NORTH CAROLINA REPORTS

VOL. 233

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1950

SPRING TERM, 1951

REPORTED BY

JOHN M. STRONG

RALEIGH

BYNUM PRINTING COMPANY

PRINTERS TO THE SUPREME COURT

1951

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6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
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" 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

FALL TERM, 1950—SPRING TERM, 1951

CHIEF JUSTICE:

WALTER P. STACY.

ASSOCIATE JUSTICES:

WILLIAM A. DEVIN,
M. V. BARNHILL,
J. WALLACE WINBORNE,
EMERY B. DENNY,
S. J. ERVIN, JR.
JEFF. D. JOHNSON, JR.

ATTORNEY-GENERAL:

HARRY McMULLAN.

ASSISTANT ATTORNEYS-GENERAL:

T. W. BRUTON,
H. J. RHODES,[1]
RALPH MOODY,
JAMES E. TUCKER,
PEYTON B. ABBOTT,
JOHN HILL PAYLOR.

SUPREME COURT REPORTER AND ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE:

JOHN M. STRONG.

CLERK OF THE SUPREME COURT:

ADRIAN J. NEWTON.

MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

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[1]Died 16 May, 1951. Succeeded by Claude L. Love 16 August, 1951.

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.
ZEB. A. MORRIS	Fifteenth	Concord.
JAMES C. FARTHING	Sixteenth	Lenoir.
AVALON E. HALL[1]	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]Succeeded by J. Allie Hayes, North Wilkesboro, N. C., 1 January, 1951.

SUPERIOR COURTS, SPRING TERM, 1951

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 Stevens

Beaufort—Jan. 15* (2); Feb. 19† (2); Mar. 19* (A); Apr. 9†; May 7† (2); June 25.
Camden—Mar. 12.
Chowan—Apr. 2; Apr. 30†.
Currituck—Mar. 5.
Dare—May 28.
Gates—Mar. 26.
Hyde—May 21.
Pasquotank—Jan. 8†; Feb. 12†; Feb. 19* (A) (2); Mar. 19†; May 7† (A) (2); June 4*; June 11† (2).
Perquimans—Apr. 16.
Tyrrell—Feb. 5†; Apr. 23.

SECOND JUDICIAL DISTRICT
Judge Harris

Edgecombe—Jan. 22; Mar. 5; Apr. 2† (2); June 4 (2).
Martin—Mar. 19 (2); Apr. 16† (A) (2); June 18.
Nash—Jan. 29; Feb. 19† (2); Mar. 12; Apr. 23† (2); May 28.
Washington—Jan. 8 (2); Apr. 16†.
Wilson—Feb. 5†; Feb. 12*; May 14*; May 21†; June 25†.

THIRD JUDICIAL DISTRICT
Judge Burney

Bertie—Feb. 12 (2); May 7 (2).
Halifax—Jan. 29 (2); Mar. 19† (2); Apr. 30; June 4† (2).
Hertford—Feb. 26; Apr. 16 (2).
Northampton—Apr. 2 (2).
Vance—Jan. 8*; Mar. 5*; Mar. 12†; June 18*; June 25†.
Warren—Jan. 15*; Jan. 22†; May 21*; May 28†.

FOURTH JUDICIAL DISTRICT
Judge Nimocks

Chatham—Jan. 15; Mar. 5†; Mar. 19†; May 14.
Harnett—Jan. 8*; Feb. 5† (2); Mar. 19* (A); Apr. 2† (A) (2); May 7†; May 21*; June 11† (2).
Johnston—Jan. 8† (A) (2); Feb. 12 (A); Feb. 19† (2); Mar. 5 (A); Mar. 12; Apr. 16 (A); Apr. 23† (2); June 25*.
Lee—Jan. 29† (A); Feb. 5 (A); Mar. 26*; Apr. 2†; June 18† (A).
Wayne—Jan. 22; Jan. 29†; Feb. 5† (A); Mar. 5† (A) (2); Apr. 9; Apr. 16†; Apr. 23† (A); May 28; June 4†; June 11† (A).

FIFTH JUDICIAL DISTRICT
Judge Carr

Carteret—Mar. 12; June 11 (2).
Craven—Jan. 8; Jan. 29† (2); Feb. 12; Apr. 9; May 14†; June 4.
Greene—Feb. 26 (2); June 25.
Jones—Apr. 2.
Pamlico—Apr. 30 (2).
Pitt—Jan. 15†; Jan. 22; Feb. 19†; Mar. 19 (2); Apr. 17 (2); May 7† (A); May 21† (2).

SIXTH JUDICIAL DISTRICT
Judge Morris

Duplin—Jan. 8† (2); Jan. 29†; Mar. 12† (2); Apr. 9† (2).
Lenoir—Jan. 22*; Feb. 19† (2); Apr. 23; May 14† (2); June 11† (2); June 25*.
Onslow—Mar. 5; May 28 (2).
Sampson—Feb. 5 (2); Mar. 26† (2); Apr. 30† (2); June 11† (A) (2).

SEVENTH JUDICIAL DISTRICT
Judge Bone

Franklin—Jan. 22† (2); Feb. 12*; Apr. 16*; Apr. 30† (2).
Wake—Jan. 8*; Jan. 15†; Jan. 22† (A) (2); Feb. 19† (2); Mar. 5* (2); Mar. 19† (2); Apr. 2*; Apr. 16† (A); Apr. 23†; Apr. 30† (A); May 7* (A); May 14† (3); June 4* (2); June 18† (2).

EIGHTH JUDICIAL DISTRICT
Judge Parker

Brunswick—Jan. 22; Apr. 2†; May 21.
Columbus—Jan. 8† (A) (2); Jan. 29* (2); Feb. 19† (2); May 7*; June 18.
New Hanover—Jan. 15*; Feb. 5† (A); Feb. 12†; Feb. 26* (A); Mar. 5*; Mar. 12† (2); Apr. 9† (2); May 14*; May 28† (2); June 11*.
Pender—Jan. 8; Mar. 26†; Apr. 30.

NINTH JUDICIAL DISTRICT
Judge Williams

Bladen—Jan. 8; Mar. 19*; Apr. 30†.
Cumberland—Jan. 15*; Feb. 12† (2); Mar. 5* (A); Mar. 12*; Mar. 26† (2); Apr. 30* (A); May 7† (2); June 4*.
Hoke—Apr. 23.
Robeson—Jan. 15† (A) (2); Jan. 29* (2); Feb. 26† (2); Mar. 19* (A); Apr. 9* (2); Apr. 23† (A); May 7* (A) (2); May 21† (2); June 11†; June 18*.

TENTH JUDICIAL DISTRICT
Judge Frizzelle

Alamance—Jan. 29† (A); Feb. 26*; Apr. 2†; May 14* (A); May 28† (2).
Durham—Jan. 8*; Jan 15† (2); Jan. 29† (A); Feb. 19*; Feb. 26† (A); Mar. 5† (2); Mar. 19† (A); Mar. 26*; Apr. 2* (A); Apr. 9† (A) (3); Apr. 30† (2); May 21*; May 28† (A) (3); June 25*.
Granville—Feb. 5 (2); Apr. 9 (2).
Orange—Mar. 19 May 14†; June 11; June 18†.
Person—Jan. 29; Feb. 5† (A); Apr. 23.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT
Judge Nettles

Ashe—Apr. 16*; May 28† (2).
Alleghany—Jan. 29 (A); Apr. 30.
Forsyth—Jan. 8* (2); Jan. 15† (A); Jan. 22† (2); Feb. 5* (2); Feb. 12† (A); Feb. 19† (2); Mar. 5* (2); Mar. 12† (A); Mar. 19† (2); Apr. 2* (2); Apr. 16 (A); Apr. 23; Apr. 30 (A); May 14* (2); May 28† (A) (2); June 11* (2).

TWELFTH JUDICIAL DISTRICT
Judge Moore

Davidson—Jan. 29; Feb. 19† (2); Apr. 9† (A) (2); May 7; May 28† (A) (2); June 25.
Guilford, Greensboro Division—Jan. 8*; Jan. 15† (2); Feb. 5* (2); Feb. 19† (A) (2); Mar. 5*; Mar. 26* (A); Apr. 2† (2); Apr. 16† (2); Apr. 23*; May 21*; June 4† (2); June 18*.
Guilford, High Point Division—Jan. 15*; Feb. 12† (A); Mar. 12*; Mar. 19† (2); Apr. 30*; May 14† (A) (2); May 28*.

THIRTEENTH JUDICIAL DISTRICT
Judge Clement

Anson—Jan. 15*; Mar. 5†; Apr. 16 (2); June 11†.
Moore—Jan. 22*; Feb. 12†; Mar. 26†; May 21*; May 28†.
Richmond—Jan. 8*; Feb. 5† (A); Mar. 19†; Apr. 9*; May 28† (A); June 18†.
Scotland—Mar. 12; Apr. 30†.
Stanly—Feb. 5†; Feb. 12† (A); Apr. 2; May 14†.
Union—Feb. 19 (2); May 7.

FOURTEENTH JUDICIAL DISTRICT
Judge Sink

Gaston—Jan. 15*; Jan. 22† (2); Mar. 12* (A); Mar. 19† (2); Apr. 23*; May 21† (A) (2); June 4*.
Mecklenburg—Jan. 8*; Jan. 8† (A) (2); Jan. 22* (A) (2); Jan. 22† (A) (2); Feb. 5† (3); Feb. 5† (A) (2); Feb. 19† (A) (2); Feb. 26*; Mar. 5† (2); Mar. 5† (A) (2); Mar. 19* (A) (2); Mar. 19† (A) (2); Apr. 2† (2); Apr. 2† (A) (2); Apr. 16* (A); Apr. 16†; Apr. 23† (A); Apr. 30† (2); Apr. 30† (A) (2); May 14*; May 14† (A) (2); May 21† (2); May 28† (A) (2); June 11*; June 11† (A) (2); June 18†; June 25* (2).

FIFTEENTH JUDICIAL DISTRICT
Judge Phillips

Alexander—Jan. 22 (A) (2).
Cabarrus—Jan. 8 (2); Feb. 26†; Mar. 5† (A); Apr. 23 (2); June 11† (2).
Iredell—Jan. 29 (2); Mar. 12†; May 21 (2).
Montgomery—Jan. 22*; Apr. 9† (2).
Randolph—Jan. 29† (A) (2); Mar. 19† (2); Apr. 2*; June 25*.
Rowan—Feb. 12 (2); Mar. 5†; Mar. 12† (A); May 7 (2).

SIXTEENTH JUDICIAL DISTRICT
Judge Gwyn

Burke—Feb. 19; Mar. 12 (2); June 4 (3).
Caldwell—Jan. 8† (A) (2); Feb. 26 (2); May 7 (A); May 21† (2); June 4† (A) (2).
Catawba—Jan. 15† (2); Feb. 5 (2); Apr. 9† (2); May 7† (2).
Cleveland—Jan. 8; Mar. 26 (2); May 21† (A) (2).
Lincoln—Jan. 22 (A); Jan. 29†.
Watauga—Apr. 23*; June 11† (A) (2).

SEVENTEENTH JUDICIAL DISTRICT
Judge Bobbitt

Avery—Apr. 16 (2).
Davie—Mar. 26; May 28†.
Mitchell—Apr. 2 (2).
Wilkes—Jan. 15† (3); Mar. 5 (3); Apr. 30† (2); June 4 (2); June 18† (2).
Yadkin—Feb. 5 (3).

EIGHTEENTH JUDICIAL DISTRICT
Judge Armstrong

Henderson—Jan. 8† (2); Mar. 5 (2); Apr. 30† (2); May 28† (2).
McDowell—Jan. 15* (A); Feb. 12† (2); June 11 (2).
Polk—Jan. 29 (2).
Rutherford—Feb. 26†; Apr. 16† (2); May 14 (2); June 25† (2).
Transylvania—Apr. 2 (2).
Yancey—Jan. 22†; Mar. 19 (2).

NINETEENTH JUDICIAL DISTRICT
Judge Rudisill

Buncombe—Jan. 8† (2); Jan. 15 (A) (2); Jan. 22*; Jan. 29; Feb. 5† (2); Feb. 19*; Feb. 19 (A) (2); Mar. 5† (2); Mar. 19*; Mar. 19 (A) (2); Apr. 2† (2); Apr. 16*; Apr. 16 (A) (2); Apr. 30; May 7† (2); May 21*; May 21 (A) (2); June 4† (2); June 18*; June 18 (A) (2).
Madison—Jan. 29† (A); Feb. 26; Apr. 2 (A) (2); May 28; June 25.

TWENTIETH JUDICIAL DISTRICT
Judge Rousseau

Cherokee—Jan. 22† (2); Apr. 2 (2); June 18† (2).
Clay—Apr. 30.
Graham—Jan. 8† (A) (2); Mar. 19 (2); June 4† (2).
Haywood—Jan. 8† (2); Feb. 5 (2); May 7† (2).
Jackson—Feb. 19 (2); May 21 (2); June 11† (A).
Macon—Apr. 16 (2).
Swain—Jan. 15† (A) (2); Mar. 5 (2).

TWENTY-FIRST JUDICIAL DISTRICT
Judge Pless

Caswell—Mar. 19 (2).
Rockingham—Jan. 22* (2); Mar. 5†; Mar. 12*; Apr. 16†; May 7† (2); May 21* (2); June 11† (2).
Stokes—Jan. 1*; Apr. 2*; Apr. 9†; June 25*.
Surry—Jan. 8 (2); Feb. 12 (3); Apr. 23 (2); June 4.

*For criminal cases.
†For 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, ninth Monday after the second Monday in September 1951 only. J. DOUGLAS TAYLOR, Deputy Clerk, Wilmington.

OFFICERS

JOHN HALL MANNING, U. S. Attorney, Raleigh, N. C.
LOGAN D. HOWELL, Raleigh, N. C., JOHN C. RODMAN, Washington, 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.

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

SPRING TERM, 1951

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 3rd day of April, 1951:

ANDERSON, GEORGE MCCLINTOCK.....Rocky Mount.
ANDERSON, HUGH ROGER.....Hayesville.

BAIRD, THURMAN GAIL.....Asheville.
BARBEE, CHARLES WESLEY, JR.....Durham.
BASON, GEORGE FOUST.....Raleigh.
BELL, CHARLES VINCENT.....Plymouth.
BODDIE, ROY CONRAD.....Nashville.
BONEY, NORWOOD BRUCE, JR.....Kenansville.
BRASWELL, DAVID CROCKETT.....Wilson.
BRITT, EVANDER MUNN.....Lumberton.
BROGDEN, BLACKWELL MARKHAM.....Durham.
BROUGHTON, ROBERT BAIN.....Raleigh.
BRYANT, ROBERT MARSDEN.....Winston-Salem.
BUMGARNER, WILLIS CLIFTON.....Lenoir.

CALDWELL, JAMES JACKSON.....Maiden.
CARTER, DERB STANCIL.....Fayetteville.
CHALMERS, LESTER VERMONT, JR.....Raleigh.
CLARK, FOY.....Mount Airy.
CLARK, RICHARD SCHUYLER.....Wadesboro.
CLEMENT, ROBERT LEBBY, JR.....Durham.
COLTRANE, THOMAS WORTH.....Sophia.
COMBS, WILLIAM THOMAS, JR.....Leaksville.
CURTIS, STUART ALBERT.....Ahoskie.

DAILEY, BLAIR LORIMER.....Greensboro.
DANIEL, JOHN COLEMAN, JR.....Maxton.
DEES, JULIUS GLADSTONE, JR.....Bayboro.
DIXON, WRIGHT TRACY, JR.....Raleigh.

ELKINS, LLOYD STANLEY, JR.....Bladenboro.
ELLER, THOMAS ROBERT, JR.....Salisbury.
EMANUEL, ROBERT LOUIS.....Raleigh.
EVANS, DON TOLBERT.....Enfield.

FLEMING, JAMES CARLTON.....Creedmoor.
FRAZIER, CYRUS CLIFFORD, JR.....Greensboro.
FRIDAY, JOHN RALPH.....Dallas.

GARDNER, JOHN SHERRIN.....Lumberton.
GIEZENTANNER, JOHN HENRY.....Asheville.
GILBERT, CLARENCE NEWELL.....Asheville.
GROVES, HARRY EDWARD.....Durham.
GWYN, ALLEN HATCHETT, JR.....Reidsville.

HAINES, BENJAMIN DOWLING.....Durham.
HAIRE, WILLIAM CLYDE, JR.....Winston-Salem.
HALL, GENE HAROLD.....Brevard.
HARPER, JOHN CLIFTON.....Durham.
HENRY, HOMER HUNTER.....Clyde.

HENSON, PERRY CLEVELAND.....Otto.
HIATT, VERNON TALMAGE.....Mount Airy.
HOOKS, DEWEY JACK.....Whiteville.
HOOPER, EDWIN WILLYS.....Asheboro.
HOWE, WILLIAM BELL WHITE.....Hendersonville.
HOYLE, KENNETH RICHARD.....Sanford.
HUMPHREY, HUBERT BEN, JR.....Lumberton.

JOHNSON, JESSE CLYDE, JR.....Mayodan.
JOHNSON, RUSSELL HAGOOD, JR.....Conway.
JONES, EVERITT CRAIG, JR.....Smithfield.

KIRKMAN, CHARLES HARRIS.....Lumberton.
KNOX, CHARLES EUGENE.....Davidson.

LAMM, JAKE THOMAS.....Wilson.
LANCASTER, SIDNEY WILLIAMS.....Chapel Hill.
LANIER, RUSSELL JARVIS.....Beulaville.
LAWSON, GEORGE AUGUSTUS.....Greensboro.
LIGON, RODDEY MILLER, JR.....Chapel Hill.
LOCKHART, THOMAS ASHE.....Charlotte.
LONG, PETER LOWRY.....Chapel Hill.

MCCLAIN, OREN WALSH.....Durham.
MCFARLAND, WILLIAM AUSTIN.....Columbus.

MATTHIS, JOHN RICE BRITT.....Turkey.
MELVIN, WILLIAM WHITE.....Elizabethtown.
MITCHELL, WADE HAROLD.....Morganton.
MODLIN, PHILIP HODGIN.....Jamestown.
MOORE, EUGENE JAMES.....North Wilkesboro.
MOORE, JESSE SENECA, JR.....Reidsville.
MORROW, GEORGE RICHARD.....Durham.

NASH, MARCUS LEONARD.....Tryon.

PASCHAL, DONALD LEE.....Siler City.
PHILLIPS, HERBERT ORLANDAH, III.....Morehead City.
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POTTER, ROBERT DANIEL.....Wilmington.

RABIL, GEORGE JOHN.....Wilson.
RANDOLPH, CLYDE CLIFTON, JR.....Winston-Salem.
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WILLIAMSON, MILTON CLAY.....Farmville.
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WINDERS, WILLIAM RUDOLPH.....Durham.
WINFREE, FRANKLIN WILSON.....Summerfield.
WOLFE, JAMES BOYD, JR.....Greensboro.

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OLSEN, ROBERT WAYNE.....Durham.
RABIN, DAVID.....Durham.

BY COMITY:

GEBHARDT, BRUCE OSBOURNE.....Charlotte, from Ohio

Given over my hand and the seal of the Board of Law Examiners this 10th day of August, 1951.

[SEAL.]

EDWARD L. CANNON, *Secreary,*
Board of Law Examiners,
State of North Carolina.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1950

A. DEWEY CARTER, E. HAINES GREGG AND GEORGE E. DOMBHART, AS TRUSTEES UNDER THE WILL OF A. B. CARTER, DECEASED; A. B. CARTER, INC.; DEWEY CARTER, INDIVIDUALLY, AND WIFE, JEAN MURRAY CARTER; RUBY CARTER GREGG AND HUSBAND, E. HAINES GREGG, INDIVIDUALLY; AND MAE COGGINS CARTER v. MADGE CARTER KEMPTON AND HUSBAND, E. S. KEMPTON; MARGARET K. KELLY AND HUSBAND, ROY W. KELLY; MARGARET ANN KELLY AND ROY WILLIAM KELLY, JR.; MADGE KEMPTON; J. BYNUM CARTER; TULA C. ROBBINS AND HUSBAND, WILBUR G. ROBBINS; WILBUR G. ROBBINS, JR.; PATRICIA ANNE GREGG, JEANNE ELLEN GREGG; THE UNBORN ISSUE OF A. DEWEY CARTER, RUBY CARTER GREGG AND MADGE CARTER KEMPTON; AND ALL OTHER PERSONS WHO HAVE OR MIGHT HAVE ANY RIGHT, TITLE, OR INTEREST WHATSOEVER IN THE PROPERTY INVOLVED IN THIS SUIT WHETHER IN ESSE OR NOT IN ESSE.

(Filed 13 December, 1950.)

1. Executors and Administrators § 24—

While family settlements, when fairly made, are favorites of the law, this rule is subject to material limitations when a testamentary trust is involved.

2. Same—

Where a family agreement involves the rights of infants, the rule that the law looks with favor upon such agreements will not prevail over the precept that equity will be guided by the welfare of infants in determining the reasonableness and validity of the agreement.

3. Trusts § 27—

The power of courts of equity to modify a trust created by will is exercised to preserve the trust estate and effectuate the intent of testator by

making modifications in accordance with the spirit of the instrument to provide for exigencies relating to and growing out of the trust itself which were not foreseen by testator and which make action by the courts indispensable to the preservation of the trust and the protection of the infant beneficiaries. Modification will not be made at the will of the beneficiaries or for their welfare or merely because they find the terms of the trust objectionable.

4. Wills § 33c—

Where the beneficiaries of an active trust are given all or part of the income pending final division, or the language of the instrument discloses a clear intent that the beneficial interest should vest upon death of testator, the interest of the beneficiaries is vested, with full enjoyment merely postponed until the termination of the trust.

5. Same—

Where there is no gift of the estate or of the income therefrom during the life of the trust, provision for equal distribution among the beneficiaries at the termination of the stated period of the trust is of the essence of the donation and constitutes a condition precedent, so that the *corpus* of the trust does not vest until that time, and the distributees take a transmissible interest contingent upon their capacity to answer at the time the roll is called.

6. Same: Trusts § 11—Under terms of this trust, corpus does not vest until the termination of the trust.

The will in suit set up a trust estate with provision that the *corpus* be divided among testator's children and their heirs at the expiration of twenty years. There was no provision for the payment of the income from the estate other than payment of a small sum per month to one beneficiary not made a distributee of the *corpus* of the estate, and provision giving the trustees discretionary authority to alleviate any emergency in the affairs of testator's children or the issue of a deceased child, and provision that if the interest of any beneficiary should be forfeited under provisions of the instrument, such interest should go to the other beneficiaries. *Held:* The *corpus* of the estate does not vest until the termination of the trust, and the minor children of the named distributees have a contingent interest therein sufficient to invoke the protective jurisdiction of a court of equity.

7. Trusts §§ 11, 14a—

A devise to trustees to receive, dispose of, and lease the property as though they were absolute owners thereof vests the title to the property in the trustees subject to their duty to account for same, but conveys no beneficial interest to the trustees.

8. Executors and Administrators § 24: Trusts § 27—Equity cannot modify trust merely to avoid controversy between trustees and beneficiary.

Under the testamentary trust in suit the beneficiaries, including minor children, took a contingent interest. There was no provision for payment of income to the ultimate distributees except upon emergency. One of the named distributees instituted an action against the trustees alleging

mala fides and maladministration, and praying a construction of the trust as to the compensation the trustees were entitled to pay themselves from the estate. In order to end the litigation, the parties entered into an agreement that a proportionate part of the estate be set aside for the benefit of the objecting distributee and placed under the control of another trustee and the income therefrom be paid to her yearly. *Held:* A court of equity has no authority to modify the trust by approving the family agreement.

9. Same—

Injury resulting from controversy between the trustees and the beneficiaries of a trust only incidentally affects the trust, and is not such an exigency as will justify a court of equity in modifying its provisions.

APPEAL by defendant S. B. Dolley, guardian *ad litem,* from *Patton, Special Judge,* October Extra Term, 1950, MECKLENBURG.

Petition for approval of a family settlement of differences respecting the administration of a trust estate.

A. B. Carter died testate 15 September 1939, possessed of some real estate and personal property composed almost entirely of the stock of A. B. Carter, Inc. He owned all the stock of that corporation.

He devised all his property, real and personal, to A. Dewey Carter, a son, E. Haines Gregg, a son-in-law, and George E. Dombhart, a trusted employee, in trust. After vesting the trustees with full power to hold, manage, control, and dispose of the trust property "as though they were absolute owners thereof" and to receive, collect, invest, reinvest rents, dividends, and profits of the estate, as well as the *corpus,* in their discretion. The will further provides: "I desire that they (the trustees) have and exercise full and independent discretion in connection with all matters relating to said estate."

Other than as thus provided, there are only two provisions for the use of the income of the estate during the existence of the trust, except for the payment of expenses and compensation to the trustees, which are as follows:

(1) The trustees are directed to pay to Mae Coggins Carter $140 per month during the 20-year period of the trust unless she shall die prior thereto; and in addition she is to have the right to occupy the residence in Greenville, S. C., until and unless it is sold by the trustees.

(2) "2.(5) If during the term of the trust above created an emergency arises in connection with the affairs of either of my children or the issue of a deceased child, and there is not sufficient income on hand to enable the trustees to make payment or payments of such an amount as will enable the said child or issue of deceased child to meet such emergency, then in their discretion they may use sufficient of the principal of the estate to make the needed payments, and their decision as to the necessity or propriety of such payment and the amount of the same shall

not be subject to question by any beneficiary of this will or other persons. Such payment or payments shall be charged to the recipient thereof or handled in such way as the trustees see fit, so as to equalize the ultimate distribution of the estate among my said children and issue."

Otherwise there is no bequest of the income or of any interest in the estate except as provided in Item 2 (4) which is as follows:

"(4) At the end of the twenty year period the trustees shall divide the trust estate among my children, share and share alike, to them and their heirs forever."

Three children survive the testator: A. Dewey Carter, Ruby Carter Gregg, plaintiffs herein, and defendant Madge Carter Kempton. All of said children now have living issue.

In 1948-49 Madge Carter Kempton instituted three separate suits against the three trustees and others in which she alleges numerous acts of maladministration, misuse, and appropriation of trust funds. She sought to recover, not for herself, but for the use and benefit of A. B. Carter, Inc. The trustees instituted an action against her to have her interest in the estate declared forfeited under the terms of Item 2 (11) of the will and to restrain her from prosecuting her actions.

The several actions were compromised by the payment of more than $150,000 to Mrs. Kempton out of the funds of A. B. Carter, Inc., under judgment entered at the May Term, 1949, Mecklenburg Superior Court.

Thereafter, Mrs. Kempton instituted another action in which she alleges that the trustees are paying to themselves excessive salaries and bonuses, dealing in trust funds with themselves and members of their families and others, and are disregarding the mandates of the will and their duties as fiduciaries under the will. She prays for construction of the will and for a recovery to the use of A. B. Carter, Inc., of all funds misused and for other relief. The defendants appeared and moved to strike certain allegations of the complaint.

Pending the hearing of the motion to strike, the parties entered into the "family settlement" agreement which is the subject matter of this proceeding.

The agreement provides that one-third of the estate, claimed by defendant Madge Carter Kempton, shall be segregated and now set apart to her. This is to be accomplished by delivering to her 1000 shares of the capital stock of A.B. Carter, Inc., and paying her $6,100 in cash for her interest in the real estate belonging to the trust, the total value of the part so set apart being $220,000. In consideration thereof, she is to release and quitclaim to the trustees all her right, title, interest, and estate in the remaining property and assets of the trust. Thereupon she is to transfer and assign said stock and her alleged interest in the real property to A. B. Carter, Inc., for the agreed value thereof.

The money received by Mrs. Kempton from the resale of said property, less certain deductions, together with $54,000 now due under the agreement adjusting the original actions, is to be delivered to the American Trust Company to be held by it in trust until 15 September 1959 (the date of expiration of the original trust) under a trust agreement, the terms of which are in substantial accord with the original trust except that the fund is to be held for the exclusive benefit of Mrs. Kempton and her heirs and she is to be paid the income therefrom annually within the trust year it is received.

The court below, after finding certain facts, especially in respect to the litigation formerly instituted, now pending, and which may hereafter be provoked, and the probable adverse effect thereof on the trust, concluded "that it is necessary that said family settlement be made and approved in order to preserve the trust estate created by the will of A. B. Carter and to effectuate his primary purposes and intentions." It thereupon entered judgment in all respects ratifying and affirming said family settlement. S. B. Dolley, guardian *ad litem* for children *in esse* and *in posse* of A. Dewey Carter and Ruby Carter Gregg, excepted and appealed.

Garland & Garland and Frank H. Kennedy for plaintiff appellees.

Tillett, Campbell, Craighill & Rendleman for appellee Madge Carter Kempton.

S. B. Dolley, guardian ad litem, in propria persona.

BARNHILL, J. Family settlements, when fairly made, are favorites of the law. They are bottomed on a sound public policy which seeks to preserve estates and to promote and encourage family accord. These statements in varying forms are to be found in many of our decisions. See *Redwine v. Clodfelter,* 226 N.C. 366, 38 S.E. 2d 203, and cases cited. But when a testamentary trust is the subject matter of the agreement, there are material limitations upon their application.

(1) The will creating a trust is not to be treated as an instrument to be amended or revoked at the will of devisees or to be sustained *sub modo* only after something has been sweated out of it for the heirs at law. The power of the court is exercised not to defeat or destroy, but to preserve, it.

(2) The rule that the law looks with favor upon family agreements does not prevail when the rights of infants are involved. A court of equity looks with a jealous eye on a contract that materially affects the rights of infants. Their welfare is the guiding star in determining its reasonableness and validity.

(3) 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. See *Redwine v. Clodfelter, supra.*

(4) To invoke the jurisdiction of a court of equity the condition or emergency asserted must be one not contemplated by the testator and which, had it been anticipated, would undoubtedly have been provided for; and in affording relief against such exigency or emergency, the court must, as far as possible, place itself in the position of the testator and do with the trust estate what the testator would have done had he anticipated the emergency. *Cutter v. Trust Co.,* 213 N.C. 686, 197 S.E. 542. It is not the province of the courts to substitute their judgment or the wishes of the beneficiaries for the judgment and wishes of the testator. The controlling objective is to preserve the trust and effectuate the primary purpose of the testator. *Hospital v. Comrs. of Durham,* 231 N.C. 604; *Hospital v. Cone,* 231 N.C. 292; *Penick v. Bank,* 218 N.C. 686, 12 S.E. 2d 253.

