross-examination, and defendant cannot complain if it also incidentally appeals to the sympathy of the jury. *Crouse v. Vernon*, 24.

The trial court may properly sustain objection to a question asked on redirect examination which is merely repetitious and directed to matter fully

EVIDENCE—*Continued.*

testified to by witness on his direct examination, however proper the matter may have been in the first instance. *Spivey v. Newman*, 281.

§ 30e. Expert Testimony—X-ray Pictures.

Testimony of an expert as to the disclosures of an X-ray picture of plaintiff's head is properly excluded when such picture is not authenticated as being actually an X-ray picture of plaintiff's head. *Spivey v. Newman*, 281.

§ 32. Transactions with Lunatic.

A party interested in the event of the action may not testify as a witness as to a transaction with the adverse party who at the time of trial has been adjudged *non compos mentis*. *Price v. Whisnant*, 653.

§ 36. Private Writings, Accounts, and Records.

Advertisements are improperly admitted in evidence against a party merely upon identification of the newspaper in which published, it being necessary to show that the party against whom they are sought to be admitted authorized or instigated publication. *Lochner v. Sales Service*, 70.

The rule permitting the introduction in evidence of original entries recorded in regular course of business at or near the time of the transactions involved, when authenticated by one who is familiar with them and the method under which they were made, cannot be extended to permit a witness who has no personal knowledge of the transactions to testify in regard thereto from a memorandum or statement of such transactions made up by a bookkeeper under the witness' direction from such original records. *Supply Co. v. Ice Cream Co.*, 684.

§ 46d. Opinion Evidence as to Market Value.

In order to testify as to the value of property before and after the damage in suit, it is not required that the witness should have seen the property immediately before and after the injury, reasonable nearness under the circumstances being sufficient. In the present case, testimony disclosing that the witness saw the house a few days before the fire and its remains two or three days after the fire, *held* to render the witness' testimony of comparative values competent. *Crouse v. Vernon*, 24.

§ 47. Expert Medical Testimony.

Exceptions to the testimony of an expert witness based upon proper hypothetical questions supported by the evidence as to the cause of suffering alleged to have been endured by plaintiff are untenable. *Spivey v. Newman*, 281.

EXECUTION.

§ 23. Application of Proceeds of Execution Sale.

A successor guardian is entitled to the entire proceeds of sale of the lands of the original guardian under a judgment of defalcation to the exclusion of those claiming under a judgment which, although rendered prior to the successor guardian's judgment, has been barred by the discharge of the judgment debtor in bankruptcy. *Trust Co. v. Parker*, 512.

EXECUTORS AND ADMINISTRATORS.

§ 3. Removal and Revocation of Letters, and Appointment of Successors.

The Clerk of the Superior Court has jurisdiction to entertain verified petition for the removal of an administrator. *In re Estate of Johnson*, 59.

Where, in proceedings for removal of an administrator, the administrator resigns, a vacancy occurs and the Clerk has authority to appoint a successor. *Ibid.*

§ 5. Assets of the Estate.

Upon the death of a partner the administration of the partnership and the administration of the deceased partner's estate are separate and distinct, and only the deceased partner's interest in the surplus after the winding up of the partnership belongs to his estate or his distributees, as the case may be. *In re Estate of Johnson*, 59.

§ 8. Title to and Possession of Assets of Estate.

Administrator has no interest in, title to, or control over realty of his intestate, and therefore has no authority to bind heirs to consent judgment adjudicating title to the lands. *Pack v. Newman*, 397.

§ 12b. Sale of Assets Under Power Contained in Will.

Where the will directs lands to be sold and the proceeds divided among named beneficiaries, the unanimous consent of the beneficiaries to reconvert defeats executor's power of sale. *Trust Co. v. Allen*, 274.

§ 15k. Payment of Taxes.

In the absence of testamentary provision to the contrary, the Federal Estate Tax is chargeable to the residuary estate and not against the specific legacies or devisees. *Craig v. Craig*, 729.

§ 24. Family Agreements for Settlement of Estate.

A valid contract compromising a family dispute over the validity of a will and providing for the distribution of the estate in a manner other than that specified in the will, is enforceable in equity under the doctrine of family settlements, and when all persons having any interest in the estate are parties to the contract and are *sui juris*, it is a valid contract enforceable at law. *Hunter v. Trust Co.*, 69.

While the courts look with favor on family settlements, neither the terms of a will nor of a testamentary trust will be modified merely because the beneficiaries dislike its provisions, but such an agreement will be approved only when the right of infants are not prejudiced and when such modification is necessary in order to preserve the trust. *Rice v. Trust Co.*, 222.

Where a caveat has been filed which, if successful, would defeat provisions for the benefit of certain heirs, minors *in esse* and not *in esse*, a family agreement which provides for modification of the trust in certain material aspects but which provides for the preservation of the *corpus* of the trust estate and protects the rights of the infant beneficiaries therein, is properly approved, since under the circumstances the filing of the caveat creates an exigency not contemplated by the testator and the family settlement is, therefore, advantageous to the infant beneficiaries. *Ibid.*

Lease executed by beneficiaries, with minor contingent beneficiaries represented by guardian *ad litem*, and approved by court, *held* supportable as family settlement. *Trust Co. v. Allen*, 274.

FEDERAL RENT CONTROL.

§ 2. Violation and Enforcement.

Federal Housing and Rent Act is penal law. *Williams v. Gibson*, 133.

Municipal-County Court of Greensboro has jurisdiction to recover penalty of $90 under the Act. *Ibid.*

FRAUD.

§ 4. Knowledge and Intent to Deceive.

A positive representation by the seller's agent, acting within the scope of his employment, that the house, the subject of sale then under negotiation, was brick veneer when in fact it was built of "speed brick" which allowed the seepage of water destructive of plaster and paint on the inside, *held* sufficient to support an action for fraud even in the absence of *scienter*, since a person who is in a position to know the truth may be held liable for a misrepresentation made in conscious and reckless ignorance of its truth or falsity when such representation is made to induce the sale and is reasonably relied on by the purchaser. *Atkinson v. Charlotte Builders*, 68.

§ 5. Deception and Reliance on Misrepresentation.

Where sublessees are advised that their term automatically terminates upon termination of the main lease and are kept fully advised as to the negotiations for the renewal of the main lease, they may not maintain a counterclaim against their lessor for fraud based upon representations of their lessor's agents with known limited authority, since knowledge forestalls deception. *Texas Co. v. Stone*, 489.

FRAUDS, STATUTE OF.

§ 5. Promise to Answer for Debt or Default of Another.

A parol promise by the owners to pay materialmen the amount due them by the contractor cannot form the basis of a claim of lien because of the statute of frauds. *Lumber Co. v. Horton*, 419.

HIGHWAYS.

§ 8. Powers and Duties of State Highway Commission in General.

The courts will not interfere with the State Highway and Public Works Commission in the exercise of its sound discretion and informed judgment in the discharge of the governmental functions entrusted to it unless there has been some substantial departure from legislative limitations or directives. *Teer v. Jordan*, 48.

Commission may purchase road building machinery with part of proceeds of secondary road bond issue. *Ibid.*

HOMICIDE.

§ 3. Elements and Essentials of Murder in First Degree in General.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *S. v. Lamm*, 402.

A murder which is perpetrated by means of poison is murder in the first degree. *S. v. Hendrick*, 447.

§ 4c. Premeditation and Deliberation.

Premeditation means thought beforehand for some length of time, however short. *S. v. Lamm*, 402.

HOMICIDE—*Continued.*

Deliberation does not require brooding or reflection for any appreciable length of time, but imports the execution of an intent to kill in a cool state of blood without legal provocation in furtherance of a fixed design. *Ibid.*

§ 8a. Manslaughter—Negligence or Culpability of Defendant.

The evidence tended to show that a dog belonging to deceased and one belonging to defendant were fighting, that after unsuccessful efforts by both of them to part the dogs, defendant procured a shotgun from her house, and fired, as deceased was stooping over the dogs trying to part them, inflicting mortal injury on deceased and injuring four other persons standing nearby. There was no evidence of malice, and defendant contended she fired to stop the dog fight and that deceased's death was the result of an accident. *Held:* The evidence was sufficient to be submitted to the jury on the question of defendant's culpable negligence and sustain verdict of guilty of involuntary manslaughter. *S. v. Wiggins*, 619.

The State's evidence tending to show that defendant intentionally shot deceased, inflicting injury causing his death, while attempting to hold him for officers of the law because he had stolen defendant's shirt, even though defendant did not intend to inflict fatal injury, *is held* sufficient to overrule nonsuit in a homicide prosecution. *S. v. Early*, 717.

Culpable negligence in the law of crimes is more than actionable negligence in the law of torts, and 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 or rights of others. *Ibid.*

Upon defendant's plea of an accidental killing, an instruction to the effect that defendant would be guilty if the shooting resulted from negligence must be held for prejudicial error in making the defense unavailing if defendant were guilty of mere negligence rather than culpable negligence. *Ibid.*

§ 16. Presumptions and Burden of Proof.

The intentional killing of a human being with a deadly weapon implies malice and, if nothing else appears, constitutes murder in the second degree, and the State has the burden of proving beyond a reasonable doubt premeditation and deliberation in order to constitute the offense murder in the first degree. *S. v. Lamm*, 402.

In a prosecution for murder by means of poison, the burden is on the State to prove beyond a reasonable doubt that the deceased died from poison and that defendant administered the poison with criminal intent. *S. v. Hendrick*, 447.

§ 20. Evidence of Motive and Malice.

In order for a marriage certificate to be competent as a circumstance tending to show that defendant killed her husband in order to remarry it must be shown that defendant and the person named in the certificate are the same. *S. v. Hendrick*, 447.

Solicitude of widow immediately after husband's death as to insurance on his life, *held* not competent circumstance under facts of this case. *Ibid.*

§ 21. Evidence Competent on Questions of Premeditation and Deliberation.

All attending circumstances and the conduct of defendant before and after, as well as at the time of the homicide, are competent to be considered by the jury upon the question of premeditation and deliberation. *S. v. Lamm*, 402.

HOMICIDE—*Continued.*

§ 25. Sufficiency of Evidence and Nonsuit in Homicide Prosecutions.

Circumstantial evidence *held* sufficient to sustain conviction of first degree murder. *S. v. Fulk*, 118.

Evidence tending to show that defendant intentionally killed deceased with a deadly weapon in a cool state of blood without legal provocation, *is held* sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree. *S. v. Lamm*, 402.

While evidence of motive is competent to be considered by the jury as a circumstance tending to identify the accused as the perpetrator of the offense, such evidence alone is insufficient to sustain a conviction. *S. v. Hendrick*, 447.

Solicitude of deceased's widow immediately after his death as to insurance on his life of which she was beneficiary *is held* not a circumstance tending to show that she poisoned him under the facts of this case, it appearing that the policies were in a small amount, that the widow selected a casket for her husband, and that her interest in the insurance may have been a natural concern about funeral expenses and in entire harmony with the hypothesis of her innocence. *Ibid.*

Evidence that defendant had an opportunity to commit the offense is a circumstance to be considered by the jury along with other evidence of guilt, but is insufficient standing alone to show that the act was done by defendant. *Ibid.*

Purported confession, which even though true, is entirely consistent with hypothesis of innocence, *held* insufficient to take case to jury. *Ibid.*

§ 27b. Charge on Presumptions and Burden of Proof.

An instruction that the burden of showing want of malice was upon defendant is not erroneous when, construing the charge contextually, the instruction relates solely to the burden resting upon defendant to rebut the presumptions arising when the State has shown beyond a reasonable doubt an intentional killing with a deadly weapon. *S. v. Holbrook*, 503.

An instruction to the effect that defendant must have satisfied the jury from his own testimony or the testimony of his witnesses of the want of malice to rebut the presumption arising from a showing of an intentional killing with a deadly weapon, will not be held for reversible error as excluding from the jury's consideration on the point any exculpatory testimony given by or elicited from the State's witnesses when the *lapsus linguæ* is corrected in other portions of the charge. *Ibid.*

The singular omission of the word "intentional" in the charge upon presumptions arising from an intentional killing with a deadly weapon, will not be held for prejudicial error when in other portions of the charge the court has repeatedly instructed the jury that the shooting had to be intentional in order for the presumptions to obtain. *Ibid.*

§ 27f. Instructions on Right of Self-Defense.

Defendant's evidence was to the effect that there was a disturbance in his place of business, during which a shot was fired, and that he approached the scene of the disturbance armed with a pistol to restore order. *Held:* A correct abstract instruction as to the law of self-defense, followed by an instruction that if defendant pointed his pistol at deceased, he would have made the first assault and would have had to withdraw from the difficulty with notice to his adversary before he could kill in self-defense, must be held for error

HOMICIDE—*Continued.*

in failing to apply the law to defendant's evidence and in making the right of self-defense upon the evidence to depend solely upon whether defendant first pointed his pistol at deceased. *S. v. Herbin*, 318.

An erroneous charge on the right of self-defense by a person when on his own premises cannot be held prejudicial when the error in the instruction is favorable to defendant in stating too broadly the right to use force to repel an assault, especially where the evidence discloses that defendant had followed his adversary off the premises and shot him some distance away. *S. v. Holbrook*, 503.

Defendant requested special instruction as to his right to use a deadly weapon, such as a rifle, to repel an assault made upon him in his own home by a larger, younger, and stronger man, even though his assailant was unarmed, if it reasonably appeared to him necessary to save himself from death or great bodily harm. An instruction to the effect that defendant's right of self-defense did not depend upon whether his assailant was armed and that defendant would be legally entitled to stand his ground and repel force with force and to increase his force so as not only to resist but also to overcome the assault, *is held* in substantial compliance with the prayer, and the charge is not subject to criticism for the failure of the court to specifically state that defendant had a right to use a rifle in his self-defense. *S. v. Pennell*, 573.

§ 27h. Form and Sufficiency of Instructions on Less Degree of Crime.

Where the evidence tends to show that defendant intentionally killed deceased with a deadly weapon without just cause or legal provocation, and there is no evidence in mitigation, the court is not required to submit to the jury the question of defendant's guilt of manslaughter. *S. v. Lamm*, 402.

HOSPITALS.

§ 3. Liability to Patients—Agents and Employees Within Doctrine of Respondeat Superior.

In this action against two physicians and a hospital for malpractice, nonsuit as to the hospital *held* properly entered on authority of *Smith v. Duke University*, 319 N.C. 628. *Wilson v. Hospital*, 362.

HUSBAND AND WIFE.

§ 13a. Business and Contracts with Third Persons.

Where husband and wife purchase an automobile, each paying a part of the purchase price or promising to pay such part, they become tenants in common therein in the proportion which the amount paid, or agreed to be paid, by each bears to the entire purchase price. *Bullman v. Edney*, 465.

§ 14. Estates by Entireties.

Where man has deed executed to himself and a woman under mistaken belief that they are husband and wife, the instrument does not create tenancy by entirety but tenancy in common. *Lawrence v. Heavner*, 557.

INJUNCTIONS.

§ 2. Remedy at Law.

Equity will not undertake by injunction to protect the property rights of a party who has an adequate remedy at law. *Arey v. Lemons*, 531.

INJUNCTION—*Continued.*

§ 3. Irreparable Injury.

It is incumbent upon plaintiff to make out a *prima facie* case of irreparable injury entitling him to equitable relief by injunction. *Teer v. Jordan*, 48.

§ 6. Nature and Grounds for Issuance of Preliminary Restraining Orders.

The purpose of an interlocutory injunction is to preserve the *status quo* of the subject matter of the suit until a trial can be had on the merits, and therefore when defendants are in the actual and peaceable possession and enjoyment of the property in dispute, an interlocutory order will not lie to enjoin them from using same in order to coerce them to transfer the property to plaintiff, the consumption or destruction of the property not being involved. *Arey v. Lemons*, 531.

A plaintiff lessor claiming ownership of tanks, pumps and other equipment used at a filling station, and maintaining that defendant lessee had forfeited his term for breach of lease provision that the station should sell only petroleum products of plaintiff lessor, *held* not entitled to the issuance of a preliminary injunction, since plaintiff fails to show inadequacy of the legal remedies available to it. *Ibid.*

In order to be entitled to a preliminary restraining order, plaintiff must make out at least a *prima facie* showing of right to the final relief demanded by him. *Ibid.*

§ 8. Continuance, Modification and Dissolution of Temporary Orders.

Where the sole objective of the suit is the issuance of a restraining order, and no material issues of fact arise on the pleadings, the action is properly dismissed when plaintiff is not entitled to injunctive relief upon the facts. *Teer v. Jordan*, 48.

INSURANCE.

§ 16. Fire Insurance—Contracts to Insure.

Plaintiff's testimony to the effect that the mortgagee promised to insure the house under construction for a definite sum for the protection of both mortgagor and mortgagee, and to deduct the premiums from the mortgagor's account, *is held* sufficient to be submitted to the jury on the issue of the existence of a contract to insure in the amount stated for mortgagor's benefit. *Crouse v. Vernon*, 24.