(5) The exigency, contingency, or emergency necessary to invite the intervention of the courts must relate to and grow out of the trust itself or directly affect the *corpus* thereof or the income therefrom.

The interest of the infant grandchildren, *in esse* and *in posse,* depends upon whether the date appointed in the will for the completion of the trust, and the division and delivery of the estate to those named as the ultimate takers, is a time annexed to the substance of the gift, marking the creation of the estate and the time of its vesting, or whether it operates as a mere postponement of the complete enjoyment of the estate, vesting at the death of the testator.

Where an active trust is created for the use and benefit of named beneficiaries, or there is a gift of all or a part of the income therefrom to the beneficiaries, pending final division, or there is other language in the will evidencing a clear intent that a beneficial interest in the estate shall vest in the parties named immediately upon the death of the testator, with directions to the trustees to divide and deliver the estate at a stated time in the future, the interest vests immediately upon the death of the testator and the date of division merely postpones the complete enjoyment thereof. *Coddington v. Stone,* 217 N.C. 714, 9 S.E. 2d 420; *Robinson v. Robinson,* 227 N.C. 155, 41 S.E. 2d 282; *Sutton v. Quinerly,* 228 N.C. 106, 44 S.E. 2d 521.

Conversely, if there is no gift of the estate, or the income therefrom, or other interest therein, distinct from the provision for its division, which is to be made equally between all the children and, for the first time, upon the termination of the trust, the "when" of the division is of the essence of the donation and is a condition precedent. It marks the time of vesting as well as the time of the full enjoyment of the gift.

Anderson v. Felton, 36 N.C. 55; *Guyther v. Taylor,* 38 N.C. 323; *Bowen v. Hackney,* 136 N.C. 187; *Fuller v. Fuller,* 58 N.C. 223; *McDonald v. Howe,* 178 N.C. 257, 100 S.E. 427; *Scales v. Barringer,* 192 N.C. 94, 133 S.E. 410; *Knox v. Knox,* 208 N.C. 141, 179 S.E. 610. See also notes, L.R.A. 1915 C 1014.

Such gifts come within the rule which annexes the time to the substance of the legacy and makes the right dependent upon the capacity of the legatee to answer at the time designated. *Giles v. Franks,* 17 N.C. 521.

When the time is annexed to the substance of the gift or devise, as a condition precedent, it is contingent and transmissible. *Bowen v. Hackney, supra.*

The will devises the estate of the testator to the named trustees for a period of twenty years. They are directed to pay one beneficiary $140 per month and permit her to occupy the residence as a home. The trustees are authorized in their discretion to use income or principal to alleviate any emergency arising in the affairs of either of testator's children or the issue of a deceased child. Any funds so expended are to be "charged to the recipient thereof or handled in such way as the trustees see fit, so as to equalize the ultimate distribution of the estate among" testator's "children and issue." If the interest of any "heir, next of kin, legatee, devisee, beneficiary" shall be forfeited under paragraph 2 (11) of the will, then such interest to which he or she "might otherwise become entitled" is devised or bequeathed "to such of the beneficiaries . . . as shall not have violated" this provision of the will. These compose all the dispositive provisions of the will.

There is no direct gift to the children of any part of the *corpus* of the estate, or the income therefrom, apart from the provisions of paragraph 2 (4) directing a division of the property at the end of 20 years. The gift to them must be implied from the language there used. Delete that paragraph and the children take nothing under the will.

At the end of the twenty-year period, the trustees are to divide the estate among testator's children. In the division of the property they are to receive it in equal shares. As they are the beneficiaries of the division, the property, by necessary implication, is given to them, title thereto vesting at the time of the division.

The devise therefore falls within the second class of cases above cited. The gift annexes the time to the substance of the legacy as a condition precedent. It is of such nature as to vest in the infants a contingent interest therein. This is not the time or the occasion for defining the exact nature of that interest. Suffice it to say that it is sufficient to invoke the protective jurisdiction of a court of equity.

The testator has provided the method of administration of his estate desired by him, and he has entrusted that administration to those named

in his will. A court of equity will not divide or otherwise alter the trust so established for any of the reasons advanced in this proceeding. If the trustees are or become persistently disregardful of their fiduciary obligations, other adequate remedies are available, and the courts, on proper application, will unhesitatingly enforce them, even to the extent of assuming complete supervisory authority over the estate. *Trust Co. v. Rasberry,* 226 N.C. 586.

The proposed settlement materially modifies the original trust as created by the testator and "sweats out" something for one of the beneficiaries. *Redwine v. Clodfelter, supra.* It divides the estate which, under the will, is to be held intact for a period of twenty years. It appoints, and vests with discretionary power, a trustee other than those named in the will. It vests in Mrs. Kempton the right to claim the income from one-third of the estate and to deduct therefrom funds with which to pay her counsel for personal services rendered to her. While not all inclusive, these specifications serve to point out that material modifications are proposed.

The former actions instituted by defendant Kempton were not against the trustees, as such, and in no wise involved the *corpus* of the estate. They were bottomed squarely on allegations of *mala fides* on the part of the trustees in the administration of the trust. She did not sue in her own behalf. She sought, in behalf of A. B. Carter, Inc., to recover from the trustees, as individuals, profits they had earned by dealing in trust property for the benefit of themselves and members of their families. That there was merit in her allegations is made evident by the fact that the trustees paid her more than $150,000 to settle the actions. The sum, however, was not paid by the trustees out of gains they had wrongfully received. It was paid out of the funds of A. B. Carter, Inc. The purpose of the actions was to recover for the corporation. Yet the corporation paid. Just why, we are unable to perceive.

The pending action instituted by Mrs. Kempton seeks to have the court construe the will, particularly in respect of the power of the trustees to fix their own salaries and bonuses and in respect of similar matters, and to recover funds allegedly unlawfully paid to themselves out of the trust estate.

Yet it is contended, and the court below found, that if that action is prosecuted to final judgment and they are required to answer the charges leveled at them therein, it will perpetuate the family feud engendered by the original actions, plunge the family into litigation, act as a constant barrier to the establishment of family peace, and tend to destroy the peace, honor, and dignity of the family.

If to be compelled to discharge the simple but important duty of accounting for their actions as trustees will disclose facts which will have

such serious results, it is high time they should be compelled to do so. If they have nothing to hide, disclosure will hurt no one.

If deep-seated suspicion between the trustees and some of the beneficiaries exists, and pending litigation will be bitter, and the trustees resent the constant surveillance of Mrs. Kempton, these conditions arise out of the mental attitudes of the parties. They are not due to any defect in the trust, unforeseen by the testator. Careful adherence to the duties and obligations imposed upon the trustees, and the prompt disclosure of those matters which should be made known to the interested parties, will go far toward removing existing irritations.

In this connection it is not amiss to call attention to the fact that while the property is devised to the trustees "to receive . . . dispose of, or lease all or any part" thereof coming into their hands "as though they were absolute owners thereof," the language "as though they were absolute owners thereof" relates to the management and disposition of the property and not to the beneficial ownership thereof. It does not relieve the trustees of the duty to manage and account for the assets of the estate as fiduciaries. Although they, as trustees, are vested with absolute title to the property during the twenty-year period, subject to the duty to account for same at the expiration of the trust, they will be held accountable for any bad faith or abuse of discretion in the management thereof.

Interference with the trust by altering the provisions thereof to prevent losses resulting from the gossip which may arise when actions based on allegations of maladministration are instituted, and the other disturbing influences growing out of such actions, are not within the equity jurisdiction of the court. Furthermore, it may not be said that it was not within the contemplation of the testator that suits might be instituted for breach of fiduciary duties and that there would be reactions therefrom which might injuriously affect the trust estate. Doubtless this is what he had in mind when he adjured his trustees to endeavor to work harmoniously together.

The court is not justified in altering a trust to preserve the spiritual values of family affection. In family settlement cases that objective, worthy though it is, cannot be made the sole basis of decision. The court acts when, and only when, it is necessary to preserve the trust and effectuate its primary purpose. This does not include the threat to the estate incident to squabbling between the trustees and beneficiaries regarding the proper administration of the trust. Such questions in respect thereto, which have been raised by the parties to this proceeding, can be settled by the courts without resort to a division or modification of the trust.

The proposed division of the trust estate is not primarily to preserve the estate, for there is no reason to believe that the present trustees cannot, if they will, manage the estate as advantageously as anyone else. It is

proposed so as to dispense with the watchful eye of one of the beneficiaries and terminate her recurring forceful reminders that the trustees are disregardful of the fiduciary duties imposed upon them by the will.

In the final analysis, the conditions about which the parties complain are created by family differences which only incidentally affect the trust. The trust is merely caught in the rip tide of family dissension. This will not suffice to support the proposed settlement.

Upon a full consideration of the record before us we are constrained to conclude that the approval of the proposed settlement by the court below was not well advised. The judgment entered to that end is

Reversed.

JOHN McCOLLUM AND WIFE, MATTIE McCOLLUM, v. HENRY SMITH AND LOUISE SMITH GRAY AND HUSBAND, CHARLES HOWARD GRAY.

(Filed 13 December, 1950.)

1. Judgments § 29—

As a general rule a judgment of a court of competent jurisdiction is final and binding on the parties to the action or proceeding, and those standing in privity to them.

2. Same: Mortgages §§ 31h, 39b: Registration § 1—Decree of foreclosure held to estop attack on commissioner's deed on the ground of want of registration or because not executed within ten years of decree.

Decree of foreclosure was entered directing the sale of lands and providing that the defendants therein should be forever barred from any and all equity of redemption if they failed to redeem before the date fixed for sale. More than ten years after the decree the commissioner executed deed to the purchaser at the sale, which deed recited that original deed to the purchaser had been lost or destroyed and had never been registered. *Held:* The defendants in the foreclosure action and those in privity with them are estopped to attack the title of the grantee in the commissioner's deed, and those who deraign title from such defendants may not maintain that the commissioner's deed was ineffective because not executed until more than ten years from the rendition of the decree of foreclosure, G.S. 1-47, G.S. 1-234, nor that the instruments in their chain of title were registered prior to the registration of the commissioner's deed, G.S. 47-18.

3. Lost or Destroyed Instruments § 1—

When a deed has once been delivered, its subsequent loss or destruction will not divest title to the grantee.

APPEAL by plaintiffs from *Frizzelle, J.*, at 11 August, 1950 (out of term), of CUMBERLAND.

Civil action instituted 12 January, 1949, to remove cloud from title to certain land in Cumberland County, North Carolina.

The original defendants were May E. Smith and her husband, Henry Smith, but she having since died, their only child Louise Smith Gray and her husband were made parties defendant.

From the pleadings and agreed statement of facts, the following appears:

I. Plaintiffs and defendants claim the 71 acres of land in question from a common source of title, Robert Strange, who with his wife, on 27 March, 1923, conveyed it to D. Walter Townsend, Jr. And on same date Townsend gave a mortgage deed to Strange conveying said land as security for two purchase money notes under seal maturing on or before 27 March in 1924 and 1925. Both the deed and the mortgage were registered three days later.

II. Plaintiffs deraign title from D. Walter Townsend, Jr., through the following *mesne* conveyances, all of which are registered in office of register of deeds of Cumberland County:

(1) On 1 December, 1923, D. Walter Townsend, Jr., and wife, by deed registered, as stated, conveyed four lots of said land to Eddie Smith and wife, who on same date gave a purchase money mortgage thereon, which was registered as stated. This mortgage was foreclosed by D. Walter Townsend, Jr., as mortgagee, and deed for three of the four lots was made to H. L. Townsend on 28 November, 1929.

(2) Also on 28 November, 1929, D. Walter Townsend, Jr., and wife made deed to H. L. Townsend purporting to convey the 71-acre tract of land (excepting said three lots), subject to the mortgage to Robert Strange, as set forth above in paragraph numbered I.

(3) On 1 September, 1930, H. L. Townsend and wife made deed to George McCollum and wife, purporting to convey the 71-acre tract of land, wherein the grantors promised to pay the remaining purchase money note to the estate of Robert Strange, mortgagee.

(4) Also on 1 September, 1930, George McCollum and wife gave a deed of trust to E. R. MacKethan, Jr., Trustee, conveying the 71-acre tract of land, to secure the payment to E. R. MacKethan and D. W. Townsend seven notes dated 1 September, 1930, maturing as specified and providing for accelerated maturity on default, at option of holder thereof.

(5) Thereafter, on 3 July, 1945, E. R. MacKethan, Jr., Trustee, purportedly under the power of sale in the last recited deed of trust, made deed to John McCollum and wife, reciting sale on 22 June, 1945, at $1,500.00. And at the purported foreclosure sale, defendant Henry R. Smith gave public notice of the claim and ownership of the lands by the defendants.

(6) And John McCollum and wife executed a deed of trust to A. E. Cook, Trustee for Crawford B. MacKethan, Guardian of E. R. MacKethan and D. W. Townsend, agent for the estate of D. W. Townsend,

deceased, securing $1,500.00 at 90 days, with interest from date. This and the last mentioned foreclosure deed were both registered on 12 July, 1945.

III. On the other hand, defendants base their claim of title upon a judgment, dated 10 July, 1933, in a foreclosure action entitled "Henry R. Smith, administrator of Robert Strange, deceased, *vs.* D. W. Townsend and wife, Ella Townsend, Eddie D. Smith and wife, Alma Ann Smith, Geo. M. McCollum and wife, Ida Florence McCollum, and E. R. MacKethan, Trustee."

This judgment recites that it appears that each defendant has been duly served with summons and a copy of the complaint in the cause, that time for answering has expired and no answer has been filed and that plaintiff is entitled to the relief prayed in his said complaint. And then, "It is, therefore, ordered, considered, adjudged and decreed that the plaintiffs recover judgment against defendants as follows:

"1. That he recover of defendant, E. W. Townsend, Jr., the sum of $750.00 with interest thereon from the 27th day of March, 1931, until paid.

"2. That the said amount be, and it is hereby declared to be a specific lien upon the 71 acres of land set out and described in paragraph three of the complaint, to wit: Lying and being in Cumberland County on the west side of the Cape Fear River"; specifically described as in the complaint in present action, "being the same land conveyed by Robert Strange and wife, Mae B. Strange, to D. W. Townsend, Jr., by deed dated March 27, 1923.

"3. That the defendants have two months from the date of this judgment to redeem said land by paying into court the full amount of the judgment, interest and costs, the last thirty days of which two months may run contemporaneously with the time of the advertisement of the sale and that after the expiration of said two months the said defendants, and each and all of them, shall be forever barred of any and all equity of redemption in said land or any part thereof.

"4. That the plaintiff be allowed to become a bidder and if necessary a purchaser of said land.

"5. That H. S. Averitt be, and he is hereby appointed commissioner to sell the land set out and in this judgment to the highest bidder for cash at the courthouse door in Cumberland County after due and lawful advertisement, and that he report his proceedings in this cause into the office of the clerk of the court.

"6. That he recover of the defendants his costs in this action . . ."

The judgment roll of the action of foreclosure, in which the foregoing judgment was rendered and docketed is lost, but the judgment is docketed in Judgment Docket in office of the Clerk of the Superior Court of

said county as indicated, and the following entry appears on this docket: "The land set out and described in the complaint in this action having been sold to Mrs. May Smith for $500, this judgment is cancelled as to the deficiency after giving credit for the $500 the land brought. This Sept. 21, 1934—H. S. Averitt, Plaintiff's attorney."

And the agreed facts identify and attach as an exhibit a copy of notice of sale of said land by Commissioner H. S. Averitt, dated 25 August, 1933, published in a certain local newspaper, weekly for four weeks, beginning 31 August, 1933, expressly "under a judgment and decree of the Superior Court in an action entitled 'Henry R. Smith, Administrator *d. b. n.* of Robert Strange, deceased, *vs.* D. W. Townsend, Jr., *et al.,*'" and fixing Monday, the 25th day of September, 1933, the first day of September Term of Superior Court, at 12 o'clock noon at the courthouse in Cumberland County as the time and place when and where the land would be exposed to sale to the highest bidder for cash,—the sale to be subject to confirmation by the court.

Thereafter on 10 August, 1945, H. S. Averitt, Commissioner appointed in the aforementioned and entitled action, made a deed to May H. Smith, purporting to convey said 71-acre tract of land, for purposes recited as follows: "That whereas, the said H. S. Averitt, Commissioner, being thereto licensed by a judgment and decree of the Superior Court, Cumberland County, North Carolina, in the above entitled action, did on Monday, the 25th day of September, 1933, being the first day of September term of the Superior Court, at the hour of 12:00 noon, at the Court House door in Cumberland County, North Carolina, after due and lawful advertisement, once a week for four weeks, in *People's Advocate,* a newspaper published in Cumberland County, and also by notices posted at the Court House Door and at three other public places in Cumberland County for thirty days next preceding the date of sale, expose to sale to the highest bidder for cash the land hereinafter described, at which time and place the said May H. Smith became the last and highest bidder for said land for the sum of Five Hundred and no/100 ($500.00) dollars; and whereas, it appears that after the lapse of the 20 days allowed by law from the date of sale, the said sale was confirmed and the said Commissioner on payment of the purchase-money executed to the said May H. Smith a deed in fee simple for said land which deed is now lost or mislaid and cannot be found, having never been registered and whereas, the said Commissioner is now willing to execute to the purchaser another deed for said land in lieu of the said deed which has been lost or mislaid."

Moreover, on 20 April, 1930, Fannie Strange and 17 others as the heirs at law of Robert Strange, deceased, as parties of the first part, in consideration of premises therein set forth, made a quitclaim deed to Henry R. Smith quitclaiming "all and singular their right, title and

interest in and to the estate of Robert Strange, deceased, be it real, personal or mixed, wheresoever the same may be situated, *saving and excepting,* however, any specific devise or bequest to any one of the parties of the first part in said last will and testament contained, . . . etc."

Defendants are and have been in the actual continuous possession of the 71 acres since the Fall of 1933.

And defendant Henry R. Smith paid the *ad valorem* taxes for the year 1930, when the land was listed in the name of H. L. Townsend, and for the years 1931, 1932 and 1933, when it was listed in the name of G. W. McCollum, and then listed it in his own name for the succeeding years, and paid the taxes through the year 1947.

Plaintiffs allege in their complaint that they are the owners in fee of the 71-acre tract; and that the claim of defendants is not valid either in law or equity because (1) under G.S. 1-47 and G.S. 1-234 the force of a judgment of any court is exhausted at the expiration of ten years from the rendition thereof, and hence the commissioner's deed to May H. Smith, described above, having been made more than ten years after the rendition of the judgment authorizing such deed, is invalid; and (2) under G.S. 47-18 no conveyance of land is valid to pass any property as against a purchaser for a valuable consideration unless such conveyance is registered; and plaintiffs are purchasers of this land for a valuable consideration at a time, and had their deed for such land registered, when there was no registration of defendants' purported deed.

Defendants, on the other hand, deny said allegations of plaintiffs' complaint and assert their claim of ownership of the land in question, and for further defense aver: (1) That plaintiffs are estopped from maintaining this action, by the judgment of 10 July, 1933, rendered on foreclosure action entitled as hereinbefore set forth,—forever foreclosing all of the defendants therein from any and all equity of redemption in the 71-acre tract of land mentioned in both actions. (2) "The defendants in the former action having failed to redeem the land as in the decree provided, and May H. Smith having become the owner thereof under the sale and conveyance by H. S. Averitt, commissioner, in 1933, and said defendants having abandoned all claim thereto, and neither listed nor paid the taxes thereon, and Henry R. Smith, owner of the estate of Robert Strange, deceased, and as his Administrator and the plaintiff in said action, relying thereon and the perpetual bar decreed against defendants therein, caused the judgment to be cancelled on the judgment docket on 21 September, 1934, as to the $250.00 deficiency; and the defendants in this action, and those under whom they claim, having listed and paid the annual taxes on the land for many years and also caused public notice to be given at the purported sale by E. R. MacKethan, Jr., Trustee, of the claim and ownership of the land by defendants, and those under whom

they claim, so that the plaintiffs in the present action had full notice and knowledge thereof, the plaintiffs herein, in good conscience, ought to be and are estopped now to claim the land or maintain this action."

And defendants aver that they and those under whom they claim are and have been in possession of the land in question, under known and visible lines and boundaries, and under color of title, for more than seven years next preceding the commencement of this action.

Defendants also plead the three year—the ten year—and the twenty year—statutes of limitations, respectively, in bar of this action.

The court, upon consideration of the pleadings and agreed statement of facts, and under pertinent and applicable principles of law, entered judgment declaring (1) that defendants are seized of said premises in fee and are rightfully in possession of the same; and (2) that plaintiffs have no right, title or interest in and to the same, and are not entitled to any of the relief sought by them; and (3) that defendants go without day and recover of plaintiffs their costs.

Plaintiffs appeal therefrom to Supreme Court and assign error.

Tally & Tally and Alexander Cook for plaintiffs, appellants.

Robert H. Dye for defendants, appellees.

WINBORNE, J. Plaintiffs, as appellants on this appeal, on the facts of record, which they concede, and fairly so, we think, fail to show error in the judgment from which appeal is taken. In their brief, as premises to argument on questions of law sought to be presented, appellants summarize the facts, in pertinent part, in this manner:

"By judgment of the Superior Court of Cumberland County dated and docketed 10 July, 1933, in an action to foreclose a mortgage, defendants were given a certain length of time in which to pay the balance of the mortgage indebtedness, otherwise to be perpetually barred from any interest in the land in controversy in this case and the land to be deeded to May H. Smith, a defendant (now deceased) in the instant case, and the successful bidder at the court-ordered sale. Defendants did not redeem within time allowed. Accordingly, the operative provisions of the judgment confirming sale to Mrs. Smith applied and deed should have been made to her by the court-appointed commissioner."

Thus appellants concede that the defendants in the foreclosure action did not redeem the land, either within the time specified or at any time, and that, hence, by the terms of the judgment therein rendered, they were "forever barred of any and all equity of redemption in said land or any part thereof."

The general rule is that a judgment of a court of competent jurisdiction is final and binding upon parties to the action or proceeding, and those

standing in privity to them. *Gibbs v. Higgins,* 215 N.C. 201, 1 S.E. 2d 554; *Current v. Webb,* 220 N.C. 425, 17 S.E. 2d 614, and others. The term "privity" means mutual or successive relationship to the same rights or property. Black's Law Dictionary.

In accordance with this principle of law, the judgment in the foreclosure proceeding is binding upon the defendants therein, and they are thereby barred of any equity of redemption in the land which was the subject of that proceeding. Hence there remained in no one of them any interest in the land, or any right to foreclose and sell the land under a deed of trust registered subsequent to the mortgage deed involved in the foreclosure proceeding. And the defendants there are the predecessors in title of the present plaintiffs as shown by the agreed facts, and these plaintiffs stand in privity to them in respect of the property in controversy.

Moreover, appellants, having further conceded that May H. Smith was "the successful bidder at the court-ordered sale," and that "the operative provisions of the judgment confirming sale to Mrs. Smith applied and deed should have been made to her by the court-appointed Commissioner," and it appearing that she paid the purchase price, she became more than a preferred bidder. See *Lord v. Meroney,* 79 N.C. 14; *Flemming v. Roberts,* 84 N.C. 533; *Kemp v. Kemp,* 85 N.C. 492; *Lynn v. Lowe,* 88 N.C. 478; *Long v. Jarratt,* 94 N.C. 444; *Campbell v. Farley,* 158 N.C. 42, 73 S.E. 103.

But whatever the rights of May H. Smith are, the plaintiffs, standing in privity to those parties expressly barred of rights in respect to the land involved, as above stated, are likewise barred and estopped, and they may not challenge the rights of May H. Smith as successful bidder at the foreclosure sale.

Nevertheless, there is evidence in the agreed facts to support a finding that a deed was made to May H. Smith prior to 21 September, 1934, the date of the marginal entry on the judgment docket. And when a deed has once been delivered its subsequent loss or destruction will not divest title to the grantee. See *Powers v. Murray,* 185 N.C. 336, 117 S.E. 161.

In the light of these principles and holdings, other questions need not be treated,—and the judgment below is

Affirmed.

MARTIN FLYING SERVICE, INC., v. LAWRENCE MARTIN AND E. H. BROCKENBROUGH.

(Filed 13 December, 1950.)

1. Trial § 23f—

While nonsuit should be granted for a fatal variance, since such variance amounts to a failure of proof, where the variance is not such as will defeat recovery and the allegation is not such as to mislead defendant, as where an express contract is alleged and the proof tends to establish an implied agreement, nonsuit is properly refused.

2. Pleadings § 24a—

Where the difference between the allegation and proof is not substantial and could not mislead the other party, as where plaintiff declares on an express contract and seeks to recover on an implied agreement arising out of the same transaction, the variance is not fatal.

3. Trial § 31b—

The court is required to state the evidence to the extent necessary to explain the law applicable thereto and to give equal stress to the respective contentions of the parties, G.S. 1-180, as rewritten by Chap. 107, Session Laws of 1949.

4. Same: Money Received § 4—Charge held for error in failing to explain law applicable to defendant's contention supported by evidence.

Plaintiff sought to recover as for money had and received the amount paid by it to a bank on a note secured by a chattel mortgage on an airplane executed by defendants. Defendants contended that plaintiff leased defendants' plane for student training under an agreement to pay the bank installments on the mortgage note as they became due out of the sums received from student pilots for use of the plane. *Held:* An instruction in effect leaving the jury to answer the issue of indebtedness either nothing or the amount of the note paid by plaintiff must be held for reversible error in failing to submit to the jury the question of the amounts received by plaintiff from student pilots which, under defendants' contentions, should have been paid by plaintiff on the note under the rental agreement, leaving defendants liable only for the amounts paid by plaintiff on the note out of its corporate assets.

APPEAL by defendant Brockenbrough from *Phillips, J.*, July Term, 1950, of GASTON. New trial.

Plaintiff corporation instituted this action to recover of defendants money paid to their use and benefit, under mistake of facts.

There was verdict in favor of plaintiff for $2,792.40, and from judgment predicated thereon defendant Brockenbrough appealed.

Bulwinkle & Howard for plaintiff, appellee.

Alvin A. London, J. C. Sedberry, and Robert G. Sanders for defendant Brockenbrough, appellant.

DEVIN, J. The plaintiff based its action upon the allegation in its complaint that it had made payments to the Wachovia Bank & Trust Company at various times in 1947 and 1948 aggregating $2,792.40, which payments were credited on and used for the payment of a note of $3,193.32 secured by chattel mortgage which had been executed by the defendants and owed by them to the bank, and that the defendants had received this amount to their use and benefit and now refuse repayment.

Defendants denied the material allegations of the complaint, and further alleged that the defendants owned a Cessna Twin Engine Airplane on which was due $3,193.32, evidenced by note and chattel mortgage to the bank in that amount, payable in monthly installments of $266.11; that the plaintiff corporation, or a partnership under the same name which it took over, had leased the airplane for use in its flying school under agreement to pay as rental therefor the installments due on defendants' note, and that the payments to the bank were made pursuant to this agreement.

From the evidence offered, taking it up in chronological sequence, it appeared that in 1946 defendant Martin and E. B. Robinson entered into a partnership agreement to engage in the business of operating airports, training airplane pilots, and selling, servicing and operating airplanes under the name of Martin's Flying Service, Martin to own two-thirds of the business, assets and profits, and Robinson one-third. On 3 February, 1947, defendant Martin and defendant Brockenbrough became joint owners of the airplane described and executed to the bank note and chattel mortgage thereon in the sum of $3,193.32.

On 14 October, 1947, defendant Martin conveyed his two-thirds interest in the partnership to E. B. Robinson, making Robinson sole owner. The bill of sale for this transaction recited the inclusion in the sale of all shop and office equipment, airplanes, veterans' school supplies, accounts, contracts and all other personal property owned and used in connection with the operation of the business under the name of Martin Flying Service. As part consideration for the conveyance Robinson agreed to assume and pay all notes, accounts and other liabilities due or to become due by Martin Flying Service.

Apparently about this date Martin Flying Service, Inc., which theretofore had been incorporated, took over and continued to operate the business, with E. B. Robinson as President.

Thereafter on 4 December, 1947, E. B. Robinson and defendant Brockenbrough executed a note to the bank in the sum of $825 secured by lien on the Cessna plane, the note payable in monthly installments of $137.65. This note was paid one-half by Robinson and one-half by defendant Brockenbrough, each paying monthly $68.82, and the note was marked paid July, 1948. Defendant Brockenbrough testified this note was given

to "refinance" the balance then due on the $3,193 note. The $3,193 note was marked paid 21 January, 1948.

E. B. Robinson testified he paid all of the $3,193 note except about $400 paid by Brockenbrough as above shown, and that this money paid off and discharged the note and chattel mortgage of the defendants; that he made those payments under the mistaken belief that the bill of sale from defendant Martin included Martin's half interest in the plane, and that the note to the bank was a liability of Martin's Flying Service which he had agreed to assume, but that defendants denied he had any right to the plane and removed it from the flying field.

In the itemized statement of payments to the bank attached to the complaint appear two payments of $266.11, 18 October and 28 November, 1947, and $532.22, 17 November, 1947. Apparently this accounts for four monthly installments on the $3,193 note. There also appear the six monthly payments of $68.82—$412.93—paid by Robinson on the $825 note. The last item on this statement is the undated item of $1,315.03, which added to the other items mentioned makes the total of $2,792.40, the amount plaintiff is suing for in this action.

On behalf of the defendants it was testified by defendant Martin that he purchased one-half interest in the Cessna plane with his own money; that Robinson declined to buy; that the plane was brought to the field of Martin's Flying Service and leased to the Government for the training of students at $35 an hour, the net profits to be divided between him and Brockenbrough, and that payments on the plane were made out of these rentals. Martin also testified that at the time he sold his interest to Robinson the books showed Brockenbrough was due something over $400, and that the Government owed for flying time. The plane was not included in the bill of sale. Brockenbrough did not remove the plane until July, 1948. Another witness, who had been Vice-President of plaintiff corporation and chief pilot, testified the plane was used after Martin sold his interest; that 15 or 20 students were trained requiring minimum of 20 hours each at $35, and that the money was paid to Martin Flying Service, Inc. In addition defendant Brockenbrough testified that the plane was used by Martin's Flying Service on a rental basis, the net amount after paying expenses to be paid to the bank; that after Martin sold his interest Robinson for the plaintiff agreed to continue the arrangement; that he, Brockenbrough, then asked for the amount due him on past transactions and was told the books had not been audited; that he has never received anything for the use of his plane; that the note of $825 executed 4 December, 1947, was to refinance the balance then due on the $3,193 note. At that time Robinson did not state he had paid out any money for the defendants. Witness also testified that with a representative of the bank he went to see Robinson; that Robinson had been

advised if he wished to use the plane to complete student training, payments on the plane must be brought up-to-date; that rather than have the bank repossess the plane it was agreed that Robinson and Brockenbrough should sign the $825 note, each paying half of the amount owing; that the payments of $532.22 and $266.11 made in November, 1947, were given to bring the payments up-to-date.