An agreement by the mortgagee to procure insurance for the benefit of mortgagor and mortgagee will not be held void for indefiniteness for its failure to specify a date within which the insurance should become in force, since in such instance the insurance must be placed in a reasonable time, as implied by the nature and purpose of the contract. *Ibid.*

In an action for damages for breach of contract to procure insurance where no time is specified in the contract for performance, the failure of the court to instruct the jury on the question of reasonable time for performance will not be held for error in the absence of a special request when it appears that more than two months elapsed between the agreement and the fire causing the damage, especially where defendants defend solely upon the theory that there was no contract to insure. *Ibid.*

§ 19g. Avoidance of Policy for Misrepresentation or Fraud.

Avoidance of policy for misrepresentation or fraud is an affirmative defense upon which insurer has burden of proof, and therefore insurer cannot be

entitled to nonsuit on this ground upon its own evidence. *Gibson v. Ins Co.*, 712.

§ 34a. Disability Insurance.

Plaintiff's testimony that he had been totally and permanently disabled by bodily injury or disease, with testimony of his physician that defendant by reason of illness was permanently, continuously, and wholly prevented from doing any work whatsoever for compensation, gain, or profit, or from following any gainful occupation, *is held* sufficient to be submitted to the jury in an action on a disability clause in a certificate of insurance notwithstanding defendant's evidence to the contrary and contradictions and discrepancies in the testimony of plaintiff's own witnesses. *Jackson v. Hodges*, 694.

§ 43a. Automobile Insurance—Risks Covered.

While a policy covering accidental damage or loss to an automobile, except by collision, like other policies, will be construed strictly against the insurer when the provisions therein are ambiguous, yet the intention of the contracting parties as gathered from the instrument itself is controlling. *Kirkley v. Ins. Co.*, 292.

"Accidental" ordinarily implies that which is unintended, unexpected, unforeseen and fortuitous, and refers to the event or occurrence which produces the result and not to the result. *Ibid.*

A policy covering all property damage to an automobile resulting from direct and accidental loss of or damage to the vehicle, except loss caused by collision, *is held* not to cover damage to the wooden frame of the station wagon insured caused by wood-boring insects entering at an unknown time and manner and remaining therein for an unknown period, certainly in the absence of evidence that the original infestation took place during the life of the policy. *Ibid.*

§ 43c. Automobile Insurance—Vehicles Insured.

A vehicle covered by a policy of liability insurance may be identified as between the parties not only by the motor and serial numbers entered on the policy but also by descriptive insignia resorted to in the policy, or, in case of an ambiguous description, by evidence *aliunde*, and this without resort to the equitable doctrine of reformation for mutual mistake or fraud. *Ratliff v. Surety Co.*, 166.

The complaint alleged in effect that insured owned but two White Tractors, one of which had been scrapped for junk at the time the policy was issued, and that the other was involved in the collision in suit, but that through mistake the motor and serial numbers of the scrapped vehicle were entered in the policy instead of those of the vehicle in use, and that the vehicle in use was the one actually insured. *Held:* Demurrer to the complaint was improperly sustained, since, as between the parties, insured is entitled under the allegations of the complaint, admitted by the demurrer, to attempt to identify the property insured by other descriptive insignia contained in the policy and by evidence *aliunde*. G.S. 58-30. *Ibid.*

§ 44e. Automobile Insurance—Cancellation for Misrepresentation or Fraud.

Avoidance of policy for misrepresentation is an affirmative defense upon which insurer has the burden of proof, and therefore it cannot be entitled thereto on its own evidence. *Gibson v. Ins. Co.*, 712.

INTOXICATING LIQUOR.

§ 2. Construction and Operation of Control Statutes.

The Turlington Act is in full force in those counties which have not elected to come under the Alcoholic Beverage Control Act except to the extent which the former statute is modified by the later. *S. v. Welch*, 77.

G.S. 18-2 prohibiting the transportation of intoxicating liquor has been modified by G.S. 18-49 and G.S. 18-58 so that it is not unlawful to transport through a county which has not elected to come under the provisions of the Alcoholic Beverage Control Act, alcoholic beverages in actual course of delivery to any Alcoholic Beverage Control Board, or for a person to transport into such county not in excess of one gallon of alcoholic beverages lawfully purchased outside the State or from ABC stores in counties of the State which have elected to come under the Alcoholic Beverage Control Act, provided the liquor is for personal use and the seals of the containers have not been broken. *Ibid.*

The statutes relating to alcoholic liquors must be interpreted in the light of the common law principle that guilty knowledge is an essential element of crime, and therefore a person cannot be held guilty of illegally transporting intoxicating liquors if he has no knowledge of the nature of the goods transported. *Ibid.*

§ 3. Definitions.

The term "intoxicating liquors," G.S. 18-1, includes the more restrictive term "alcoholic beverages," G.S. 18-60, and the terms are not synonymous. *S. v. Welch*, 77.

The word "transport" means to carry or convey from one place to another, and therefore a person transports intoxicating liquor if he carries it on his person or conveys it in a vehicle under his control or in any other manner, regardless of whether the liquor belongs to him or is in his custody. *Ibid.*

§ 7. Transportation.

A person cannot be guilty of transporting intoxicating liquor in his automobile unless he has knowledge of the presence of the liquor, since a general intent to commit the act is essential; and while such intent will be presumed from proof of the act and is sufficient to make out a *prima facie* case, such presumption is rebuttable. *S. v. Elliott*, 377.

§ 9d. Sufficiency of Evidence and Nonsuit.

Evidence which, considered in the light most favorable to the State, is sufficient to warrant findings that the automobile owned and driven by defendant in a county which had not elected to come under the Alcoholic Beverage Control Act contained, to defendant's knowledge, two gallons of alcoholic beverage, *is held* sufficient to overrule nonsuit in a prosecution for unlawful transportation, even though one of the gallons of liquor belonged to a passenger in the automobile, and both defendant and the passenger had purchased the liquor at an ABC store for personal consumption, and the seals of the containers had not been broken. *S. v. Welch*, 77.

§ 9f. Instructions.

Where, in a prosecution for unlawful possession and transportation of intoxicating liquor, defendant specifically pleads want of knowledge of the presence of liquor in his automobile and offers evidence in support of that plea, he raises an issue of fact for the determination of the jury, and it is error for

INTOXICATING LIQUOR—*Continued.*

the court to fail to instruct the jury that defendant would not be guilty in the absence of knowledge that the liquor was in his automobile, this being a part of the law of the case arising upon the evidence. *S. v. Elliott*, 377.

§ 9g. Verdict and Sentence.

Upon a general verdict of guilty to an indictment charging separately unlawful possession of intoxicating liquor and unlawful transportation of intoxicating liquor, the court is empowered to assign separate punishment for each count, notwithstanding that the possession was physically necessary to the act of transporting. *S. v. Chavis*, 83.

JUDGMENTS.

§ 1. Nature and Essentials of Judgments by Consent.

An administrator has no authority to enter consent judgment adjudicating that a claimant is the owner of the fee in lands of the estate. *Pack v. Newman*, 397.

Heirs at law who are not parties are not bound by consent judgment adjudicating title to decedent's lands. *Ibid.*

§ 9. Judgments by Default in General.

Where an answer containing a counterclaim is not served on plaintiff or her attorney of record, each allegation of the answer is deemed denied, G.S. 1-140, and therefore defendant cannot be entitled to a default judgment on the counterclaim on the ground that no reply was filed thereto. *Lawrence v. Heavner*, 557.

§ 10. Judgment by Default Final.

Default judgment that plaintiff is owner of land in suit is conclusive as to title, but suit remains pending for purposes of relief of receivership and accounting of funds prayed for in complaint. *Ionic Lodge v. Masons*, 252.

§ 17a. Nature and Form of Judgments in General.

Judgment in special proceeding, as well as in civil action, may be either interlocutory or final. *Russ v. Woodard*, 36.

A final judgment is one which decides the case upon its merits without need of further directions of the court; an interlocutory order or judgment is provisional or preliminary, and does not determine the issues but directs some further proceeding preliminary to final decree. *Ibid.*

§ 17b. Necessity That Judgment Be Supported by Verdict.

A judgment is a conclusion of law upon facts admitted or in some way established, and therefore a judgment cannot be entered properly upon an ambiguous verdict. *Gibson v. Ins. Co.*, 712.

§ 18. Process, Notice and Service, and Jurisdiction.

Where suit for escheat, in which heirs are served by publication, is consolidated for judgment with action by creditor of estate, the heirs are not parties to the creditor's action and the judgment adjudicating the creditor to be the owner of decedent's lands is not binding on the heirs. *Pack v. Newman*, 397.

JUDGMENTS—*Continued.*

§ 20a. Change, Modification and Correction by Trial Court.

An interlocutory order or judgment is subject to change by the court during the pendency of the action to meet the exigencies of the case. *Russ v. Woodard*, 36.

§ 23. Life of Lien of Judgment.

The period during which the judgment debtor is in the bankrupt court and his property in *custodia legis* should be deducted from the ten year period as provided in G.S. 1-234. *Trust Co. v. Parker*, 512.

§ 25. Procedure to Attack.

A judgment obtained by means of fraud upon the jurisdiction of the court may be attacked by motion in the cause. *Henderson v. Henderson*, 1.

Nothing else appearing, an attorney of record continues in this relationship to the client not only until the rendition of final judgment but also so long as the opposing party has the right, by statute or otherwise, to challenge the validity of the judgment, and therefore such attorney may be served with notice of motion in the cause to set aside the judgment on the ground of fraud upon the jurisdiction of the court, and such notice is notice to the party. *Ibid.*

§ 26. Time Within Which Attack May Be Made.

Motion in the cause to set aside judgment for fraud on the jurisdiction of the court *held* not barred by laches, even though judgment had been rendered seven years before, since action was commenced within two years from discovery of fraud. *Henderson v. Henderson*, 1.

§ 27a. Setting Aside Judgment for Excusable Neglect.

Where the court sets aside a judgment upon its findings of excusable neglect and meritorious defense, a sole exception to the signing of the judgment does not present the findings for review, and the judgment, being supported by the findings, will be affirmed. *Gas Corp. v. Bullard*, 730.

§ 29. Parties Concluded.

A decree of adoption which prescribes and limits the right of the adopted child to inherit property has the force and effect of a judgment of a court of competent jurisdiction, and comes within the general rule that parties and their privies are ordinarily bound by a judgment. *Wilson v. Anderson*, 212.

Heirs not brought in and made parties in any manner sanctioned by law are not bound by judgment. *Pack v. Newman*, 397.

§ 30. Matters Concluded.

An order of the Superior Court may not be extended beyond the particular question raised and ruled upon. *Perkins v. Perkins*, 91.

Where the clerk enters a default judgment declaring plaintiff to be the owner of an undivided interest in lands in accordance with the facts alleged in the complaint, but does not appoint a receiver or make provision for an accounting as prayed for, the judgment is conclusive as to title, but the suit remains pending in the Superior Court for such further relief to which plaintiff may be entitled consequent upon the adjudication of title. *Ionic Lodge v. Masons*, 252.

§ 31. Conclusiveness and Effect of Foreign Judgments.

An equitable decree entered by a court of another state in a suit in which all persons in interest are parties *held* effective here although the trust affected

JUDGMENTS—*Continued.*

is a North Carolina trust, since equity acts *in personam*. *Johnson v. Salsbury*, 432.

§ 33a. Judgments of Nonsuit as Bar to Subsequent Action.

Where the trial court finds after examination and comparison of the records in a subsequent action between the same parties upon substantially identical allegations that the evidence in the second action is substantially identical with that of the first, and the record reveals sufficient basis for the findings, judgment dismissing the second action on the ground of *res judicata* will be affirmed on appeal. *Smith v. Furniture Co.*, 412.

LABORERS' AND MATERIALMEN'S LIENS.

§ 5a. Notice and Filing of Lien.

Materialmen can have no lien where the owners pay the contractor in advance more than the contractor had earned up to the time he abandoned the job and the claim was asserted, and mere promise of owner to pay is void for want of consideration and as within statute of frauds. *Lumber Co. v. Horton*, 419.

LANDLORD AND TENANT.

§ 2. Form and Validity of Leases.

Lease to oil company rent free and lease back to owner rent free upon agreement that only products of oil company be sold at the filling station *held* void as contrary to monopoly statute. *Arey v. Lemons*, 531.

§ 15. Rights and Liabilities Upon Sublease.

Where a sublease provides for a term of one year but also that it should terminate *co instanti* the termination of the main lease, the sublessee, upon termination of the main lease according to its terms, cannot maintain that there was a breach of the sublease for its termination prior to the expiration of the year. *Texas Co. v. Stone*, 489.

§ 23. Notice to Quit.

The lease in suit was for a period of five years with the right to renew for an additional five year period, the rent being payable the first of each month in advance. The term began on the fourteenth of the month. On the first of that month during which the first five year term ended notice to vacate was served on lessees. *Held:* The notice is insufficient. *Hoover v. Crotts*, 617.

LARCENY.

§ 7. Sufficiency of Evidence and Nonsuit.

Evidence in this prosecution for larceny of certain pigs *held* sufficient to overrule defendant's motion to nonsuit. *S. v. White*, 385.

LIMITATION OF ACTIONS.

§ 6b. Actions for Trespass.

An action in ejectment by the owner of the fee to recover that part of the right of way no longer used by the railroad company or its lessee for railroad purposes is not subject to the three year statute of limitations, since it is not an action in trespass for damages. *Sparrow v. Tobacco Co.*, 589.

LIMITATION OF ACTIONS—*Continued.*

§ 19. Instructions.

Where the three year statute of limitations is pleaded in an action at common law to recover for silicosis contracted by plaintiff as the result of alleged negligence of defendant in failing to use reasonable care to provide a reasonably safe place to work, G.S. 1-52 (5), an instruction which fails to limit recovery to those injuries proximately resulting from negligent acts of defendant committed within three years next before the institution of the action, must be held for error. *Bame v. Stone Works*, 267.

MANDAMUS.

§ 1. Nature and Scope of Remedy in General.

Mandamus can confer no new authority, but will lie only to enforce a clear legal right of the party seeking the writ against a party under legal obligation to perform the act sought to be enforced. *Laughinghouse v. New Bern*, 596; *Hancock v. Bulla*, 620.

§ 2b. Discretionary, Ministerial or Legal Duty.

Where the owners of land apply for a permit for a hotel building permitted in the zone under the municipal zoning ordinance, which application shows compliance with all State and local laws regulating the construction of hotels, *mandamus* lies to compel the issuance of the permit, since the plaintiffs have a clear legal right to its issuance and defendants have no discretionary power to withhold it. *Mitchell v. Barfield*, 325.

Where municipality has authority to participate in State Employees' Retirement System under general law and under charter provision, repeal of charter authority does not justify *mandamus* to compel it to withdraw from State System, since governing authorities still retain discretionary power under general law. *Laughinghouse v. New Bern*, 596.

MASTER AND SERVANT.

§ 2a. The Contract of Employment.

A contract of employment will not be held void for indefiniteness when it stipulates the nature and extent of service to be performed, the place where and the person to whom it is to be rendered, and the compensation to be paid. *Lochner v. Sales Service*, 70.

§ 4a. Distinction Between Employees and Independent Contractors.

Where the employer has the right to control the manner and method of doing the work, irrespective of whether such control is exercised or not, the relation is that of employer and employee, but if the employer has the right merely to require certain definite results in conformity to the contract, the relation is that of employer and independent contractor. *Scott v. Lumber Co.*, 162.

§ 14a. Liability of Master for Injuries to Servant in General.

The employer is not an insurer of the safety of his employee but is required only to exercise the care which a man of ordinary prudence would exercise under like circumstances for his own safety to provide a reasonably safe place in which to work and such machinery, implements and appliances as are approved and in general use in places of like character. *Baker v. R. R.*, 523.

MASTER AND SERVANT—*Continued.*

§ 14b. Common Law Liability of Employer Electing Not to Come Under Compensation Act.

Where an employer who regularly employs more than five employees in his business elects not to operate under the Workmen's Compensation Act, an injured employee may maintain an action against him at common law, in which action contributory negligence, negligence of a fellow employee, and assumption of risks are not available as defenses. *Bame v. Stone Works*, 267.

An employer who has elected not to operate under the provisions of the Workmen's Compensation Act may be held liable by the employee in an action at common law for an occupational disease when such disease is contracted as the result of negligence of the employer in failing to exercise ordinary care to provide a reasonably safe place in which to work, which proximately causes such occupational disease. Evidence in this case of such negligence and proximate cause *held* sufficient to take the case to the jury. *Ibid.*

The doctrine of *res ipsa loquitur* does not apply to the contraction of silicosis by an employee of a stone company. *Ibid.*

§ 20. Employer's Liability for Injuries to Employee—Contributory Negligence of Employee.

Where an employee has a choice of two places in which to do his work, one safe and the other dangerous, his duty to select the safe place is a duty owed by him to his employer, but he owes no such duty to third persons. *Holderfield v. Trucking Co.*, 623.

§ 22c. Employer's Liability for Injuries to Third Persons—Scope and Course of Employment.

Demurrer of corporate defendant is properly sustained to a complaint alleging that it sent its employee to the home of plaintiff on a business mission and that while there the employee committed an assault upon the *feme* plaintiff with licentious intent and purpose, since the complaint discloses that the assault was made to carry out an independent and licentious purpose of the employee and not to accomplish the business mission entrusted to him, and that therefore the employee in making the assault was not acting within the course and scope of his employment. *Hoppe v. Deese*, 698.