Defendants contended that plaintiff's president was well aware that the plane belonged to the defendants, and that it was being used on a rental basis, payments therefor to be made to the bank as credits on defendants' note; and further that plaintiff's evidence as to an undated item of $1,315, for which he now claims repayment from defendants, was vague and indefinite; that this item should be considered in connection with the evidence that the balance on the note of $3,193 was settled by the note of 4 December, 1947, and that the item now claimed should be rejected.

Defendant Brockenbrough assigns as error the denial of his motion for judgment of nonsuit on the ground that in the complaint it was alleged that the payments to the Wachovia Bank & Trust Co. for the benefit of defendants were made "under an express contract," whereas the proof as to appellant tended to show only an implied contract to repay money had and received to the use and benefit of the defendants—one of the common counts in *assumpsit.* The motion was properly denied. The rule is established that evidence of material matters not alleged will not be received or avail against a motion to nonsuit (*Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14), but the variance here cannot be held fatal. *Brown v. Tel. Co.,* 169 N.C. 509, 86 S.E. 290; *Oates v. Kendall,* 67 N.C. 241; G.S. 1-168; G.S. 1-169. One may sue on an express contract and recover on an implied contract (*Wittkowski v. Harris,* 64 F. 712) unless the allegation is such as to mislead the defendant. The rule is stated by *Justice Walker* in delivering the opinion of the Court in *Talley v. Granite Quarries Co.,* 174 N.C. 445, 93 S.E. 995: "When the difference between the allegation of the pleading and proof is substantial, so that the other party is grossly misled by it, and it really amounts to alleging one cause of action and proving another, it is not a variance merely, but a failure of proof." To the same effect is the holding in *Whichard v. Lipe, supra.* The appellant in the case at bar was in nowise misled.

The appellant Brockenbrough also assigns error in that the court did not call to the attention of the jury material contentions of the defendants, nor explain the law arising on the evidence offered on their behalf as required by G.S. 1-180. An examination of the Judge's charge in connection with the evidence hereinbefore set out at some length leads us to the conclusion that the appellant's assignment of error in this respect is well-founded.

G.S. 1-180, as rewritten by Chapter 107, Session Laws 1949, requires the trial judge to "declare and explain the law arising on the evidence given in the case." He is not required to state the evidence, "except to the extent necessary to explain the application of the law thereto." This would seem to require that the Judge in explaining the law to the jury should state the evidence from which the questions of law arise, and the rules of law applicable to those facts. He must also "give equal stress to the contentions" of the parties. *S. v. Ardrey,* 232 N.C. 721; *Grant v. Bartlett,* 230 N.C. 658, 55 S.E. 2d 196; *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484.

According to the record before us the Judge charged the jury in substance that if the plaintiff made the payments to the bank believing it owed the amounts so paid as debts of the Flying Service which it had assumed, and that the defendants received the benefit of these payments in the settlement and discharge of their note and chattel mortgage, plaintiff would be entitled to recover of defendants the amounts so paid. But that if the plane belonged to the defendants and there was an agreement that the plane be used to pay off the debt due the bank, and the plane was used by plaintiff a sufficient time to pay off the debt, and it was paid off by that method, the answer to the issue would be "nothing."

Without additional instruction the court stated briefly the contentions of the parties as to the issue submitted. In doing so the court stated the defendants' contention that they owned the entire interest in the plane, and that they had an agreement with plaintiff for its use in training students for the Government, the payments therefor to be applied to the payment of the note and chattel mortgage in the bank; and that the plane was so used, and that money paid to the bank was derived from use of the plane and did not come from assets of the corporation. And further that although plaintiff's witness testified he paid $2,792 on this note the checks offered do not aggregate more than $1,400. The court then stated the contrary contention of plaintiff "that the plaintiff insists and contends even though he has not offered all the checks to substantiate it, the defendants admit the difference that's what was paid after the corporation took over the affairs of the partnership; the plaintiff says and contends that would be the difference that was paid by the corporation to the bank, which would be all except the amount Brockenbrough paid, which would be $2,792.40."

The defendant Brockenbrough contends that the evidence which he offered raised the question whether there was an agreement on the part of the plaintiff, or to which he assented, for the rental of the defendants' airplane for student training at a lucrative price, and, if so, how long was the plane so used by plaintiff and what amount was derived from that source for which the appealing defendant was entitled to credit;

and as a corollary what amounts were actually paid by plaintiff corporation from its assets to the bank on defendants' note. He contends the impression was given the jury that they must answer the issue "$2792.40," or "nothing," without submitting to the jury some intermediate ground, as warranted by the evidence, upon which to rest a verdict. *Davis v. Morgan,* 228 N.C. 78 (82), 44 S.E. 2d 448. He complains that the evidence relating to these matters and the law arising therein were not sufficiently stated to the jury.

The credibility of the witnesses and the weight to be given their testimony were matters for the jury. Without expressing any opinion thereon, we have stated the evidence only for the purpose of noting the questions of law relating thereto and arising thereon, and to determine if appellant's assignments of error as to the court's instruction to the jury are of sufficient merit to warrant a new trial. On the record we think there should be another hearing.

There were other exceptions noted at the trial and brought forward in defendants' assignments of error, but it is unnecessary to consider them as they may not arise on another trial.

New trial.

WACHOVIA BANK & TRUST COMPANY AND ZEB GRUBB LITTLE, CO-EXECUTORS AND CO-TRUSTEES UNDER THE WILL OF ZEB VANCE GRUBB, v. ALMA LEE GRUBB, EDNA GRUBB LITTLE, BEULAH GRUBB FITZGERALD, R. C. FITZGERALD, EULA GRUBB BECK, RALPH BECK, THEO GRUBB, MIRIAM GRUBB, LILLIAN GRUBB, ZEB GRUBB LITTLE, INDIVIDUALLY, JUNE CARTER LITTLE, SARAH JEAN HOLLAND LITTLE, FLORENCE HUDDLE, JOHN HUDDLE, R. C. FITZGERALD, JR., LOTTA FITZGERALD, ROBERT EDWIN FITZGERALD, MAY FITZGERALD, ROBERT EDWIN FITZGERALD, JR., THOMAS K. FITZGERALD, W. B. HUNT, GUARDIAN FOR LOU GRUBB AND ROBT. GRUBB, JR., MINORS; LOU GRUBB, ROBERT GRUBB, JR., AND THE UNBORN ISSUE OF EDNA GRUBB LITTLE, BEULAH GRUBB FITZGERALD, EULA GRUBB BECK, THEO GRUBB, LOU GRUBB, JUNE CARTER LITTLE, ZEB GRUBB LITTLE AND ROBERT GRUBB, JR., AND HUBERT E. OLIVE, GUARDIAN AD LITEM FOR ROBERT EDWIN FITZGERALD, JR., THOMAS K. FITZGERALD, AND THE UNBORN ISSUE OF EDNA GRUBB LITTLE, BEULAH GRUBB FITZGERALD, EULA GRUBB BECK, THEO GRUBB, LOU GRUBB, JUNE CARTER LITTLE, ZEB GRUBB LITTLE AND ROBERT GRUBB, JR.

(Filed 13 December, 1950.)

1. Wills § 38—

The *corpus* of the estate remaining after payment of specific legacies, taxes, debts, and costs of the administration, is the residue, and while the

amount cannot be determined until the administration is complete, it is then to be determined as of the date of the testator's death.

2. Wills § 34e—Beneficiaries of income held entitled thereto from date of testator's death.

The will in suit devised the residue of the estate in trust with provision that "the entire net income" be "paid monthly, or quarterly, after the expiration of three years from the date of my death" to named beneficiaries. *Held:* The income from the trust for the first three years should not be added to the *corpus* of the estate, but the beneficiaries named are entitled thereto with payment merely postponed until three years after testator's death, both under the general rule that the beneficiary of income is entitled thereto from the date of testator's death, and also in accordance with testator's intent as expressed in the instrument, since the word "entire" used in the bequest of the income imports all the income undiminished and unimpaired.

APPEAL by petitioners and respondent Hubert E. Olive, guardian *ad litem,* from *Clement, J.,* September Term, 1950, DAVIDSON. Affirmed.

Petition for construction of will and for advice and direction in the administration of a testamentary trust.

On 31 August 1949, Zeb Vance Grubb of Davidson County died testate. He was the owner of a large estate located in Davidson County. He devised and bequeathed to petitioners, in trust, all the residue of his estate, after the payment of debts, costs of administration, and specific legacies, to administer the same for a period of twenty years.

The pertinent trust provision is as follows:

"Article XIV . . .

"(1) The entire net income derived from my trust estate shall be paid monthly, or quarterly, after the expiration of three years from the date of my death and probate of this will, to the following:" (his widow and other named beneficiaries.)

The will also provided that no cash legacy other than the gifts to four named beneficiaries should be paid "within three years from the date of" his death. While there was a codicil to the will, it is not material to the controversy here presented.

On 24 May 1950, testator's widow, recipient of 52% of the income derived from the trust, notified petitioners, who are also executors, that she claimed her ratable part of the income derived from the residuum of the estate from and after the death of the testator. Certain legatees who are to share in the *corpus* of the estate at the expiration of the trust contend that the income accruing during the three-year period next after the death of testator becomes a part of the *corpus* of the estate and is not distributable as income. The petitioners, faced with this controversy respecting the administration of the estate, filed the petition herein to obtain the advice of the court and directions as to the proper disposition

of the net income of the trust estate accruing during the three years next after the death of testator.

The court below adjudged that the beneficiaries of the trust estate are entitled to the entire net income of the trust accruing from and after the date of the death of the testator and directed the trustees to disburse the same in accord with the terms of the will. The petitioners and Hubert E. Olive, guardian *ad litem* of certain infants who may share in the final distribution of the *corpus* of the trust, excepted and appealed.

Hudson & Hudson and Charles W. Mauzé for petitioner appellants.

Hubert E. Olive, guardian ad litem, in propria persona.

Linn & Shuford and Don A. Walser for Alma Lee Grubb, appellee.

BARNHILL, J. The residue of the testator's estate was devised to petitioners in trust. The residue of an estate comprehends all of the estate left by the testator at the time of his death, subject to all deductions required by operation of law or by direction of the testator. Conversely stated, the residue is that part of the *corpus* of the estate left by the testator which remains after the payment of specific legacies, taxes, debts, and costs of administration. Webster's New Int. Dic. (2d Ed.); Callaghan, Cyc. Law Dic. (2d Ed.); *Trust Co. v. Jones,* 210 N.C. 339, 186 S.E. 335.

While the exact nature and *quantum* of the residue cannot be determined until the administration is complete, it is formed at the death of the testator and must be ascertained as of that date. *Trust Co. v. Jones, supra; Trust Co. v. Smith,* 165 N.E. 657 (Mass.).

When such residue has been devised in trust with direction that the income therefrom shall be paid to named beneficiaries, does the income accruing during the three-year period next after the death of testator constitute a part of the *corpus* of the trust, or must it be accounted for as income and disbursed as such?

On this question there is some division of judicial opinion. One line of cases establishes what is known as the English rule under which such income must be added to and accounted for as part of the *corpus* of the estate. The other line has formulated a rule, sometimes called the Massachusetts rule, which has been adopted by the authors of the Restatement of the Law of Trusts as representative of the weight of current authority on the subject.

The latter rule is there stated as follows:

"Where a trust is created by will and by the terms of the trust the income is payable to a beneficiary for a designated period, the beneficiary is entitled to income from the date of the death of the testator, unless it is otherwise provided in the will. The rule here stated is applicable to

trusts created by a specific devise or legacy, by a general pecuniary legacy, and by a residuary devise or bequest; and it is immaterial whether the same person is designated as executor and trustee." Restatement of the Law of Trusts, sec. 234, p. 692; *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17; 54 A.J. 92; Anno. 70 A.L.R. 636, 105 A.L.R. 1194, and 158 A.L.R. 441.

Under this rule those to whom the income is to be paid are entitled to the income from the date of the death of testator unless it is otherwise provided in the will.

The appellants concede that the general rule, as above quoted, prevails in this jurisdiction, *Cannon v. Cannon, supra,* and that nothing else appearing, all the income must be disbursed as directed in the will. But they stressfully contend that it is "otherwise provided in the will"; that the language "after the expiration of three years from the date of" testator's death fixes the time the income shall begin to accrue to the use of the beneficiaries, as well as the time the payments to them are to begin. We agree that the will specifically designates the income which is to be paid to beneficiaries of the trust and that the language in the will is controlling, but we do not concur in their conclusions as to the effect of the language used by the testator.

The devise to the trustees took effect as of the date of the death of the testator. The trustees are to pay "the entire net income" derived from the trust estate to the named beneficiaries. "Entire" connotes "whole," "total," "all," "undiminished," "unimpaired," "undivided." Webster's New Int. Dic. (2d Ed.). The payment of anything less than the entire net income accruing from the trust property from and after the date of the death of the testator would not suffice to meet the express directions of the testator. The beneficiaries must receive all, undiminished and unimpaired by any deduction, or by application, in whole or in part, to other purposes.

The language "after the expiration of three years from the date of my death" designates the time payments to the beneficiaries shall begin and merely postpones the enjoyment of the gift. *Priddy & Co. v. Sanderford,* 221 N.C. 422, 20 S.E. 2d 341; *Carter v. Kempton, ante,* p. 1, and cases cited.

The language used by the testator is clear. His purpose and intention as expressed thereby are controlling. *Conrad v. Goss,* 227 N.C. 470, 42 S.E. 2d 609; *Taylor v. Taylor,* 228 N.C. 275, 45 S.E. 2d 368; *Schaeffer v. Haseltine,* 228 N.C. 484, 46 S.E. 2d 463; *Trust Co. v. Shelton,* 229 N.C. 150, 48 S.E. 2d 41; *Sutton v. Quinnerly,* 231 N.C. 669.

The testator made a similar provision in respect of the payment of specific legacies. It would seem to be apparent that his intention was to give the executors ample time within which to settle the estate, free from

the demands of devisees who might become importunate. In any event, the language used discloses his intent as to the *quantum* of the income which was to be paid to the beneficiaries. That intent must be effectuated.

So then, whether we apply the general rule prevailing in this jurisdiction or resort to the language used by the testator, the result is the same. The net income accruing from the trust property from and after the death of the testator must be delivered to the trustees, intact, to be paid by them as directed in Item XIV (1) of the will.

The appellees move to dismiss the appeal of the plaintiffs for that they are not the parties aggrieved. They have no partisan interest in the controversy, and they are fully protected by the judgment of the court below. There was no cause for them to appeal. Even so, the appeal of the guardian *ad litem* is sufficient to bring the case here, and their appeal does not complicate the record. The proceeding is *in rem* and constitutes a necessary expense of administration of the estate now in the hands of plaintiffs as executors. The costs must, therefore, be paid out of the funds of the estate. In the light of these facts, we may pass the motion without a ruling thereon.

The judgment of the court below is

Affirmed.

ROY WALDROP AND WIFE, IRMA FAYE WALDROP, v. TOWN OF BREVARD, A MUNICIPAL CORPORATION.

(Filed 13 December, 1950.)

1. Deeds § 13a: Easements § 1—Grant of land for garbage dump with covenant not to sue for annoyance arising from such operation held to convey easement running with land.

The owner of a tract of land conveyed a portion thereof to a municipality for express use as a garbage dumping ground, and released and waived all right of action which grantors or their successors might ever have arising out of the use of the land conveyed for such purpose. *Held:* The waiver or release constituted a covenant not to sue, binding on grantors and their heirs and assigns, and operated to create an easement running with the land so that purchasers of the remaining lands of the grantors, either directly or by *mesne* conveyances, are estopped to maintain an action against the city for the nuisance resulting from the operation of the garbage dump in a reasonably careful and prudent manner, notwithstanding that the deed to the city was not in their chain of title. G.S. 47-27.

2. Easements § 6—

Where the owner of land conveys a portion thereof together with an easement over his remaining lands by deed duly recorded, grantees of the servient tenement, directly or by *mesne* conveyances, take title subject to

the duly recorded easement, notwithstanding that no deed in their chain of title refers to such easement.

3. Easements § 9—

Where a municipality acquires an easement over adjacent lands to maintain a garbage dump on lands purchased by it, change in conditions in the neighborhood cannot justify the release of the owners of the servient tenement of the burden of the duly recorded easement.

APPEAL by plaintiffs from *Rudisill, J.*, July-August Mixed Term, 1950, of TRANSYLVANIA.

This is an action in which the plaintiffs seek to have abated as a private and public nuisance the presently maintained garbage dump of the Town of Brevard, and to recover special damages resulting from its operation since 1 October, 1946.

In 1938 the Town of Brevard purchased from I. F. Shipman and wife a tract of land, consisting of five acres, for a garbage dump. The land purchased was near the middle of a 120-acre tract owned by the grantors. At the time the appellees purchased this land, only the grantors and one other family lived on the Shipman lands.

The duly recorded deed from Shipman and wife to the Town of Brevard, in addition to conveying the five-acre tract of land, contains the following provisions:

"Together with a right of way across the lands of the parties of the first part 16 feet in width, extending from the road from Rocky Hill to Camp Illahee along the present road leading from said road to the property herein described. With the right to construct, reconstruct, repair or maintain said road in any manner which the party of the second part may see fit.

"It is understood and agreed that the party of the second part is purchasing the property hereinabove described for use as a dumping ground for garbage, waste, trash, refuse, and other materials and products which the party of the second part desires to dispose of. And as a part of this conveyance the parties of the first part do hereby grant and convey unto the said party of the second part, its successors and assigns, the right, without limit as to time and quantity, to use the lands hereinabove described as a dumping ground for the Town of Brevard for garbage, waste, trash, refuse and other materials and products of any and every kind which the said party of the second part desires to dispose of by dumping on said lands and burning or leaving thereon, and the said parties of the first part do hereby release, discharge, waive and convey unto the said party of the second part, its successors or assigns, any or all rights of action, either legal or equitable which they have or ever might or may have by reason of any action of the party of the second

part in using the lands hereinabove described as a dumping ground for the Town of Brevard, or by reason of any fumes, odors, vapors, smoke or other discharges into the atmosphere by reason of such location and use of a dumping ground on the lands hereinabove described.

"The agreements and waiver hereinabove set out shall be covenants running with the remainder of the lands owned by the parties of the first part, and binding on said parties as the owners of said lands, and their heirs and assigns, and anyone claiming under them, or any of them, as owners or occupants thereof."

After the Town of Brevard began using the land referred to herein as a garbage dump, I. F. Shipman and wife began selling other portions of the original 120-acre tract. Now some 35 or 40 families live in the neighborhood.

In 1939 Van R. Tinsley and wife purchased a lot from I. F. Shipman and wife, the lot being a portion of the original 120-acre tract and situate approximately 300 yards or more from the land used by the defendant as a garbage dump. The Tinsleys constructed a house on the lot and conveyed the property to the plaintiffs in 1940. They have owned and resided on the premises since that time.

The plaintiffs offered evidence which they contend supports the allegations of their complaint, to the effect that the garbage dump as maintained by the defendant is a public and private nuisance, and that they have suffered special damages as a result thereof.

The defendant denied the plaintiffs' allegations to the effect that the maintenance and operation of its garbage dump was a nuisance, and offered evidence which it contends supports its further answer and defense to the effect that its garbage dump has been maintained and operated in a clean and sanitary manner, as required by the rules and regulations of the District Health Department for Transylvania and adjoining counties. The defendant further alleges that the plaintiffs are estopped from maintaining this action by reason of the covenants contained in its deed from I. F. Shipman and wife, and plead such estoppel in bar of plaintiffs' right to maintain the action.

At the close of plaintiffs' evidence, the defendant moved for judgment as of nonsuit. The motion was denied, but upon renewal thereof at the close of all the evidence, the motion was allowed. Plaintiffs except, appeal and assign error.

Philip C. Cocke and William J. Cocke for plaintiffs.

Ramsey & Hill and Lewis P. Hamlin for defendant.

DENNY, J. If it be conceded that the normal operation of the defendant's garbage dump in a reasonably careful and prudent manner consti-

tutes a nuisance, in our opinion these plaintiffs are estopped from asserting any claim for damages or for other relief by reason thereof, in view of the grant and covenants contained in the conveyance from I. F. Shipman and wife to the Town of Brevard.

It was stated in the conveyance to the Town of Brevard, that the property was to be used as a garbage dump, and I. F. Shipman and wife expressly granted to it the right, without limit as to time and quantity, to use the premises conveyed as a dumping ground for the Town of Brevard, for garbage, waste, etc., and for themselves, their heirs and assigns, they released, discharged and waived any or all rights of action, either legal or equitable, which they have or might have by reason of any action of the Town of Brevard in using the lands conveyed to it as a dumping ground for said town, or by reason of any fumes, odors, vapors, smoke or other discharges into the atmosphere by reason of the use of the premises as a garbage dumping ground. The parties further stipulated that the agreements and waiver set forth in the deed shall be covenants running with the remainder of the lands owned by the grantors and binding on them "as the owners of said lands, and their heirs and assigns, and anyone claiming under them, as owners or occupants thereof."

"A covenant or agreement may operate as a grant of an easement if it is necessary to give it that effect in order to carry out the manifest intention of the parties." 17 Am. Jur., Sec. 27, p. 940.

The grant and release or waiver contained in the deed from I. F. Shipman and wife to the Town of Brevard, in our opinion, created a right in the nature of an easement in favor of the Town of Brevard, upon the remainder of the lands owned by the grantors. And the waiver or release of any right to make a future claim for damages or other relief, resulting from the use of the premises conveyed to the defendant as a garbage dump, constitutes a covenant not to sue and is binding on the grantors, their heirs and assigns. *Consolidation Coal Co. v. Mann,* 298 Ky. 28, 181 S.W. 2d 394; *Brush v. Lehigh Valley Coal Co.,* 290 Pa. 322, 138 Pac. 860; *J. T. Donohue Realty Co. v. Wagner,* 154 Md. 588, 141 A. 337; *Mayor and Councilmen of Troy v. Coleman,* 58 Ala. 570; *Mayor and Councilmen of Union Springs v. Jones,* 58 Ala. 654. 13 C.J., Section 399, p. 458; 17 C.J.S., Sec. 104, p. 459. "If the owner of property has charged it with a servitude as to the matter complained of, a subsequent grantee cannot recover damages therefor." 29 Cyc. 1260.

The appellants contend they are not bound by the covenants in the deed from I. F. Shipman and wife to the Town of Brevard, because (1) the Town of Brevard is not plaintiffs' predecessor in title; (2) no deed in plaintiffs' chain of title contains or refers to the covenants contained in the defendant's deed; and (3) there has been such a change in the

neighborhood it would be unconscionable and inequitable, and against public policy to enforce the covenants in the defendant's deed.

The plaintiffs are relying on the case of *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197, as authority for their position that since no deed in their chain of title contains or refers to the covenants set forth in the Shipman deed to the defendant, they are not bound thereby. This position might be well taken if we were dealing with restrictive covenants instead of an easement and a waiver and release of any and all claims for damages incident to the exercise of the easement granted. Grantees take title to lands subject to duly recorded easements which have been granted by their predecessors in title. G.S. 47-27; *Walker v. Phelps,* 202 N.C. 344, 162 S.E. 727; *Norfleet v. Cromwell,* 64 N.C. 1; *Burgas v. Stoutz,* 174 La. 586, 141 So. 67; *J. T. Donohue Realty Co. v. Wagner, supra;* 28 C.J.S., Section 24, p. 676, *et seq.*

In the case of *Walker v. Phelps, supra,* the Virginia-Carolina Joint Stock Land Bank owned some 1,200 acres of land, known as the Alexander Farm. It conveyed 600 acres of the land to the plaintiff Walker and others, and granted the right of ingress and egress over certain areas of the remaining 600 acres of land retained by the grantor, including certain drainage rights, and stipulated that the expense of keeping open a canal through the lands sold and those retained should be borne by the owners of the respective tracts of land in proportion to the acreage draining into the canal. The deed to Walker and others was duly recorded on 24 July, 1930. Theretofore, on 27 January, 1930, the grantor had entered into a contract for the sale of the other 600 acres of the Alexander Farm to the defendant Phelps. This contract was not recorded prior to the recording of the Walker deed. Phelps contended he was not bound by the covenants and stipulations contained in the Walker deed. *Connor, J.,* in speaking for the Court, said: "The stipulations contained in the deed from the Virginia-Carolina Joint Stock Land Bank to the plaintiffs, with respect to the Mountain Canal, are covenants which run with the land conveyed by said deed. *Norfleet v. Cromwell,* 64 N.C. 1. The plaintiffs, as grantees in said deed, have the right to use the Mountain Canal for the purpose of draining their land, and further have the right to require their grantor and all persons claiming title to the remainder of the Alexander Farm, subsequent to the registration of their deed, to contribute to the expense of maintaining said canal, as provided in said deed. This right is in the nature of an easement with respect to that part of the Alexander Farm which was not conveyed to plaintiffs. It is enforceable as provided in the deed against the grantor therein, and against all persons claiming title thereto under said grantor subsequent to the registration of the deed to the plaintiffs."

The plaintiffs' contention that conditions have changed to such an extent, in the neighborhood adjacent to the defendant's garbage dump, that the covenants in the defendant's deed should not be enforced, is without merit. Changed conditions may, under certain circumstances, justify the non-enforcement of restrictive covenants, but a change, such as that suggested by the plaintiffs here, will not in any manner affect a duly recorded easement previously granted.

We do not construe the plaintiffs' complaint to allege that the nuisance complained of was the result of negligent conduct on the part of the defendant, its agents or employees. Therefore, in view of the interpretation we have given to the provisions contained in the defendant's conveyance from I. F. Shipman and wife, plaintiffs' predecessors in title, the judgment as of nonsuit entered below should be upheld.

Affirmed.

STATE v. STERLING L. HICKS AND CHESLEY MORGAN LOVELL.

(Filed 13 December, 1950.)

1. Criminal Law § 52a (6)—

A fatal variance between indictment and proof may be taken advantage of by a motion to nonsuit.

2. Same: Property § 3—

Where the indictment charges defendants with conspiracy to maliciously damage real property of a named owner, and the proof tends to show a conspiracy to injure the property of a different owner, there is a fatal variance, and appealing defendant's exception to the refusal of his motions to nonsuit will be sustained.

APPEAL by defendant Sterling L. Hicks from *Bennett, Special Judge,* March Extra Criminal Term, 1950, of MECKLENBURG.

Criminal action tried upon two bills of indictment, one of which charged Sterling L. Hicks and Chesley Morgan Lovell with conspiring to damage a building owned by the Jefferson Standard Broadcasting Company, by the use of dynamite or other high explosive; and the other charged them with conspiring "to maliciously commit damage and injury to and upon the real property of the Jefferson Standard Broadcasting Company," and "to wantonly and wilfully injure the personal property of the Jefferson Standard Broadcasting Company, to-wit: Radio broadcasting equipment."

The defendant Chesley Morgan Lovell pleaded guilty to the charges as contained in both bills of indictment.

In apt time the Solicitor made a motion to consolidate the cases for the purpose of trial, and it was so ordered.

The State offered the defendant Lovell as a witness, who testified that he was introduced to the defendant Hicks on Main Street, in Columbia, S. C., about 5:30 p.m., on 12 January, 1950, and that Hicks said he had a job for him; that when he inquired as to the nature of the job, Hicks said, "We will talk some other place." They then went to a cafe in West Columbia. "We . . . talked for two or three minutes and he started telling me about the plans, showed me how to get into W-B-T tower. He first wanted me to 'throw' the tower. By throwing the tower I mean to cut the guy-lines from No. 3 tower. But he said there was a house in range of it, and it might fall on the house, and I said I didn't want no part of it. Then he said we could blow up the transformer. . . . Hicks asked me what I would charge to do the job, and I told him it would be worth $250.00 and he would have to give me some transportation—that I didn't have any car or money. He said 'How much transportation money would it take?' and I said 'Around $25.00,' and he gave me $25.00 and left, and I didn't see him any more. . . . Hicks agreed to pay me when the job was finished. He said he was affiliated with the Brotherhood—some union. Hicks said if we could get the transformer knocked out, we could put pickets around it, and keep electricians from going in there to repair it."

The State offered evidence by other witnesses tending to show that the defendant Hicks was in Columbia on the above date, making inquiry about the defendant Lovell, and that Lovell was located, and Hicks and Lovell went to the cafe in West Columbia, where the defendant Lovell testified the agreement was made. The defendant Lovell further testified that he received a telephone call on 19 January, 1950, from a man he thought to be Hicks. "He told me where the dynamite was hid, and I picked it up."

According to Lovell, he visited the premises of the Jefferson Standard Broadcasting Company on Friday night, the 20th, but didn't "like the looks of the place, with the tower all lit up, so I hid the dynamite in the woods and went back to Columbia." On the following night, "I went and got the dynamite—and I went towards the tower with it; and the 'law' hollered at me and I threw it down and ran . . . I got access to the tower by cutting the barbwire fence."

On cross-examination Lovell testified, "I do not say that upon a payment of $25.00 I made these two or three trips to Charlotte for the purpose of trying to blow up the W-B-T tower. I was not to blow up the tower—it was the transformer, not the tower. The transformers are not within the fence that encloses the tower. They are to one side . . . I was going to stick the dynamite under the transformer and light the

fuse and leave." The witness admitted he had a criminal record and was on probation at the time he was arrested in connection with the present charges.

Evidence was offered by the State to the effect that the entire property of the Broadcasting Company, consisting of 19 acres, was enclosed by four strands of barbed wire, and that there was an individual fence approximately five feet high and fifty feet square around each of three towers located on the property; and that the gate to each of these enclosures is kept locked, as required by the Federal Communications Commission.

M. J. Minor, Chief Engineer of the Broadcasting Company, testified: "There is a transformer, or power mat, west of the transmitter building, approximately 150 feet from the building. This is not Jefferson Standard property; the property belongs to the Duke Power Company, and its purpose is to serve the Jefferson Standard Broadcasting Company."

At the close of the State's evidence, the appellant interposed a demurrer to the evidence and moved for judgment as of nonsuit. The demurrer was overruled and the motion denied.

Hicks then testified in his own behalf and denied that he was in Columbia, S. C., on 12 January, 1950, or at any other time since May, 1948. He denied having talked with Lovell, and testified he had never seen him prior to the preliminary hearing on 23 February, 1950. Approximately a dozen witnesses testified they talked with the defendant Hicks in Charlotte on 12 January, 1950. And according to the testimony of seven or eight of these witnesses, they talked with him between 5:30 and 9:00 p.m., on the above date. Certain documentary evidence was also introduced, which tended to corroborate the testimony of the defendant Hicks and his witnesses in this respect. He also offered evidence of his good character.

The motion for judgment as of nonsuit was renewed at the close of all the evidence, and was sustained as to the count charging a conspiracy to injure personal property.

The jury returned a verdict of not guilty as to the charge of conspiracy to damage a building owned by the Jefferson Standard Broadcasting Company, but "Guilty of conspiracy to damage real property."

From the judgment entered on the verdict, the defendant Hicks appeals and assigns error.

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

Ralph V. Kidd and J. C. Sedberry for defendant Sterling L. Hicks.

DENNY, J. The appellant assigns as error the failure of the trial judge to sustain his demurrer to the evidence and allow his motion for judg-

ment as of nonsuit interposed at the close of the State's evidence, and renewed at the close of all the evidence. This assignment of error is bottomed on the contention that there is a fatal variance between the charge in the bill of indictment upon which the appellant stands convicted and in the proof submitted to the jury.

The only evidence offered by the State, tending to establish a conspiracy to maliciously damage property, was the testimony of the defendant Lovell, who entered a plea of guilty and was used as a witness for the State. Lovell testified that he was employed by Hicks for a consideration of $250.00 to blow up the transformer. There is no evidence of an agreement to damage the real property of the Jefferson Standard Broadcasting Company. The transformer, or power mat, which serves the Broadcasting Company, according to the State's evidence, is not the property of the Jefferson Standard Broadcasting Company, but, on the contrary, is the property of the Duke Power Company.

In the case of *S. v. Mason*, 35 N.C. 341, *Ruffin, C. J.*, in speaking for the Court, said: "In indictments for injuries to property it is necessary to lay the property truly, and a variance in that respect is fatal." *S. v. Hill*, 79 N.C. 656; *S. v. Sherrill*, 81 N.C. 550.

In the last cited case the defendant and others were indicted for trespass upon the premises of one Harris, whereas the evidence revealed that the trespass was upon the premises of one Lewis. This was held to be a fatal variance.

There is a fatal variance between the indictment and the proof on this record. The indictment charges the defendants with conspiring to maliciously commit damage and injury to and upon the real property of the Jefferson Standard Broadcasting Company. The proof is to the effect that they conspired to maliciously commit damage and injury to the property of the Duke Power Company. *S. v. Nunley*, 224 N.C. 96, 29 S.E. 2d 17; *S. v. Corpening*, 191 N.C. 751, 133 S.E. 14; *S. v. Harbert*, 185 N.C. 760, 118 S.E. 6; *S. v. Gibson*, 169 N.C. 318, 85 S.E. 7; *S. v. Davis*, 150 N.C. 851, 64 S.E. 498.

The question of variance in a criminal action may be raised by motion for judgment as of nonsuit, or by demurrer to the evidence. *S. v. Law*, 227 N.C. 103, 40 S.E. 2d 699; *S. v. Grace*, 196 N.C. 280, 145 S.E. 399; *S. v. Harris*, 195 N.C. 306, 141 S.E. 883; *S. v. Harbert, supra; S. v. Gibson, supra.*

The motion for judgment as of nonsuit should have been allowed with leave to the Solicitor to secure another bill of indictment, if so advised. *S. v. Law, supra; S. v. Jackson*, 218 N.C. 373, 11 S.E. 2d 149; *S. v. Gibson, supra.*

Reversed.

DORA ANNIE LEE FOUST v. GATE CITY SAVINGS AND LOAN ASSOCIATION, NORMAN A. BOREN, TRUSTEE, ERNEST STADIEM AND WIFE, BERNICE L. STADIEM, IDA B. STADIEM, GUARDIAN OF MORRIS STADIEM.

(Filed 13 December, 1950.)

1. Mortgages § 33b—

Immediately upon the filing of an upset bid in the foreclosure of a mortgage or deed of trust, the clerk acquires jurisdiction and supervisory power over the sale, which continues until after final sale and confirmation thereof, and his record as to the amount of each bid, the purchase price, and the final settlement (G.S. 45-28 prior to enactment of Chap. 720, Session Laws of 1949) is a public record constituting an essential part of the foreclosure proceeding.

2. Mortgages § 39e—

While inadequacy of the purchase price alone is insufficient to upset foreclosure of a mortgage or deed of trust duly and regularly made, nevertheless where there is an irregularity it may be considered on the question of whether the irregularity was material.

3. Same—

After upset bid, the property in suit, having a market value of from $5,500 to $6,000, was actually sold for $825. The trustee erroneously reported the bid as $6,400, which report was on record in the clerk's office from the date of the sale until confirmation. *Held:* The irregularity is of such substantial nature as to require a court of equity to vacate the confirmation and the deed pursuant thereto without requiring trustors to prove that anyone was misled or failed to file an upset bid by reason of the erroneous report.

4. Mortgages §§ 39e (3), 39e (5)—

In a suit to set aside foreclosure of a deed of trust for irregularity, defendants' defense that they were innocent purchasers for value is an affirmative one upon which they have the burden of proof, and therefore they cannot be entitled to nonsuit on the ground of such defense.

5. Trial § 24a—

Nonsuit may not be granted in favor of one who has the burden of proof.

APPEAL by plaintiff from *Sink, J.*, April Term, 1950, GUILFORD. Reversed.

Civil action to vacate deed of foreclosure.

On 20 June 1946, plaintiff and her husband, now deceased, owned lots 7 and 8 in Block 1 of the Garland Daniel Lutherville Subdivision as tenants by entirety. On that date they conveyed same by trust deed to Norman A. Boren, trustee, to secure a debt due Gate City Savings and Loan Association.

The grantors therein having defaulted in the payment of the loan secured by the trust deed, the trustee, on 28 April 1949, advertised the

property for sale as provided by the contract. The last bid of $750 having been raised by the deposit of $75 in the office of the Clerk of the Superior Court of Guilford County, said Clerk duly ordered a resale. The property was again offered for sale. Defendant Ernest Stadiem became the highest bidder in the sum of $825. The trustee, on 6 July 1949, the day of the resale, reported to the Clerk in writing that he had sold the property at said sale to defendant Ernest Stadiem, last and highest bidder, at the price of $6,400. On 18 July the Clerk entered his decree of confirmation reciting that the property was sold to Stadiem at the price of $825 and empowering the trustee to execute foreclosure deed to said premises. This deed likewise contains the recital that the property was sold for the price of $825. On 27 July 1949, the trustee filed his final account in which he accounts for the sum of $825 received as the purchase price. On 30 July 1949, Ernest Stadiem conveyed the premises to his wife, defendant Bernice L. Stadiem.

The property has a fair market value of from $5,500 to $6,000.

The plaintiff offered evidence tending to establish the foregoing facts and rested. The defendants moved to dismiss as in case of nonsuit. Thereupon, the court inquired of counsel for plaintiff whether they had any evidence to show that anyone was misled or failed to file an upset bid on the property by reason of the erroneous figure reported to the court on the bottom of the advertisement of the second sale. Upon receiving a negative answer, it allowed the motion and entered judgment of nonsuit. Plaintiff excepted and appealed.

Harry Rockwell, Thomas Turner, and Cooke & Cooke for plaintiff appellant.

Stedman H. Hines and Chas. A. Hines for defendants Gate City Savings and Loan Association and Norman A. Boren, Trustee, appellees.

Frazier & Frazier for defendants Ernest Stadiem and wife, Bernice L. Stadiem and Ida B. Stadiem, appellees.

BARNHILL, J. The material facts are not controverted. The property, having a market value of from $5,500 to $6,000, was actually sold for $825. The trustee erroneously reported that it was bid in for the sum of $6,400. His report to that effect was on record in the clerk's office from the day of sale until the confirmation of the sale. Anyone seeking information concerning the sale would have ascertained that the property sold for more than its reasonable market value.

These facts raise the single question of law: Was the irregularity in the report of such substantial nature as to require the Court to vacate the order of confirmation and the deed executed pursuant thereto? We must answer in the affirmative.

The provisions of G.S. 45-28 are, by operation of law, incorporated in all mortgages and deeds of trust and enter into and control any sale under such instruments. *In re Sermon's Land,* 182 N.C. 122, 108 S.E. 497. The jurisdiction of the clerk vests at the moment an upset bid is filed with him. Thereafter he has supervisory power over the sale which continues until after the final sale and confirmation thereof. *Lawrence v. Beck,* 185 N.C. 196, 116 S.E. 424.

He is authorized to make all such orders as may be just and necessary to safeguard the interest of all parties, and "he shall keep a record which will show in detail the amount of each bid, the purchase price, and the final settlement between parties." G.S. 45-28 (Note: This and related sections were repealed by Chap. 720, Sess. L., 1949, effective 1 January 1950, and a more strict and detailed law controlling foreclosures was enacted.)

The record the clerk must keep is a public record for the information of interested parties and affords a ready means for ascertaining details respecting both pending and completed sales. The keeping of this record constitutes an essential part of the foreclosure proceeding after the clerk acquires jurisdiction thereof.

Mere inadequacy of the purchase price realized at a foreclosure sale, standing alone, is not sufficient to upset a sale, duly and regularly made in strict conformity with the power of sale. *Weir v. Weir,* 196 N.C. 268, 145 S.E. 281; *Roberson v. Matthews,* 200 N.C. 241, 156 S.E. 496; *Hill v. Fertilizer Co.,* 210 N.C. 417, 187 S.E. 577.

Even so, where there is an irregularity in the sale, gross inadequacy of purchase price may be considered on the question of the materiality of the irregularity. *Hill v. Fertilizer Co., supra,* and cases cited.

Speaking to the subject in *Weir v. Weir, supra, Stacy, C. J.,* says: "But gross inadequacy of consideration, when coupled with any other inequitable element, even though neither, standing alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties. *Worthy v. Caddell,* 76 N.C. 82, 70 A. & E. (2 Ed.) 1003; note: 42 L.R.A. (N.S.) 1198"; *Bundy v. Sutton,* 209 N.C. 571, 183 S.E. 725; *Roberson v. Matthews, supra.*

This principle, in our opinion, is controlling here. It is generally held that where the amount due is grossly overstated or so excessive that it might deter and discourage bidders, it will render the sale invalid. *Peterson v. Johnson,* 91 A.L.R. 723, anno. p. 733.

The irregularity here is of a kindred nature. There is no contention that the error in the report was deliberate, or was prompted by an evil purpose, or was other than the result of an honest mistake. It appears to have been one of those slips which may occur in business transactions. Nonetheless, it was highly deceptive and its natural and probable effect

was to chill any desire on the part of interested parties to engage in further competitive bidding. Thus it tended to prevent any upset bid.

Actuality of injury is not a prerequisite of relief. The potentialities of the error, considered in connection with the grossly inadequate price, compel the conclusion that the irregularity in the sale was material and prejudicial—sufficient in nature to justify the interposition of a court of equity.

The defendants Stadiem insist that they are innocent purchasers for value and that, therefore, the judgment of nonsuit as to them should be affirmed. But the burden of proof on their affirmative defense rests upon them. *Williams v. Insurance Co.*, 212 N.C. 516, 193 S.E. 728; *MacClure v. Casualty Co.*, 229 N.C. 305, 49 S.E. 2d 742. A nonsuit may not be granted in favor of one who has the burden of proof. *MacClure v. Casualty Co., supra; Barnes v. Trust Co.*, 229 N.C. 409, 50 S.E. 2d 2. Furthermore, the fatal irregularity appears on the face of the record. Whether they can overcome this fact is for the court below to decide at the final hearing.

The judgment below is

Reversed.

GEORGE MARSHALL v. SOUTHERN RAILWAY COMPANY.

(Filed 13 December, 1950.)

1. Railroads § 6: Automobiles § 18h (3)—

In this action to recover for injuries received in a collision at night when plaintiff struck the timbers supporting a railroad overpass which encroached on the street in plaintiff's lane of travel from eight to twelve feet, the evidence *is held* to disclose contributory negligence as a matter of law on the part of plaintiff in failing to keep a reasonably careful lookout and such control over his car as to be able to stop within the range of his lights.

2. Automobiles § 18c—

The duty of a motorist to exercise that degree of care for his own safety which an ordinarily prudent person would exercise under similar circumstances requires him to keep a reasonably careful lookout and to keep his car under such control at night as to be able to stop within the range of his lights.

3. Negligence § 11—

In order to bar recovery, contributory negligence need not be the sole proximate cause of the injury, it being sufficient for this purpose if it be a proximate cause or one of them.

APPEAL by plaintiff from *Sink, J.*, at 20 March, 1950, Civil Term, High Point Division, of GUILFORD.

Civil action to recover damages for personal injuries sustained by plaintiff when automobile operated by him collided with trestle supports at underpass under railroad of defendant on Ward Street in the city of High Point, North Carolina, allegedly resulting from actionable negligence of defendant.

Plaintiff alleges in his complaint that his injuries were proximately caused by the negligence of defendant in that, summarily stated, it had constructed, and was maintaining an underpass with trestle supports obstructing Ward Street without lights, markings or signals of any kind to warn motorists using said street in the nighttime, when it knew of the dangerous condition thereby created; and in that it permitted said obstruction to remain and exist in violation of an ordinance, Chapter J, Article IV, Section 16 of the City of High Point pertaining to "Obstructions of Streets."

Defendant, answering, denies the allegations of negligence set out in the complaint, and, as further defense, avers: That on the night in question plaintiff, in operating the automobile on Ward Street and approaching the underpass, negligently failed: (1) To have his automobile under control, (2) to keep a proper lookout ahead, and (3) to pay heed to or observe the warning of the red reflectors,—averring particularly that red warning reflectors were located on the supports of the trestle at the underpass in plain view of plaintiff; and that plaintiff carelessly and negligently drove his automobile: (1) At a rate of speed too fast to enable him to stop within the vision of his headlights, (2) at such rate of speed that he was unable to stop after he saw or should have seen the supports of said trestle, and (3) at a rapid and careless rate of speed out of the traveled portion of the street and against the poles and timbers supporting the tracks at the underpass. And defendant avers that all of said negligent acts on the part of plaintiff contributed to, and were proximate causes of his injury and damage, and it pleads such contributory negligence as a bar to plaintiff's recovery.

Upon the trial in Superior Court plaintiff offered evidence as shown in the record, tending to show these facts:

At the time the underpass in question was built on Ward Street, the opening was as wide as the dirt road. Later the street was paved the width of the dirt road. In later years the street was widened on either side of the underpass,—the width in that area being 30 feet. But the timber supports of the defendant's trestle over the street projected from the north side from 8, 10 or 12 feet, as variously estimated by plaintiff and his witnesses, and from the south side about three feet,—leaving the underpass opening of approximately 15 feet in width,—plenty of space through which one car could pass. Thus it is apparent that Ward Street came to dead ends at the trestle to the extent of the projection of the

supports of the trestle. And the underpass, on night of 25 April, 1949, when the collision here involved occurred, was in the same condition it had been for 20 or 25 years. The trestle was supported by heavy dark black round timbers, eight of them, about sixteen inches in diameter. And on and attached to the support next to, and on north side of underpass, there were two red reflectors approximately three inches in diameter, one above the other, about seven feet above the ground.

Traveling west on Ward Street, as plaintiff was, Green Street, also referred to as West Green Street, dead-ends into Ward Street, about 200 feet, as estimated by plaintiff, and about 400 feet in the opinion of his witness, a police officer, before reaching the underpass. It is downgrade from the crest of a hill east of the Green Street intersection toward the underpass, and then upgrade beyond, but nearly level in the immediate vicinity of the underpass.

Plaintiff testified that he was "not too familiar with Ward Street"; that it had been some time since he had been over the street—10 or 12 months prior to the accident; that during 10 or 12 years he had been on Ward Street occasionally but not very often; that he had driven across there a few times, that the way he got up and down Ward Street was in company with another person in a motor vehicle each time; that each time he made that trip up and down Ward Street he had to go through this underpass; that probably he remembered going by there enough to know that there were timbers there just like the one he hit, but that there were two or three underpasses on that street; and that he had not noticed any change in the one he hit from the way it was each time he passed under there.

Plaintiff also testified that at the time he approached the trestle, 11:30 at night, he was driving at speed of around 25 or 30 miles per hour; that as he came over the crest there and started down, it was dark; that there was a car approaching with bright lights; that he dimmed his lights two or three times but he "couldn't see ahead . . . very well"; that he was concentrating on his (the other car's) lights; that the first thing he knew, he looked up and there it was; that he swerved to the left and struck a portion of the trestle,—the first abutment on the right-hand side.

And, on cross-examination, plaintiff testified: That when he started down to the underpass, he did not know exactly where the approaching automobile was; that it had not reached the underpass; that as he approached the underpass he did not know whether the automobile was on the other side of those timbers as it came toward him; that he did not see the timbers, and, quoting, "I did not see the timbers until I hit them. As he approached me I slowed down a bit . . . I was wanting him to dim his lights . . . I don't think I ever did hit my brakes . . . It is

true that I watched Green Street as I came by to see if any traffic was coming in."

Also plaintiff, in answer to question whether he knew the underpass was there, replied, "It didn't dawn on me that the thing was sticking out there. At the time I was thinking of this car."

And plaintiff continuing on cross-examination, testified: "I could see approximately 100 feet in front of me with my headlights on bright . . . I was driving by my dimmers. I was being blinded by his lights. I could see the road between me and him for about 30 feet ahead of me. It happened so quick I didn't have a chance to put my brakes on. It was right in front of me. I did not see those red reflectors on the post . . . They were certainly there the next afternoon. The post the reflector is on is the one I hit."

And the police officer, witness for plaintiff, testified: That those red reflectors are small, about like you see on the back of a bicycle; that he noticed them on the night of the accident; that the speed limit along there is 25 miles an hour; that as he came down Ward Street and by Green Street to the underpass, he could see the underpass at the time he passed Green Street,—could see it with his headlights.

At the close of plaintiff's evidence motion of defendant for judgment as of nonsuit was allowed. And from judgment in accordance therewith plaintiff appeals to Supreme Court and assigns error.

York, Morgan & York for plaintiff, appellant.

W. T. Joyner and Roberson, Haworth & Reese for defendant, appellee.

WINBORNE, J. Passing without deciding the question raised as to whether defendant were negligent as alleged in the complaint, it is manifest from the evidence that plaintiff failed to exercise due care at the time and under the circumstances of his injury, and that such failure contributed to, and was a proximate cause of his injury and damage. The case comes within and is controlled by the principles enunciated and applied in *Weston v. R. R.*, 194 N.C. 210, 139 S.E. 237; *Lee v. R. R.*, 212 N.C. 340, 193 S.E. 395; *Beck v. Hooks*, 218 N.C. 105, 10 S.E. 2d 608; *Sibbitt v. Transit Co.*, 220 N.C. 702, 18 S.E. 2d 203; *Dillon v. Winston-Salem*, 221 N.C. 512, 20 S.E. 2d 845; *Pike v. Seymour*, 222 N.C. 42, 21 S.E. 2d 884; *Allen v. Bottling Co.*, 223 N.C. 118, 25 S.E. 2d 388; *Atkins v. Transportation Co.*, 224 N.C. 688, 32 S.E. 2d 209; *McKinnon v. Motor Lines*, 228 N.C. 132, 44 S.E. 2d 735; *Riggs v. Oil Corp.*, 228 N.C. 774, 47 S.E. 2d 254; *Tyson v. Ford*, 228 N.C. 778, 47 S.E. 2d 251; *Cox v. Lee*, 230 N.C. 155, 52 S.E. 2d 355; *Brown v. Bus Lines*, 230 N.C. 493, 53 S.E. 2d 539; *Hollingsworth v. Grier*, 231 N.C. 108, 55 S.E. 2d 806.

See also *Baker v. R. R.*, 205 N.C. 329, 171 S.E. 342; *Montgomery v. Blades*, 222 N.C. 463, 23 S.E. 2d 844.

It is a general rule of law, even in the absence of statutory requirement, that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. And in the exercise of such duty it is incumbent upon the operator of a motor vehicle to keep a reasonably careful lookout and to keep same under such control at night as to be able to stop within the range of his lights.

Plaintiff's negligence need not be the sole proximate cause of the injury to bar recovery. It is enough if it contribute to the injury as a proximate cause, or one of them. *McKinnon v. Motor Lines, supra,* and cases cited.

In the light of these principles, applied to the evidence shown in the record on this appeal, the judgment as of nonsuit entered in the court below is

Affirmed.

A. B. KING v. CYNTHIA J. MOTLEY, FRED MOTLEY, JR., AND C. FRANK McLEESE, JR.

(Filed 13 December, 1950.)

1. Pleadings § 19c—

A demurrer tests the sufficiency of a pleading, liberally construed and admitting the allegations of fact contained therein and relevant inferences of fact necessarily deducible therefrom, and the demurrer will not be sustained unless the pleading is fatally defective. G.S. 1-151.

2. Automobiles § 24c—

Allegations to the effect that appealing defendant had possession of the automobile in question for his use and enjoyment, that the driver was operating same as his servant and agent and under his direction, and that the appealing defendant was a passenger therein when the driver committed an assault upon plaintiff police officer with his fist and by means of reckless driving in order to escape arrest of them both by the officer, *is held* sufficient to state a cause of action against appealing defendant for assault on the theory of *respondeat superior.*

3. Master and Servant § 22c—

The master is liable for injury inflicted by his servant upon a third person, whether malicious or negligent, when the tort is committed by the servant while acting within the course and scope of his employment.

4. Appeal and Error § 40f—

Exception to the refusal of motion to strike certain allegations from the complaint overruled on this appeal.

APPEAL by defendant Fred Motley, Jr., from *Patton, Special Judge,* at 18 September, 1950, Extra Civil Term of MECKLENBURG.

Civil action to recover damages for an alleged "willful, wanton and reckless assault of the defendant McLeese, Jr., in seeking to avoid the arrest of himself and his companion," heard in Superior Court upon motion of defendants Cynthia J. Motley and Fred Motley, Jr., to strike certain portions of the complaint, and upon their demurrer *ore tenus* to the complaint of plaintiff.

Upon hearing in Superior Court the motion to strike was allowed in part, and disallowed in part. The portion disallowed is shown within the parentheses in the following material allegations set forth in the complaint, in part summarily stated: That at times hereinafter stated a certain Ford automobile, known as a "hot rod," of which defendant Cynthia J. Motley was the registered owner, was in the possession and control of her son, the defendant Fred Motley, Jr., being delivered to him by his mother for his use and enjoyment:

"6. That on or about the 7th day of May, 1950, the defendant Fred Motley, Jr., was being driven about the city of Charlotte by his servant and agent, the defendant C. Frank McLeese, Jr., who had been directed by the said Motley to drive the car (because the defendant Motley had been drinking during the afternoon and feared that his license might be revoked if he were caught driving under these circumstances).

"7. That at about 9 p.m. on the aforesaid day the plaintiff A. B. King, . . . a member of the Charlotte police force and . . . on duty . . . with a fellow officer . . . observed the defendant's automobile pass him at the junction of Providence and Caswell Roads in the City of Charlotte at such an excessive rate of speed that they turned around and pursued the car to make an arrest for speeding.

"8. That the defendants Motley, Jr., and McLeese, Jr., drove into . . . a dead end street . . . off of Providence Road about four blocks from the intersection with Caswell.

"9. That the defendants turned their car around and started back out toward Providence Road. When their path was obstructed by the police car, the two cars collided and the defendant McLeese, Jr., allowed their car to roll slowly backwards as the plaintiff approached them.

"10. That the plaintiff proceeded from the squad car to the defendants' car for the purpose of arresting the defendants and as he reached the defendants' car, he placed his elbows over the front left door sill of the said car next to the driver McLeese, Jr., and began to question the occupants.

"11. That suddenly and without any warning or sign whatsoever to the plaintiff, the defendant McLeese, Jr., released the clutch and the car shot forward around the police car accelerating at a violent rate of speed.

"12. That the plaintiff was unable to release his grip upon the door of the defendants' car for fear of falling under it and being run over and, as the plaintiff continued to clutch the car, the defendant McLeese, Jr., beat the plaintiff about the head with his fist and hands in an attempt to force the plaintiff to loosen his hold.

"13. That as the plaintiff clung to the defendants' car, the defendant McLeese, Jr., raced it wildly up the street accelerating from zero to a rate of 50 or 60 miles an hour within a space of 300 or 400 yards, continuing to beat and maul the plaintiff in the face, and finally gouging the plaintiff in the eye with his thumb so violently that the plaintiff was forced to release his hold and fall to the street.

"14. That as a result of the plaintiff's efforts to prevent himself from being killed by the wilful, wanton and reckless assault of the defendant McLeese, Jr., in seeking to avoid the arrest of himself and his companion, this plaintiff was dragged along the street for a distance of 3 or 4 hundred yards and finally thrown to the ground . . ." to his injury in respects stated.

"15. That by reason of the negligence of the defendants as herein alleged, the plaintiff has suffered great injury to his person and has been in great pain and mental anguish all to his great injury and detriment."

The demurrer of defendants Motley is upon the grounds: That the complaint does not state facts sufficient to constitute a cause of action against defendants Cynthia J. Motley and Fred Motley, Jr., or either of them, in that in pertinent part, it appears upon the face of the complaint (a) "that the injuries and damages, if any, sustained by the plaintiff were due solely and proximately to the alleged willful, wanton and reckless assault of the defendant C. Frank McLeese, Jr."; (b) "that the plaintiff was not injured or damaged by any negligence, act or conduct of the defendants Cynthia J. Motley and Fred Motley, Jr., or either of them"; (c) "that the automobile in question was at all times being driven by the defendant C. Frank McLeese, Jr., and not by these defendants, or either of them."

The presiding judge of Superior Court, upon hearing on demurrer, being of opinion, and holding, that the demurrer of defendant Cynthia J. Motley should be sustained, but that that of defendant Fred Motley, Jr., should be overruled, so adjudged in order entered of record.

Defendant Fred Motley, Jr., excepted (1) to the ruling in respect of the motion to strike as stated, and (2) to the order overruling his demurrer, and appeals therefrom to the Supreme Court, and assigns error.

Shannonhouse, Bell & Horn and Ray W. Bradley, Jr., for plaintiff, appellee.

Helms & Mulliss for defendant, appellant.

WINBORNE, J. "The office of demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of fact contained therein; and ordinarily relevant inferences of fact, necessarily deducible therefrom, are also admitted . . .," *Stacy, C. J.*, in *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761. See also *McCampbell v. Building & Loan Asso.,* 231 N.C. 647, 58 S.E. 2d 617, and cases there cited.

The statute G.S. 1-151 requires that "in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties." And the decisions of this Court, applying the provisions of this statute, hold that every reasonable intendment is to be made in favor of the pleader. A pleading must be fatally defective before it will be rejected as insufficient. See *McCampbell v. Building and Loan Asso., supra,* and cases cited.

Applying these principles to the allegations of the complaint in the present case, we are unable to say that in no view it fails to state a cause of action against the defendant Fred Motley, Jr.

There is allegation that the automobile in question was in the possession and control of defendant Fred Motley, Jr., for his use and enjoyment; that defendant McLeese was driving the automobile as the servant and agent of defendant Fred Motley, Jr., and by his direction; that defendant Fred Motley, Jr., was riding in the automobile; and that defendant McLeese not only willfully, wantonly, and recklessly assaulted plaintiff with his fist, but so operated the automobile at unlawful rate of speed and wildly as to cause injury to plaintiff, and that by reason thereof plaintiff has suffered injury.

The allegation is sufficient to support a finding that the relationship of master and servant, or of principal and agent, existed between defendant Fred Motley, Jr., and defendant McLeese.

And it is elementary that the master is liable for the acts of his servant and the principal for the acts of his agent, whether malicious or negligent, which result in injury to third persons, when the servant or agent is acting within the line of his duty and exercising the functions of his employment. *Roberts v. R. R.,* 143 N.C. 176, 55 S.E. 509; *Dickerson v. Refining Co.,* 201 N.C. 90, 159 S.E. 446, and numerous other cases.

"A servant is acting in the course of his employment, when he is engaged in that which he was employed to do, and is at the time about his master's business. He is not acting in the course of his employment if he is engaged in some pursuit of his own. Not every deviation from the strict execution of his duty is such an interruption of the course of employment as to suspend the master's responsibility. But if there is a total departure from the course of the master's business, the master is no longer answerable for the servant's conduct." Tiffany on Agency 270, quoted in *Dickerson v. Refining Co., supra.*

"A master is civilly liable for an assault and battery by his servant on the third person if, and only if, it is committed while the servant is acting within the course and scope of his employment." *Ervin, J.*, in *Hoppe v. Deese*, 232 N.C. 698.

And as to the ruling of the Court in reference to the motion to strike, we are of opinion that the portion left in the complaint does not come under the ban of improper pleading. Hence the judgment from which appeal is taken is

Affirmed.

THOMASVILLE CHAIR COMPANY v. UNITED FURNITURE WORKERS OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS, LOCAL No. 286.

(Filed 13 December, 1950.)

1. Arbitration and Award § 1a—

The provisions of G.S. 1-544 *et seq.* are cumulative and concurrent to common law arbitration.

2. Arbitration and Award § 13—

An award is always open to attack on the ground that arbitrators exceeded their powers.

3. Same—Decision of arbitrators held within the terms of the arbitration agreement and of the particular grievance submitted to them.