§ 26. Negligence of Railroad Employer Under Federal Employers' Liability Act.

Evidence disclosing that the boxcar in question was a standardized one, fully equipped with all appliances required by law, does not support plaintiff employee's allegation of negligence in that the car was not equipped with sill steps, ladders, grab irons or hand-holds, for use in entering and leaving the car, since such additional appliances might have resulted in a more hazardous instrumentality instead of a safer one. *Camp v. R. R.*, 487.

Plaintiff employee, in attempting to enter a boxcar, extended his hand to a fellow employee, who caught it and endeavored to help him up. Plaintiff lost his balance, and another fellow employee grabbed him to prevent his falling, causing plaintiff's foot to slip and plaintiff fall against the outer edge of the boxcar floor, to his serious injury. *Held:* The acts of the fellow employees cannot be imputed to defendant railroad company as negligence, since the injury could not have been foreseen or anticipated as the result thereof, and the injury was purely accidental or misadventurous. *Ibid.*

In an action against a railroad company under the Federal Employers' Liability Act, plaintiff is required to show negligence proximately producing

injury, and when the evidence shows nothing but a fortuitous injury a directed verdict for defendant is correct. *Ibid.*

Where plaintiff fails to allege or prove that the workmen's rail motor car of the kind furnished by defendant employer was not approved and in general use under the conditions of work, he may not maintain that the employer was negligent in failing to equip it with hand-holds in addition to the standard hand-holds. *Baker v. R. R.*, 523.

Where plaintiff's evidence is to the effect that the workmen's motor rail car in question was equipped with a solid canvas windbreaker over which the occupants could easily look and see anything on the track, such evidence negates the allegation of negligence of the employer in providing a motor car equipped with a canvas windshield containing a small plexiglass opening which was covered with dust, dirt and other foreign substances so as to prevent the occupants of the car from having a clear vision ahead. *Ibid.*

A railroad employee was killed when the motor rail car on which he was riding struck a dog on the track. *Held:* No presumption of negligence arises from the mere fact of hitting the dog, and since an operator of the car has the right to assume up to the moment of impact that a dog would leave the track in time to avoid a collision unless it was apparently helpless on the track or totally oblivious of its surroundings, there is no showing of negligence in the absence of evidence as to how long the dog had been on the track or as to its condition. *Ibid.*

The basis of liability under the Federal Employers' Liability Act is negligence proximately producing injury. *Ibid.*

§ 37. Nature and Construction of Compensation Act in General.

The Workmen's Compensation Act is a radical and systematic change in the common law, and the Act must be liberally construed to accomplish its purposes, its provisions being superior to the common law in all respects where it deals with the liabilities arising out of the relationship of employer and employee. *Essick v. Lexington*, 200.

§ 39b. Employers Subject to Act—Subcontractors and Independent Contractors.

A lumber company which purchases timber on the basis of a stipulated price per thousand feet when processed into lumber by it, and which is given the privilege of going upon the land and cutting and logging the timber to its site, cannot be held a contractor of the owners of the timber in the performance of the logging operations, and therefore a person employed by it to conduct logging operations cannot be a subcontractor within the meaning of G.S. 97-19, and the statute has no application in determining the liability for injury to one of the workmen employed in the logging operations. *Evans v. Lumber Co.*, 111.

Where a lumber company, pursuant to its contract for the purchase of timber, engages in logging operations, and a workman is injured in the course of his employment relating thereto, the Industrial Commission should find from the evidence whether the person employed by the lumber company to perform the logging operations was an employee or an independent contractor in order to determine the respective liabilities of the parties for compensation for injury to the workman. *Ibid.*

Compensation is recoverable only against the employer of the injured workman, and therefore if the workman is an employee of an independent con-

MASTER AND SERVANT—*Continued.*

tractor, the employer of the independent contractor cannot be held liable for compensation. G.S. 97-2. *Scott v. Lumber Co.*, 162.

Whether a person is an independent contractor or an employee within the meaning of the Workmen's Compensation Act is to be determined in accordance with the common law. *Ibid.*

Evidence tending to show, *inter alia*, that defendant lumber company operated a sawmill as a part of its general business, that it owned the sawmill, controlled the premises where the work was performed, determined the amount of work to be done thereat, gave directions on occasion as to dimensions of the lumber to be sawed, and that the person directing the sawmill operations worked exclusively for the lumber company, which had the power to discharge him at any time with or without cause, *is held* sufficient to support a finding that the director of the sawmill operations was a supervisory employee and not an independent contractor. *Ibid.*

The driver of a truck leased to an interstate common carrier cannot be held an independent contractor when the lease agreement under which he performs his duties gives the lessee specific supervision, control and direction in the performance of the work. *Roth v. McCord*, 678.

§ 39f. Dual Employment—Employer Liable for Compensation.

Where a truck belonging to one holding no franchise as a common carrier is leased to a holder of a franchise as a common carrier in interstate commerce, the driver of the truck, even though furnished by the lessor, must be deemed an employee of the franchise holder while making a trip in interstate commerce, both by reason of statutory provisions and also by reason of the lease agreement when the lease specifically provides that the driver should be under the exclusive control and direction of the lessee. *Roth v. McCord*, 678.

Where the holder of a franchise in interstate commerce leases the tractor of a nonfranchise holder for an interstate shipment upon an agreement which stipulates that lessor should carry workmen's compensation insurance, those entitled to recover under the Workmen's Compensation Act for fatal injury to the driver on such trip are not bound by the lease provision as to carriage of workmen's compensation, but are entitled to recover from the lessee employer. *Ibid.*

§ 40a. Injuries Compensable in General.

In order for an injury to an employee to be compensable under the Workmen's Compensation Act it must result from an accident arising out of and in the course of employment. *Berry v. Furniture Co.*, 303.

§ 40c. Whether Accident "Arises Out of Employment."

"Out of the employment" as used in the Workmen's Compensation Act refers to the origin or cause of the accident and implies some casual relation between the employment and the injury. *Matthews v. Carolina Standard Corp.*, 230; *Berry v. Furniture Co.*, 303.

Findings to the effect that during lunch hour the employees were free to go as they pleased, that deceased employee had stopped his work for the lunch period, and, in attempting to board a truck moving within the premises of the employer, fell and was fatally injured, with further evidence that the employee had been given no order and had no duty connected either with the truck or its contents, and was acting according to his own will, *is held* insufficient to show affirmatively that the injury resulted from a hazard incident to

MASTER AND SERVANT—*Continued.*

the employment, and supports the ruling of the Industrial Commission that it did not arise out of the employment. *Matthews v. Carolina Standard Corp.*, 230.

An accidental injury received by an employee while riding in a truck on a vacation pleasure trip does not arise out of the employment notwithstanding that the employer furnished the vacation trip as a matter of good will and personal relations among the employees and paid the entire expenses of the trip in accordance with its agreement entered into at the time of the employment as a part of the remuneration and inducement to its employees. *Berry v. Furniture Co.*, 303.

§ 40d. Whether Accident "Arises in Course of Employment."

"In course of" the employment as used in the Workmen's Compensation Act referes to the time, place and circumstances in which the injury by accident occurs. *Matthews v. Carolina Standard Corp.*, 229; *Berry v. Furniture Co.*, 303.

§ 41. Actions Against Third Person Tort-Feasor Under Workmen's Compensation Act.

Superiors of the injured employee are within the immunity of G.S. 97-9 when their orders, upon which alleged liability is predicated, are given in the conduct of the employer's business, and such supervisory employees are improperly made additional parties defendant upon the motion of the original defendant in an action by the personal representative of a deceased employee against the third person tort-feasor. *Essick v. Lexington*, 200.

While in an action by the employer or the insurance carrier against the third person tort-feasor, such defendant may plead the negligence of the employer in bar of recovery by subrogation, where the personal representative of the deceased employee alone sues the third person tort-feasor, such defendant is not entitled to joinder of the employer as an additional party defendant upon allegations that the employer was guilty of concurring negligence constituting the primary cause of the injury. *Ibid.*

Two employees, traveling in an automobile in the discharge of the employer's business, had a collision with another vehicle. In an action by the employee passenger against the owner and driver of such other vehicle, the employee driver is improperly joined as an additional defendant on motion of the original defendant for the purpose of contribution as a joint tort-feasor, since the employee driver is immune from liability under the provisions of G.S. 97-9. *Bass v. Ingold*, 295.

§ 42b. Compensation Insurance Policies—Employees Covered.

Where a policy of insurance covering liability for injuries to employees under the Workmen's Compensation Act is ambiguous as to the employees covered, such ambiguity will be resolved against the insurer. *Williams v. Stone Co.*, 88.

Policy held to cover employees engaged in operations incident to employer's business, though performed at separate place. *Ibid.*

The fact that insurer fails to collect premiums based on the wages of some of the employees covered by the policy does not preclude liability for injuries to such employees. *Ibid.*

§ 47. Disqualification of Commissioners to Hear Cause.

The mere fact that at the time of hearing a claim the chairman of the Industrial Commission was financially interested in organizing a compensation insurance company, entirely unrelated to the company sought to be held liable upon the claim, *is held* insufficient to upset the award rendered by the unani-

MASTER AND SERVANT—*Continued.*

mous commission, it further appearing by affidavits that the chairman's decision in the case was not influenced by his interest in organizing a separate and distinct insurance company. *Matthews v. Carolina Standard Corp.*, 229.

§ 50. Burden of Proof.

The burden is upon claimant to show (1) injury by accident, (2) suffered in the course of employment, and (3) arising out of the employment. *Matthews v. Carolina Standard Corp.*, 229.

§ 55d. Review of Award of Industrial Commission.

The findings of fact made by the Industrial Commission are conclusive on appeal when supported by competent evidence. *Williams v. Stone Co.*, 88.

While findings of fact of the Industrial Commission are conclusive on appeal when supported by evidence, G.S. 97-86, the courts must review the reasonableness of the inferences of fact deduced from the basic facts found, and the conclusions of law predicated upon them. *Evans v. Lumber Co.*, 111.

Findings of fact of the Industrial Commission that the superior of the injured workman was a supervisory employee and not an independent contractor is conclusive on appeal when supported by competent evidence. *Scott v. Lumber Co.*, 162.

A sole assignment of error to the signing of the judgment of the Superior Court affirming the award of the Industrial Commission presents only the question whether the facts found by the Industrial Comission support the award of compensation. *Berry v. Furniture Co.*, 303.

Where opposing inferences reasonably may be drawn from the evidence before the Industrial Commission, its findings are conclusive upon the courts, even though the opposite conclusion is equally tenable upon the evidence. *Johnson v. Cotton Mills*, 321.

§ 55g. Determination and Disposition of Appeal from Industrial Commission.

Where the award of the Industrial Commission is eroneous, the courts may not on appeal make an award *pro* or *con* from the evidence, but will remand the cause to the Industrial Commission for proper findings of fact and conclusions of law. *Evans v. Lumber Co.*, 111.

§ 57. "Employing Unit" Within Meaning of Employment Security Act.

Evidence to the effect that general contractors engaged in the demolition of buildings hired a licensed plumber to dismantle the plumbing in such buildings supports a finding of the Employment Security Commission that the plumber so hired was engaged in the usual business of the contractors, and therefore was an employing unit subject to contributions under G.S. 96-8 (f) (8), prior to repeal. *Employment Security Com. v. Kermon*, 342.

§ 59c. Collection of Contributions Under Employment Security Act.

In an action by the Employment Security Commission to determine liability of defendant for contributions under the Act, the defendant may not raise the question of the constitutionality of the statute under which the Commission levied the assessment in question, it being required in order to raise this defense that he pay the contributions under protest and sue for recovery. G.S. 96-10 (f). *Employment Security Com. v. Kermon*, 342.

MASTER AND SERVANT—*Continued.*

§ 62. Appeals from Employment Security Commission.

Review of exceptions to the findings of the Employment Security Commission is limited to determining whether the findings are supported by any competent evidence, and the Superior Court may not disregard a finding and substitute its own finding in lieu thereof. G.S. 96-4 (m). *Employment Security Com. v. Kermon*, 342.

While the determination of whether defendant was an employing unit within the purview of the N. C. Employment Security Law may be a mixed question of law and fact, the courts may not interfere with the conclusion of the Commission if it is supported by any competent evidence. *Ibid.*

MONOPOLIES.

§ 2. Contracts and Transactions Illegal.

A single instrument whereby the owner of lands leases same to an oil company rent free, and the oil company subleases the property back to the owner rent free, upon agreement that only the petroleum products of the oil company should be sold at the filling station, *is held* void, since the only consideration is the promise of the oil company to sell its products to the owner and the promise of the owner to handle such products to the exclusion of similar merchandise of competitors, which agreement is in contravention of G.S. 75-5, and this result is not affected by a recital in the writing that the owner signed same as a part of consideration for a deed to the property executed by a third person. *Arey v. Lemons*, 531.

MUNICIPAL CORPORATIONS.

§ 5. Powers and Functions in General.

A municipality has only those powers conferred by statute and those necessarily implied by law. *Stephenson v. Raleigh*, 42.

It has no power to waive its immunity from tort liability in performance of governmental function. *Ibid.*

A municipal corporation has only such powers as are conferred upon it expressly or by necessary implication by its charter and by the applicable general laws, construed together. *Laughinghouse v. New Bern*, 596.

Where a municipal corporation is given a specified power both by general statute and by amendment to its charter, and later the charter amendment is repealed, the power under the general statute is left unimpaired and available to the city. *Ibid.*

§ 6. Distinction Between Governmental and Private Powers.

A function of a municipality which is discretionary, political, legislative, or public in nature and performed for the public good in promotion or protection of the health, safety, security or general welfare of its citizens, is a governmental function. *Raleigh v. Fisher*, 629.

§ 12. Liability for Torts—Exercise of Governmental and Corporate Powers in General.

A municipality may be held liable for torts of its officers or employees committed in performance of its corporate or private functions, but in the absence of statutory provision to the contrary it may not be held liable for such torts

MUNICIPAL CORPORATIONS—*Continued.*

committed in performance of a public or governmental function. *Stephenson v. Raleigh*, 42.

It may not waive such immunity; nor will the terms of a liability policy obtained by it create such liability to injured third persons. *Ibid.*

In collecting and removing shrubbery and tree prunings from the homes of citizens pursuant to authority conferred by law for the public benefit a municipality is exercising a governmental function, and it may not be held liable for the negligence of its servants in the performance of such duties in the absence of statutory liability. *Ibid.*

§ 15b. Torts of Municipalities—In Operation of Sewerage Systems.

Permanent damage may be awarded against a city for the taking of an easement incident to the operation of its sewage disposal plant and at the same time the municipality may be required to keep its plant in proper repair and be enjoined from emptying untreated sewage into the open channel of the creek flowing across plaintiff's land. G.S. 130-117. *Veazey v. Durham*, 744.

§ 36. Nature and Extent of Municipal Police Power in General.

Obligations of contracts and vested rights must yield to the proper exercise of the police power, which, nevertheless, must not be exercised arbitrarily or oppressively, and must be reasonably related to the accomplishment of a public purpose. *Cab Co. v. Shaw*, 138.

Zoning ordinances come within police power delegated to municipalities. *Raleigh v. Fisher*, 629.

§ 37. Zoning Ordinances and Building Permits.

A building permit for a permissible use may not be denied on the ground that the applicants intend, after its completion, to use the premises for another and prohibited use. *Mitchell v. Barfield*, 325.

Mandamus will lie to compel issuance of building permit for permissible use under zoning ordinance. *Ibid.*

In enacting and enforcing zoning regulations a municipality acts as an agency of the State in the exercise of a delegated police power. *Raleigh v. Fisher*, 629.

Where person obtaining building permit for dwelling uses the structure for commercial purposes contrary to a zoning regulation then in force, and later the zoning ordinance is repealed but the area is again denominated a residential district, and the saving clause of the new ordinance provides that it should not impair building permits theretofore issued or interfere with continuance of uses theretofore lawful, the commercial use was unlawful from its inception and is not within the saving clause of the second ordinance. *Ibid.*

§ 39. Regulations Relating to Public Safety or Health.

A municipal corporation has the power of regulating the privilege of using its streets for the operation of taxicabs, to prohibit franchise holders from leasing or renting its vehicles for such purposes to independent contractors, even though they are duly licensed and qualified taxicab drivers. *Cab Co. v. Shaw*, 138.

§ 40. Validity, Violation and Enforcement of Police Regulations.

A municipal ordinance promulgated in the exercise of the police power will not be declared unconstitutional unless clearly so, and every reasonable intendment will be made to sustain it. *Cab Co. v. Shaw*, 138.

MUNICIPAL CORPORATIONS—*Continued.*

Municipality may enjoin violation of zoning ordinances. *Raleigh v. Fisher*, 629.

Ordinance provision prescribing proceedure for enforcement of zoning regulations in conflict with those prescribed by G.S. 160-178 are void. *Mitchell v. Barfield*, 325.

Municipality cannot be estopped by acts of its officials from enforcing valid zoning regulations. *Raleigh v. Fisher*, 629.

NEGLIGENCE.

§ 1. Acts or Omissions Constituting Negligence in General.

Negligence is the failure to exercise proper care in the performance of some legal duty which defendant owes plaintiff under the circumstances in which they are placed. *Baker v. R. R.*, 523.