The agreement between the employer and the union provided that holidays specified should be considered as eight hours worked in computing any work week, and stipulated two days holiday at Christmas. On the year in question Christmas fell on Sunday, and the 25th and 26th of December were designated as the two day Christmas Holiday. Upon dispute as to whether the Sunday of Christmas should be included in computing the work week, the matter was referred to arbitrators under the contract which provided for arbitration of any differences arising in the construction of the agreement. *Held:* The decision of the question was within the terms of the agreement and of the particular grievance submitted to the arbitrators, and therefore the decision of the arbitrators is final and binding upon both parties.

4. Same—

In determining the validity of the decision of arbitrators the question is not whether they acted wisely but whether they went beyond the limits established by the agreement between the parties, and a decision within the terms of the agreement to arbitrate and the particular grievance submitted to them is final and binding upon both parties.

APPEAL by plaintiff from *Sink, J.*, May Term, 1950, of DAVIDSON. Affirmed.

The Thomasville Chair Company filed with the court its motion-complaint for an order vacating, modifying or correcting an award of a Board of Arbitration which had been constituted under the collective bargaining agreement between the Chair Company and the United Furniture Workers of America, Local No. 286, hereinafter called the Union.

The agreement between the Chair Company and the Union contains the following pertinent provisions: "Article VIII, Section 1: Time and one-half regular rate of pay shall be paid for all hours worked in excess of forty (40) hours in any workweek. Any holidays enumerated in Article IX, when not worked, shall be considered as eight (8) hours 'worked' for the purpose of computing the 40 hours in any workweek."

"Article IX. The following holidays will be observed: Easter Monday, July Fourth, Labor Day, Thanksgiving Day, and two (2) days at Christmas. Employees will work on these holidays if requested and will be paid time and one-half for work performed on such holidays. This provision shall not apply to firemen, watchmen, and maintenance employees who are employed with the understanding and agreement that work on holidays is a regular part of their workweek."

The agreement further declares that in the event of a grievance or dispute as to the interpretation and application of any of its provisions the question may be submitted to arbitration by three arbitrators, one to be appointed by the Company, one by the Union, and a third to be designated by the American Arbitration Association. The Board of Arbitrators is empowered to hear the evidence, find the facts and render its award based thereon, the decision and award to be final and binding upon both parties. Section 4, of Article V, specifically provides that "the Board at all times shall be governed by the terms of this agreement and shall have no power or authority to change the agreement in any respect, or to add to, or take away from its terms."

On 12 January, 1950, the Union filed with the Company the following written grievance: "In accordance with Article VIII, section 1, of the agreement which reads in part, 'Any holidays enumerated in Article IX, when not worked, shall be considered as eight hours "worked" for the purpose of computing the 40 hours in any workweek.' And further in accordance with Article IX, 'The following holidays shall be observed . . ., two days at Christmas.' The Union contends that there should have been considered as worked two days (16 hours) in computing the 40-hour workweek for the Christmas Week. The Union asks that where this was not done, it be corrected." To this the Company replied: "Request of the Union for 16 hours credit towards computing 40 hours in the workweek ending December 30, 1949, is denied."

Thereupon on request of the Union a Board of Arbitrators was duly constituted as provided in the agreement. The arbitrators, after hearing

the evidence and contentions of the parties, rendered an award signed by a majority of the arbitrators, including the chairman, to which one arbitrator dissented.

The Board of Arbitrators found that the regular pay roll week extended from Sunday to Saturday, inclusive, and that the regular workweek, with some exceptions, was from Monday to Friday, and that the Company had designated Sunday and Monday, December 25 and 26, as the two-day Christmas holiday period, and had credited the workers only with Monday, December 26, not worked, as 8 hours "worked" in computing the 40-hour workweek; and that the Union contended that the contract called for the observance of two days at Christmas which would entitle the worker to two days or 16 hours, rather than 8, in computing the 40-hour workweek to determine the amount of overtime.

The arbitrators were of opinion that the 40-hour workweek is referred to in the agreement merely as the point at which the time and one-half rate goes into effect, and that as it further provides that any holiday when not worked shall be considered as 8 hours "worked," it was not the intent of the contracting parties as expressed in the agreement to exclude Sunday and Christmas Day from being considered a holiday. A majority of the arbitrators decided the demand of the Union should be allowed.

The movant-plaintiff Thomasville Chair Company moved the court to issue an order vacating or modifying the award. In the hearing before Judge Sink this motion was denied, and judgment was rendered affirming the award of the arbitrators and directing compliance therewith by the movant-plaintiff.

Brooks, McLendon, Brim & Holderness, Don A. Walser, and B. G. Gentry for plaintiff, appellant.

Weinstock & Tauber and Ford Meyers for defendant, appellee.

DEVIN, J. No procedural question is raised. No facts are in dispute. The only ground upon which the award of the arbitrators is attacked by plaintiff's motion or action is that the award is not within the scope of the agreement and that the arbitrators exceeded their powers.

The arbitration in this case was not instituted under the provisions of the statute, G.S. 1-544, *et seq.*, but it was said in *Copney v. Parks*, 212 N.C. 217, 193 S.E. 21, "that the statutory methods of arbitration are to be regarded merely as constituting an enlargement on the common-law rule, and that the provisions of the statute are cumulative and concurrent rather than exclusive." In any event an award is always open to attack on the ground that the arbitrators exceeded their powers. It is from the agreement that the arbitrators derived their authority. *Farmer v. Wilson*, 202 N.C. 775, 164 S.E. 356.

The power and authority of the arbitrators here was limited by the terms of the agreement and the grievance submitted, and the scope of the inquiry and decision must be determined in accord with that standard. The question is not whether the arbitrators decided wisely but whether they went beyond the limits established by the agreement between the Company and the Union. The agreement specifically provides that any dispute as to the interpretation or application of its terms may be submitted to arbitration, and that the arbitrators selected in the manner prescribed shall be governed by the terms of the agreement.

The collective bargaining agreement between the Company and the Union enumerates among the holidays to be observed "two days at Christmas." Under the contract, when no work is performed on a holiday, the eight hours of that day nevertheless are counted in computing the 40-hour workweek, and if when added to the hours of work on other days of the workweek they exceed 40 hours the employee is entitled to time and one-half pay for all hours over 40. Ordinarily the workweek observed by the Company extended from Monday through Friday.

In 1949 Christmas Day fell on Sunday. It appears that at the factory of the Company for the calendar week beginning December 25 no work was performed on Sunday the 25th or Monday the 26th, but that nine (9) hours' work was performed on each remaining day of the week, that is, the 27th, 28th, 29th, and 30th. This would make 36 hours actually worked, and the Union contended that credit for the two holidays which the contract specified at Christmas should be added, making 52 hours for the week, or 12 hours overtime for which the employees would be entitled to time and one-half regular rate of pay. The Company's contention was that, Sunday did not fall within the workweek period of Monday to Friday and should not be counted as a credit in computing overtime pay, and hence that only 8 hours for Monday the 26th could be added to the 36 hours actually worked to bring the total to 44.

The question, then, was whether under the agreement employees were entitled to have two days at Christmas considered as 16 hours "worked" in computing the 40 hours in the workweek to determine overtime pay, as contended by the Union, or whether only one day, or 8 hours could be credited for that purpose. The Company contended the latter interpretation should be adopted for the reason that according to the intent and purview of the agreement Sunday could not be regarded as a part of the workweek which began on Monday.

On the submission to them of this question the arbitrators have undertaken to decide that the provisions of Art. VIII, sec. 1 of the contract, that any holiday not worked be considered as 8 hours "worked" in computing the 40 hours in any workweek, should not be interpreted to exclude

the benefit of the specifically named "two days at Christmas" when one of these holidays fell on Sunday.

In deciding this question the arbitrators have acted within the terms of the agreement and of the particular grievance submitted to them. They have not exceeded their powers. We think the interpretation of the terms of the agreement as to Christmas holidays and the proper method of its application to the factual situation here presented, about which the parties disagreed, came within the scope of the arbitration instituted in accordance with the contract, and that the decision of the arbitrators thereon must be held "final and binding upon both parties."

Settlement of disputes between labor and management by means of fair and intelligent arbitration is to be commended, and the result will be upheld by the courts when within the scope of the collective bargaining agreement and the terms of submission. Said *Justice Ashe* in *Robbins v. Killebrew,* 95 N.C. 19, "The policy of the law is in favor of settlements by arbitrators, and their awards should be sustained whenever it can be done consistently with the rules of law."

The judgment sustaining the award is

Affirmed.

EDWIN GILL, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA, v. F. D. SMITH, ALIAS GEORGE SMITH.

(Filed 13 December, 1950.)

Taxation § 38b—

Where the Commissioner of Revenue assesses additional income tax against a taxpayer in accordance with provisions of G.S. 105-160, and has the certificate filed in the county in which the taxpayer has property for the purpose of creating a lien, G.S. 105-242 (3), the taxpayer may not move in such county to vacate and set aside the certificate on the ground of irregularity or invalidity, no execution having been issued thereon nor any effort made to enforce the lien, but the taxpayer is remitted to the statutory remedies given him to contest the assessment or attack its validity. G.S. 105-163, G.S. 105-267.

APPEAL by defendant from *Carr, J.,* May Term, 1950, of GUILFORD. Affirmed.

Motion by defendant to vacate and set aside certificate of tax liability filed by the Commissioner of Revenue and docketed in the Superior Court of Guilford County, on the ground that the certificate was void.

In support of his motion defendant alleged that upon receipt of notice of proposed assessment for additional income tax in the sum of $632,-162.23, he requested a hearing as provided in G.S. 105-160; that no

hearing was had nor was any notice given him before the certificate of tax liability or assessment in the amount stated was filed and docketed on the judgment docket of Guilford County April 4, 1949; that defendant had filed income tax returns and paid the tax for the years covered by the proposed assessment; that the assessment was made without authority and is void, irregular and a nullity; that the filing of the certificate of tax liability has the force and effect of a judgment constituting a lien on his property, enforceable by execution, and that this was accomplished without due process of law and in violation of his rights under the Constitution of North Carolina and the Constitution of the United States.

The present Commissioner of Revenue Eugene Shaw moved that defendant's motion be dismissed for that the statutes provide an adequate remedy for the matters complained of by defendant, and that the Superior Court of Guilford County had no jurisdiction to vacate or set aside the certificate of tax liability.

The court below dismissed the defendant's motion, and defendant appealed.

Attorney-General McMullan, Assistant Attorneys-General Tucker and Abbott, Hoyle & Hoyle, Special Counsel, and G. C. Hampton, Jr., Special Counsel, for plaintiff, appellee.

A. Stacey Gifford and Welch Jordan for defendant, appellant.

DEVIN, J. The Commissioner of Revenue has not answered the allegations of fact contained in defendant's motion but has taken the position that adequate remedy for the matters complained of is provided by pertinent statutes; and further that the jurisdiction to vacate and set aside a certificate of tax liability or assessment made by the Commissioner of Revenue, in the performance of his duty of enforcing the collection of taxes due the State, and filed by authority of the statute in any county or counties where defendant has property, does not appertain to the Superior Court of Guilford County and that defendant's motion constitutes a collateral attack thereon. He suggests that defendant's motion is in effect an indirect attempt to restrain the collection of taxes which is prohibited by statute.

Section 105-160 of the General Statutes of North Carolina provides that if the Commissioner of Revenue discovers that the income of any taxpayer has not been assessed he may within three years give notice in writing to the taxpayer of such deficiency, and any taxpayer feeling aggrieved by such proposed assessment shall be entitled to a hearing before the Commissioner, if within thirty days he shall apply in writing, explaining his objections thereto. If no request for such hearing is so made, the proposed assessment shall be final and conclusive. If request

for hearing is made, the taxpayer shall be heard and notified of the Commissioner's decision. The limitation of three years to the assessment shall not apply to assessments upon fraudulent returns. Similar provisions are contained in G.S. 105-177 and in Chap. 392, Session Laws 1949, codified as G.S. 105-241.1. By G.S. 105-162 a taxpayer may apply to the Commissioner of Revenue for revision of taxes assessed against him at any time within three years from the date of notice of amount, and the Commissioner shall grant a hearing and determine the matter according to the law and the facts.

By G.S. 105-163, any taxpayer may file exceptions to a finding by the Commissioner with respect to his taxable income either as to matter of fact or law, and the Commissioner shall pass upon the same and notify the taxpayer. The taxpayer within ten days may appeal to the Superior Court of Wake County upon paying the tax assessed and giving bond for costs, or he may within that time appeal to the State Board of Assessment on exceptions to the finding of the Commissioner. Appeal may then be taken by either the taxpayer or the Commissioner to the Superior Court of Wake County. The statute outlines the procedure in the Superior Court with right of appeal to the Supreme Court.

By G.S. 105-267 the taxpayer has the right to pay the tax assessed under protest and sue to recover it.

It does not appear from defendant's affidavit in support of his motion filed 5 April, 1950, that he has availed himself of any of the remedies prescribed by these statutes except that he alleges he notified the Commissioner in writing "requesting a hearing as provided in G.S. 105-160."

The principle is generally upheld by the courts that statutory remedies granted to a taxpayer must first be exhausted before applying to the courts. In *Association v. Strickland,* 200 N.C. 630, 158 S.E. 110, it was said, "The Courts everywhere are in accord with the proposition that if a valid statutory method of determining a disputed question has been established, such remedy so provided is exclusive, and must be first resorted to, and in the manner specified therein." *Allen v. Hunnicutt,* 230 N.C. 49, 52 S.E. 2d 18; *Worley v. Pipes,* 229 N.C. 465 (472), 50 S.E. 2d 504; *Commissioner of Revenue v. Hinsdale,* 207 N.C. 37, 175 S.E. 847. It is still open to the defendant to pursue his remedy under and in accord with the provisions of applicable statutes.

The defendant's motion to set aside the certificate of tax liability which had been transmitted to and docketed by the Clerk of the Superior Court of Guilford County, in accord with the provisions of G.S. 105-242 (3), was not properly cognizable by that court. The statute empowering the Commissioner of Revenue to make an assessment against a delinquent taxpayer authorized him to transmit the certificate to any county in which the taxpayer has property. In accordance with this statute certifi-

cate that the defendant Smith was indebted to the State on account of duly assessed and delinquent taxes in the sum stated was transmitted under the hand and seal of the Commissioner of Revenue to the Clerk of the Superior Court of Guilford County and there docketed. The certificate was regular on its face and could not be regarded as a nullity. The statute G.S. 105-241.1 declares it "shall be deemed correct." Its validity may not be collaterally attacked in Guilford County. No execution had been issued thereon nor effort made to enforce it. The certificate of tax liability is made and issued at the office of the Commissioner of Revenue at the seat of state government in Wake County. The statutes declare Wake County the *situs* of proceedings in relation to questions of review of tax liability. Under the law this certificate of the Commissioner may be transmitted to the county or counties where the taxpayer has property only for the purpose of establishing a lien on his property in that county with power to have execution issued thereon to enforce collection. Proceedings affecting the validity of the certificate and the right of the Commissioner to issue it should be instituted and conducted in accordance with the statutes, and not by motion in the county to which the certificate or transcript of assessment has been transmitted. Defendant's pleading alleges irregularity in the procedure employed by the Commissioner of Revenue, but the Commissioner's power to make the assessment conferred by statute may not be denied.

In *Holden v. Totten,* 225 N.C. 558, 35 S.E. 2d 635, where transcript of a money judgment rendered in Durham County had been docketed in Greene County, it was held that an action to restrain sale of land under execution could be maintained in Greene County. "But," said *Chief Justice Stacy* in writing the opinion for the Court, "the invalidity of the judgment upon which the execution was issued may not be collaterally attacked unless it be void or unenforceable." Proceedings to determine the correctness of the judgment in that case were properly heard in Durham.

There was no error in dismissing defendant's motion.

Affirmed.

J. O. FERGUSON, O. PHILLIP COLE, CARL KLABBATZ AND DONALD A. JONES, ON BEHALF OF THEMSELVES AND ALL OTHER CITIZENS AND QUALIFIED VOTERS OF MOORE COUNTY, NORTH CAROLINA, v. SAM C. RIDDLE, HARRY W. FULLENWIDER AND FRANKLIN HUSSEY, MEMBERS OF THE MOORE COUNTY, NORTH CAROLINA, BOARD OF ELECTIONS.

(Filed 13 December, 1950.)

1. Appeal and Error § 31e—

The rule that an appeal from the refusal to restrain the holding of an election will be dismissed as academic when the election has been held pending appeal does not apply when plaintiffs also assert that if the election were held it would be void and that if the election went against the legalized sale of beer and wine they would suffer irreparable property and monetary loss for which they would have no adequate remedy at law.

2. Elections § 1—

A county may not hold an election on the question of legalizing the sale of beer and wine therein within sixty days from an election in a municipality of the county, irrespective of the time of making the order calling such election. G.S. 18-124 (d) (f).

APPEAL by plaintiffs from *Sink, J.*, at Chambers, 25 August, 1950. Reversed.

Plaintiffs, citizens and taxpayers of Moore County, instituted this action against the defendants, members of the County Board of Elections, to restrain them from holding an election called for 26 August, 1950, on the question of legalizing the sale of beer and wine in Moore County, under the provisions of G.S. 18-124.

The plaintiffs alleged in their complaint that in compliance with a petition presented 31 December, 1948, as provided by the statute, the Board of Elections on 30 May, 1950, ordered that an election as to the sale of beer and wine in the County be held 26 August, 1950. Plaintiffs averred that the election so ordered could not legally be held, for that the order was entered more than thirty days from the filing of the petition, and for the further reason that on 15 August, 1950, an election was duly held in Southern Pines, a municipality of and within Moore County, and that to hold the election ordered for 26 August would violate the restriction contained in the statute that "No election shall be held pursuant to the provisions of this article in any county within sixty days of the holding of any general election, special election or primary election in said County or any municipality thereof."

Plaintiffs further alleged "that if said election were held and the legal sale of beer and wine voted against in said election, these plaintiffs and all other citizens and taxpayers of Moore County would be caused to suffer large and irreparable property and monetary loss and damage for

which they have and would have no adequate remedy at law." Plaintiffs prayed that defendants be restrained from holding said election, and that the court adjudge that the election, if held under the circumstances stated, would be illegal and void.

Defendants, answering, admitted the material facts alleged as to the calling of the election for 26 August, 1950, and that a municipal election in Southern Pines was held 15 August. But defendants allege that at the time the county-wide election was ordered 30 May, 1950, no election had been called in Southern Pines nor had petition for such election been filed. Defendants further allege that since the filing of proper petition for a county election as to beer and wine in December, 1948, the Board of Elections had twice before ordered an election thereon and each time after the order was made a municipal election had been called and held, once before in Southern Pines and once in Pinebluff, and defendants, to avoid question as to the legality of the election, did not hold the election on the dates then designated, and defendants say that now again after the calling of an election for 26 August another municipal election was called and held in Southern Pines.

Defendants prayed that plaintiffs' motion for a restraining order be denied, and this action dismissed.

In the hearing on plaintiffs' motion at chambers, the court expressed the opinion that the calling of the election in Southern Pines for a municipal purpose was in good faith and in conformity with law, but that at the time defendants ordered the county election for 26 August no other election, municipal or general, had been called which would tend to make it illegal, and upon the facts set out in the pleadings entered the following order:

"It is now ordered and adjudged that the defendants' motion to dismiss this action be treated as a demurrer *ore tenus,* and the demurrer is sustained, in so far as the action pertains to the said county election being held within sixty days of another election held in Moore County, and the Court finding the plaintiffs are not entitled to the said restraining order prayed for, it is ordered and adjudged that the motion of the plaintiffs for said restraining order be and the same is hereby overruled and disallowed, and that the plaintiffs and their surety pay the cost incurred by their said motion."

Plaintiffs excepted and appealed.

J. O. Tally, Jr., and W. D. Sabiston, Jr., for plaintiffs, appellants.

Spence & Boyette for defendants, appellees.

DEVIN, J. The court denied the plaintiffs' motion for a restraining order enjoining the election called to be held 26 August on the question

of legalizing the sale of beer and wine in Moore County. Thereafter the election was held and the vote was against the sale of beer and wine. The defendants insist that the questions raised by the plaintiffs' appeal have now become academic. *Saunders v. Bulla,* 232 N.C. 578; *Eller v. Wall,* 229 N.C. 359, 49 S.E. 2d 758; *Penland v. Gowan,* 229 N.C. 449, 50 S.E. 2d 182; *S. v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663. But we think the decisions cited are not controlling on the facts here presented. In the case at bar restraining the election was not the sole object of the litigation. *Eller v. Wall, supra; Penland v. Gowan, supra.* The plaintiffs as citizens and taxpayers have alleged that the election, if called and held on the date named, would be in violation of the restrictions contained in the statute, would be illegal and void, and that if the vote went against the legal sale of beer and wine property rights of the plaintiffs and of others would be materially affected and the county suffer serious impairment of revenue. The plaintiffs are entitled to a determination of the questions presented by their appeal.

The statute, G.S. 18-124, under which the election was called and held, contains these provisions: "(d) Time of calling election.—Whenever a petition for an election is presented to the county board of elections pursuant to the provisions of this article, said board shall within thirty (30) days call the election petitioned for . . . (f) Restrictions as to time of election.—No election shall be held pursuant to the provisions of this article in any county within sixty (60) days of the holding of any general election, special election, or primary election in said county or any municipality thereof." G.S. 18-124 (d) (f).

The able judge of the Superior Court, who heard this matter below, was of the opinion that the prohibition contained in the statute against a county election on the question of legal sale of beer and wine within sixty days of any general or municipal election referred to the time of making the order calling the election, and as admittedly no other election at that time (30 May, 1950) had been called, the subsequent calling and holding of a municipal election did not render the election of 26 August illegal. Accordingly, the motion for restraining order was denied, and demurrer *ore tenus* to the complaint sustained.

We are unable to concur in this view. The statute declares that no election shall be held within sixty days of the holding of a municipal election. Here it appears that an election in good faith, in conformity with law, was held 15 August, 1950, in a municipality of and within the County of Moore, within less than sixty days of the date of county election now in question.

Defendants contend that under this construction of the statute, it is always within the power of a municipality in the county, if it sees fit, to render ineffectual a county election on the legal sale of beer and wine,

and that this is not in accord with the legislative purpose. But the statute makes no exception. We have no power to add to or subtract from the language of the statute. The province of the Court is to interpret statutes conformable to the language in which they are expressed, and to declare the law in accord with the will of the law-making power, when exercised within constitutional limits. The question of the wisdom or propriety of statutory provisions is not a matter for the courts, but solely for the legislative branch of the state government.

For the reasons herein set out the order sustaining defendants' demurrer *ore tenus* to the complaint must be held for error and the judgment

Reversed.

ALPINE MOTORS CORPORATION v. EFFIE MAE HAGWOOD ET AL.

(Filed 13 December, 1950.)

1. Evidence § 2—

The courts will take judicial knowledge as to the appointment and terms of a special judge of the Superior Court and the public records later made by him or at his instance.

2. Judges § 2b—

A special judge who has been retired under the provisions of G.S. 7-51 on the ground of total disability is not an emergency judge. The provision of G.S. 7-50 that persons embraced within the provisions of G.S. 7-51 are constituted emergency judges is neither appropriate nor applicable to a judge who retires for total disability under the 1937 Amendment to G.S. 7-51.

3. Judgments § 27b—

Where a hearing is *coram non judice* because the person holding the term of court is not a qualified judge, the proceeding is a nullity and the judgment will be vacated and the case restored to the docket.

4. Appeal and Error § 37—

Where it is manifest from the public records of which the Supreme Court will take judicial knowledge that the person holding the term of court at which the judgment appealed from was rendered was not a qualified judge, the Supreme Court will vacate the judgment *ex mero motu*. Whether the parties themselves could have interposed any valid objection to the proceeding as being less than *de facto*, not presented or decided.

APPEAL by plaintiff from *Honorable Luther Hamilton,* May Term, 1950, of NEW HANOVER.

Civil action to enforce terms of conditional-sale contract, or title-retained lien, executed at time of sale of 1948 Pontiac Sedan-Coupe auto-

mobile, wherein the ancillary remedy of claim and delivery was invoked by plaintiff.

The case was heard at the May Term, 1950, New Hanover Superior Court, before Honorable Luther Hamilton, without a jury, all parties agreeing that he should find the facts and determine the rights of the parties arising thereunder or thereon.

From the facts found, judgment was entered dismissing the action and taxing the plaintiff with the costs. Plaintiff appeals, assigning errors.

J. Q. LeGrand and Carr & Swails for plaintiff, appellant.

Thomas W. Davis and Kellum & Humphrey for defendants, appellees.

STACY, C. J. At the threshold of the case, we are met with the fact that the May Term, 1950, New Hanover Superior Court, was presided over by Honorable Luther Hamilton, at one time a Special Judge of the Superior Court of the State serving under appointments by the Governor.

From the public records, of which we take judicial notice, it appears that Judge Hamilton's last term of two years as such special judge expired 30 June, 1949. At that time he did not have sufficient age and length of service on the Bench, without more, to retire and assume the status of an Emergency Judge under the Retirement Act of 1921, as amended, G.S. 7-51. He did have sufficient service, however, to retire under the clause which reads: "Every . . . regular or special judge of the Superior Court who, without regard to the age of such judge . . . having served one full term of six years on . . . the . . . Superior Court, and while still in active service thereon, shall have become totally disabled through accident or disease to carry on the duties of said office . . . who retires at the end of his term, shall receive for life two-thirds (⅔) of the annual salary," etc.; provided he were able to meet the other requirements of this provision of the statute.

On 22 June, 1949, Judge Hamilton made application for retirement under the Act, writing the Governor that he had hoped "for reasons assigned in our conference of about six weeks ago I might be permitted to withhold this submission until after a hoped-for reappointment, however temporary that might have been. For obvious reasons the matter now cannot be longer delayed, and I will thank you to have it given proper consideration as promptly as practicable."

Supporting his claim, and enclosed with his letter, were certificates of four physicians touching his physical condition or state of health.

His application was granted on 12 July, 1949, the Governor finding as a fact, *inter alia,* on the evidence submitted, that ". . . (2) Since Judge Hamilton's appointment on the 1st day of July, 1937, and while still in active service as a Special Superior Court Judge, he has served

more than six years as such; and while still in active service in such capacity, he has become totally disabled through disease, to wit, a heart disease, to carry on the duties of his office"; whereupon it was ordered that his name be placed on the retirement list, with pay, under authority of G.S. 7-51.

Assuming Judge Hamilton's status to be that of an Emergency Judge since his retirement he has been assigned to hold three terms of two weeks each and six terms of one week each of the Superior Court in various counties of the State under commissions issued by the Governor. This would seem to manifest beyond all peradventure that his total disability to carry on the duties of such office has disappeared or is no longer existent. It follows, therefore, that one of the essential elements of his claim to retirement under the Act, namely, total disability through accident or disease to carry on the duties of said office, has likewise disappeared or has been removed. The main prop upon which he would stand is gone. It is noteworthy, perhaps, that Judge Hamilton himself, so far as the record discloses, nowhere says specifically or in so many words that "while still in active service" on the Superior Court bench, he became "totally disabled through accident or disease to carry on the duties of said office." His application for retirement simply says, "I hereby give notice of my retirement as Superior Court Judge under the provisions of G.S. 7-51." It is true his application was accompanied by supporting certificates of four physicians upon which the Governor made his findings and based his order of retirement, but so far as Judge Hamilton is concerned he leaves the conclusion of total disability to others. His willingness to hold the courts and requests that he be assigned to hold them give some indication of his thought on the subject and how he feels about it.

Indeed, it would appear to be a contradiction in terms to say that one is totally disabled to do a thing, and yet he may do it. We are presently concerned more with actuality or fact than with theory. A public statute of policy-making import is involved, and not a private convention between contracting parties which may be subject to different rules of construction or indulgencies. The law contemplates a judge on the bench competent to act, and not one totally disabled through accident or disease to carry on the duties of his office. Conjure with this as we may, there is no way to reconcile these opposing positions either in law or in logic. They are irreconcilable. Having taken one horn of the dilemma he may not now shift to the other. Measured by his own public record and conduct, that which would qualify him for retirement under the Act, no longer exists. His actions demonstrate or make manifest his disqualification to hold the office of Emergency Judge under the Retirement Act. The basis of his retirement was total disability to carry on the duties

of the office. He now says he is able to hold the courts, as witness the twelve weeks already held, and no term of court hardly could be regarded as trifling, insignificant, or inconsequential, either in law or in fact. Hence, his present position, which may be the same that he has taken all along, would seem to be at variance or incompatible with his retirement under the Act. When public business loses its community value it should be abandoned. Certainly a term of the Superior Court is important to the community and a matter of serious public concern. It has been said by a student of the subject, "The office of Superior Court Judge is the most important office in the State." It is without doubt one of the most powerful. We would not minimize or depreciate its worth or underestimate its value. The conclusion seems inescapable or irresistible that the hearing of the instant case at the May Term, 1950, New Hanover Superior Court, was *coram non judice.*

True, it is provided by G.S. 7-50 that "persons embraced within the provisions of G.S. 7-51 are hereby constituted emergency judges of the superior court," etc. This provision, however, was a part of the original Retirement Act of 1921, and is neither appropriate nor applicable to the judges who retire under the later amendment of 1937 on the ground of total disability to carry on the duties of the office. If the General Assembly intended to give these the status of Emergency Judges it would seem that it could be only on an honorary basis, for one totally disabled to carry on the duties of the office would hardly be assigned to hold the Superior Courts.

We do not reach the question whether the parties themselves could have interposed any valid objection to the proceeding as being less than *de facto, Chemical Co. v. Turner,* 190 N.C. 471, 130 S.E. 154; nor are we presently concerned with a total disability clause in a policy of health and accident insurance. *Thigpen v. Insurance Co.,* 204 N.C. 551, 168 S.E. 845, 149 A.L.R. 95 (court-crier case); *Medlin v. Insurance Co.,* 220 N.C. 334, 17 S.E. 2d 463; *Ireland v. Insurance Co.,* 226 N.C. 349, 38 S.E. 2d 206. We are simply taking cognizance or judicial notice of the public records made by Judge Hamilton, or at his instance, and of his later supposedly official conduct and activities. The statute is clear as to who may assume the status of an Emergency Judge and who may retire beneficially thereunder on the ground of total disability incurred while in office. The emergency judgeship is an office of reward for services rendered and to be rendered. It is something earned, not imposed or granted. Its occupant is in truth and in fact a judge emeritus. Judge Hamilton is not an Emergency Judge within the purview of the Retirement Act. His commission to hold the May Term, 1950, New Hanover Superior Court, was improvidently issued.