Negligence is the failure to perform some legal duty imposed by statute or the failure to observe the duty arising out of the conditions or the relationship between the parties to exercise due care and caution. *Holderfield v. Trucking Co.*, 623.

§ 5. Proximate Cause.

Proximate cause is that cause which produces the result in continuous sequence and without which it would not have occurred, and one from which a man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed. *Baker v. R. R.*, 523.

The violation of a statute designed and intended to protect life or property renders the tort-feasor liable for all damages naturally and proximately resulting therefrom regardless of whether he could have foreseen such injurious result, but otherwise foreseeability is an element of proximate cause. *Holderfield v. Trucking Co.*, 623.

§ 9. Anticipation of Injury.

It is not required that the exact injury be foreseeable, it being sufficient if plaintiff could have reasonably foreseen that some likely injury or injurious consequences might result under the circumstances. *Howard v. Bell*, 611.

§ 10. Last Clear Chance.

The doctrine of last clear chance is applicable only when a sufficient interval elapses between the time defendant discovers or should have discovered plaintiff's perilous position to enable a reasonably prudent man in like position to have avoided the injury notwithstanding plaintiff's contributory negligence. *Aydlett v. Keim*, 367.

Defendant's original or primary negligence is barred by plaintiff's contributory negligence and cannot be relied upon by plaintiff as a basis for the doctrine of last clear chance. *Ibid.*

§ 11. Contributory Negligence in General.

Contributory negligence is negligence on the part of plaintiff in failing to exercise the care which an ordinarily prudent man would observe under the circumstances, which proximately concurs with the negligence of defendant in producing the injury. *Maddox v. Brown*, 244.

Contributory negligence is the breach of duty of the plaintiff to exercise due care for his own safety in respect of the occurrence about which he complains,

NEGLIGENCE—*Continued.*

which bars recovery if one of the proximate contributing causes of his injury, foreseeability and proximate cause being essential elements of both negligence and contributory negligence. *Holderfield v. Trucking Co.*, 623.

The duty of an employee to select the safer of two places in which to do his work is a duty owed the employer, and he owes no such duty to third persons. *Holderfield v. Trucking Co.*, 623.

§ 16. Pleadings in Actions for Negligence.

Mere characterization of an act or course of conduct as negligent is insufficient, but plaintiff must allege the facts constituting negligence in order that the court may see whether there has been a breach of duty. *Fleming v. Light Co.*, 457.

§ 17. Burden of Proof.

Plaintiff has the burden of showing not only negligence but that such negligence was the proximate cause of the injury. *Baker v. R. R.*, 523.

§ 19a. Questions of Law and of Fact.

Negligence and proximate cause are questions of law, and when the facts are admitted or established are for the determination of the court. *Baker v. R. R.*, 523.

§ 19c. Nonsuit on Ground of Contributory Negligence.

Nonsuit on the ground of contributory negligence of plaintiff may be allowed only when the plaintiff's evidence, considered in the light most favorable for him, establishes his own negligence as a proximate contributing cause of the injury so clearly that no other conclusion reasonably can be drawn therefrom. *Samuels v. Bowers*, 149.

Nonsuit on the ground of contributory negligence should not be granted unless plaintiff's evidence tends to show contributory negligence so clearly that no other conclusion reasonably can be drawn therefrom. *Levy v. Aluminum Co.*, 158; *Carruthers v. R. R.*, 183; *Collingwood v. R. R.*, 192.

Nonsuit on the ground of contributory negligence can be properly entered only when contributory negligence and also the conclusion that such contributory negligence proximately concurred in producing the injury, are established by plaintiff's own evidence as the sole reasonable inferences that can be drawn therefrom. *Maddox v. Brown*, 244; *Boles v. Hegler*, 328.

Plaintiff's own evidence must show contributory negligence without opposing inferences in order to justify nonsuit on this ground, since defendant's evidence upon the issue is not to be considered in passing upon the question and contradictions and discrepancies in plaintiff's own evidence do not justify nonsuit. *Williams v. Kirkman*, 609.

§ 20. Instructions in Negligence Actions.

An instruction that it is important for the jury to understand what is meant by negligence as "implied" in cases of the character in suit, *held* reversible error. *Bame v. Stone Works*, 267.

Instruction in this case *held* without error. *Spivey v. Newman*, 281.

NOTICE.

§ 3. Service of Notice.

Where a statute provides for service of a notice without prescribing a mode of service, it must be served by some officer authorized by law to make service of process, notices, and the like. *Utilities Com. v. Mills Co.*, 690.

OBSCENITY.

§ 2. Prosecutions.

Evidence in this prosecution of defendant for peeping secretly into a room occupied by a woman, *held* sufficient to be submitted to the jury. *S. v. Peterson*, 332.

PARENT AND CHILD.

§ 3a. Civil Rights and Liabilities in General.

A child has no interest in the property of his parent during the lifetime of the latter, but only possibility of inheritance. *Holt v. Holt*, 497.

PARTIES.

§ 1. Parties Who May or Must Sue.

An action must be prosecuted in the name of the real party in interest. G.S. 1-57, G.S. 1-68. *Ionic Lodge v. Masons*, 648.

"Complainant" means the party who makes the complaint in an action or proceeding and is synonymous for all practical purposes with "petitioner" or "plaintiff." *Utilities Com. v. Mills Co.*, 690.

PARTITION.

§ 4h. Validity and Attack of Decree.

Where one of the tenants in common is a minor, represented by a next friend, and after his coming of age, he ratifies and confirms the division of the property as made in the partition proceeding, such tenant is estopped from challenging the validity of the proceeding, and it is conclusive, there being no contingent interests involved. *Langston v. Wooten*, 124.

PARTNERSHIP.

§ 10. Dissolution by Death of Partner.

The death of a partner ordinarily dissolves the partnership as of that date. *In re Estate of Johnson*, 59.

§ 12. Administration and Settlement of Partnership Affairs.

Upon death of partner, property vests in survivor for purpose of winding up partnership, with appropriate remedies to compel survivor to file bond and inventory. *Johnson, In re Estate of*, 59.

PHYSICIANS AND SURGEONS.

§ 10. Creation of Relationship—Employment by Third Persons.

Where the physician engaged by the patient arranges that during his absence the patient should be under the care of another physician, previously unknown to the patient, such substituted physician is the agent of the former in the performance of the necessary services to the patient which the former had contracted to render. *Wilson v. Hospital*, 362.

§ 14. Liability to Patients in General.

A physician is not an insurer, and he may be held responsible for the unsuccessful outcome of his treatment only if it proximately results from lack of learning, skill and ability ordinarily possessed by others similarly situated,

PHYSICIANS AND SURGEONS—*Continued.*

or from his failure to exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case. *Wilson v. Hospital*, 362.

§ 20. Sufficiency of Evidence in Malpractice Cases.

Where the evidence is such that the lack of reasonable care and diligence in the application of the physician's knowledge and skill in treating the patient's case is patent, requiring only common knowledge and experience to understand and judge it, expert testimony is not necessary to establish a cause of action for malpractice. *Wilson v. Hospital*, 362.

PLEADINGS.

§ 2. Joinder of Causes.

Where two plaintiffs institute one action against defendants for the recovery of their respective property alleged to have been destroyed by the negligence of defendants, and there is no allegation that each defendant had an interest in the property of the other, there is a misjoinder of parties and causes of action, and the cause is demurrable. *Teague v. Oil Co.*, 65.

Causes of action to recover for wrongful eviction and detention of personal property, breach of lease contract and malicious injury to business and credit standing, may not be properly joined in the same complaint and the causes should be severed upon demurrer. *Snotherly v. Jenrette*, 605.

§ 3a. Statement of Cause of Action.

The complaint should set forth the essential facts without alleging evidential facts better left for proof at the time of trial. *Rhodes v. Jones*, 548.

Each cause of action should be separately stated without reference to any other cause. *Cherry v. Walker*, 725.

§ 10. Counterclaims and Cross-Actions.

One defendant may not set up a cross action for alleged injury suffered by her codefendant. *Lawing v. Wheeler*, 517.

In an action in ejectment and to recover damages for breach of lease contract, defendant may not set up a cross action for slander of his title, since such cross action is based upon a separate, independent tort. *Ibid.*

§ 15. Office and Effect of Demurrer.

Upon demurrer the facts alleged in the complaint, as well as relative inferences of fact necessarily deducible therefrom, are taken as true. *Stephenson v. Raleigh*, 42.

A demurrer tests the sufficiency of the complaint to state a cause of action, admitting for this purpose the truth of its allegations of fact. *Johnson v. Salsbury*, 432.

§ 16. Time of Demurring.

Demurrer *ore tenus* on the ground that it appears on the face of the complaint that the court is without jurisdiction may be made at any time, even in the Supreme Court on appeal. *Brissie v. Craig*, 701.

§ 19b. Demurrer for Misjoinder of Parties and Causes.

Where there is a misjoinder of parties and causes of action, defendants' demurrer on this ground must be sustained, and the court has no authority to direct severance for the purpose of trial, G.S. 1-132. *Teague v. Oil Co.*, 65.

PLEADINGS—*Continued.*

While a complaint will be construed liberally in favor of the pleader, where its allegations are sufficient to state several causes of action, the pleader may not successfully contend that the allegations constituting a misjoinder of causes should be limited to the function of stating transactions connected with the main cause of action and be related to it solely on the question of damages, but the question of misjoinder must be determined in accordance with the allegations in the pleading. *Snotherly v. Jenrette*, 605.

Where, in an action instituted by copartners against lessors to recover for wrongful eviction and detention of personal property, breach of lease contract and malicious injury to business and credit standing, the complaint alleges that the original lease was made to the copartners but prior to the acts complained of a new agreement was entered into under which one of the partners bought out the interest of the other and the agreement sued on was made solely with the remaining partner, *held* there is but one party plaintiff to whom relief could be available on the facts alleged, and therefore dismissal on demurrer for misjoinder of parties and causes was improperly entered. *Ibid.*

§ 19c. Demurrer for Failure of Complaint to State Cause of Action.

Defendant's demurrer on the ground that the complaint failed to state a cause of action *held* properly overruled upon the principle that to be subject to demurrer a pleading must be fatally defective, and that if any portion of it or to any extent it presents facts sufficient to constitute a cause of action, the demurrer should be overruled. *Snotherly v. Jenrette*, 605.

Each cause of action should be stated separately without reference to any other cause, and allegations of one cause should not be considered in passing upon a demurrer *ore tenus* to another cause. *Cherry v. Walker*, 725.

§ 20. Waiver of Right to Demur.

The filing of answer to the original complaint does not waive defendants' right to demur to the amended complaint on the ground of misjoinder of parties and causes of action. G.S. 1-134. *Teague v. Oil Co.*, 65.

§ 20½. Form and Effect of Judgment Upon Demurrer.

Where there is a misjoinder of causes of action, the cause will not be dismissed upon demurrer but the court will merely sever the causes and divide the actions. G.S. 1-132. *Teague v. Oil Co.*, 469; *Snotherly v. Jenrette*, 605.

Where the complaint fails to state a cause of action, order sustaining demurrer on this ground does not effect a dismissal but merely strikes the complaint, and the cause remains on the docket and should be dismissed only if plaintiff fails to amend or file a new complaint as permitted to do by statute. *Teague v. Oil Co.*, 469.

Where there is a misjoinder of parties and causes of action an order sustaining demurrer thereto on this ground necessitates a dismissal of the action. *Teague v. Oil Co.*, 469; *Snotherly v. Jenrette*, 605.

§ 22b. Amendment by Permission of Trial Court.

While motion to amend the complaint is addressed to the discretion of the trial court, when the court erroneously dismisses the action on the ground that plaintiff has no capacity to sue, and thereupon denies plaintiff's motion to be allowed to amend, the order denying the motion to amend will be stricken out on appeal without prejudice to plaintiff to renew its motion in order that it may be properly considered in the discretionary power of the court. *Ionic Lodge v. Masons*, 252.

PLEADINGS—*Continued.*

Where there is a misjoinder of parties and causes of action, plaintiff may move to file a substituted or amended pleading at any time before judgment is entered sustaining the demurrer, but after such judgment is entered the court has no authority to entertain a motion for leave to file a new or amended complaint for the reason that there is no action pending in which the court has jurisdiction to entertain a motion. G.S. 1-161. *Teague v. Oil Co.*, 469.

Where the Supreme Court decides that the trial court was in error in overruling demurrer for misjoinder of parties and causes of action, the cause remains on the docket until entry of judgment in accordance with the opinion of the Supreme Court, and at any time prior to the entry of such judgment the trial court has authority to hear plaintiff's motion for leave to file a substitute or amended pleading. *Ibid.*

Ordinarily an appeal suspends all further proceedings in the trial court pending the appeal, and where an appeal is pending from order sustaining demurrer to the cross-action of defendants against those joined as additional defendants, the court has no power at a subsequent term to allow the plaintiff to amend so as to demand recovery against such additional defendants. *Harris v. Fairley*, 555.

§ 24a. Variance in General.

Variance between allegation and proof which is insufficient to mislead defendant to her prejudice in maintaining her defense is immaterial. *Spivey v. Newman*, 281.

§ 28. Motions for Judgment on the Pleadings.

Motion for judgment on the pleadings is properly denied when the material facts are not admitted, *a fortiari* when the answer raises issues of fact. *Hoover v. Crotts*, 617.

A motion for judgment on the pleadings is in the nature of a general demurrer, and its purpose is to test the sufficiency of the adversary's pleading to state facts which constitute a cause of action or a defense, admitting for the purpose the truth of all well pleaded facts in the pleading of the adversary and the untruth of movant's allegations which are controverted by them. *Raleigh v. Fisher*, 629.

§ 31. Motions to Strike.

A "further defense" which contains averments of fraud but which is insufficient to state a cause of action against plaintiff for actionable fraud is properly stricken upon motion when the averments are irrelevant to the issue between plaintiff and defendant. *Thalhimer v. Abrams*, 96.

Allegations against one who is not a party to an action, and which have no bearing on the plaintiff's right to obtain the relief sought, do not constitute proper pleadings and should, on motion, be stricken therefrom. *Richardson v. Welch*, 331.

Allegations should be stricken only when they are clearly improper, impertinent, irrelevant, immaterial, or unduly repetitious, but defendant is not entitled to have stricken allegations of material fact even though they may not be stated in the most concise manner and even though containing scenery and stage decorations. *Rhodes v. Jones*, 547.

PLUMBING AND HEATING CONTRACTORS.

§ 2. Licenses.

The license required by G.S. 18-21 is for those who install, alter, or restore plumbing, and is not required for the dismantling of plumbing. *Employment Security Com. v. Kermon*, 342.

PRINCIPAL AND AGENT.

§ 7c. Apparent Authority of Agent.

Whether agent authorized to hire employees had implied authority to agree to pay salary at annual rate *held* for jury. *Lochner v. Sales Service*, 70.

§ 7d. Ratification and Estoppel.

Plaintiff introduced in evidence account books and receipts for payments on a loan from the corporate defendant which she testified was negotiated by the individual defendant as its agent. The corporate defendant admitted it was in the business of lending money and that the individual defendant is its employee. *Held:* The evidence is sufficient to show authority of the individual defendant to make loans for the finance company and to make statements for it in the scope of his employment by ratification at least. *White v. Disher*, 260.

§ 7f. Special Agents.

One dealing with an agent or representative with known limited authority can acquire no rights against the principal when the agent or representative acts beyond his authority or exceeds the apparent scope thereof. *Texas Co. v. Stone*, 489.

PROCESS.

§ 4. Alias and Pluries Summonses.

Plaintiff has the duty to sue out *alias* and *pluries* summons when necessary, and upon his failure to maintain the chain of process there is a discontinuance. *McIntyre v. Austin*, 189.

Plaintiff may "sue out" an *alias* or *pluries* summons either by oral or written application to the clerk, and no order of court is necessary to the issuance of such process, although an order or memorandum by the clerk showing the relation to the proceeding writ or writs will not render the writ invalid if in proper form otherwise. *Ibid.*

The mere endorsement of the words "*alias*" or "*pluries*" upon a summons is ineffective, but the *alias* or *pluries* summons must contain sufficient information in the body thereof to show its relation to the original summons. *Ibid.*

Legal service of an *alias* or *pluries* summons is effective from the date of the original process. *Ibid.*

A summons issued after an amendment constituting a new cause of action is ineffectual as an *alias* summons, and endorsement of the word "*alias*" thereon does not make it in law an *alias* summons. *Perkins v. Perkins*, 91,

§ 5a. Service of Process on Individuals in General.

Where suit for escheat, in which heirs are served by publication, is consolidated with action by claimant against estate, the heirs are not thereby made parties to the claimant's action and are not in court in that action in any manner sanctioned by law. *Pack v. Newman*, 397.

PROCESS—*Continued.*

§ 6. Service by Publication and Attachment.

Where the summons issued with the filing of the complaint is returned "*defendant not to be found in the county,*" and thereafter purported *alias* summons is stricken as ineffectual, plaintiff is still entitled to attachment of defendant's property and the service of summons and notice of attachment by publication upon affidavit sufficient in form that defendant had left the State and was a nonresident, there being no discontinuance, and the attachment and service by publication in the prescribed manner obviating the necessity of issuance of summons. *Perkins v. Perkins*, 91.

§ 8d. Service on Corporations—Foreign Corporations "Doing Business" Here.

Whether a corporation is "doing business" in this State within the purview of G.S. 55-38 is an inference of law and of fact to be drawn from the specific facts found, and is subject to review on appeal. *Radio Station v. Eitel-McCullough*, 287.

Foreign corporation held not doing business in this State so as to subject it to service by service on Secretary of State.

§ 8e. Service on Foreign Insurance Companies.

The statutes authorizing substituted service, being in derogation of the common law, must be strictly construed, and compliance with the statutory requirements must appear of record. *Hodges v. Ins. Co.*, 457.

The insurance commissioner is not authorized to accept service for foreign insurance companies under the provisions of G.S. 58-150 as amended by Chap. 348, Sec. 2, Session Laws of 1945, the passive agency under the statute being solely for the purpose of constituting him an agent upon whom service on foreign insurance companies may be made in the statutory manner. G.S. 1-89. *Ibid.*

§ 14. Correction and Waiver of Defects.

Where a subpoena issued by a municipal-county court and running outside the county is a nullity because not attested by the seal of the court, neither service of the process nor voluntary appearance thereunder, can waive the defect or vitalize the process. *Greensboro v. Black*, 154.

PROPERTY.

§ 2b. Personal Property.

Ownership of personalty is a mixed question of law and fact, and it is only when the facts are not in dispute that the question of title is one of law for the court. *Bullman v. Edney*, 465.

Where husband and wife each pay part of purchase price of automobile they become tenants in common therein. *Ibid.*

PUBLIC OFFICERS.

§ 4a. Qualification.

The fact that law enforcement officers appointed by a board of alcoholic control have not given bond, G.S. 128-9, does not affect their capacity to execute a search warrant or other judicial process, since the giving of bond is not a condition precedent to the authority of a public officer to perform his duties but is solely for the protection and indemnification of persons who may be damnified by his failure or neglect in the discharge of his duties. *Hinson v. Britt*, 379.

PUBLIC OFFICERS—*Continued.*

§ 5a. De Facto Officers.

A duly appointed public officer is a *de facto* officer notwithstanding his failure to give bond required by statute, and his acts as such are valid in law in respect to the public, whom he represents, and to third persons, with whom he deals officially. *Hinson v. Britt*, 379.

QUIETING TITLE.

§ 1. Nature and Grounds of Remedy.

In an action to quiet title, plaintiffs may not seek to have an unprobated instrument declared invalid as the last will and testament of a decedent on the ground that defendants claim an interest in the land under such unprobated instrument, since equity has no jurisdiction to declare what is or what is not a last will and testament, and therefore the parties may not confer such jurisdiction upon it as an incident to its equitable jurisdiction to remove clouds and quiet titles. *Brissie v. Craig*, 701.

RAILROADS.

§ 4. Accidents at Crossings.

Evidence *held* to show contributory negligence as a matter of law barring recovery for injuries received by plaintiff when she rode her bicycle onto the tracks of defendant railroad company at a grade crossing, and was struck by defendant's train. *Boyd v. R. R.*, 171.

Evidence tending to show that intestate, driving his employer's truck at a rate of ten to fifteen miles per hour, drove upon a crossing of a spur track without slackening speed or turning, and was struck by defendant railroad company's engine, that his view was unobstructed in the direction from which the engine approached for a distance of several hundred feet when he was within 24 feet 8 inches of the nearest rail, together with evidence that intestate was familiar with the crossing and was aware of the fact that trains passed over the spur track almost daily and usually at the time of the accident, is *held* to show contributory negligence barring recovery as a matter of law irrespective of evidence that the engine was traveling twenty miles per hour or the fact that on the occasion in question there were no crew members on the front and back of the train as was customary. *Carruthers v. R. R.*, 183.

Plaintiff's evidence to the effect that he had already turned on the lights of his car, that it was almost dark, that defendant's engine was moving noiselessly down grade, and that just as defendant drove upon the grade crossing light flashed up from the oncoming locomotive and its whistle was blown, but that it approached the crossing without light and without warning signal of any kind, *is held* not to establish contributory negligence as a matter of law. *Collingwood v. R. R.*, 192.

Where the evidence discloses that plaintiff was entirely familiar with the railroad crossing in question, that he stopped and looked when within eight or ten feet of the nearest rail where his view of the approaching train was obstructed by a bank, and then drove upon the crossing without again looking in that direction, although he could have stopped in safety beyond the bank where his view of the approaching train was unobstructed for a distance of one-half to two miles, *is held* to disclose contributory negligence barring recovery as a matter of law. *Parker v. R. R.*, 472.

RAILROADS—*Continued.*

Whether railroad employee was contributorily negligent in riding pilot platform of engine *held* for jury in his action against motorist to recover for injuries received in crossing accident. *Holderfield v. Trucking Co.*, 623.

Where, in an action to recover for a collision at a railroad grade crossing, there is no evidence that either party had the last clear chance, that the view at the crossing was obstructed, or that the crossing was unusually hazardous, it is error for the court to charge the jury on such principles of law which do not arise upon the evidence. *Collingwood v. R. R.*, 724.

RAPE.

§ 1. Elements of the Offense.

Emission of seed is not necessary, the slightest penetration of the sexual organ of the female by the sexual organ of the male being sufficient. *S. v. Bowman*, 374.

§ 3. Competency and Relevancy of Evidence.

The provisions of Sec. 4, Chap. 299, Session Laws of 1949, amending G.S. 14-21, provides merely that the jury may recommend life imprisonment even though the jury finds facts from the evidence sufficient to constitute rape, and that the judge shall instruct the jury that such verdict may be returned, but the statute makes no change in the elements constituting the crime of rape or the rules of evidence in such prosecutions, and therefore evidence otherwise incompetent is not rendered admissible because directed to an appeal for mercy. *S. v. Shackleford*, 299.

§ 15. Carnal Knowledge of Female Between 12 and 16—Elements of the Crime.

The three essential elements of the offense created by G.S. 14-26 are (1) a male person's carnal knowledge of a girl (2) over twelve and under sixteen years of age (3) who has never before had sexual intercourse with any person. *S. v. Bowman*, 374.

"Carnal knowledge" and "sexual intercourse" are synonymous, and exists in a legal sense when there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. *Ibid.*

§ 18. Carnal Knowledge of Female Between 12 and 16—Sufficiency of Evidence and Nonsuit.

Testimony by prosecutrix that defendant had "intercourse" with her and "raped" her is sufficient evidence of carnal knowledge to be submitted to the jury in a prosecution under G.S. 14-26. *S. v. Bowman*, 374.

§ 23. Prosecution for Assault on Female.

In those offenses in which the want of consent of the person affected is an element, such as assault on a female, entrapment amounting to a consent of the person affected cannot be made the basis of a criminal charge, and therefore in a prosecution for such offense defendant is entitled to introduce evidence tending to show that the prosecuting witness agreed with officers that she would meet defendant and go with him voluntarily for the purpose of prosecuting him for any offense he might commit. *S. v. Nelson*, 602.

§ 24. Assault With Intent to Commit Rape.

In a prosecution for an assault with intent to commit rape, a repeated instruction defining the offense as an assault with an intent to have sexual

intercourse with prosecutrix "without her conscious express permission" must be held for reversible error notwithstanding that in other portions of the charge the jury was instructed that the intent must be to accomplish the act "forcibly and against her will," and notwithstanding that the question of consent or permission was not mooted. *S. v. Randolph*, 382.

Assault with intent to commit rape is not the same as an attempt to commit rape, but is an assault with the requisite felonious attempt. *Ibid.*

RECEIVERS.

§ 8. Proceedings and Appointment of Receiver for Insolvent.

Any judge of the Superior Court has jurisdiction to appoint a receiver for an insolvent. G.S. 1-501. *Surety Corp. v. Sharpe*, 98.

In receiverships of insolvents under G.S. 1-501, G.S. Chap. 55, Art. 13, will be applied as far as possible. G.S. 1-502. *Ibid.*

All claims against an insolvent must be settled in the original action in which the receiver is appointed except in the infrequent instances where the appointing court, for cause shown, may grant leave to a plaintiff to bring an independent action against the receiver. *Ibid.*

§ 12a. Filing and Proof of Claims.

All claims against an insolvent must be presented to the receiver in writing. G.S. 55-152. *Surety Corp. v. Sharpe*, 98.

The court should fix a time, giving appropriate notice thereof to creditors, within which claims against an insolvent must be presented or be barred. G.S. 55-152. *Ibid.*

§ 12c. Proceedings Before Receiver.

The receiver must pass upon the validity and priority of all claims presented, and to this end has plenary power to examine claimants and witnesses and to require the production of relevant books and papers, G.S. 55-152, and must notify claimants of his determination of their claims and report his findings to the next ensuing term of Superior Court. G.S. 55-153. *Surety Corp. v. Sharpe*, 98.

§ 12d. Exceptions to Receiver's Report and Order of Payment.

An order for the distribution of the assets of an insolvent should not be made until after the validity of all claims has been determined and their order of priority fixed. *Surety Corp. v. Sharpe*, 98.

Any claimant may except to the receiver's determination of his claim or to the granting of priority to the claim of any other creditor which will exhaust the funds available for the payment of his claim, at any time within ten days after notice of the finding of the receiver and not later than three days after the beginning of the term to which the report is made, with discretionary power in the court to extend the time. G.S. 55-153. *Ibid.*

If claimant does not demand a jury trial in his exceptions to the report of the receiver, he waives his right thereto. G.S. 55-153. *Ibid.*

The general rules of evidence apply to the trial of exceptions to the report of a receiver upon an appropriate issue to be submitted by the court. *Ibid.*

Court may not order receiver to pay certain claim as prior lien without notice and opportunity to be heard to other claimants. *Ibid.*

REFORMATION OF INSTRUMENTS.

§ 3. Mutual Mistake.

Where it is judicially admitted by the parties that the male defendant agreed to support plaintiffs for the rest of their lives as consideration for deed to lands executed by plaintiffs to defendants, and that this provision was omitted from the deed through the mutual mistake of the parties, the court may decree reformation of the deed by the insertion of such provision. *Minor v. Minor*, 669.

§ 7. Pleadings.

The equitable right to reformation may be invoked by a defendant by way of defense or counterclaim in an action based on the deed. *Lawrence v. Heavner*, 557.

In plaintiff's action to recover one-half the rents from property as tenant in common, allegations in the answer that defendant had the property conveyed to himself and plaintiff under the mistaken belief that he and plaintiff were husband and wife and that her name was eroneously inserted therein as co-grantee because of her fraud in marrying him with knowledge that she had a living and undivorced husband by a former marriage, *is held* sufficient to invoke the equitable relief of reformation for mistake on one side induced by fraud on the other. *Ibid.*

§ 11. Issues and Verdict.

Where a man has a conveyance executed to himself and a woman under the mistaken belief that they are man and wife, and sufficiently sets forth a cause of action to reform the deed by striking therefrom her name as co-grantee on the ground of mistake induced by fraud, a verdict which merely establishes that the woman paid no part of the purchase price or improvement of the property is insufficient to support decree of reformation. *Lawrence v. Heavner*, 557.

RETIREMENT SYSTEMS.

§ 8. Local Governmental Employees' Retirement Systems—Inauguration.

Defendant municipality became an employer participating in the State Retirement System under authority of General Statutes 128-21 through 128-38, and also under authority of an act amending its charter, Chap. 30, Sec. 1. sub-section 5 (a), 5 (b), Session Laws of 1947. Later the charter amendment was repealed upon approval of the voters, Chap. 650, Session Laws of 1949. *Held:* The municipality retained the power to participate in the State Retirement System by virtue of authority granted by the General Statutes. *Laughinghouse v. New Bern*, 596.

Where a city has no authority to inaugurate its own retirement system for its employees, there is no authority for the submission of such question to its voters, and a majority vote in favor of such municipal system amounts to no more than an expression of popular opinion on a subject not legally presented. *Ibid.*

§ 10. Local Governmental Employees' Retirement Systems—Withdrawal from State System.

Where a city has become an employer participating in the State Retirement System under authority conferred by General Statutes and by an act amending its charter, the repeal of the charter provision leaves its governing authorities with discretionary power to participate in the retirement system under authority conferred by the General Statutes, and *mandamus* will not lie to com-

RETIREMENT SYSTEMS—*Continued.*

pel it to withdraw from the State Retirement System. *Laughinghouse v. New Bern*, 596.

ROBBERY.

§ 3. Prosecution and Punishment.

Evidence in this case tending to show that one defendant arranged to have the prosecuting witness stopped at a country store where all of the defendants, acting in concert, assaulted and robbed him of a sum of money, *is held* sufficient to be submitted to the jury on the charges of conspiracy to assault and rob, and with robbery. *S. v. Cottle*, 567.

SCHOOLS.

§ 3a. Establishment and Consolidation of Districts.

A county board of education has the power, with the approval of the State Board of Education, to consolidate school districts under its jurisdiction whenever and wherever in its judgment the consolidation will better serve the educational interest of the county or any part of it. *Feezor v. Siceloff*, 564.

And ordinarily, courts will not interfere with the exercise of such discretion. *Gore v. Columbus County*, 636.

But consolidation cannot be made when it involves allocating funds from bond issue to new school when purposes for which bonds were issued remain unsatisfied. *Ibid.*

§ 4c. District Boards and Officers.

A school committeeman for a district holds for a term of two years and is not removable at will of county board of education, but may be removed only by proceeding under G.S. 115-74, which is judicial or *quasi*-judicial with right to review by *certiorari*. *Russ v. Board of Education*, 128.

§ 6a. Selection of School Sites.

The power to change the location of a school and to select a site for a new school are vested in the sound discretion of the school authorities, with the exercise of which discretion the courts will not interfere in the absence of manifest abuse. *Feezor v. Siceloff*, 563.

But courts cannot authorize selection of site and building of new school with proceeds of bond issue when purposes for which bonds were issued remain unsatisfied. *Gore v. Columbus County*, 636.

§ 10h. Allocation and Expenditure of Funds from Bond Issues.

Held: County commissioners had authority to allocate funds for new central high school in lieu of remodeling old buildings. *Feezor v. Siceloff*, 563.

A statute authorizing a school board to make changes in the allocation of funds from a school bond issue cannot empower the board to do so in the exercise of an arbitrary discretion but only in the exercise of a discretion in good faith in the light of existing facts and circumstances. Chap. 942, Session Laws of 1949. *Gore v. Columbus County*, 636.

County board may not use funds from school bond issue for different project without finding that original project was no longer necessary. *Ibid.*

STATE.

§ 3. Suits and Claims Against the State.

While an individual may not enjoin governmental agencies in the performance of their official duties merely because he disagrees with the policy or discretion of those in charge, a citizen and taxpayer may maintain an action to restrain the unlawful use of public funds to his injury. *Teer v. Jordan*, 48.

The immunity of the State to suit by an individual, except when consent thereto has been expressly given, does not extend to individual officers of the State, even though they assume to act under the authority of the State. *Ibid.*

STATUTES.

§ 5a. Construction in General.

The General Assembly may define a word used in a statute and give it new or additional meaning not strictly within its ordinary definition, which meaning the courts must follow to effectuate the intent and purpose of the legislative act. *Carter v. Carter*, 614.

§ 10. Prospective and Retroactive Effect.

Statutes are presumed to operate prospectively only. *Wilson v. Anderson*, 212.

A statute will not be given retroactive effect when such construction would interfere with vested rights or with judgments already entered. *Ibid.*

§ 15. Repeal and Re-enactment.

Where a statute or an ordinance expressly repeals a former and at the same time re-enacts all or some of the provisions of the statute or ordinance repealed, the provisions re-enacted continue in force without interruption. *Raleigh v. Fisher*, 629.

TAXATION.

§ 1a. Uniform Rule and Discrimination in General.

The General Assembly may levy a tax on one aspect of a business or occupation and also an additional tax on another aspect or different development of the business of the same taxpayer, provided the tax applies equally to all in the same class, since double taxation, as such, is not prohibited by the Constitution and is valid if the rule of uniformity is observed. *Bottling Co. v. Shaw*, 307.

§ 1c. Classification of Businesses, Trades and Professions for Taxation.

The power to classify subjects of taxation carries with it the discretion to select them, and a wide latitude is accorded taxing authorities, particularly in respect of occupational taxes, under the power conferred by Art. V, Sec. 3, of the Constitution of North Carolina. *Bottling Co. v. Shaw*, 307.

§ 11. Use and Allocation of Proceeds of Bond Issues.

While the proceeds of the bond issue authorized by Chap. 1250, Session Laws of 1949, constitute a separate fund to be used exclusively for the construction of secondary roads, and not for primary roads or maintenance, there is not requirement that the work must be let to contract and the tSate Highway and Public Works Commission has discretionary power to construct or improve secondary roads by the use of its own materials, equipment and engineering supervision, and may use a part of the equalization fund set up by the Act for the purchase of equipment to this end. *Teer v. Jordan*, 48.

TAXATION—*Continued.*

Where, in the use of part of the equalization fund set up by Chap. 1250, Session Laws of 1949, for the purchase of construction equipment, provision is made for the use of a rental system for the purpose of allocating the funds among the counties as required by the Act, the matter is resolved into a question of bookkeeping, and the possibility of injury to a resident of any particular county by the failure of his county to receive its correct proportion of the funds is too remote to justify the intervention of equity. *Ibid.*

§ 23½. Construction of Taxing Statutes in General.