The judgment will be vacated and the cause restored to the docket for trial.

Judgment vacated; case restored to docket.

EMMIE S. PIPPIN v. JOHN H. BARKER AND WIFE, ESTELLA BARKER.

(Filed 13 December, 1950.)

APPEAL by defendant from *Honorable Luther Hamilton,* at September Term, 1950, of HENDERSON.

Civil action for specific performance of contract to purchase land.

From judgment for plaintiff, defendants appeal.

Charlton E. Huntley and L. B. Prince for plaintiff, appellee.

O. B. Crowell for defendants, appellants.

PER CURIAM. It appearing that the September Term, 1950, of Superior Court of Henderson County was presided over by Honorable Luther Hamilton, the judgment rendered in the above entitled action will be vacated on authority of *Alpine Motors Corporation v. Effie Mae Hagwood, et al., ante,* 57, and the cause restored to the docket for trial.

Judgment vacated; case restored to docket.

STATE v. JOHN CHESTER HILL.

(Filed 13 December, 1950.)

1. Automobiles § 8i—

The "right of way" at an intersection means the right of a driver to continue in his direction of travel in a lawful manner in preference to another vehicle approaching the intersection from a different direction.

2. Same—

Where an intersection has no stop signs or traffic signals and two vehicles approach it at approximately the same time, the vehicle on the right has the right of way, G.S. 20-155 (a); but when the vehicle on the left comes first to the intersection and the driver finds no vehicle approaching from his right within such distance as reasonably to indicate danger of collision, taking into consideration the respective distances of the vehicles to the intersection and their relative speeds and other attendant circumstances, the vehicle on the left has the right of way.

3. Same—

A driver having the right of way may act upon the assumption, in the absence of notice to the contrary, that the other motorist will recognize his right of way and grant him free passage over the intersection.

4. Same: Automobiles § 28e—Evidence held not to show culpable negligence of defendant proximately causing fatal accident at intersection.

Where the evidence discloses that a vehicle approaching from the south came to a virtual stop at the southern edge of an intersection 23 feet from the northern edge thereof, and that a vehicle approaching the intersection from the east at a speed of 15 to 20 miles an hour was then more than 125 feet from the eastern edge of the intersection, the vehicle from the south, thus entering the intersection an appreciable length of time ahead of the vehicle from the east, has the right of way, and where he proceeds without notice that the driver of the vehicle from the east did not intend to grant him free passage, and is hit on his right side by the front of the vehicle from the east after he had traveled at least one-half way across the intersection, he cannot be held guilty of culpable negligence.

5. Criminal Law § 81f—

The sustaining of defendant's motion to nonsuit in the Supreme Court has the force and effect of a verdict of not guilty. G.S. 15-173.

APPEAL by defendant from *Sharp, Special Judge,* and a jury, at the August Term, 1950, of GUILFORD.

Criminal prosecution for involuntary manslaughter arising out of a homicide caused by a collision of two motor vehicles at a street intersection.

The accident out of which this prosecution arose happened on the intersection of two paved streets in the City of Greensboro. These streets are Winston Street, which runs north and south and is 19 feet in width, and Industrial Avenue, which runs east and west and is 23 feet in width. There are no stop signs or traffic signals at the intersection.

The only testimony at the trial was that of the State. When this evidence is stripped of its non-factual admissions and conclusions, it is sufficient to establish the matters set out in the next paragraph.

On the mid-afternoon of 23 October, 1949, the defendant drove his automobile northward on Winston Street. He brought his vehicle to a virtual stop at the southern edge of the intersection, where he was able to see a Chevrolet car coming from the east on Industrial Avenue at a speed of 15 or 20 miles an hour. The distance between the Chevrolet car and the eastern edge of the intersection was "between 125 and 150 feet." The defendant entered the intersection and proceeded northward thereon until he crossed the middle of the intersection, when the Chevrolet car entered the intersection and struck the right side of the defendant's automobile with its front. As a result of the impact, a door of the Chevrolet car was thrown open, and the decedent, Silas Gray Murray, Jr., a

five year old passenger therein, fell to the pavement, suffering fatal injury. The Chevrolet car did not change its course or slacken its speed as it approached and entered the intersection.

The jury found the defendant "guilty as charged," and the court entered judgment on the verdict. The defendant appealed, assigning as error the disallowance of his motion for a compulsory nonsuit.

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

John G. Prevette for the defendant, appellant.

ERVIN, J. The appeal presents this question for decision: Was the testimony for the State sufficient to carry the case to the jury and support its verdict that the defendant was guilty of criminal negligence proximately resulting in the death of the decedent? See: *S. v. Cope,* 204 N.C. 28, 167 S.E. 456; *S. v. Stansell,* 203 N.C. 69, 164 S.E. 580.

It is manifest that there is no basis for any conclusion that the accused was negligent in the premises unless the State's evidence affords a factual foundation for the contention of the prosecution that it was his legal duty to yield the right of way at the intersection to the Chevrolet car in which the deceased was riding.

As applied to vehicular travel at intersections of highways and streets, the term "right of way" means "the right of a vehicle to proceed uninterruptedly in a lawful manner in the direction in which it is moving in preference to another vehicle approaching from a different direction into its path." 60 C.J.S., Motor Vehicles, section 362.

Inasmuch as vehicular traffic at the intersection of the streets involved in this action was not controlled by stop signs, traffic signals, or similar means, the question as to who had the right of way at such intersection at the time of the fatal accident must be determined by applying to the testimony rules of conduct established by law for the government of motorists approaching or entering highway or street intersections. The relevant rules are as follows:

1. "When two vehicles approach or enter an intersection . . . at approximately the same time," the driver on the right has the right of way, and the driver on the left must yield him that right. G.S. 20-155 (a).

2. This statutory rule does not apply, however, unless the two vehicles approach or enter the intersection at approximately the same time. When that condition does not exist, the vehicle first reaching and entering the intersection has the right of way over a vehicle subsequently reaching it, irrespective of their directions of travel; and it is the duty of the driver of the latter vehicle to delay his progress so as to allow the first

arrival to pass in safety. *Kennedy v. Smith,* 226 N.C. 514, 39 S.E. 2d 380; *Crone v. Fisher,* 223 N.C. 635, 27 S.E. 2d 642; *Cab Co. v. Sanders,* 223 N.C. 626, 27 S.E. 2d 631; *Piner v. Richter,* 202 N.C. 573, 163 S.E. 561.

3. Two motor vehicles approach or enter an intersection at approximately the same time within the purview of these rules whenever their respective distances from the intersection, their relative speeds, and the other attendant circumstances show that the driver of the vehicle on the left should reasonably apprehend that there is danger of collision unless he delays his progress until the vehicle on the right has passed. *Cab Co. v. Sanders, supra; Essig v. Cheves,* 75 Ga. App. 870, 44 S.E. 2d 712; *Kirchoff v. Van Scoy,* 301 Ill. App. 366, 22 N.E. 2d 966; *Henderson v. Johnson,* 300 Ill. App. 613, 21 N.E. 2d 42; *Gold v. Portland Lumber Co.,* 137 Me. 143, 16 A. 2d 111; *Warnen v. Markoe,* 171 Md. 351, 189 A. 260; *Lee v. City Brewing Co.,* 279 N.Y. 380, 18 N.E. 2d 628; *Ries v. Cheyenne Cab & Transfer Co.,* 53 Wyo. 104, 79 P. 2d 468. A corollary of this proposition may be stated conversely in these words: When the driver of a motor vehicle on the left comes to an intersection and finds no one approaching it on the other street within such distance as reasonably to indicate danger of collision, he is under no obligation to stop or wait, but may proceed to use such intersection as a matter of right. *Kallansrud v. Libbey,* 234 Iowa 700, 13 N.W. 2d 684; *State v. Brighi,* 232 Iowa 1087, 7 N.W. 2d 9.

4. A driver having the right of way may act upon the assumption in the absence of notice to the contrary that the other motorist will recognize his right of way and grant him a free passage over the intersection. *Cab Co. v. Sanders, supra.*

The task of applying these rules to the evidence must now be performed.

When the defendant's automobile came to the southern edge of the intersection, the distance between it and the northern edge of the intersection was only 23 feet whereas the distance between the eastern edge of the intersection and the approaching Chevrolet car was more than 125 feet. The Chevrolet car was traveling at a speed of only 15 or 20 miles an hour. In view of the distances to be traveled by the two vehicles, the speed of the Chevrolet car, and the other circumstances then existing, it reasonably appeared that the defendant's automobile could pass northward over the intersection without danger of collision with the Chevrolet car. The defendant entered the intersection under these conditions an appreciable length of time ahead of the Chevrolet car, and proceeded northward upon the intersection without any notice that the driver of the Chevrolet car did not intend to grant him free passage. After the defendant's automobile had traveled at least half-way across the inter-

section, the Chevrolet car entered the intersection, and struck the right side of the defendant's automobile with its front.

These things being true, the two vehicles did not approach or enter the intersection at approximately the same time, and the Chevrolet car did not have the right of way at that place. Such right belonged to the defendant, who reached and entered the intersection an appreciable length of time ahead of the Chevrolet car. *Crone v. Fisher, supra; Enz v. Johns,* 112 Cal. App. 1, 296 P. 115; *Loffer v. Witte,* 71 S.D. 626, 28 N.W. 2d 698.

It necessarily follows that there is no factual foundation in the record for the verdict finding the defendant guilty of criminal negligence proximately resulting in the death of the decedent. For this reason, the conviction and sentence are vacated, and the motion of the defendant for judgment of nonsuit is sustained on this appeal. Under G.S. 15-173, this ruling has the force and effect of a verdict of not guilty.

Reversed.

HERMAN H. GRIMM v. A. T. WATSON, OPERATING AND DOING BUSINESS AS CITY RAPID TRANSIT COMPANY.

(Filed 13 December, 1950.)

1. Automobiles § 8c—

The violation of either of the requirements of G.S. 20-154 that a motorist before turning to the right or left from a direct line on the highway must first exercise reasonable care to ascertain that such movement can be made in safety and shall give the appropriate statutory signal of his intention to make a turn is negligence *per se* and is actionable if it proximately causes injury.

2. Automobiles § 18h (2)—

Evidence tending to show that plaintiff, following defendant's bus on the highway, turned into the left or passing lane of the highway and blew his horn to warn of his intention to pass the bus, which was traveling in the right traffic lane, and that when plaintiff's car was abreast the rear wheels of the bus, the bus driver turned sharply to the left without any signal or warning, resulting in collision in suit, *is held* sufficient to be submitted to the jury on the issue of negligence.

3. Automobiles § 18h (3): Negligence § 19c—

Defendant is not entitled to nonsuit on the ground of contributory negligence unless plaintiff's own evidence establishes the facts indispensable to sustain the plea.

APPEAL by defendant from *Phillips, J.,* and a jury, at the March Term, 1950, of MOORE.

Civil action arising out of a collision between two motor vehicles proceeding in the same direction.

The accident occurred upon the Fort Bragg-Fayetteville Boulevard on 21 July, 1948, when the plaintiff's Chevrolet car overtook and attempted to pass the defendant's bus, which was admittedly being operated on a mission for the defendant. The plaintiff sought damages for injuries to his person and vehicle upon a complaint charging that such injuries were caused by the actionable negligence of the bus driver. The answer denied this charge, and pleaded as an affirmative defense that the plaintiff failed to keep a proper lookout and drove at an excessive speed and thereby proximately contributed to his injuries.

The Fort Bragg-Fayetteville Boulevard connects Fort Bragg on the north and Fayetteville on the south. It is a dual highway having two lanes of traffic in each direction, with a wide grass plot between the pairs of lanes. The left of the lanes on each side is for passing other motor vehicles going in the same direction, and there are numerous signs so warning motorists. The pairs of lanes are joined by occasional cross-overs used when motorists want to go in the opposite direction.

According to the plaintiff's evidence, the events giving rise to this litigation happened in this way:

The defendant's bus was traveling toward Fort Bragg at a speed of about 25 miles per hour, and the plaintiff's car was following the bus at a speed of about 35 miles per hour. Both vehicles were proceeding in the outside or right traffic lane. When the car was 100 yards behind the bus, the plaintiff observed that the left lane was clear, and pulled into such lane for the purpose of passing the bus. After so doing, he blew his horn to warn the bus driver of his intention to pass the bus, which was still in the outside or right traffic lane. When the front of the plaintiff's car was abreast the rear wheels of the bus, the bus driver turned the bus sharply to the left without any signal or warning, and entered the left traffic lane, striking and damaging the plaintiff's car and injuring the plaintiff. The highway is level and straight at the scene of the collision, which occurred several hundred feet from the nearest cross-over.

Testimony for the defendant gave this version of the untoward occurrence:

The bus driver, who was proceeding toward Fort Bragg in the outside or right traffic lane of the boulevard, desired to turn left, cross the grass plot dividing the pairs of traffic lanes at a place other than a regular cross-over, and return to Fayetteville on the opposite side of the dual highway. He ascertained by the use of the rear-view and side-view mirrors on the bus that no motor vehicle was nearing the bus from the rear, and turned on an electrical signal device on the back of the bus to indicate his intention to make the contemplated left turn. After taking these

precautions, he pulled the bus to the left. Just as the left front wheel of the bus entered the left traffic lane, the plaintiff's car came upon the scene from the rear at a high speed, striking the bus back of its left rear wheel and causing the damage and injury whereof the plaintiff complains.

Issues were submitted to and answered by the jury as follows:

1. Was the personal property of the plaintiff injured and damaged by the negligence of the defendant, as alleged in the complaint?

Answer: Yes.

2. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

Answer: Yes.

3. Did the plaintiff by his negligence contribute to his own injury and damage, as alleged in the answer?

Answer: No.

4. What property damage, if any, is the plaintiff entitled to recover?

Answer: $600.00.

5. What amount, if any, is the plaintiff entitled to recover for personal injuries?

Answer: $900.00.

The court entered judgment on the verdict, and the defendant appealed, assigning errors.

Spence & Boyette for plaintiff, appellee.

Seawell & Seawell for defendant, appellant.

ERVIN, J. The defendant reserved exceptions to the refusal of his motions for a compulsory nonsuit under G.S. 1-183.

Under the statute codified as G.S. 20-154, any person who undertakes to drive a motor vehicle upon a highway must exercise reasonable care to ascertain that such movement can be made in safety before he turns either to the right or the left from a direct line. Besides he is required by the same statute to signal his intention to turn in the prescribed manner and for the specified distance before changing his course "whenever the operation of any other vehicle may be affected by such movement." A motorist violates G.S. 20-154 and in consequence is negligent as a matter of law if he fails to observe either of these statutory precautions in changing the course of his vehicle upon the highway, and his negligence in such respect is actionable if it proximately causes injury to another. *Cooley v. Baker,* 231 N.C. 533, 58 S.E. 2d 115. This being so, the issue of whether the driver of the defendant's bus was guilty of actionable negligence was rightly adjudged to be a question of fact for the determination of the jury.

This brings us to the defendant's contention that the plaintiff was contributorily negligent as a matter of law.

The plea of contributory negligence in this case is simply this: (1) That the plaintiff drove his automobile upon the highway at an excessive speed and without keeping a proper lookout; and (2) that such specific acts of negligence proximately contributed to the plaintiff's damage and injury. The controlling rule on this phase of the litigation is elaborated in *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307, where this language is used: "Contributory negligence is an affirmative defense which the defendant must plead and prove. G.S. 1-139. Nevertheless, the rule is firmly embedded in our adjective law that a defendant may take advantage of his plea of contributory negligence by a motion for a compulsory judgment of nonsuit under G.S. 1-183 when the facts necessary to show the contributory negligence are established by the plaintiff's own evidence."

The testimony of the plaintiff at the trial did not establish the facts indispensable to the defendant's plea of contributory negligence. Hence, the trial judge rightly rejected the argument that the plaintiff was guilty of contributory negligence as a matter of law.

The questions raised by the remaining exceptions have been decided adversely to defendant in well considered precedents, and require no discussion.

The judgment of the Superior Court is upheld, for there is in law

No error.

STATE OF NORTH CAROLINA v. JACK SMITH.

(Filed 13 December, 1950.)

1. Criminal Law § 62f—

Where the suspension of sentence has been revoked by the county court for condition broken, *certiorari* will lie solely to review the regularity and legality of the judgment invoking the original sentence, and the "affirmance" of the judgment by the Superior Court is in effect a dismissal of the writ for want of merit, and will be so considered upon further review.

2. Same—

Where a defendant does not object or except to the conditions upon which sentence is suspended nor appeal therefrom, the conditions become an integral part of the covenant voluntarily assented to by defendant, and he may thereafter contest the execution of the sentence for condition broken only on the ground of want of evidence to support a finding of breach of condition or on the ground that the conditions are unreasonable or for an unreasonable length of time.

3. Same—

The presumption is in favor of the reasonableness of the conditions upon which sentence is suspended.

4. Same—

Upon conviction of larceny of 900 pounds of seed cotton, suspension of sentence on condition that defendant not operate a motor vehicle on the highways of the State for one year will not be held unreasonable as having no relation to the offense, since it will be presumed in the absence of a showing to the contrary that the operation of a motor vehicle was involved in the larceny. In this case it appeared further that defendant was addicted to the use of alcoholic beverages.

5. Same: Automobiles § 34b—

While the Superior Court is without jurisdiction to revoke a driver's license, it may suspend execution of sentence on condition that defendant not operate a motor vehicle on the highways of the State for a reasonable length of time when such condition bears a reasonable relation to the offense of which defendant stands convicted.

APPEAL by defendant from *Phillips, J.*, March Term, 1950, SCOTLAND. Affirmed.

Indictment for larceny, heard on writ of *certiorari* issued to the criminal court for the county of Scotland.

On 25 October 1949, defendant was convicted on a charge of larceny of 900 pounds of seed cotton. The judge of the county court pronounced judgment of imprisonment for a term of two years and placed the defendant on probation under the general conditions set forth in the statute and the further condition that the defendant "be denied the right to operate a motor vehicle on the highways of North Carolina during the first twelve months of probation. During the next twelve months shall drive only upon the recommendation of the Probation Officer."

On 15 February 1950, the court, after due notice and hearing, found that defendant had willfully violated the special condition relating to the operation of a motor vehicle and adjudged that the order of probation be revoked and commitment issue on the sentence originally imposed. Defendant was ordered into the custody of the sheriff to begin said sentence. He applied to Phillips, J., for a writ of *certiorari* which was duly issued.

When the writ came on for hearing in the court below, Phillips, J., affirmed the judgment of the county court and ordered that commitment issue. Defendant excepted and appealed.

Attorney-General McMullan, Assistant Attorney-General Moody, and John R. Jordan, Jr., Member of Staff, for the State.

Gilbert Medlin and Jennings G. King for defendant appellant.

BARNHILL, J. The cause was before the court below solely for review of the regularity and legality of the judgment of the county court invoking the original sentence. *S. v. King,* 222 N.C. 137, 22 S.E. 2d 241. Its judgment, in effect, was a dismissal of the writ for want of merit. It will be so treated.

The defendant did not object or except to the imposition of the condition, about which he now complains, at the time it was imposed. Nor did he appeal therefrom. By his conduct he impliedly consented thereto and committed himself to abide by the terms of the probation. *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143; *S. v. Wilson,* 216 N.C. 130, 4 S.E. 2d 440; *S. v. Pelley,* 221 N.C. 487, 20 S.E. 2d 850; *S. v. Jackson,* 226 N.C. 66, 36 S.E. 2d 706. The condition thereupon became an integral part of the treaty or covenant which the defendant voluntarily entered into with the court. *S. v. Shepherd,* 187 N.C. 609, 122 S.E. 467; *S. v. Miller, supra.*

Having consented to the imposition of the condition, he was thereafter relegated to his right to contest the execution of the sentence for that (1) there is no evidence to support a finding that the conditions imposed have been breached, *S. v. Johnson,* 169 N.C. 311, 84 S.E. 767; *S. v. Miller, supra;* or (2) the conditions are unreasonable and unenforceable or for an unreasonable length of time. *S. v. Shepherd, supra; S. v. Miller, supra.*

The defendant does not assert here that there was no evidence to support the finding made by the judge of the county court. The sole grounds of attack upon the particular condition and the judgment invoking the sentence for breach thereof is bottomed upon the contention that it (1) is unrelated to and did not grow out of the offense for which he was convicted and is therefore unreasonable; and (2) is beyond the jurisdiction of the court, for the reason the court has no authority to revoke or suspend a license to operate a motor vehicle. These grounds of attack are, on this record, untenable.

While at first blush larceny and the operation of a motor vehicle would seem to be wholly unrelated, such is not necessarily the case here. The defendant was charged with the larceny of 900 pounds of seed cotton. The "taking and carrying away" of such a heavy and bulky quantity of seed cotton no doubt involved the use of a vehicle. If, in committing the larceny the defendant used an automobile, the crime and the operation are directly related. It is presumed, in the absence of proof to the contrary, that the proceeding was legal and the court acted with proper discretion. *S. v. Hilton,* 151 N.C. 687, 65 S.E. 1011; *S. v. Everitt,* 164 N.C. 399, 79 S.E. 274.

Furthermore, the primary purpose of a suspended sentence or parole is to further the reform of the defendant. There is strong suggestion in the

record that defendant is addicted, at least to some extent, to the use of alcoholic beverages. The judge may have considered that the primary need of defendant was to be kept off the public roads while under a steering wheel. Certainly there is nothing in the record to induce a contrary view. *S. v. Ray,* 212 N.C. 748, 194 S.E. 472.

It is true the court was without jurisdiction to suspend or revoke defendant's license to operate a motor vehicle duly issued by the Motor Vehicle Department of the State. *S. v. McDaniels,* 219 N.C. 763, 14 S.E. 2d 793; *S. v. Cooper,* 224 N.C. 100, 29 S.E. 2d 18; *S. v. Warren,* 230 N.C. 299, 52 S.E. 2d 879. This does not mean, however, that it might not suspend the execution of a sentence of imprisonment on condition the defendant refrain from operating a motor vehicle upon the public highways of the State. The court did not undertake, as in *S. v. Cooper, supra,* to revoke defendant's driver's license or prohibit him from operating a motor vehicle. It merely gave him the option to serve his sentence or agree not to operate a motor vehicle upon the highways for the period specified. *S. v. Miller, supra; S. v. Jackson, supra,* and cases cited.

Defendant stood convicted of grand larceny. He was sentenced to serve a term in prison. The court afforded him an opportunity to escape the service of the sentence imposed by observing the conditions of the parole. He accepted. When he broke faith with the court he furnished the grounds for invoking the original sentence. He, by his own conduct, opened the prison doors. He cannot now complain that he must enter therein.

So far as this record discloses, the record before the trial court was in all respects regular and the condition imposed was reasonable, both in substance and time. Therefore, the judgment of the court below must be

Affirmed.

WISCASSETT MILLS COMPANY v. EUGENE G. SHAW, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 13 December, 1950.)

1. Pleadings § 19c—

A demurrer admits the truth of all allegations of fact and inferences of fact reasonably drawn therefrom.

2. Same—

A complaint is not demurrable unless it is fatally defective in failing to allege any fact or combination of facts which, if true, entitles plaintiff to some relief.

3. Taxation §§ 29, 38c—

In an action to recover additional assessment of income tax paid under protest, allegation that plaintiff made a gift of real property to a school board for educational purposes and that plaintiff's total gifts during the fiscal year did not exceed 5% of its total net income for that year, states a cause of action to have the gift allowed as a deduction, and defendant's contention that his demurrer should be sustained because of plaintiff's error in alleging the theory of value of the gift, is untenable, the value of the gift and the amount of plaintiff's allowable deduction therefor being matters to be determined at the trial.

APPEAL by plaintiff from *Sink, J.*, October Term, 1950, STANLY. Reversed.

Civil action to recover income tax paid under protest.

On 7 February 1949 defendant Commissioner of Revenue disallowed certain deductions for alleged allowable expense and gifts made by plaintiff and claimed by it in its returns for its fiscal years 1946 and 1947, and made assessment therefor. Plaintiff paid the additional assessment under protest and now sues to recover the amount so paid.

It alleges certain items of expense paid during 1946 and 1947 which were disallowed and also certain gifts made by it in said years which were likewise disallowed; that the total of all deductions for gifts during said years did not exceed five per cent of its income for the year in which the gifts were made and for which credit is claimed; and that the additional assessments were and are unjust and contrary to law.

The defendant demurred to the complaint for that it fails to state facts sufficient to constitute a cause of action. The court below entered judgment sustaining the demurrer and dismissing the action. Plaintiff appealed.

E. T. Bost, Jr., and W. H. Beckerdite for plaintiff appellant.

Attorney-General McMullan, Assistant Attorneys-General Tucker and Abbott, and Edward B. Hipp, Member of Staff, for the State.

BARNHILL, J. The demurrer admits the truth of all the allegations of fact and inferences of fact reasonably drawn therefrom. *Ferrell v. Worthington,* 226 N.C. 609, 39 S.E. 2d 812; *Sabine v. Gill, Comr. of Revenue,* 229 N.C. 599, 51 S.E. 2d 1; *Leonard v. Maxwell, Comr. of Revenue,* 216 N.C. 89, 3 S.E. 2d 316.

A complaint cannot be overthrown by a demurrer unless it be wholly insufficient. If any portion of it presents facts sufficient to constitute a cause of action, the pleading will repel the demurrer. It must be fatally defective in that it fails to allege any fact or combination of facts which, if true, entitles plaintiff to some relief. *Blackmore v. Winders,* 144 N.C.

212; *Fairbanks, Morse & Co. v. Murdock Co.*, 207 N.C. 348, 177 S.E. 122.

A consideration of the complaint in the light of these controlling rules leads to the conclusion that the complaint is sufficient to repel the demurrer interposed by defendant.

Plaintiff in part alleges:

"11. That . . . during the fiscal year ending November 30, 1947, the plaintiff, by deed of gift and without being paid anything therefor, conveyed to the Board of School Commissioners of the Town of Albemarle in fee simple a large tract of land on which a new school building was erected; that the said land had a reasonable market value at the time of the conveyance of $6,000; that the said land was conveyed for the purpose of and is being used exclusively for literary, scientific and educational purposes."

This allegation, coupled with the further allegation that the total gifts made by it during that fiscal year, including the one pleaded, did not exceed five per cent of its total net income for that year, states facts sufficient to entitle plaintiff to some relief. With the exact amount it is entitled to recover and the basis of calculation upon which that amount should be ascertained, we are not presently concerned.

The defendant's contention that plaintiff must allege a cause of action in accord with defendant's theory of its right to claim credit for a deductible gift, that is, that it must follow strictly the "cost value" theory in its complaint is without merit. It has alleged a gift of real property to an educational institution and that the property was conveyed for the purpose of, and is being used exclusively for literary, scientific, and educational purposes. These facts are admitted for the purpose of the demurrer. It has further alleged the value of its gift and the consequent amount of its allowable deduction. This latter allegation is binding on no one. Whether the amount of deduction to which plaintiff is entitled, on the facts admitted, is to be ascertained on the "reasonable value" or the "cost" basis, or on the basis of the value on the date of the original adoption of our income tax law, is, in the first instance, for the court below to decide.

The parties debate at some length the merit of plaintiff's claim in respect of each item asserted as an allowable deduction. But the questions so discussed are not before us on this appeal. Only the sufficiency of the complaint to state a cause of action is challenged. The ruling thereon by the court below is

Reversed.

LILLIAN KNITTING MILLS COMPANY v. T. B. EARLE, MRS. MARY B. EARLE AND SAM HOUSTON.

(Filed 13 December, 1950.)

1. Pleadings § 19b—

Where there is only one party plaintiff there can be no misjoinder of parties plaintiff. G.S. 1-127.

2. Corporations § 7—

Corporate directors and officers are personally liable for making fraudulent misrepresentations of fact as to the financial condition of the corporation to persons who deal with the corporation and suffer loss by reason of their reliance on such misrepresentations.

3. Same: Fraud § 9: Pleadings § 19b—Complaint held to allege cause against corporate officers for fraud and not one to set aside corporate conveyances as fraudulent.

A complaint alleging that defendants, officers and agents of a corporation, made fraudulent misrepresentations of fact as to the financial condition of the corporation, thereby inducing plaintiff to sell the corporation merchandise on credit, and that defendants thereafter secretly caused the corporation to convey its assets to them with the purpose of cheating and defrauding plaintiff and other creditors, and that the corporation was thereafter placed in receivership with virtually no assets, with prayer that plaintiff recover of defendants the amount lost through the extension of credit, *is held* to state only the one cause of action for actionable fraud on the part of defendants and is demurrable neither on the ground of misjoinder of causes nor the ground that it stated a cause of action to set aside the conveyances appertaining solely to the corporate receivers.

APPEAL by defendants from judgment overruling their demurrer to the complaint rendered by *Phillips, J.*, at the May Term, 1950, of STANLY.

The complaint alleges in specific detail that the plaintiff, Lillian Knitting Mills Company, is a domestic business corporation; that during 1949 the defendants, T. B. Earle, Mrs. Mary B. Earle, and Sam Houston, constituted all the officers and directors of another business corporation, to wit, the Earle Hosiery Corporation; that on various occasions between 6 January and 3 June of that year the defendants made fraudulent misrepresentations of fact to the plaintiff grossly exaggerating the financial standing and worth of the Earle Hosiery Corporation, and thereby induced the plaintiff to sell and deliver substantial quantities of merchandise to the Earle Hosiery Corporation on credit; that while these misrepresentations were being made and the resultant sales and deliveries on credit were taking place, to wit, on 10 January and 29 April, 1949, the defendants secretly caused the Earle Hosiery Corporation to convey all of its realty to the defendants, T. B. Earle and Mrs. Mary B. Earle,

without consideration "for the purpose of cheating and defrauding the plaintiff as well as other creditors of the Earle Hosiery Corporation"; and that subsequent to 3 June, 1949, the Earle Hosiery Corporation was placed in receivership with assets of virtually no value, and without having paid the sum of $8,373.24 due plaintiff for merchandise sold and delivered to it on credit from 13 May to 3 June, 1949. The complaint asserts as a conclusion of law that "the defendants . . . are justly indebted to the plaintiff in said amount," and ends with this prayer: "Wherefore, plaintiff demands judgment against the defendants . . . for the sum of $8,373.24, with interest on same from the 3rd day of June, 1949, and the costs of this action to be taxed by the Clerk."