The construction given a taxing statute by the Commissioner of Revenue, though not controlling, will be given consideration by the courts. *Bottling Co. v. Shaw*, 307.

Where a taxing statute uses the alternative conjunction "or" it creates tax liability on any coming within a description permissible under the statute. *Ibid.*

§ 30. Sales, License and Excise Taxes.

A bottling company which owns and distributes as a part of its business a large number of machines for distributing its product which it places in location with merchants and others under agreement, is liable for the occupational tax of $100.00 levied under the provisions of G.S. 106-65.1 and is also liable for a tax of $15.00 on each such distributing machine under G.S. 105-65.2, and the statute is not so uncertain and vague as to be unenforceable. *Bottling Co. v. Shaw*, 307.

The tax of $15.00 on each soft drink dispensing machine levied by G.S. 105-65.2 applies regardless of whether the distributor controls the coin box keys and collects the intake, paying a fixed rent or share of the receipts to the owner of the premises, or charges the retailer a fixed amount for servicing the machines and permits the retailer to control the coin box keys and retain the intake. *Ibid.*

§ 40a. Foreclosure Proceedings in General.

In proceedings to sell lands for taxes, the court, even though it be a court of general jurisdiction, exercises a limited statutory authority, and therefore it must appear by the recitals of the record itself that the court not only had authority over the subject matter but also that it acquired jurisdiction of the parties in some manner recognized by law. *Eason v. Spence*, 579.

§ 40b. Notice and Parties in Tax Foreclosure Proceedings.

Where a proceeding to foreclose a tax sale certificate under Chap. 260, Public Laws of 1931, is instituted solely against the life tenant and her husband, the remaindermen who are neither made parties nor served with summons are not before the court notwithstanding that notice to "all persons claiming any interest" was posted at the courthouse door and published in a general advertisement in some newspaper in the county, and therefore a sale of such lands pursuant to such proceeding does not pass the interest of the remaindermen. *Eason v. Spence*, 579.

§ 40g. Attack of Foreclosure.

Foreclosure of a tax sale certificate in proceedings in which the life tenant alone is a party is void as to the remaindermen for want of jurisdiction and the remaindermen may attack it collaterally. *Eason v. Spence*, 579.

TAXATION—*Continued.*

§ 41. Redemption from Foreclosure.

Where foreclosure of a tax sale certificate is had in proceedings in which the life tenant alone is made a party, the commissioner's deed conveys only the interest of the life tenant, but the sale is for the full amount of the tax lien and necessarily extinguishes it, and therefore the remaindermen are under no necessity to attempt redemption subsequent to the sale in order to protect their interests. *Eason v. Spence*, 579.

TENANTS IN COMMON.

§ 2. Creation and Existence of Cotenancy.

Where husband and wife purchase an automobile, each paying a part of the purchase price or promising to pay such part, they become tenants in common therein in the proportion which the amount paid, or agreed to be paid, by each bears to the entire purchase price. *Bullman v. Edney*, 465.

Where a man has property conveyed to himself and a woman under the mistaken belief that they are man and wife, and the purported marriage is later decreed void *ab initio*, the conveyance makes them tenants in common and, nothing else appearing, each is entitled to one-half the rents received from third parties. *Lawrence v. Heavner*, 557.

§ 7½. Rights and Remedies Inter Se.

While one tenant in common may not maintain an action in the nature of trover against his co-tenant, where one tenant exercises dominion over the property in direct denial of or inconsistent with the rights of the other, or consumes or sells the personalty, the other tenant may maintain an action for conversion. *Bullman v. Edney*, 465.

§ 10. Conveyance by One Tenant.

Where one tenant in common in personalty sells the chattel, he can convey only his interest therein in the absence of estoppel, and his purchaser becomes a tenant in common with the one who has not sold his interest. *Bullman v. Edney*, 465.

TORTS.

§ 6. Right to Contribution and Joinder of Additional Parties Defendant.

In an action by an employee or his personal representative against a third person tort-feasor, such defendant *held* not entitled to joinder of fellow-employee or employer upon allegations that their negligence concurred and constituted primary cause of injury. *Essick v. Lexington*, 200; *Bass v. Ingold*, 295.

Where an additional defendant is brought in by the original defendant for the purpose of contribution under G.S. 1-240, the propriety of such joinder will be determined by the pleadings of the original defendant, unaffected by any pleadings filed by plaintiff. *Bass v. Ingold*, 295.

Where driver of car is under control of passenger any negligence of driver is imputed to passenger and precludes action by passenger against him, and therefore in passenger's action against driver of other car involved in collision such defendant is not entitled to have plaintiff's driver joined as additional defendant for contribution. *Ibid.*

TRIAL.

§ 6. Expression of Opinion by Court During Course or Conduct of Trial.

The trial court should not express opinion upon matters before jurors whom it proposes to poll in regard to such matters. *Call v. Stroud*, 478.

§ 11. Consolidation of Actions.

The consolidation of two independent actions for judgment does not constitute them a single action, but they remain separate suits. *Pack v. Newman*, 397.

§ 18. Province of Court and Jury in General.

It is error for the trial court to determine issues of fact raised by the pleadings in the absence of waiver of the constitutional and statutory right to a trial by jury. *Sparks v. Sparks*, 492.

§ 21. Office of Motion to Nonsuit.

A motion for a compulsory nonsuit challenges the sufficiency of the evidence to take the case to the jury and support a verdict for plaintiff. *Lochner v. Sales Service*, 70.

§ 22a. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, plaintiff's evidence is taken as true. *Crouse v. Vernon*, 24; *Brafford v. Cook*, 699.

On motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff. *Levy v. Aluminum Co.*, 158; *Maddox v. Brown*, 244; *White v. Disher*, 260; *Brafford v. Cook*, 699.

§ 22b. Consideration of Defendant's Evidence on Motion to Nonsuit.

Defendant's evidence in conflict with that of plaintiff is not to be considered on motion to nonsuit. *Howard v. Bell*, 611; *Jackson v. Hodges*, 694; *Brafford v. Cook*, 699.

§ 22c. Contradictions and Discrepancies in Plaintiff's Evidence.

Contradictions in plaintiff's evidence do not justify nonsuit. *Maddox v. Brown*, 244; *Williams v. Kirkman*, 609; *Jackson v. Hodges*, 694; *Brafford v. Cook*, 699.

§ 23a. Sufficiency of Evidence to Overrule Nonsuit in General.

If upon the whole evidence there are inferences tending to support plaintiff's case, nonsuit is properly refused. *Maddox v. Brown*, 244.

§ 23b. Sufficiency of Evidence to Overrule Nonsuit—Prima Facie Case.

A *prima facie* showing takes the case to the jury for its determination as to whether or not the necessary facts have been established. *Bennett v. R. R.*, 144.

§ 23f. Nonsuit for Variance.

Variance between allegation and proof as to whether plaintiff was standing in the street in the act of boarding defendant's car as a guest, or whether he was in the car in the act of seating himself, when defendant's act in suddenly putting the car in motion caused the door to swing violently backward and strike plaintiff's forehead, *is held* insufficient to mislead defendant to her prejudice in maintaining her defense upon the merits, and therefore the variance was immaterial and does not justify nonsuit. *Spivey v. Newman*, 281.

TRIAL—*Continued.*

§ 24a. Nonsuit on Affirmative Defense.

Nonsuit cannot be granted in favor of the party upon whom rests the burden of proof, and therefore defendant's evidence establishing an affirmative defense cannot entitle it to nonsuit. *Gibson v. Ins. Co.*, 712.

§ 31b. Statement of Evidence and Application of Law Thereto.

While the trial court's instructions as to the law should be confined to that arising upon the evidence adduced at the trial, an examination of the entire charge in this case *is held* not to disclose prejudicial error in stating principles of law based on facts having no relation to those in evidence in the case. *Collingwood v. R. R.*, 192. Reversed on petition to rehear, 724.

It is proper for the court to instruct the jury to the effect that the jury should take the law from the court rather than from counsel. *Spivey v. Newman*, 281.

The court need not read a statute to the jury, a simple explanation of the law without the involvement of the technical language of a statute being preferable. *Batchelor v. Black*, 314.

Where, in stating the evidence and explaining the law arising thereon, the court deals with all substantial and essential features of the evidence, an objection thereto on ground that the charge failed to comply with G.S. 1-180 cannot be sustained, it being the duty of the objecting party if he desired some subordinate feature to have been presented to the jury to have aptly tendered request for special instructions thereon. *Metcalf v. Foister*, 355.

Allegata and *probata* must correspond to each other to be effective, and it is error for the court to charge upon proof which is not supported by allegation. *Maddox v. Brown*, 542.

It is error for the court to charge the law on an aspect of the case entirely unsupported by the evidence. *Ibid.*

It is prejudicial error for the court to charge the jury as to principles of law in no way arising upon the evidence. *Collingwood v. R. R.*, 724.

The court is required to charge the law arising on the evidence given in the case, and a charge containing declarations of abstract principles of law without relating them to the evidence, is insufficient. *Ibid.*

§ 33. Additional Instructions and Redeliberation of Jury.

Where through inadvertence the issue submitted to the jury uses the word "defendant" when the word "plaintiff" was intended, the trial court may, upon the matter being called to his attention by the jury after they had deliberated for some hour and twenty minutes, correct the issue and have the jury resume its deliberations. *Spivey v. Newman*, 281.

§ 36. Form and Sufficiency of Issues.

The issues should embrace all material questions in controversy and afford each party opportunity to fairly and fully present his contentions of law and fact, and where the issue submitted fails to do so, judgment on the verdict will be set aside and a new trial granted. *Turnage v. McLawhon*, 515.

The issues should be certain and import a definite meaning free from ambiguity, and therefore an issue connecting two separate propositions by "and/or" is in the alternative and is inconclusive, and a finding thereon by the jury is insufficient to support a judgment. *Gibson v. Ins. Co.*, 712.

TRUSTS.

§ 3a. Establishment and Validity of Written Trust in General.

The validity of a testamentary trust of personalty is governed by the law of the state of testator's domicile at the time of his death. *Johnson v. Salsbury*, 432.

§ 4b. Transactions Creating Resulting Trusts.

Where the will directs that certain lands might be sold at any time at the discretion of the executors, and directs that in the event of sale the proceeds should be invested in bonds and the income therefrom be paid to testator's wife during widowhood and after her death the bonds be divided among testator's children, *held* upon the sale of lands and the investment of the proceeds of sale in other lands, a resulting trust arises in favor of the persons beneficially entitled to the funds, and therefore upon the death of the wife, testator's children are entitled to the lands purchased by the executors in fee simple absolute, and such lands do not come within the provisions of a subsequent item of the will disposing of real estate "not herein disposed of and not sold under the powers hereinbefore granted." *Elmore v. Austin*, 13.

Where each of two parties supplies a part of the purchase price and title is taken solely in the name of one of them, a resulting trust arises in favor of the other, and this rule applies to personalty as well as realty. *Bullman v. Edney*, 465.

The power of equity to decree a resulting trust where one person pays the purchase price for lands and has title taken in the name of another is exercised to effectuate the presumed intention of the parties, and therefore where a man intentionally has lands conveyed to himself and a woman under erroneous belief that they are man and wife, he is not entitled to have himself declared the sole owner under the doctrine of resulting trust even though he had paid the entire purchase price, since in such instance the deed was executed in accordance with the actual intent of the parties. *Lawrence v. Heavner*, 557.

§ 5c. Actions to Establish Constructive Trusts.

In an action to have defendant declared a trustee *ex maleficio* on the ground that he first acquired plaintiff's trust and confidence to such extent as to occupy a confidential or fiduciary relationship and then took advantage of his position of trust to plaintiff's hurt, *held* mere allegation that defendant had won plaintiff's trust and confidence and obtained the deed in question by fraud and undue influence would not be sufficient, but plaintiff was entitled to allege the facts and circumstances which created the relationship of trust and those which led up to and surrounded the consummation of the transaction attacked, including allegations as to plaintiff's youth and inexperience, the series of transactions between them by which defendant won plaintiff's confidence, the duration and character of their friendship, as well as the fact that plaintiff was possessed of a substantial estate, but not as to its method of accumulation. *Rhodes v. Jones*, 547.

§ 8. Removal and Appointment of Successor Trustees.

Order accepting trustee's resignation is interlocutory, since approval of judge of Superior Court is necessary before it is effective. *Russ v. Woodard*, 36.

The clerk of the Superior Court has power to set aside his prior order accepting the resignation of a trustee and appointing a successor when no appeal

TRUSTS—*Continued.*

has been taken and the order has not been approved by the judge of the Superior Court. *Ibid.*

After setting aside such order he may enter another order accepting the trustee's resignation, and such second order will be upheld when the proceedings are according to the statutory requirements and the order is approved by the judge of the Superior Court. *Ibid.*

§ 14a. Control and Management of Trust Property.

A testamentary trust in personalty will be administered in accordance with the laws of the state of the testator's domicile at the time of his death unless the will affirmatively show an intention that the trust be administered elsewhere, even though the trustee and the beneficiary be residents of another state. *Johnson v. Salsbury*, 432.

§ 20a. Sale of Trust Property by Trustee.

A trustee can properly sell trust property if power of sale is conferred upon him by the instrument creating the trust. *Johnson v. Salsbury*, 432.

The execution of a power will be attributed to a valid authority even though the trustee profess to act under an authority which is defective, and therefore where the trust instrument gives the trustee valid power of sale, the trustee's sale of the trust property will be attributed to this authority, rendering it unnecessary to determine the validity of a decree authorizing the trustee to sell. *Ibid.*

§ 30½. Decree of Court Terminating Trust.

A decree entered in another state by a court therein having general equitable jurisdiction, terminating a trust and directing the trustee to divide the property among the beneficiaries, is effective here when the trustee and beneficiaries were parties to the suit in such other court, even though the trust is created by a North Carolina instrument, since equity acts *in personam* and its decree is binding upon all parties in interest. *Johnson v. Salsbury*, 432.

USURY.

§ 1. Statutory Provisions in General.

The maximum legal rate of interest in this State is 6% per annum. *White v. Disher*, 260.

§ 9e. Sufficiency of Evidence and Nonsuit in Usury Actions.

Evidence in this case *is held* sufficient to be submitted to the jury on the question of whether defendant finance company loaned plaintiff a certain sum secured by chattel mortgage on an automobile and knowingly charged and received interest on said sum in excess of the legal rate, and its motion to nonsuit in plaintiff's action to recover double the amount of interest paid, G.S. 24-2, was properly denied. *White v. Disher*, 260.

UTILITIES COMMISSION.

§ 2. Jurisdiction and Authority.

A sanitary district furnishing drinking water to the public is a *quasi*-municipal corporation and is not under the control of the Utilities Commission as to service and rates, even though it engages in furnishing filtered water to industrial consumers. *Paper Co. v. Sanitary District*, 421.

UTILITIES COMMISSION—*Continued.*

§ 3. Hearings.

A utility which files application for authority to amend its rate schedule originates the proceeding and complains that its rates are insufficient to provide reasonable and necessary revenue, and therefore is the original complainant in the proceeding. G.S. 62-25. *Utilities Com. v. Mills Co.*, 690.

§ 5. Appeals.

Where an interested party intervenes and contests an application filed by a utility for authority to amend its rate schedule, G.S. 62-24, and the application is granted, notice of appeal of such interested party from the order of the Commission must be served upon the utility, G.S. 62-26.6, and where such interested party merely mails a copy of such notice to the utility the attempted appeal is ineffectual. *Utilities Com. v. Mills Co.*, 690.

VENDOR AND PURCHASER.

§ 7½. Title.

A "marketable title" is one free from reasonable doubt in law or fact as to its validity; an "indefeasible title" is one which cannot be defeated, set aside, or made void. *Pack v. Newman*, 397.

VENUE.

§ 1a. Residence of Parties in General.

The residence of a corporation for the purpose of venue is the county in which it maintains its principal office. *Trust Co. v. Finch*, 485.

§ 1b. Parties—Executors and Administrators.

The proper venue of an action against an executor or administrator in his official capacity is the county wherein the executor or administrator qualified and the letters were issued, G.S. 1-78, unless otherwise provided by statute. *Wiggins v. Trust Co.*, 391.

An action on the official bond of an executor or administrator should be instituted in the county where the bond was given if he or any surety on his bond lives in that county, and if not, plaintiff may then institute such action in the county of plaintiff's residence. *Ibid.*

The rule that the venue of an action against an executor or administrator in his official capacity is the county wherein the letters testamentary were issued is not affected by the fact that neither the personal representative nor any surety on his bond lives in such county, nor by the fact that the personal representative has not given bond because exempt from so doing by statute. G.S. 53-159. *Ibid.*

The fact that the principal place of business of a corporate executor or administrator is a county other than the one in which the letters testamentary were issued does not affect the question of venue of an action against such executor or administrator in its official capacity. *Ibid.*

The fact that an individual is joined as a defendant with an executor or administrator, and that the individual defendant is a resident of the county in which the cause of action is brought, *held* not to affect the executor or administrator's right to removal to the county in which it qualified. *Ibid.*

G.S. 1-78 applies only to suits instituted against executors or administrators, and has no application to suits instituted by them. *Ibid.*

VENUE—*Continued.*

G.S. 1-82 governs the venue of actions instituted by an executor or administrator in his official capacity. *Trust Co. v. Finch*, 485.

The residence of a corporate executor or administrator for the purpose of determining venue of an action instituted by it, like that of other domestic corporations, is the county in which it maintains its principal office, G.S. 1-79, and not the county of its qualification. *Ibid.*

A corporate administrator instituted suit in the county of its qualification and in which it maintained a branch office, against a defendant who was a resident of another county in which the corporate administrator maintained its principal office. *Held:* The action was properly removed upon motion to the county in which the corporate administrator maintained its principal office and in which defendant resides. G.S. 1-79. *Ibid.*

§ 3. Objections to Venue.

Where an action is brought in the wrong county, defendant is not entitled to abatement or dismissal, since venue is not jurisdictional, but is entitled only to removal to the proper county if motion therefor is made in apt time, since otherwise the question of venue is waived. *Wiggins v. Trust Co.*, 391.

§ 4b. Change of Venue for Convenience of Witnesses and Promotion of Ends of Justice.

The fact that a motion for change of venue is allowed as a matter of right does not preclude plaintiff from thereafter moving that the cause be removed back to the original county or some other county for the convenience of witnesses and the promotion of the ends of justice. *Wiggins v. Trust Co.*, 391.

WAREHOUSEMEN.

§ 3b. Delivery of Goods Upon Surrender of Receipts and Liability for Wrongful Delivery.

A warehouse and its manager, sued for conversion of cotton, may not maintain a cross-action against the transferees of the warehouse receipts when it is alleged they obtained the receipts from the owner and had the cotton delivered to persons designated by them upon surrender of the duly endorsed receipts, nor may the allegations of conversion contained in the complaint aid the allegations in such cross-action when the answer denies the conversion. *Harris v. Fairley*, 551.

The fact that the owner fails to take up his warehouse receipts when he delivers his cotton to the warehouse is not alone sufficient to relieve the warehouseman of liability if the removal of the cotton from the warehouse is contrived by the fraud of the manager. *Ibid.*

§ 3c. Negotiation, Transfer and Assignment of Receipts.

In order for transferree of warehouse receipts to be *bona fide* holder within meaning of G.S. 27-51 it is necessary not only that he acquire same before maturity for value and without notice of fraud, but also that he take same honestly and without knowledge of facts which would negative good faith. *Cotton Mills v. Cotton Co.*, 186.

Official warehouse receipts are negotiable by written assignment and delivery, and negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation if the person to whom the receipt was negotiated took same for value, in good faith, and without notice of the breach of duty. *Harris v. Fairley*, 551.

WATER COMPANIES.

§ 2. Control and Regulation.

A sanitary district which, as a part of its functions, furnishes drinking water to the public and also filtered water for industrial consumers is a *quasi*-municipal corporation, G.S. 130-39, and is not under the control and supervision of the North Carolina Utilities Commission as to services or rates, G.S. 62-30 (3). *Paper Co. v. Sanitary District*, 421.

§ 3. Powers and Functions.

Defendant sanitary district was unable to raise funds for the construction of a filter plant and, in order to carry out the purposes for which it was created, leased a cotton mill's filter plant under an agreement that the mill should get its water at cost of filtering and should have priority over other industrial consumers. *Held:* The leased contract was in the public interest and the district had authority to execute it, G.S. 130-97 (7), G.S. 130-39 (9) (b), and the contract is valid since it does not impair the ability of the district to discharge its duties to the public nor unlawfully discriminate between commercial customers similarly circumstanced. *Ibid.*

§ 4. Rates and Service.

Defendant sanitary district was unable to raise funds for the construction of a filter plant and, in order to carry out the purposes for which it was created, leased a cotton mill's filter plant under an agreement that the mill should get its water at cost of filtering and should have priority over other industrial consumers. Thereafter the district agreed with a paper mill to furnish it water from the surplus remaining after the needs of the district and lessor enterprise had been satisfied. *Held:* Upon increased demand by the lessor, resulting in a diminution of the surplus available for sale to other industrial consumers, the district had the power to reduce the amount of water furnished the paper mill proportionately, since the paper mill had no right to any water except out of surplus water remaining after the requirements of the district and the lessor enterprise had been satisfied, and since there was no discrimination in service to commercial users similarly circumstanced in regard to such surplus. *Ibid.*

WILLS.

§ 1. Nature and Essentials of Testamentary Disposition of Property.

An instrument of testamentary character is wholly ineffectual until it is admitted to probate by a competent tribunal. *Brissie v. Craig*, 701.

§ 15a. Proof of Will and Probate Proceedings.

Probate of will is in exclusive jurisdiction of clerk of the Superior Court. *Brissie v. Craig*, 701.

The right to apply to have a paper writing probated is not limited to parties interested in establishing the paper writing as the will of deceased, but under the statute any "person interested in the estate" may make such application G.S. 31-13, which he may do even though his interest is against the instrument and in such instance he may apply to have the will proved and simultaneously file a caveat thereto, G.S. 31-32. *Ibid.*

§ 16. Effect of Probate in Common Form.

The probate of a paper writing in common form conclusively establishes it as the valid will of the decedent until it is declared void by a competent

tribunal on an issue of *devisavit vel non* in a ceveat proceeding. G.S. 31-19. *Holt v. Holt*, 497.

§ 17. Caveat Proceedings.

Superior Court has no jurisdiction to determine whether instrument is a will except upon issue of *devisavit vel non* duly raised by caveat filed with clerk. *Brissie v. Craig*, 701.

A caveat is neither a civil action nor a special proceeding in the strict sense, but is a proceeding *in rem* in which the court pronounces the judgment as to whether the script itself is or is not the will of the deceased. *Ibid.*

§ 31. General Rules of Construction.

The objective of construction is to effect the intent of testator as expressed in the instrument, either explicitly or implicitly. *Elmore v. Austin*, 13.

Where the language of a will is plain and its import obvious, the words of testator must be taken to mean exactly what they say. *Ibid.*

Where the intention of testator is obscure because of ambiguous language or the use of inconsistent clauses or words, the court may resort to canons or rules of testamentary construction. *Ibid.*

As a general rule, a will should not be construed phrase by phrase so that a subsequent restrictive phrase be rejected as repugnant to a prior general devise, but the entire instrument should be construed from its four corners to ascertain the intent of testator. *Williamson v. Williamson*, 54.

The intent of testator as gathered from the four corners of his will must be given effect unless contrary to some rule of law or at variance with public policy. *Buffaloe v. Blalock*, 105.

A will should not be construed so as to nullify the instrument or any part of it, and therefore the courts will adopt that construction which will uphold the will in all its parts if such course is consistent with established rules of law and the intention of testator. *Johnson v. Salsbury*, 432.

The intent of testator as gathered from the four corners of the instrument must be given effect unless contrary to some rule of law or at variance with public policy, and such intent is the will even though not within the letter, and a thing within the letter is not within the will if not also within the intent. *Weathers v. Bell*, 561.

§ 33a. Estates and Interests Created in General.

A devise will be construed to be in fee simple unless an intent to convey an estate of less dignity is apparent from the language of the instrument. *Elmore v. Austin*, 13; *Langston v. Wooten*, 124.

§ 33c. Vested and Contingent Interests and Defeasible Fees.

Testator devised lands to his daughter with further provision that the gift should become absolute if she improved the land by erecting a dwelling or if she should die leaving issue, but that if she should fail to improve the lot or should die without living issue, then the lands should be disposed of as directed in a subsequent item. *Held:* The devise created a fee simple determinable, and under the rule of construction requiring that the fee simple absolute should vest as soon as the language of the testator permits, the ambiguous provisions for defeasance must be read so as to require both of the specified contingencies to occur before the fee should be defeated, and therefore upon

WILLS—*Continued.*

the erection of a dwelling house upon the property by the daughter her fee became absolute. *Elmore v. Austin*, 13.

Defeasible fees defined. *Ibid.*

A devise for life should the devisee die without living issue, but should the devisee leave issue living at her death the estate should become absolute, creates a fee simple determinable upon the death of the devisee without issue living at the time of her death. *Ibid.*

The devisee of a fee simple determinable upon her death without issue her surviving cannot become the owner of a part of the fee simple absolute by inheritance as an heir of testator since she could not qualify as an eligible heir of testator upon the happening of the condition of defeasance. *Ibid.*

There can be no merger of fee simple determinable and possibility of reverter. *Ibid.*

A devise to testator's four sons, but if any one of them should "fail to become a father of a living child by lawful wedlock" his share should revert to the estate, *is held* to devise a fee simple to each son, defeasible upon his death without having had a living child born in wedlock, but which becomes a fee simple absolute as to each son upon the birth to him of a living child in wedlock. *Buffaloe v. Blalock*, 105.

Possibility of reverter *held* to have passed under residuary clause. *Ibid.*

Where a woman of 63 years of age, without children, is the owner of lands devised to her with provision that if she should die without issue, testatrix' executor should sell the property and divide the proceeds among testatrix' heirs, it may be assumed for all practical purposes that devisee holds only a life estate in the premises. *Trust Co. v. Allen*, 274.

Devise of remainder to county for use as a charitable hospital, with provision for forfeiture if county fail to maintain property and use it for hospital, *held* to create conditional fee. *Featherstone v. Pass*, 349.

§ 33d. Estates in Trust.

Testatrix bequeathed certain property to her grandchildren with subsequent provisions that it was her will and desire that her son be appointed their guardian and that the guardian should hold and manage the property for the grandchildren with power to sell, convey or exchange the securities. *Held:* Since testatrix could not appoint a testamentary guardian for her grandchildren, G.S. 33-2, the provisions will be interpreted as bequeathing the property to testatrix' son as trustee for testatrix' grandchildren, in order that each provision of the instrument be given effect consistent with testatrix' intention. *Johnson v. Salsbury*, 432.

§ 33g. Life Estates and Remainders.

The sole dispositive sentence was to testator's wife in fee simple all his property, "she to be entitled to same so long as she lives." *Held:* The will devised only a life estate to the wife, and as to the remainder testator died intestate. *Williamson v. Williamson*, 54.

The will devised the *locus* to two daughters who were unmarried at the time of the execution of the will, so long as either of them remained single, with provision that if either married the property should be owned by the remaining single daughter for her lifetime, and at her death be equally divided among testatrix' living daughters. One of the designated daughters was married at the time of testatrix' death, and the other married subsequently. *Held:* The

daughter who was single at the time of testatrix' death took an estate for life so long as she remained single, and upon her marriage such estate was divested, and all the married daughters took a fee simple as tenants in common. *Weathers v. Bell*, 561.

§ 33i. Restraint on Alienation.

Where the will directs that the devisees of the fee should not have the right to convey the property except among themselves, the attempted restraint on alienation is void as repugnant to the fee. *Langston v. Wooten*, 124.

§ 33k. Renunciation and Acceleration of Remainder.

Renunciation of conditional fee is tantamount to failure to comply with conditions and is act of forfeiture. *Featherstone v. Pass*, 349.

§ 34b. Designation of Devisees and Legatees.

Testator devised certain property to his sister for life, remainder to the county to be used as a charitable hospital, with further provision that if the property should not be so used, the county should forfeit the right of possession and title, and the property pass to testator's heirs at law. *Held:* Upon the renunciation by the county after the death of the life tenant, the remainder passes to testator's heirs in accordance with the expressed intent of testator, leaving no interest to pass under the subsequent residuary clause of the will. *Featherstone v. Pass*, 349.

§ 38. Residuary Clauses.

Where testator directs that if the executor sells certain lands the proceeds of sale be divided among specified beneficiaries, *held*, upon the sale of the lands and the reinvestment of the proceeds of sale in other lands, the beneficiaries take same under a resulting trust, and the lands do not fall in the residuary clause disposing of lands "not herein disposed of and not sold under powers hereinbefore granted." *Elmore v. Austin*, 13.

Possibility of reverter *held* to have passed under residuary clause. *Buffaloe v. Blalock*, 105.

The general rule that lapsed, void, or rejected devises or legacies pass under the residuary clause of the will is subject to the rule that the intent of the testator as expressed in the instrument controls, and therefore where testator makes specific provision for the disposition of the property upon the failure of the devise or bequest, such property cannot fall into the residuary clause. G.S. 31-42. *Featherstone v. Pass*, 349.

§ 41. After-Born Children.

Testator had two children, one born before and one after the execution of the will. No testamentary provision was made for either child, but testator, after the birth of the second child, procured a policy of life and accident insurance on his life, making both the children beneficiaries therein. *Held:* The procurement of the policy was not such a provision for the afterborn child as to prevent such child from participating in his father's property as heir and distributee. G.S. 31-45. *Williamson v. Williamson*, 54.

§ 43. Void and Forfeited Legacies and Devises.

Renunciation of conditional fee is tantamount to failure to comply with conditions, and is act of forfeiture. *Featherstone v. Pass*, 349.

WILLS—*Continued.*

§ 46. Title of, and Conveyance by Devisees.

Where devisee takes defeasible fee under the devise and also the possibility of reverter under the residuary clause, his deed estops himself and heirs and his grantee takes fee simple absolute. *Buffaloe v. Blalock*, 105.

Where the same persons take certain lands either as devisees under the will, or, if the devise of the lands is insufficient to convey the fee, take same by inheritance from testator, they are perforce seized and possessed of the fee simple title to the premises. *Langston v. Wooten*, 124.

GENERAL STATUTES CONSTRUED.

(For convenience in annotating.)

G.S.

1-38. Possession under tax foreclosure deed conveying only right of life tenant is not adverse to remaindermen until death of life tenant. *Eason v. Spence*, 579.

1-40; 1-51. Owner of fee is not barred from maintaining action to recover that part of railroad right of way no longer used for railroad purposes until twenty years. *Sparrow v. Tobacco Co.*, 589.

1-52 (5). Where three year statute is pleaded in action at common law to recover of employer for silicosis, recovery must be limited to injuries proximately resulting from negligence of employer committed in three years next before suit. *Bame v. Stone Works*, 267.

1-57; 1-68. Action must be prosecuted in name of real party in interest. *Ionic Lodge v. Masons*, 648.

1-70. Unincorporated association may not sue in common name on cause of action unrelated to insurance. *Ionic Lodge v. Masons*, 648.

1-78; 53-159. Action against administrator or executor in official capacity in county in which it qualified, notwithstanding it did not give bond and that its principal place of business is in another county. *Wiggins v. Trust Co.*, 391.

1-79. Corporate administrator must institute action in county in which it maintains principal office and not county in which it qualified. *Trust Co. v. Finch*, 485.

1-82. Governs actions instituted by executor or administrator. *Trust Co. v. Finch*, 485.

1-83. Defendant is not entitled to abatement when action is brought in wrong county, but only to removal. *Wiggins v. Trust Co.*, 391. Change of venue as matter of right does not preclude later motion for change of venue for convenience of parties. *Ibid.*

1-89; 58-150. Insurance Commissioner is merely agent upon whom service may be made, and he is not authorized to accept service. *Hodges v. Ins. Co.*, 475.

1-95. Upon plaintiff's failure to maintain chain of process, there is a discontinuance. *McIntyre v. Austin*, 189.

1-111. Action to establish parol trust and to have defendant render accounting is not one in ejectment and defendant is not required to file bond. *Bryant v. Strickland*, 389.

1-122. Complaint should state essential facts and not evidential facts. *Rhodes v. Jones*, 547.

1-127; 1-134. Demurrer for want of jurisdiction may be made at any time, even in Supreme Court on appeal. *Brissie v. Craig*, 701.

1-132. Where there is misjoinder of parties and causes, court has no authority to direct severance. *Teague v. Oil Co.*, 65. Where there is misjoinder of causes, court should sever actions. *Teague v. Oil Co.*, 469. Upon misjoinder of causes, court will divide actions. *Snotherly v. Jenrette*, 605. Causes for wrongful eviction and detention of personalty, breach of lease contract and malicious injury to business and credit are improperly joined. *Ibid.*

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

1-132; 1-162. Judgment sustaining demurrer on ground that complaint fails to state cause of action does not effect dismissal, and plaintiff may move to amend. *Teague v. Oil Co.*, 469.

1-134. Filing of answer to original complaint does not waive right to demur to amended complaint. *Teague v. Oil Co.*, 65.

1-140. Where counterclaim is not served on plaintiff, its allegations are deemed denied, and defendant cannot be entitled to default judgment thereon. *Lawrence v. Heavner*, 557.

1-161. Where there is misjoinder of parties and causes, plaintiff may move to amend at any time before judgment sustaining demurrer is entered, even after decision on appeal that trial court was in error in overruling demurrer. *Teague v. Oil Co.*, 469.

1-172; 1-184. In absence of waiver or reference, it is error for court to determine issues of fact. *Sparks v. Sparks*, 492.