The defendants filed a twofold demurrer to the complaint. The demurrer asserts primarily that the plaintiff sues to cancel the conveyances of 10 January and 29 April, 1949, as frauds on the creditors of the Earle Hosiery Corporation; that such cause of action belongs to the receiver of the Earle Hosiery Corporation for the benefit of all the corporate creditors, and cannot be asserted by one of the creditors until after the receiver has refused to sue unless it appears that a demand for such suit would be unavailing; that the complaint does not allege that the plaintiff made demand on the receiver to sue and was refused, or that such demand would be futile; and that in consequence the complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff against the defendants. The demurrer alleges secondarily that the plaintiff has misjoined parties and causes by uniting these two distinct causes in a single complaint: (1) A cause of action belonging to the receiver to set aside the conveyances of 10 January and 29 April, 1949; and (2) a cause of action belonging to the plaintiff to recover damages allegedly suffered by it as the result of fraudulent representations of the defendants as to the financial condition of the Earle Hosiery Corporation.

Judge Phillips overruled the demurrer, and the defendant appealed, assigning such ruling as error.

R. L. Smith & Son for plaintiff, appellee.

Guy T. Carswell, Charles W. Bundy, and Carl Horn, Jr., for defendants, appellants.

ERVIN, J. There is undoubtedly a misjoinder both of parties plaintiff and of causes of action where two or more persons having distinct causes of action against the same defendants join as plaintiffs in one suit. G.S. 1-127, 1-132; *Roberts v. Mfg. Co.*, 181 N.C. 204, 106 S.E. 664.

But such is not the case at bar. The objection that there is a misjoinder of parties plaintiff lacks substance, for the very simple reason that the Lillian Knitting Mills Company is the sole party plaintiff.

The contentions that there is a misjoinder of causes of action and that the complaint does not state facts sufficient to constitute a cause of action in favor of plaintiff against defendants are likewise untenable. Properly interpreted, the complaint states only one cause of action, to wit, a cause of action belonging to the plaintiff alone for the recovery of damages allegedly suffered by it as the direct result of actionable fraud on the part of the defendants. Such cause of action is well pleaded under the rule that corporate directors and officers are personally liable for making fraudulent misrepresentations of fact as to the financial condition of the corporation to persons who deal with the corporation and suffer loss by reason of their reliance on such misrepresentations. *Harper v. Supply Co.*, 184 N.C. 204, 114 S.E. 173; *Houston v. Thornton*, 122 N.C. 365, 29 S.E. 827, 65 Am. S. R. 699; *Caldwell v. Bates*, 118 N.C. 323, 24 S.E. 481; *Solomon v. Bates*, 118 N.C. 311, 24 S.E. 478, 54 Am. S. R. 725; *Tate v. Bates*, 118 N.C. 287, 24 S.E. 482, 54 Am. S. R. 719. See also: *Thomas v. Wright*, 98 N.C. 272, 3 S.E. 487. The plaintiff does not seek to cancel the conveyances mentioned in the complaint. His allegations relating to the transfers of the property of the Earle Hosiery Corporation are simply inserted in elaboration of his claims that the representations allegedly made to it by the defendants were false and fraudulent in nature and caused it to suffer loss.

For the reasons given, the judgment overruling the demurrer is Affirmed.

STATE v. RUFFIN SAWYER.

(Filed 13 December, 1950.)

1. Criminal Law § 56—

A motion in arrest of judgment for insufficiency of the indictment or warrant may be made for the first time in the Supreme Court. Rule 21.

2. Same—

A motion in arrest of judgment must be based on matters appearing on the face of the record or which should appear thereon and do not, and therefore motion in arrest will not lie for a misnomer, since it can be supported only by facts *dehors* the record.

3. Indictment and Warrant § 12—

Objection for misnomer in the indictment or warrant must be raised by plea in abatement, and defendant waives his right to object thereto by entering a plea of not guilty and going to trial.

4. Indictment and Warrant § 10—

The names "Sawyer" and "Swayer" *held* to come within the rule of *idem sonans*.

5. Same: Criminal Law § 56—

The use of the words "the above" in the complaint in charging a criminal offense is not approved, but construing the verified complaint and the warrant subjoined together, it *is held* that the pleading sufficiently identified defendant, so as to defeat motion in arrest of judgment.

APPEAL by defendant from *Frizzelle, J.*, and a jury, at the August Term, 1950, of CUMBERLAND.

Criminal prosecution tried *de novo* on the original warrant in the Superior Court on the defendant's appeal from the Recorder's Court of the City of Fayetteville.

The verified complaint and warrant are entitled "State and City of Fayetteville *v.* Ruffin *Swa*yer." The complaint charges "the above" with these two violations of the Alcoholic Beverage Control Act of 1937: (1) The possession for sale of intoxicating liquor purchased from a county store; and (2) the sale of intoxicating liquor purchased from a county store. G.S. 18-50. The warrant, which was subjoined to the criminal complaint, addressed this order to the police of the City of Fayetteville: "For the causes stated in the affidavit, which is hereto attached and made a part hereof, you are commanded forthwith to arrest Ruffin *Swa*yer, and him have before the Recorder's Court of the City of Fayetteville on Monday the 17th day of July, 1950, to answer the above complaint and be dealt with as the law directs."

Notwithstanding his surname is *Saw*yer rather than *Swa*yer, the defendant answered the charge with a simple plea of not guilty.

The State's witness, Eugene Brown, testified that on the occasion alleged the defendant had physical custody of one pint of intoxicating liquor; that such liquor was contained in a sealed bottle bearing a county store stamp and appropriate revenue stamps; and that he bought such liquor from the defendant, and paid him $3.50 for it. The defendant denied Brown's evidence in its entirety, and asserted that he never saw Brown prior to the trial of the case in the Recorder's Court.

The jury found the defendant "guilty as charged." The court sentenced him to imprisonment, and he appealed, assigning several parts of the charge as error.

When the appeal was heard in the Supreme Court, the defendant moved in arrest of judgment. He assigned these two reasons for his motion: (1) That the criminal pleading describes him as Ruffin *Swa*yer whereas the testimony shows that his name is Ruffin *Saw*yer; and (2) that his name does not appear in the charging part of the warrant, *i.e.*,

the complaint, and by reason thereof the warrant does not describe him with sufficient certainty to identify him as the person charged with the crimes alleged.

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

Lester G. Carter, Jr., for the defendant, appellant.

ERVIN, J. Under Rule 21, a motion in arrest of judgment for insufficiency of an indictment or warrant may be made for the first time in the Supreme Court. *S. v. Harris,* 229 N.C. 413, 50 S.E. 2d 1; *S. v. Jones,* 218 N.C. 734, 12 S.E. 2d 292; *S. v. Ballangee,* 191 N.C. 700, 132 S.E. 795; *S. v. Stephens,* 170 N.C. 745, 87 S.E. 131; *S. v. Marsh,* 132 N.C. 1000, 43 S.E. 828, 67 L.R.A. 179; *S. v. Caldwell,* 112 N.C. 854, 16 S.E. 1010; *S. v. Lumber Co.,* 109 N.C. 860, 13 S.E. 719; *S. v. Watkins,* 101 N.C. 702, 8 S.E. 346.

A motion in arrest of judgment can be based only on matters which appear on the face of the record, or on matters which should, but do not, appear on the face of the record. *S. v. Mitchem,* 188 N.C. 608, 125 S.E. 190; *S. v. Shemwell,* 180 N.C. 718, 104 S.E. 885. This being so, the objection that the defendant is given an incorrect name in the warrant is not presented by his motion in arrest, for such objection can be supported only by facts *dehors* the record.

Indeed, the defendant waived this objection by pleading not guilty and going to trial without giving the court his correct name under the rule that ordinarily an objection to the misnomer of the accused in an indictment or warrant must be raised by a plea in abatement before pleading to the merits. *S. v. Ellis,* 200 N.C. 77, 156 S.E. 157; *S. v. McCollum,* 181 N.C. 584, 107 S.E. 309; 22 C.J.S., Criminal Law, section 427. Furthermore, the names Saw-yer and Swa-yer are so nearly alike as to bring them within the rule of *idem sonans. S. v. Vincent,* 222 N.C. 543, 23 S.E. 2d 832; *S. v. Gibson,* 221 N.C. 252, 20 S.E. 2d 51; *S. v. Reynolds,* 212 N.C. 37, 192 S.E. 871; *S. v. Donnell,* 202 N.C. 782, 164 S.E. 352; *S. v. Hare,* 95 N.C. 682; *S. v. Patterson,* 24 N.C. 346, 38 Am. Dec. 699.

It is settled law that an indictment or warrant is fatally defective, and subject to a motion in arrest of judgment unless it describes the accused with sufficient certainty to identify him as the person charged with the crime alleged. *S. v. Finch,* 218 N.C. 511, 11 S.E. 2d 547; *S. v. McCollum, supra; S. v. Phelps,* 65 N.C. 450. The name of the defendant does not appear in the portion of the warrant which charges the violation of the Alcoholic Beverage Control Act of 1937. The charging part of the warrant, *i.e.,* the complaint, simply alleges that "the above" committed

the offenses specified. For these reasons, we find nothing to commend in the phraseology employed by the draftsman of the pleading. Nevertheless, we are constrained to hold the warrant adequate to overcome the present objection of the defendant. The complaint refers to the title of the action, and the warrant refers to the complaint. When the title, the complaint, and the warrant are considered together as parts of the same instrument and proceeding, they point out the defendant with due certainty as the person committing the offenses alleged. *S. v. Poythress,* 174 N.C. 809, 93 S.E. 919.

The trial court instructed the jury accurately on the law of the case, summed up the evidence of the witnesses correctly, and stated the contentions of the prosecution and defense fairly. As a consequence, the exceptions to the charge are untenable.

Inasmuch as the trial in the court below was free from legal error, the judgment will not be disturbed.

No error.

STATE v. WAYNE EVERETT CAMPO.

(Filed 13 December, 1950.)

1. Parent and Child § 2—

While the presumption of legitimacy which arises from the birth of a child in wedlock may be rebutted by a showing of nonaccess on the part of the husband, neither spouse is competent to testify as to such nonaccess.

2. Criminal Law § 48d—

An instruction from the court to disregard all controversy relating to an irrelevant and incompetent matter has the effect of striking out all evidence on the point, and thus cures the inadvertence in the initial reception of the evidence.

3. Husband and Wife § 22: Parent and Child § 14—

Conflicting evidence as to whether defendant's failure to support his wife and minor children was willful, *held* adversely determined against defendant by the jury.

4. Criminal Law § 50f—

In this prosecution of defendant for willful abandonment and nonsupport of his wife and minor child, the remark of the solicitor that the State would have to support the child unless the defendant were convicted is disapproved, but *is held* not prejudicial in the light of defendant's own evidence.

APPEAL by defendant from *Phillips, J.,* July Term, 1950, of MECKLENBURG.

Criminal prosecution on warrant charging the defendant with willful abandonment and nonsupport of his wife and their minor child in violation of G.S. 14-322.

The case was tried originally in the Domestic Relations Court of the City of Charlotte and Mecklenburg County and reached the Superior Court by appeal.

The wife of the defendant testified that she and the defendant were married in March, 1947; that a child, Judy Ann, was born to their union 3 March, 1949; that the defendant abandoned them on 6 June, 1950, since which time he has failed and refused to provide any support for either of them; that the defendant is an able-bodied man, a machinist by trade and capable of earning a competent living for himself and his family.

On cross-examination, the prosecuting witness stated that when her husband was drinking and wanted to whip the little baby for crying, she said to him "That is my baby—that baby ain't yours, but I did not mean that the baby did not belong to Mr. Campo."

The defendant, a witness in his own behalf, testified as follows:

"I married my wife in March 1947; the baby was born in March, 1949, and I was living with her at the time the child was born. The separation took place in June, 1950. I have not sent her any money since the date of the separation, nor have I given her any money for the child. I have not bought any groceries or clothes or anything for her since she left. . . . I supported my wife and the child until June 1950; . . . I did not leave her, but she left me. . . . At the time of this separation we were living with my father and mother. I had two rooms there until I could finish the house which I was building for her. . . . I was providing support for my wife and I was giving her everything I made. I was working at the Whitin Machine Works at the time and making $40.00 per week. . . . I have had no work since the date of the separation between myself and my wife."

In the solicitor's argument to the jury he remarked, "The State will have to support this child unless the defendant is convicted." Objection; overruled; exception.

From a verdict of guilty, and judgment thereon, the defendant appeals, assigning errors.

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

Uhlman S. Alexander for defendant.

STACY, C. J. The trial court inadvertently allowed the legitimacy of the child, Judy Ann, to be injected into the hearing when there was no competent evidence to raise the issue and the defendant was not making

the point. The court in its charge, after "chasing this rabbit" with some loss of track now and then, finally instructed the jury, as he should have done when the matter was first broached, to disregard the whole debate as inconsequential and pointless or without substance in the case. All the evidence on the issue purports to come from the prosecuting witness who may not speak to the subject. *S. v. Bowman,* 230 N.C. 203, 52 S.E. 2d 345, and cases cited.

Conceding the presumption of legitimacy which arises from the birth of a child in wedlock may be rebutted by evidence of nonaccess on the part of the husband, nevertheless it is the policy of the law that the evidence of nonaccess must come from third persons and not from the husband or the wife. Neither spouse is to be heard on the subject. *Ray v. Ray,* 219 N.C. 217, 13 S.E. 2d 224; *S. v. Green,* 210 N.C. 162, 185 S.E. 670. The court's instruction to the jury had the effect of striking out all the evidence on the point. This cured the inadvertence of its initial reception. *Hooper v. Hooper,* 165 N.C. 605, 81 S.E. 933; *S. v. Ballard,* 79 N.C. 627.

The defendant's only defense was that his wife left him without just cause, excuse or justification; that he had been out of work ever since their separation, and that consequently he had no way or means to support them; that his failure to support was due to his inability to find work and was not willful or malicious. *S. v. Falkner,* 182 N.C. 793, 108 S.E. 756; *S. v. Cook,* 207 N.C. 261, 176 S.E. 757; *S. v. Hinson,* 209 N.C. 187, 183 S.E. 397. The jury rejected this excuse and convicted the defendant on his own testimony.

The remark of the solicitor was incautious and should have been eschewed. However, it could hardly be regarded as prejudicial in the light of the defendant's own evidence. *S. v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466. The ruling thereon is disapproved, but held harmless on the facts of the present record. *S. v. Haslebacher,* 266 Pac. (Ore.) 900. *Cf. People v. Freitas,* 94 Pac. 2d (Cal.) 397.

The verdict and judgment will be upheld.

No error.

RUTH HOBSON v. LEWIS H. HOLT ET AL.

(Filed 13 December, 1950.)

Negligence § 19b (1)—

Evidence tending to show that plaintiff and her husband were tenants or share croppers, that they had been in possession of the mules in question for eighteen or twenty months and were aware of their propensities, and that plaintiff, while riding on top of a load of hay, her husband driving,

was injured when one of the mules of a known unmanageable nature suddenly ran, throwing her to the ground, *is held* insufficient to be submitted to the jury on the issue of negligence in an action against those in charge of the farming operations.

APPEAL by plaintiff from *Clement, J.*, August Term, 1950, of GUILFORD.

Civil action to recover damages for an alleged negligent injury.

It appears from the evidence in the case that the plaintiff and her husband, together with their five children, were tenants or share croppers on the 191-acre Holt Farm in Guilford County during the years 1948 and 1949. There is no allegation as to who leased the farm to the plaintiff and her husband; nor with whom they dealt in respect of the matter. It is alleged, contrary to plaintiff's evidence, that they were employees on the farm. The evidence seems to indicate that Mrs. Elma W. Holt and Raymond Holt, both now deceased, were in charge of the farming operations during the years 1948-1949.

On motion of defendants, plaintiff's husband was made a party defendant in the case, and a cross-action was filed against him.

There is allegation and evidence on the part of plaintiff tending to show that on 16 September, 1949, plaintiff and her husband were gathering hay with a wagon and team of mules which had been furnished them; that one of the mules, the red one, was wild, dangerous and unmanageable at times; that plaintiff had talked to Lewis Holt about the mules and he promised to get rid of them by trading them off; that plaintiff talked with Helen Holt, daughter of Mrs. Elma Holt, about the mules in the late summer of 1949; that she also talked to Joe Coble, husband of one of the Holt daughters; that on the day in question plaintiff was riding on the load of hay and her husband was driving the mules to the barn; that they came to a low light wire across the road which had to be raised in order to let the load of hay pass under it; that her husband took the pitchfork and held the wire up, and "I stepped the mules up, and instead of stepping up like I asked them to, the red one gave a leap . . . and they ran from there to the barn. . . . I was slung off the wagon just when I started to turn" from the road into the barn-yard. Plaintiff was seriously injured in the fall.

Cross-examination: "We got half the corn and tobacco and one-third of the hay. Yes, I knew one of the mules was particularly dangerous. No, he had never run with me before, but I had seen him run on several occasions."

All allegations of negligence are denied, while contributory negligence and assumption of risk are pleaded in bar of recovery.

At the close of plaintiff's evidence, there was a judgment as in case of nonsuit, from which she appeals, assigning errors.

The record is silent as to what was done with the cross-action.

York & Boyd and Harry Ganderson for plaintiff, appellant.
Hughes & Hines for defendants, appellees.

STACY, C. J. The plaintiff alleges that she was an employee on defendants' farm at the time of her injury. Her evidence tends to show that she and her husband were tenants or share croppers. The hearing produced no unison between allegation and proof and apparently no effort to fit the two. At any rate, there is no showing of responsibility on the part of any of defendants which would seem to charge them with actionable negligence. Whether upon proper pleading and proof the plaintiff might get to the jury is not before us for decision.

The plaintiff and her husband were in possession of the mules and had been for eighteen or twenty months. She was well aware of their propensities. Her injury seems to be the result of carelessness on her own part, or that of her husband, or else an unfortunate accident. *Camp v. R. R.*, 232 N.C. 487.

The record suggests an affirmance rather than a reversal of the judgment of nonsuit.

Affirmed.

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

(Filed 13 December, 1950.)

Receivers § 7—

A creditor of an insolvent, having appeared and filed claim, may not object to an order in the receivership proceedings after notice requiring it to litigate its claim in that action and restraining it from maintaining an independent action thereon.

APPEAL by movant York Mills, Inc., from *Sink, J.*, as of September Term, 1950, of MOORE. Affirmed.

This case was here at Spring Term, 1950, on the appeal of York Mills, Inc., movant, and is reported in 232 N.C. 98, where the facts are stated.

Gavin, Jackson & Gavin for National Surety Corporation, appellee.
W. D. Sabiston, Jr., for American Woolen Company, respondent.
John M. Spratt and Carroll & Steele for York Mills, Inc., appellant.

DEVIN, J. In the opinion written for the Court by *Justice Ervin* on the former appeal the cause was remanded to the Superior Court for the

determination of the validity and priority of the claim of the plaintiff in accordance with the rules regulating the "presentation, proof and payment of claims in receivership." It was held that there was no valid basis for the contention of the York Mills, Inc., that its claim is a preferred one.

In the subsequent hearing in the Superior Court of Moore County, it appeared that the successive receivers in charge of the defendants' business reported a substantial loss in the operation from July, 1949, to September, 1950, and that the present receiver did not have funds sufficient to pay the losses and continue operation. Thereupon it was ordered that the receiver cease further operation, only preserving the property, paying laborers, and collecting accounts; that the clerk give notice to all claimants and creditors to present claims in writing on or before 23 October, 1950; that the clerk give notice of meeting of all creditors with receiver 3 November, to hear his report and to make recommendations to the resident judge whether operation should be continued or the property sold and the business concluded; that all creditors and claimants be required to assert and litigate their rights in this action and be restrained from independent action thereon, and that the clerk notify all creditors and persons interested in the affairs of defendants to become parties to this action. The movant York Mills, Inc., excepted to this order and appealed.

The receivership in this case was based originally upon the affidavit of the plaintiff in which the facts constituting its cause of action are set out, the insolvency of defendants alleged, and restraining order sought, and also upon the petition of the defendants admitting insolvency and praying that a receiver be appointed to operate the business of the defendants and fulfill the contract set out in plaintiff's affidavit. Thereupon by order of court a receiver was appointed and commanded to take charge of and direct the affairs of the defendants according to the law governing receiverships and according to the further orders of the court.

The order of Judge Sink, entered September, 1950, from which the appeal in this case was taken, properly required all creditors and claimants to assert and litigate their rights in this action which was begun by issuance of summons July, 1949. The law contemplates the settlement of all claims against the insolvent debtor in the original action in which the receiver is appointed. Hence all persons who have claims against the debtor who desire to participate in the distribution of the estate must present their claims in writing to the receiver. G.S. 55-152; *Surety Corp. v. Sharpe,* 232 N.C. 98 (101), 59 S.E. 2d 593.

The appellant York Mills, Inc., has appeared in this case and filed its claim with the receiver. Its rights thereon are subject to the determination of the court in this action. Its demurrer *ore tenus* to the affidavits

on which, with defendants' petition, the receivership was ordered, cannot be sustained.

On the appeal of York Mills, Inc., the order of Judge Sink is

Affirmed.

STEWART GORDON, PETITIONER, v. MITCHELL WALLACE, RESPONDENT,

and

STEWART GORDON, A RESIDENT, TAXPAYER, AND ELECTOR OF MARKS CREEK TOWNSHIP, PRECINCT No. 2, RICHMOND COUNTY, NORTH CAROLINA, ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED, PETITIONER, v. JOHN T. PAGE, JR., CHAIRMAN, RICHMOND COUNTY BOARD OF ELECTIONS, AND JIM HAYES, MEMBER OF THE RICHMOND COUNTY BOARD OF ELECTIONS, RESPONDENTS.

(Filed 13 December, 1950.)

Appeal and Error § 31e—

Appeal from the denial of *certiorari* in proceedings protesting the manner in which a registrar was performing his duties and seeking the removal of members of the county board of elections for alleged failure in their duties in regard to the appointment of the registrar and their action on the protest, will be dismissed as academic when the registration period fixed by law has expired and the dates fixed for holding the elections have passed pending the appeal.

APPEAL by petitioner from *Sink, J.*, at 17 July, 1950, Term of RICHMOND.

"Petition for writ of *certiorari* to the North Carolina State Board of Elections."

The record discloses, summarily stated, that on 9 May, 1950, the Mayor (Stewart Gordon) and Board of Commissioners of the Town of Hamlet filed with J. Thomas Page, Jr., Chairman of the Richmond County Board of Elections, a protest as to the manner in which Registrar Wallace of Precinct No. 2, Marks Creek Township, was performing the duties of his office, to the effect that the registrar worked outside the boundary of the precinct, and hence during the week days other than Saturday the registration book was not open and available to persons qualified and desiring to register for the next ensuing primary elections; that a hearing of the protest was held by and before the County Board of Elections; and that thereupon the Board (Chairman Page and J. W. Hayes, a member, voting, and the Republican member not voting) found the evidence insufficient to warrant it taking further action, and so ordered. Petitioner, as protestant, appealed to the State Board of Elections.

The record also shows that thereafter Steward Gordon, as an elector of Precinct No. 2 of Marks Creek Township, Richmond County, in behalf of himself and other persons similarly situated, filed a petition with the State Board of Elections for the removal of Chairman Page and member Hayes, of the County Board of Elections, for failure in their duties as such in respect to (1) the appointment of Registrar Wallace, and (2) their action on the protest as above set forth.

The State Board of Elections, after hearing in Raleigh, N. C., all parties being present, entered an order dismissing the appeal in the protest to the Registrar Wallace case, and the petition for removal of Chairman and members of the County Board of Elections, "for insufficiency of the evidence."

And the record shows: "That to said order, petitioner excepted."

Petitioner petitions for *certiorari*. Respondents demur thereto on fourteen stated grounds. The court sustained the demurrer. Petitioner excepts thereto and appeals to the Supreme Court and assigns error.

G. S. Steele for plaintiff appellant.

Z. V. Morgan for defendant appellees.

PER CURIAM. The registration period fixed by law for the primary elections of 1950 having expired, and the dates fixed by law for holding of such primary elections having passed, the questions petitioner seeks to present on this appeal are academic. For that reason the appeal is dismissed on authority of *Saunders v. Bulla,* 232 N.C. 578, and cases there cited.

Appeal dismissed.

EDWIN GILL, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA, v. F. D. SMITH, ALIAS GEORGE SMITH AND WIFE, MRS. F. D. SMITH, J. B. WEBSTER, JR., AND WIFE, HELEN S. WEBSTER, AND HUGER S. KING, TRUSTEE.

(Filed 13 December, 1950.)

Appeal and Error § 2—

The trial court overruled demurrer and, in the exercise of its discretion, allowed plaintiff time to amend the complaint. Defendants excepted and appealed. *Held:* The exception is, in effect, to the refusal to dismiss the action, from which no appeal lies, and the appeal will be dismissed as premature.

APPEAL by defendant from *Bennett, Special Judge,* March Term, 1950, GUILFORD.

Civil action to have defendant Smith declared the true owner of certain property, title to which is in the name of defendant J. B. Webster, Jr., and to have same sold under execution to satisfy tax certificate judgment, heard on demurrer.

The defendants demurred to the complaint for that it fails to state a cause of action. The demurrer particularizes the alleged defects in the complaint. The court overruled the demurrer and, in the exercise of its discretion, allowed plaintiffs twenty days in which to file an amended complaint. Defendants excepted to that part of the judgment which allows plaintiff to amend and appealed.

Attorney-General McMullan, Assistant Attorneys-General Tucker and Abbott, and T. C. Hoyle, Jr., and George C. Hampton, Jr., for plaintiff, appellee.

Hughes & Hines and Welch Jordan for defendant appellants.

PER CURIAM. The order allowing time to amend had the effect of retaining the cause on the docket. So then, the taproot of defendants' exception is the refusal to dismiss the action. But no appeal lies from a refusal to dismiss. *Johnson v. Insurance Co.*, 215 N.C. 120, 1 S.E. 2d 381. The order entered was interlocutory and discretionary. G.S. 1-131, 162. That there was no motion to be allowed to amend, if such be required, is not made to appear. *Teague v. Oil Co.*, 232 N.C. 469. Appeal therefrom was premature, *Johnson v. Insurance Co., supra; Utilities Com. v. R. R.*, 223 N.C. 840, 28 S.E. 2d 490; *Privette v. Privette*, 230 N.C. 52, 51 S.E. 2d 925, and will be dismissed.

Appeal dismissed.

STATE v. J. H. PHILLIPS.

(Filed 13 December, 1950.)

APPEAL by defendant from *Carr, J.*, August Term, 1950, of WAYNE.

Criminal action tried upon indictment charging the defendant with the murder of one Henry Bruce Gurganus.

The State did not seek a conviction for murder in the first or second degree, but for manslaughter.

The facts are stated in a former appeal in this case, reported in 229 N.C. 538, 50 S.E. 2d 306, and need not be repeated here.

The jury returned a verdict of guilty of involuntary manslaughter, and from the judgment entered thereon, the defendant appeals and assigns error.

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

J. Faison Thomson and William A. Dees, Jr., for defendant.

PER CURIAM. The question of the guilt or innocence of the defendant was submitted to the jury, with appropriate instructions as to whether or not the manner in which the defendant used his pistol, resulting in the death of Henry Bruce Gurganus, amounted to culpable negligence. The jury decided the question adversely to the defendant, and no prejudicial error in the trial below is made to appear.

No error.

ROBERT C. VAUSE (EMPLOYEE) v. VAUSE FARM EQUIPMENT COMPANY, INC. (EMPLOYER), TRAVELERS INSURANCE COMPANY (CARRIER).

(Filed 2 February, 1951.)

1. Master and Servant § 40c—

"Arising out of" the employment as used in the Workmen's Compensation Act refer to the origin or cause of the accident, and required that the accident be a natural and probable consequence of the employment or incident to it, so that there be some causal relation between the accident and the performance of some service of the employment.

2. Master and Servant § 40d—

"In the course of" the employment as used in the Workmen's Compensation Act refer to the time, place, and circumstances under which the accident occurs.

3. Master and Servant § 37—

While the Workmen's Compensation Act eliminates the question of negligence as a basis for recovery thereunder, it is not the equivalent of general accident or health insurance, but provides for compensation only for those injuries by accident which arise out of and in the course of the employment.

4. Master and Servant § 40c—

In order for an accident to arise out of the employment it is not required that a hazard of the employment be the sole cause of the accident, but it is sufficient if the physical aspects of the employment contribute in some reasonable degree toward bringing about or intensifying the condition which renders the employee susceptible to the accident and consequent injury.

5. Same—

Injury due to a fall in an epileptic fit may be compensable if a particular hazard inherent in the working conditions also contributes to the fall and

consequent injury, so that after the event it may be seen that the accident had its origin in the employment.

6. Master and Servant § 55d—

A finding of the Industrial Commission is conclusive on appeal if supported by evidence, even though the evidence upon the entire record might support a contrary finding, but a finding not supported by evidence is not conclusive and the courts may review the evidence to determine this question.

7. Master and Servant § 40c—

Whether an accident arises out of the employment is a mixed question of fact and of law.

8. Same—Evidence held insufficient to show that injury from fall caused by epileptic fit arose out of the employment.

The evidence tended to show that plaintiff employee was subject to epileptic fits, that while driving the employer's truck in the course of his employment he felt a seizure approaching, stopped the truck on the side of the road, opened the door and lay down on the seat of the truck with his head on the seat opposite the steering wheel and his feet hanging out of the truck, that he immediately suffered an epileptic seizure causing him to lose consciousness, and that when he "came to" his body was on the outside of the truck and his hands on the steering wheel. The expert medical testimony was to the effect that the employee had suffered broken bones caused by the fall from the seat of the truck and that the fall resulted from the epileptic seizure. *Held:* The evidence discloses that the sole cause of the employee's moving from a position of safety to his injury was the epileptic seizure, and therefore the fall was independent of, unrelated to, and apart from the employment, and the evidence cannot support a finding of the Industrial Commission that the injury resulted from an accident arising out of the employment.

APPEAL by defendants from *Stevens, J.*, at February Civil Term, 1950, of CUMBERLAND.