1-180. Under amendment, court is not required to state evidence except to extent necessary to explain law. *Whiteheart v. Grubbs*, 236. Court is required to charge law on all substantial features of the case even in absence of request. *S. v. Ardrey*, 721. Failure to submit question of guilt of less degrees of crime supported by evidence *held* error. *Ibid.* Court must charge law arising on evidence, and charge containing declarations of abstract principles is insufficient. *Collingwood v. R. R.*, 724. It is error to charge law not arising on evidence. *Ibid.* It is error for court to charge law which does not arise on evidence or which is not supported by allegation. *Maddox v. Brown*, 542. Insufficient for court to state contentions without explaining law applicable to party's version of occurrence supported by evidence. *S. v. Herbin*, 318. Party must request charge on subordinate features of case. *Metcalf v. Foister*, 355. Preferable for court to explain law rather than read statute. *Batchelor v. Black*, 314.

1-184. Court's refusal to find facts requested is tantamount to finding that matters embodied in request did not exist. *Mitchell v. Barfield*, 325.

1-206; 1-282. Party must bring to trial court's attention misstatement of evidence or contentions of parties in regard to evidence, but not error in statement of law or contentions in respect to law. *S. v. Lambe*, 570.

1-208; 1-393. Special proceeding, as well as civil action, is deemed pending from time it is commenced until final determination. G.S. 1-88. *Seawell v. Purvis*, 194.

1-211. Default judgment declaring plaintiff to be owner of land adjudicates title, but leaves cause pending for adjustment of rights of parties consequent to such adjudication. *Ionic Lodge v. Masons*, 252.

1-234. Period during which debtor is in bankruptcy court should be deducted from ten year period. *Trust Co. v. Parker*, 512.

1-240. Propriety of joinder of additional defendant is to be determined by pleadings of original defendant and not by pleadings of plaintiff. *Bass v. Ingold*, 295.

1-269. *Certiorari* is proper procedure to review proceedings of boards and officers exercising judicial or *quasi*-judicial functions. *Russ v. Board of Education*, 128. *Certiorari* will not lie when defendant has pleaded guilty in lower court. *S. v. Barber*, 577.

GENERAL STATUTES CONSTRUED—*Continued.*

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1-276. On appeal from clerk, Superior Court acquires jurisdiction of entire controversy. *In re Estate of Johnson*, 59.

1-393; 1-208. Judgment in special proceeding as well as in a civil action may be either interlocutory or final. *Russ v. Woodard*, 36.

1-501; 1-502. Any Superior Court judge may appoint receiver for insolvent, in which proceedings G.S. 55, Art. 13, will be applied as far as possible. *Surety Co. v. Sharpe*, 98.

1-586. Notice to attorney of record of motion to set aside judgment is notice to client. *Henderson v. Henderson*, 1.

2-16; 28-1; 31-12 through 31-27. Probate of will is in exclusive jurisdiction of Clerk of Superior Court, and Superior Court has no jurisdiction to declare whether writing is a will except in caveat proceedings duly filed with clerk. *Brissie v. Craig*, 701.

4-1. Common law rule that unincorporated association may not sue in common name has not been modified by statute. *Ionic Lodge v. Masons*, 648.

5-1 (4). Willful disobedience of process cannot be basis for contempt when the process is nullity because beyond jurisdiction of issuing court. *Greensboro v. Black*, 154.

7-11. Supreme Court may take cognizance of error on face of record even though it not be subject of exception. *Gibson v. Ins. Co.*, 712.

8-4. Our courts will take judicial knowledge of jurisdiction of court of another state. *Johnson v. Salsbury*, 432.

8-51. Party interested in event may not testify as to transaction with adverse party who at time is *non compos mentis*. *Price v. Whisnant*, 653.

14-17. Murder committed by means of poison is murder in first degree. *S. v. Hendrick*, 447. Circumstantial evidence that defendant knowingly administered poison with felonious intent *held* insufficient. *Ibid.* Evidence of defendant's guilt of murder in first degree *held* sufficient for jury. *S. v. Lamm*, 402.

14-21. Amendment does not render competent evidence offered solely for purpose of appealing for mercy. *S. v. Shackleford*, 299.

14-22. Assault with intent to commit rape is not an attempt to commit rape. *S. v. Randolph*, 382. Instruction that assault with intent to have intercourse without "conscious express permission" of prosecutrix *held* error. *Ibid.*

14-23. "Carnal knowledge" and "sexual intercourse" are synonymous, and exist when there is slightest penetration. *S. v. Bowman*, 374.

14-26. Testimony of prosecutrix that defendant had "intercourse" with her and "raped" her *held* sufficient on question of carnal knowledge. *S. v. Bowman*, 374.

14-54. It is unlawful to enter dwelling with intent to commit felony notwithstanding absence of breaking. *S. v. Best*, 575.

14-44; 14-45. Prosecutrix may not testify that she went to defendant because of newspaper articles stating defendant had performed abortions. *S. v. Gavin*, 323.

14-202. Evidence of guilt of secretly peeping into room *held* sufficient. *S. v. Peterson*, 332.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

15-170. Court is required to submit question of defendant's guilt of less degrees of crime only when there is supporting evidence. *S. v. Lamm*, 402.

15-170. Charge as to less degrees of crime *held* without error. *S. v. Lambe*, 570.

15-173. Evidence taken in light most favorable to State on motion to nonsuit. *S. v. Hendrick*, 447. Nonsuit on ground that defendant's evidence tends to establish defense is properly refused. *S. v. Werst*, 320.

15-183. Circumstantial evidence *held* sufficient to sustain conviction of first degree murder. *S. v. Fulk*, 118.

15-186. Does not apply when there has been valid suspension of execution by judgment of trial court. *S. v. Bowser*, 414.

18-1; 18-60. "Intoxicating liquor" includes more restrictive term "alcoholic beverages." *S. v. Welch*, 77.

18-2; 18-49; 18-58. It is not unlawful to transport through or into dry county alcoholic beverages for lawful purpose. *S. v. Welch*, 77. Transportation of two gallons of whiskey in car to driver's knowledge is unlawful, even though only one gallon belonged to driver. *Ibid.*

18-124 (b). Does not require that each signer of petition should have personally voted for a gubernatorial candidate in prior general election. *Weaver v. Morgan*, 642.

20-6; 20-150 (c). Private driveway is not intersecting highway. *Levy v. Aluminum Co.*, 158.

20-28. Driving after license has been revoked is the offense, regardless of intent. *S. v. Correll*, 696.

20-140. Circumstantial evidence of identity of defendant as reckless driver *held* sufficient. *S. v. Dooley*, 311.

20-141. Gratuitous passenger *held* not contributorily negligent as matter of law in failing to refuse to continue trip. *Samuels v. Bowers*, 149.

20-141 (a). Plaintiff's evidence of defendant's excessive speed under the circumstances *held* for jury on issue of negligence. *Brafford v. Cook*, 699.

20-141 (b) (4); 20-141 (j); 20-180. Operation of motor vehicle as speed in excess of 55 miles per hour is misdemeanor. *S. v. Sumner*, 386.

20-149 (a). Overtaking and passing vehicle on its right *held* not contributorily negligence as matter of law under circumstances. *Levy v. Aluminum Co.*, 158.

20-152; 20-149. It is error to charge law on duty to maintain safe distance behind vehicle traveling in same direction without charging law on right to overtake and pass vehicle, when supported by evidence. *Maddox v. Brown*, 542.

20-161. Whether parking of car on bridge was proximate cause of injury *held* for jury. *Boles v. Hegler*, 327.

22-1. Parol agreement by owners to pay materialmen cannot form basis of lien. *Lumber Co. v. Horton*, 419.

24-1. Maximum legal rate of interest in this State is 6%. *White v. Disher*, 260.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

24-2. Evidence *held* for jury on question of whether transaction constituted usurious contract. *White v. Disher*, 260.

27-2; 27-51. *Bona fide* holder of warehouse receipts must not only be holder for value before maturity without notice of fraud, but must also take same in good faith. *Cotton Mills v. Cotton Co.*, 186.

27-51. Breach of duty on part of transferor does not affect transfer to *bona fide* holder under statute. *Harris v. Fairley*, 551.

28-32. Clerk has jurisdiction to entertain verified petition for removal of administrator. *In re Estate of Johnson*, 59.

29-1 (14); 128-149 (10). Where adoptive parent dies prior to effective date of Act of 1947, adopted child is not entitled to inherit from collateral kin of adoptive parent even though collateral kin dies subsequent to 1947. *Wilson v. Anderson*, 212, 520.

31-13; 31-32. Party interested in estate may apply to have paper writing probated and at same time file caveat thereto. *Brissie v. Craig*, 701.

31-19. Probate stands until set aside by competent tribunal on issue of *devisavit vel non*. *Holt v. Holt*, 498.

31-38. Devise will be construed to be in fee unless contrary intent appears. *Elmore v. Austin*, 13.

31-42. Where testator makes specific provision for disposal of property upon failure of devise or bequest, such property cannot fall into residuary clause. *Featherstone v. Pass*, 349.

31-45. Procuring policy of life and accident insurance on life of child born after execution of will is not such provision as will prevent child from inheriting as distributee. *Williamson v. Williamson*, 54.

33-2. Bequest to grandchildren with direction that son be appointed guardian with power of sale *held* bequest to son as trustee. *Johnson v. Salsbury*, 432.

39-9; 39-12. Order of clerk accepting resignation of trustee is interlocutory regardless whether appeal is taken or not. *Russ v. Woodard*, 36. Where clerk, in exercise of discretion, has set aside order accepting resignation of trustee, he may thereafter in accordance with statutory procedure, enter another order accepting resignation and appointing a successor. *Ibid.*

39-24; 39-25; 1-97 (6); 1-70. Association may sue in its common name. *Ionic Lodge v. Masons*, 252. Reversed on petition to rehear, 648.

40-20; 47-23; 4-1. Statutes protect purchasers who acquire title directly or indirectly from mortgagor or conditional vendee. *Finance Co. v. Quinn*, 407.

41-4. Contingent limitation over upon death of any person without issue will be construed to take effect upon death of such person without issue living at time of death. *Elmore v. Austin*, 13.

42-33. Tender of rent before judgment bars action in ejectment for nonpayment of rent. *Hoover v. Crotts*, 617.

49-2. Willful failure and refusal to support illegitimate child means an intentional neglect or refusal. *S. v. McDay*, 388.

49-7; 49-8. Court may suspend execution on condition that defendant pay specified sums into court for support of child; clerk may not ignore

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

suspension even though conviction is affirmed on appeal. *S. v. Bowser*, 414.

49-12; 50-13. Where reputed father marries mother of child it becomes child of marriage within meaning of statute. *Carter v. Carter*, 614.

50-6. That plaintiff should have lived separate and apart from spouse for two years and lived in State for one year are jurisdictional. *Henderson v. Henderson*, 1.

50-16. Absence of allegation that defendant's misconduct was without provocation is fatal, but plaintiff may move to amend before judgment of dismissal. *Barker v. Barker*, 495. Complaint *held* to sufficiently allege want of legal provocation on part of wife, but verdict *held* to establish that wife was at fault, and therefore award of alimony without divorce cannot stand. *Bateman v. Bateman*, 659. Court may appoint receiver to collect income from property of nonresident or absconding husband. *Perkins v. Perkins*, 91. Right to subsistance pending trial does not exist when wife has abandoned husband. *Reece v. Reece*, 95.

55-38. Foreign corporation *held* not doing business in this State so as to subject it to service on Secretary of State. *Radio Station v. Eitel-McCullough*, 287.

55-152; 55-153. Receiver may examine claimants and witnesses and require production of records, but should not enter order granting preference to one claimant without notice to other claimants. *Surety Corp. v. Sharp*, 98.

58-30. Where there is error in describing vehicles insured, they may be identified by other descriptive insignia contained in policy or by evidence *aliunde*. *Ratcliff v. Surety Co.*, 166.

59-61 (4). Death of partner ordinarily dissolves partnership and vests title to partnership property in survivor for purpose of administration. *In re Estate of Johnson*, 59.

59-74; 59-76. While clerk has no jurisdiction to appoint receiver for partnership when surviving partner has failed and refused to file bond or inventory, Superior Court on appeal does have such jurisdiction. *In re Estate of Johnson*, 59.

62-24; 62-25; 62-26.6. Utility filing application for authority to amend rates is "complainant" and appeal by interested party from allowance of application must be served on the utility. *Utilities Com. v. Mills Corp.*, 690.

62-121.11. Verified petition and exhibits attached may be considered as evidence upon application. *Utilities Com. v. Motor Express*, 174. Fact that trucking company had been operating over wider radius than authorized by franchise does not preclude finding that its operations were *bona fide*. *Utilities Com. v. Motor Express*, 178. Commission may consider amendment showing operations for additional months filed with permission of Commission. *Utilities Com. v. Motor Express*, 180.

75-5. Single instrument whereby owner leases land to oil company rent free, and oil company subleases back to owner rent free on condition that only products of oil company be sold on premises *held* void. *Arey v. Lemons*, 531.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

87-21. No license required for those dismantling plumbing. *Employment Security Commission v. Kermon*, 342.

96-4 (m). Review is limited to determining whether findings are supported by evidence. *Employment Security Commission v. Kermon*, 342.

96-10 (f). Plumber hired by general contractor to dismantle plumbing *held* employing unit. *Employment Security Com. v. Kermon*, 342.

97-2. Employer of independent contractor cannot be held liable for compensation. *Scott v. Lumber Co.*, 162. Evidence *held* sufficient to support finding that sawmill director was supervisory employee and not independent contractor. *Ibid.*

97-3; 97-4; 97-14. Employer who employs less than five employees and who elects not to come under Compensation Act is liable to common law suit in which contributory negligence, assumption of risks, and negligence of fellow servant are not defenses. *Bame v. Stone Works*, 267.

97-9. Employee driver improperly joined as additional defendant on motion of third person tort-feasor in action by injured employee. *Bass v. Ingold*, 295. Supervisory employees are immune to tort action when their orders upon which liability is predicated were given in conduct of employer's business. *Essick v. Lexington*, 200.

97-19. Lumber company *held* employer and not contractor of owner in cutting timber, and therefore person employed by it to conduct logging operations could not be sub-contractor. *Evans v. Lumber Co.*, 111.

97-98. Court may review reasonableness of inferences of fact from basic facts and also conclusions of law predicated upon them. *Evans v. Lumber Co.*, 111.

105-264. Construction given statute by Commissioner of Revenue, though not controlling, will be given consideration by courts. *Bottling Co. v. Shaw*, 307.

105-410. Forfeiture of life estate for nonpayment of taxes is not automatic, but must be adjudicated in proper proceeding. *Eason v. Spence*, 579.

106-65.1; 106-65.2. Levies tax on occupation of distributing vending machines and also tax on each machine. *Bottling Co. v. Shaw*, 307.

115-74; 115-354. School committeeman holds for term of two years and cannot be removed except for cause in proper proceeding; *certiorari* will lie to review board's proceedings. *Russ v. Board of Education*, 128.

115-85; 115-99. *Held:* County commissioners had authority to allocate funds for new central high school in lieu of remodeling old buildings. *Feezor v. Siceloff*, 564.

115-99. County board may not use funds from school bond issue for different project without finding that original project is no longer necessary. *Gore v. Columbus County*, 636.

128-9. Fact that law enforcement officer has not given bond does not affect his capacity to execute search warrant or other legal process. *Hinson v. Britt*, 379.

128-21, *et seq.* Where city is given authority to join State Retirement System by charter, and later such charter provision is repealed, it still has authority to do so under the general law. *Laughinghouse v. New Bern*, 595.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

130-39. Sanitary district is not under control of Utilities Commission. *Paper Co. v. Sanitary District*, 421. District may make valid contract leasing private filter plant on condition that lessee get water at cost and be given priority over other industrial consumers. *Ibid.*

130-117. Permanent damage may be awarded for taking of easement incident to operation of sewage disposal plant and at same time city may be enjoined from emptying raw sewage into stream. *Veazey v. Durham*, 744.

136-96. Fee remains in owners of subdivision, and only they can withdraw streets from dedication under the statute. *Russell v. Coggins*, 674.

156-10. Proceeding to levy assessments for additional improvements *held* cognizable as motion in original cause in which defendant was given right to drain into canal. *Canal Co. v. Keys*, 664.

156-51. Does not apply when respondents are not members of drainage corporation. *Canal Co. v. Keys*, 664.

160-1. City has no authority to waive its immunity from tort liability in performance of governmental function. *Stephenson v. Raleigh*, 42.

160-178. Procedure for enforcement of ordinance in conflict with statute *held* void. *Mitchell v. Barfield*, 325.

160-179. Municipality may enjoin violation of zoning ordinance. *Raleigh v. Fisher*, 629.

160-200. City may prohibit franchise holders from leasing or renting cabs to independent contractors. *Cab Co. v. Shaw*, 138.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART.

I, sec. 14. Punishment which is within limits authorized by statute cannot be held cruel or unusual. *S. v. Welch*, 77.

I, sec. 17. Notice and opportunity to be heard are essential to due process. *Eason v. Spence*, 579; *Surety Corp. v. Sharp*, 98.

I, sec. 19; IV, sec. 13. Court may not determine issues of fact raised by pleadings. *Sparks v. Sparks*, 492.

IV, sec. 25. Election to fill vacancy in office of Associate Justice must be held at next regular election for members of the General Assembly. *Advisory Opinion*, 737.

V, sec. 3. Legislature has wide latitude in classifying occupations for taxation. *Bottling Co. v. Shaw*, 307.