Proceeding under Workmen's Compensation Act, filed by the plaintiff to recover compensation for disability resulting from an injury sustained by him 2 August, 1948, in a fall while suffering an epileptic seizure. The evidence tends to show that the plaintiff was president and general manager of the defendant employer; that he also served as an employee, devoting substantial time to the performance of manual labor; that the plaintiff, while driving a pick-up truck in the course of his employment to the home of a customer for the purpose of servicing a tractor, became faint and ill but was able to stop. He pulled the truck over to the side of the road and parked, then opened the door on his left, threw his feet outside, and lay down on the seat of the truck with his head on the side opposite from the steering wheel, and immediately suffered an epileptic seizure that caused him to lose consciousness. When he "came to," he was hanging to the steering wheel with his hands; his body was outside

of the truck with one foot on the running board and the other dangling side of it. He was trying to pull himself up in the cab. It was about three feet from the seat of the truck to the running board, and about eighteen inches from the running board to the ground.

The Industrial Commission found that the "plaintiff, as soon as he lay down, became unconscious and on account of his illness or seizure moved on the seat of the truck while in an unconscious condition and fell from the seat of the truck to the running board or ground. . . . that as a result of the fall from the seat of the truck to the running board of the truck or ground, the plaintiff employee suffered a fracture and dislocation of the hip and socket and also a fracture of one of the bones of the pelvis."

The decision of the Industrial Commission was made to turn on the following further finding of fact: "G. The question of whether or not the plaintiff employee as a result of the work was subject to any greater hazard than the public generally is subjected to is a very close one and has given the Commission much difficulty in arriving at a satisfactory conclusion. Unquestionably the plaintiff employee was required to drive the truck on account of his business. The question, therefore, is whether or not the driving of a motor vehicle constitutes a greater hazard for a fall and injury resulting therefrom than the public generally is subjected to. Many people drive automobiles. Many people drive trucks. However, this is a question of fact as well as law, and after a careful study of the question the Commission is of the opinion and finds as a fact that the plaintiff employee, in being required to drive the truck to perform his work, was subjected to a peculiar hazard or to a greater risk as an incident of his employment than the public is ordinarily subjected to."

The Commission, in awarding compensation, found and concluded "that the fall which the plaintiff suffered was the direct and proximate cause of his disability rather than his seizure. . . . that the plaintiff was subjected to a peculiar hazard as an incident to his work which resulted in his disability, and that said plaintiff suffered an injury by accident . . . arising both out of and in the course of his employment . . . which resulted in said disability."

On appeal to the Superior Court, the award of the Commission was affirmed. The defendants excepted and appealed to this Court.

Nance & Barrington for plaintiff, appellee.

H. L. Anderson and Smith, Leach & Anderson for defendants, appellants.

JOHNSON, J. The decisive question presented here is: Was there any evidence before the Industrial Commission upon which it could make a finding of fact that plaintiff was injured by an accident arising out of

his employment? A careful study of the record impels a negative answer. All of the evidence below points to the plaintiff's epileptic seizure as the sole cause of his injury.

The Workmen's Compensation Act expressly provides that a "personal injury" entitling an employee to an award of compensation "shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident." G.S. 97-2 (f); and G.S. 97-3. 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. *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; *Plemmons v. White's Service, Inc.,* 213 N.C. 148, 195 S.E. 370; *Ridout v. Rose's Stores, Inc.,* 205 N.C. 423, 171 S.E. 642; *Harden v. Furniture Co.,* 199 N.C. 733, 155 S.E. 728.

An injury arises "out of" the employment when it occurs in the course of the employment and is a natural and probable consequence or incident of it, so that there is some causal relation between the accident and the performance of some service of the employment. *Rewis v. Insurance Co.,* 226 N.C. 325, 38 S.E. 2d 97. The term "arising out of," says *Chief Justice Stacy* in *Bolling v. Belk-White Co.,* 228 N.C. 749, 46 S.E. 2d 838, has been defined to mean as "coming from the work the employee is to do, or out of the service he is to perform, and as a natural result of one of the risks of the employment. The injury must spring from the employment or have its origin therein . . . There must be some causal connection between the employment and the injury."

In the enactment of the Workmen's Compensation Act in 1929, our Legislature recognized that the common law remedies for injuries arising out of industry, based on negligence, were cumbersome, inadequate, and unjust. Therefore, a substitute was provided which broadened the base and liberalized the scope of compensation benefits for industrial injuries. The Act contains elements of mutual concessions between the employer and the employee by which the question of negligence is eliminated. "Both had suffered under the old system, the employer by heavy judgments, . . . the employee through old defenses or exhaustion in wasteful litigation. Both wanted peace. The master in exchange for limited liability was willing to pay on some claims in the future where in the past there had been no liability at all. The servant was willing not only to give up trial by jury, but to accept far less than he had often won in court, provided he was sure to get the small sum without having to fight for it." *Conrad v. Foundry Co.,* 198 N.C. 723, 153 S.E. 266, quoting from *Stertz v. Industrial Ins. Commission,* 91 Wash. 588, 158 Pac. 256.

The philosophy which supports the Workmen's Compensation Act is "that the wear and tear of human beings in modern industry should be charged to the industry, just as the wear and tear of machinery has always been charged. And while such compensation is presumably charged to the industry, and consequently to the employer or owner of the industry, eventually it becomes a part of the fair money cost of the industrial product, to be paid for by the general public patronizing such products." *Cox v. Kansas City Refining Co.*, 108 Kan. 320, 195 Pac. 863, 19 A.L.R. 90. However, it must be borne in mind that the Act was never intended to provide the equivalent of general accident or health insurance.

Hence, the fundamental fairness and logic of the requirement that to be compensable an injury must arise "out of" the employment, *i.e.*, it must in some reasonable sense spring from and be traceable to the employment. Accordingly, "where an injury cannot fairly be traced to the employment as a contributing proximate cause . . . it does not arise out of the employment." *Bryan v. T. A. Loving Co.*, 222 N.C. 724, 24 S.E. 2d 751, and cases cited.

The hazards of employment do not have to set in motion the sole causative force of an injury in order to make it compensable. By the weight of authority it is held that where a workman by reason of constitutional infirmities is predisposed to sustain injuries while engaged in labor, nevertheless the leniency and humanity of the law permit him to recover compensation if the physical aspects of the employment contribute in some reasonable degree to bring about or intensify the condition which renders him susceptible to such accident and consequent injury. But in such case "the employment must have some definite, discernible relation to the accident." *Cox v. Kansas City Refining Co., supra.* See also 58 Am. Jur., Workmen's Compensation, Section 247.

Similarly, it is generally held that where an employee is seized with an epileptic fit or dizziness and falls due to such or like causes, even so compensation will be awarded if a particular hazard inherent in the working conditions also contributes to the fall and consequent injury. See Annotations and cases reported therewith: 19 A.L.R. 95; 28 A.L.R. 204; and 60 A.L.R., 1299.

In Schneider's Workmen's Compensation, 3d Ed. (1946) Text Vol. 5, Section 1376, p. 61 *et seq.*, is found an exhaustive treatise on "Falls Due to Dizziness, Vertigo, Epilepsy and Like Causes." The text is grounded on an analysis and collation of what appears to be substantially all of the decided cases on the subject. It appears therefrom that the better considered decisions adhere to the rule that where the accident and resultant injury arise out of both the idiopathic condition of the workman and

hazards incident to the employment, the employer is liable. But not so where the idiopathic condition is the sole cause of the injury.

While there must be some causal connection between the employment and the injury, nevertheless it is sufficient if the injury is one which, after the event, may be seen to have had its origin in the employment, and it need not be shown that it is one which should have been foreseen or expected. *Conrad v. Foundry Co., supra.*

A finding of fact of the Industrial Commission is conclusive on appeal if supported by the evidence. This is so, notwithstanding the evidence upon the entire record might support a contrary finding. *Riddick v. Richmond Cedar Works,* 227 N.C. 647, 43 S.E. 2d 850. However, the findings of fact of the Industrial Commission are conclusive on appeal only when supported by evidence, and the Court, on appeal, may review the evidence to determine as a matter of law whether there is any evidence tending to support the findings. *Hildebrand v. Furniture Co.,* 212 N.C. 100, 193 S.E. 294. Therefore, the determination of whether an accident arose out of the employment is a mixed question of fact and law. *Plemmons v. White's Service, Inc., supra.*

Examining the evidence below in the light of the foregoing principles, it appears that the plaintiff while a student at State College years ago suffered a spine injury which since then has made him subject to epileptic convulsions at intermittent intervals. Dr. W. T. Rainey, who has treated the plaintiff for this condition for the past four or five years, characterized the seizures as "traumatic epilepsy." He said they produced unconsciousness and caused muscular spasms: "that they varied, some of them just a short period of unconsciousness,—just a fleeting, hardly stop, to one in which he would have convulsions in which there would be muscular contractions." The plaintiff testified he could feel one of these seizures when it was coming on. He said "they give me pretty good warning." Just before the events complained of, he felt one coming on: "I became a little nauseated or had a funny feeling in my head." Thus heeding the warning of the approaching seizure, the plaintiff drove the truck off the side of the road and lay down with his head on the side of the seat opposite the steering wheel. He said: "I stopped the truck . . . I opened the door and stuck my feet out. I more or less swung my feet so I could put my head down in the seat. My head was on the opposite side of the seat from the steering wheel." He then lost consciousness. He said the next thing he knew his body was hanging out of the truck: "When I knew anything, I was trying to pull myself back in. Evidently while I was in a subconscious mind I had fell and pulled myself, was trying to pull myself back into the truck because I had hold of the steering wheel, pulling on the steering wheel when I realized anything; but I was still in a daze. . . . I was outside of the truck . . . trying to pull myself back in . . .

had my hands over the steering wheel, with my legs extended out of the truck beyond the running board and the door. . . . I had a severe pain in my left hip. My left leg was out opposite the running board. . . . My left foot was over the running board but not on it. It was extended beyond it, towards the ground . . . my right foot was on the running board. . . . I don't know how long I was in that position in the truck, . . . I finally managed to pull myself back in the truck, because no one came along. . . . I noticed the pain when I first knew anything. My whole left leg was in severe pain. It was a paralyzed feeling."

The record discloses that there were no signs of the car "being hit," and plaintiff testified: there were "no bruises or injuries about me other than the injury mentioned to my hip." The record is silent on the circumstance of whether the surface of the road next to the parked truck showed signs of a fall or scuffle, or whether the character of the soil was such as would or would not likely have disclosed signs of a fall or scuffle.

After getting back in the truck plaintiff drove on home, using his right foot, and called for a doctor. Dr. Rainey testified that he diagnosed the injury as "a fracture and a dislocation of the hip and the socket . . . and one of the bones that form the pelvis had fractured also." He remained in traction for eleven days and left the hospital 29 September. He resumed his work 20 December, 1948. Dr. Farmer said he thought there would be some permanent disability.

Dr. Rainey testified, in answer to a hypothetical question, that the injury resulted from a fall. He also said he could not be absolutely definite about the matter. He testified in part as follows: "Q. Do you have an opinion satisfactory to yourself as to whether or not it was caused by a fall of some type? A. It could have been caused by a fall, yes, sir. Q. Would you say that's your opinion satisfactory to yourself as to the reason, I mean the cause of it? A. Yes, sir. Q. Do I understand you to say that the fall was the cause of it or it could have been the cause of it? A. It could have been the cause of it. Q. From your examination of Mr. Vause, sir, do you have an opinion satisfactory to yourself that a fall was the cause of it from your examination of him in connection with the case? A. If I chose between the fall and the convulsion, I would say the fall caused it. Q. Well, now, is that opinion satisfactory to you as a medical expert? A. Yes, sir."

Dr. William A. Farmer, who treated plaintiff at the hospital, testified that he did not have an opinion satisfactory to himself as to what caused the fracture. He said he did not have an opinion as to whether it was caused by a fall or by muscular spasm during a convulsion. But he did state: "It is my opinion that it is more logical to attribute the fracture and dislocation to his fall from the front seat of his truck rather than muscular action during a convulsive seizure."

All of the evidence tends to show that it was the epileptic seizure that caused the plaintiff to move or fall from his original reclining position on the seat of the truck. Both physicians, testifying in response to hypothetical questions based on facts as related by the plaintiff, stated that assuming such facts to be true, in the opinion of each it was the epileptic seizure that caused plaintiff to move from the reclining position on the seat of the truck to the position in which he found himself when he regained consciousness.

Dr. Rainey's testimony bearing on this matter is in pertinent part as follows: "Q. In the absence of anything else, would you say it (his epileptic seizure) did make him fall or cause him to reach that position on the assumption of the facts that he has given? A. Yes, sir. Q. You say you would? A. Yes, sir."

Dr. Farmer testified as follows on cross-examination: "Q. You did state that, from your opinion from the facts described, that his seizure caused him to move from his original position to the position which he found himself when he came to? A. I believe so."

And on re-direct examination, Dr. Farmer testified as follows: "Q. Now, doctor, by way of explanation, why do you say that in your opinion that the muscular seizure instead of a fall caused him to get out on the side of the truck away from where his head was or to fall there? A. This patient is one that has been previously diagnosed as epileptic and he stated I believe that he did feel one of these coming on, so on that, on those two facts, I base my opinion that it was an epileptic fit that caused him to change position. Q. By that you mean maybe the epileptic fit that caused him to have the fall instead of the epileptic fit that caused him to get out of the truck—You don't mean that, do you, Doctor? A. Well, however he got out, whether he changed positions or whether he fell, I still think that the epileptic seizure caused it. Q. You didn't mean to imply that in your opinion he moved out by reason of an epileptic fit instead of fell out? A. The question was worded he changed positions so I still think that he changed positions due to an epileptic seizure. Q. Whether it was a fall or whether it was a voluntary movement? A. Whether it was a fall. It must not have been voluntary because he states that he wasn't conscious at the time so it must not have been voluntary. Whether it was from a fall or involuntary contraction of the muscles, I don't know, but I think it was from an epileptic seizure."

The foregoing evidence, measured by the applicable principles of law, impels the conviction that this record does not support the Commission's finding and conclusion that plaintiff's injury arose out of the employment.

The plaintiff cites and relies on the decisions in *Rewis v. Insurance Co., supra,* and *DeVine v. Steel Co.,* 227 N.C. 684, 44 S.E. 2d 77. These decisions, however, are distinguishable. In the *Rewis case,* there was an

open question of fact whether the decedent fell to his death because of the slippery condition of the tile floor or because of his pre-existing idiopathic condition. There, the subject's employment took him to a floor which had a particular hazard and the Commission found as a fact that he fell to his death when his "feet slipped on the slick tile." This finding of fact fixed a causal connection between the employment and the accident and being supported by the record, was conclusive on appeal. *Riddick v. Richmond Cedar Works, supra.* In the instant case, the evidence is all one way. The plaintiff's employment left him in a place of safety. It was the sole force of his epileptic seizure that moved him to his hurt. Therefore, his ailment, independent of and apart from any hazard of his employment, was the sole cause of his injury.

In the *DeVine case,* the deceased was required to stand on a cement platform to lower a flag from the flag pole each day. He was found unconscious at the bottom of the flag pole, with ropes of the flag pole tangled with his body, under circumstances tending to show that while engaged in the performance of his duties he had fallen and hit the back of his head on the cement platform, which injury caused his death. The determinative factor sustaining the award was the fact that the exact cause of the fall was undetermined. In such a situation, our decisions, liberally interpreting the Workmen's Compensation Act, indulge the inference that the accident arises out of a hazard of employment, and when the Commission so finds, the finding is conclusive on appeal. The rule which distinguishes the *DeVine case* is explained by *Justice Barnhill* in *Robbins v. Hosiery Mills,* 220 N.C. 246, 17 S.E. 2d 20, as follows: "where the employee, while about his work, suffers an injury in the ordinary course of his employment, the cause of which is unexplained but which is a natural and probable result of a risk thereof, and the Commission finds from all the attendant facts and circumstances that the injury arose out of the employment, an award will be sustained. If, however, the cause is known and is independent of, unrelated to, and apart from the employment, . . . compensation will not be allowed."

In the opinion of the Industrial Commission allowing compensation below, several decisions from other jurisdictions are cited in support of the award. The better considered of these cited cases are distinguishable. In the main, they simply apply the general rule, which is in accord with the decisions of this Court, that where an employee falls from a building, scaffold, ladder, or other place of danger where his employment places him, the accident, if it appears to be incident to and a natural result of a particular risk of the work, may be said to arise out of the employment, even though illness or some pre-existing infirmity may have been a contributing cause of the fall. *Rewis v. Insurance Company, supra; DeVine v. Steel Co., supra; Robbins v. Hosiery Mills, supra.*

In *Mausert v. Albany Builders' Supply Co.,* 250 N.Y. 21, 164 N.E. 729, the deceased was employed as a teamster. While driving his horses over smooth pavement, he fell from his seat, and two wheels passed over his body. Within three hours he died. There was no evidence that his fall was intentional and the carrier disclaimed any attempt to prove intoxication. There was no proof of illness preceding the fall. The Industrial Board made no finding in respect to the cause of the fall, leaving the cause entirely undetermined. There, the fall, being unexplained but appearing to have been naturally incident to the employment, was treated by the Board as *prima facie* evidence that the fall arose out of the employment. The award was upheld by the New York Court under application of the same rule which this Court applied in *DeVine v. Steel Company, supra,* and *Robbins v. Hosiery Mills, supra.*

In *Wicks v. Dowell & Co.,* 2 K.B. (Eng.), 225, 74 L.J.K.B.N.S. 572, 53 Week. Rep. 515, 92 L.T.N.S. 677, 21 Times L.R. 487, 2 Am. Cas. 732, the English Court held that compensation was properly awarded for injuries to a workman employed in unloading a ship, resulting when he, during an epileptic seizure, fell into an open hatchway near which he was required to work, *Collins, M. R.,* stating the accident arose out of the employment "because by the conditions of his employment the workman was bound to stand on the edge of what I might style a precipice, and if in that position he was seized with a fit he would almost necessarily fall over. If this is so, the accident was caused by his necessary proximity to the precipice, for the fall was brought about by the necessity for his standing in that position." The facts which distinguish the *Wicks case* from the one at bar are obvious: There, the location of employee's work was a peculiar hazard. Here, the claimant felt the seizure coming on, stopped the truck, and lay down in a position of apparent safety.

In *Rockford Hotel Co. v. Industrial Commission,* 300 Ill. 87, 132 N.E. 759, 19 A.L.R. 80, an award was upheld where a fireman who in the usual course of his employment, while suffering an epileptic fit, fell into a pit of hot cinders which he was removing from a furnace and was burned to death. The factors which distinguish that case from the one at bar are: (1) There, again, the location of the employee's work involved a peculiar hazard,—he was required to work in close proximity to an open pit, a place of danger; and (2) the workman apparently was seized suddenly and without warning.

In *Shipbuilding Co. v. Webster,* 139 Md. 616, 116 Atl. 842, it was held that the death of a carpenter employed in the construction of a ship was the result of an accident arising out of the employment, where, in stooping to pick up tools from the deck of the ship he was attacked by vertigo or an epileptic fit and fell over backward off the ship, a distance of forty-five feet. In that case, in addition to the natural danger inherent in the

location of the work, there was evidence that the workman slipped on a rivet. Hence, the cause of the accident was an open question of fact, and the finding below that the accident arose out of the employment was sustained on appeal.

In the case of *Gonier v. Chase Companies,* 97 Conn. 46, 115 Atl. 677, 19 A.L.R. 83, Gonier, a painter, suffered an attack of indigestion and fell from a scaffolding eleven feet above the surface which was covered with wooden paving blocks. There, the evidence of the natural risks incident to the elevated location of the place of work provided adequate causal connection between the employment and the injury.

Similarly, most of the other cases cited in the opinion of the Commission are distinguishable from the facts in the instant case.

Conceding that, as found by the Commission, the plaintiff "in being required to drive the truck to perform his work, was (thereby) subjected to a peculiar hazard," even so the evidence here discloses no causal connection between the operation of the truck and the injury. The evidence here shows that the plaintiff felt the epileptic seizure coming on. He pulled the truck off the road, parked it, and lay down on the seat in a place of apparent safety, with all of the ordinary dangers of his employment suspended and in repose. We perceive in this evidence no showing that any hazard of the employment contributed in any degree to the unfortunate occurrence. The evidence affirmatively shows that it was solely the force of his unfortunate seizure that moved him from his position of safety to his injury. The cause of the fall is not in doubt. It is not subject to dual inferences. All of the evidence shows that the cause of the plaintiff's fall was "independent of, unrelated to, and apart from the employment." *Robbins v. Hosiery Mills, supra.* The chain of cause and effect clearly leads in unbroken sequence from the plaintiff's unfortunate physical seizure, brought on by a pre-existing infirmity, to his injury. The award below can be sustained only by disregarding the epileptic seizure as a cause of the injury and by starting in the chain of causation at the point of the fall. To say that the injury was caused by the fall, and thus eliminate from consideration the epileptic seizure as the cause of the fall is not in accord with the fundamental principles by which the law fixes and determines the cause and effect of events. Any such process of reasoning, in effect, would strike out of the Workmen's Compensation Act the provision which requires that an injury to be compensable shall arise "out of the employment." As to whether the scope of the Act should be so extended would seem to be a matter to be pondered by the legislative body rather than the Court.

The judgment of the lower court is

Reversed.

GUY ROLLISON v. ALFRED HICKS.

(Filed 2 February, 1951.)

1. Automobiles § 12a—

The fact that a vehicle is being driven within the statutory speed limit does not render the speed lawful when by reason of special hazards the speed is greater than is reasonable and prudent under the existing conditions. G.S. 20-141.

2. Automobiles § 18h (2)—Evidence of excessive speed resulting in injury to person riding on back of truck body held for jury.

The evidence, considered in the light most favorable to plaintiff, tended to show that the truck in question, equipped with side railing extending backwards only about five feet, was loaded with cement blocks on the bottom, on top of which were loaded doors and windows, that plaintiff employer, who had been driving the truck at a speed not exceeding twenty-five miles per hour, mounted the rear of the truck, and stood on the four feet left vacant of load, to hold the windows, instructing the employee to drive slowly, and that the employee accelerated the speed to forty miles per hour over a rough and bumpy highway with which he was familiar, so that when the truck hit a ridge five inches high, the impact hurled one of the unfastened doors against plaintiff, knocking him from the rear of the truck to his injury. *Held:* Whether the employee drove the truck at a speed greater than was reasonable and prudent under the conditions, and whether such speed was a proximate cause of the injury to plaintiff, were questions of fact for the determination of the jury.

3. Negligence § 17—

Contributory negligence is an affirmative defense which defendant must plead and prove. G.S. 1-139.

4. Negligence § 19c—

Nonsuit on the ground of contributory negligence is proper only when this defense is established by plaintiff's own evidence as the sole inference that can reasonably be drawn therefrom.

5. Automobiles § 18h (3)—Evidence held insufficient to show contributory negligence as a matter of law on part of employer in standing on rear of truck carrying loose load.

The evidence tended to show that plaintiff employer stood on the four feet at the rear of the truck left vacant after the truck had been loaded with cement blocks upon which had been placed doors and windows. The side railings of the truck extended backward only five feet, and the employer stood at the back to hold the windows, and instructed the employee-driver to drive slowly. The driver accelerated to forty miles per hour over a rough and bumpy highway. The cab of the truck was closed against the cold so that the employer could not protest against such speed. The impact of the truck against a five-inch elevation in the highway caused one of the unfastened doors to be hurled against plaintiff, knocking him to the highway. *Held:* Plaintiff was not guilty of contributory negligence as a matter of law, and the employee-driver's motion to nonsuit on this ground was properly denied.

6. Master and Servant § 1—

A person performing work for hire under the supervision and control of another becomes the servant of such other in the performance of the work.

7. Master and Servant § 20½—

The doctrine that the negligence of the employee will be imputed to the employer does not apply in an action by the employer to recover for injury sustained by reason of the negligence of the employee, the doctrine of imputed negligence being applicable upon such relationship only in regard to the employer's liability to third persons and in regard to contributory negligence when the employer seeks to recover for the negligent act of a third person.

8. Automobiles § 20b—

The doctrine that where the driver and the passenger are engaged in a joint enterprise, the negligence of the driver will be imputed to the passenger, applies only in regard to third persons and not in regard to their liability between themselves.

BARNHILL, J., dissenting.

APPEAL by defendant from *Bone, J.*, and a jury, at the May Term, 1950, of PAMLICO.

Civil action by employer against employee to recover damages for personal injury allegedly caused by actionable negligence of the employee in the operation of a motor vehicle in which the employer was riding.

The plaintiff's complaint and testimony make out this case:

1. On 21 February, 1949, which was a cold and somewhat windy day, the plaintiff, Guy Rollison, as the managing partner in a firm known as the Bayboro Hardware Company, received an order from a customer in a rural section of Pamlico County, for some concrete blocks, doors, and windows. Inasmuch as the partnership had no conveyance, the plaintiff rented a motor truck from J. W. Cowell, and employed the regular driver of such vehicle, the defendant Alfred Hicks, and his helper, Marcellus Cobb, to assist him in loading, transporting, and delivering the building materials. The plaintiff had the right to control the defendant and his helper in the performance of these tasks.

2. The body of the truck consisted of an enclosed cab for the driver, and an open platform at the rear for the load. The platform was fourteen feet in length, and was equipped with side railings extending backwards from the cab for a distance of about five feet. The vehicle was loaded under the supervision of the plaintiff. The concrete blocks, which weighed forty pounds each and comprised two-thirds of the load, were stacked at the bottom, and the doors and windows were placed on them with "the doors up to the front and the window sashes back in the center." The doors and windows simply rested on the blocks, and were not fastened to the truck in any way. The entire load weighed about three

tons, and covered the fore part of the platform, leaving a space four feet long vacant at the rear. The cab, the side railings, and the load were approximately equal in height, for they "came up a little above" the plaintiff's waist when he stood upon the platform of the truck.

3. The route from Bayboro to the place for delivery to the customer included a stretch of Highway 55, where the stress of traffic and weather had cracked the paved roadway in innumerable places. As a result, the surface of the highway was rough. At a point just east of the Alligator Creek bridge, the bursting of the pavement and subsequent efforts to repair the resulting crevice with an asphaltic composition had created an elevated ridge five inches high and eighteen inches wide extending across the entire traveled portion of the highway. There were "similar patches all up and down the road."

4. Both the plaintiff and the defendant had knowledge of the uneven surface of the roadway described in the preceding paragraph. On nearing the beginning of the rough stretch of highway, the plaintiff, who had been driving at a speed not exceeding 25 miles an hour, brought the truck to a halt, alighted, and inspected the load. He concluded that "the windows could easily fall and break," and decided to ride on the vacant space at the back of the platform for the purpose of steadying the windows and preventing them from falling. He thereupon entrusted the further driving of the truck to the defendant with the positive order "to drive slow."

5. When they entered upon the rough stretch of Highway 55, the defendant was driving the truck, Marcellus Cobb was sitting beside him on the seat of the cab, and the plaintiff was riding on the vacant space at the back of the platform to steady the windows and prevent them from falling. The cab was tightly closed to keep out the cold. The defendant accelerated the truck to a speed of 40 miles an hour. The plaintiff could not protest against such speed or order the defendant to reduce it because the closed state of the cab and the noise of the moving vehicle and wind made communication between plaintiff and defendant a physical impossibility. While the truck was being driven by the defendant over the bumpy roadway at a speed of 40 miles an hour, it struck the elevated ridge just east of the Alligator Creek bridge with a resounding thump actually heard at least 200 yards away. The impact of the truck and elevated ridge hurled one of the unfastened doors against the plaintiff, knocking him from the rear of the truck to the paved road and inflicting upon him lasting personal injuries of a most disabling and painful character.

The defendant answered, denying actionable negligence on his part and pleading contributory negligence on the part of the plaintiff. He offered testimony to sustain his allegations.

Issues were submitted to, and answered by the jury 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 own injury, as alleged in the answer? Answer: No.

3. What damages, if any, is plaintiff entitled to recover? Answer: $18,000.00.

Judgment was rendered on the verdict, and the defendant appealed, assigning the refusal of the court to nonsuit the action and various other rulings as error.

Bernard B. Hollowell and Rodman & Rodman for plaintiff, appellee.

Barden, Stith & McCotter for defendant, appellant.

ERVIN, J. The exception to the refusal of the trial court to dismiss the action upon a compulsory nonsuit raises this question at the threshold of the appeal: Was the evidence introduced by plaintiff at the trial sufficient to carry the case to the jury, and to support its finding on the first issue, *i.e.*, that the plaintiff was injured by the actionable negligence of the defendant?

The plaintiff's case is predicated on the theory that the defendant drove the truck at an excessive speed in a place outside a business or residential district, and thereby proximately caused personal injury to the plaintiff.

The testimony shows that the defendant did not exceed the absolute speed limit of forty-five miles per hour fixed by the statute for the truck in the place where it was being driven. G.S. 20-141 as rewritten by Section 17 of Chapter 1067 of the 1947 Session Laws. This fact is not sufficient of itself, however, to exonerate the defendant from liability to the plaintiff. The statute cited expressly provides that "the fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the driver from the duty to decrease speed . . . when special hazard exists . . . by reason of . . . highway conditions," and that "no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing."

When the evidence adduced by plaintiff at the trial is appraised in the light most favorable for him, it warrants these inferences: That the surface of Highway 55 was rough and bumpy, rendering the road hazardous for occupants of motor vehicles proceeding thereon at ordinary speeds. That the defendant knew the hazardous condition of the highway and that his employer, the plaintiff, was riding on the platform of the truck to steady its unfastened load. That the defendant was ordered by plaintiff "to drive slow." That notwithstanding his knowledge of the

condition of the road and of the position of the plaintiff, and notwithstanding the order to proceed slowly, the defendant drove the truck over the rough and bumpy road at a speed of forty miles per hour when he knew, or by the exercise of reasonable care would have known, that such speed in combination with the uneven surface of the highway was likely to occasion injury to the plaintiff. That the defendant did thereby in fact cause injury to the plaintiff.

This being true, whether the defendant drove the truck on the highway at a speed greater than was reasonable and prudent under the conditions then existing, and whether such speed was the proximate cause of injury to the plaintiff were questions of fact for the determination of the jury. *Howard v. Bell,* 232 N.C. 611, 62 S.E. 2d 323; *Perry v. McLaughlin,* 212 Cal. 1, 297 P. 554; *Richard v. Roquevert* (La. App.), 148 So. 92; *Anderson v. Anderson,* 188 Minn. 602, 248 N.W. 35; *Morgan v. Krasne,* 284 N.Y.S. 723, 246 App. Div. 799; *Meath v. Northern Pac. Ray. Co.,* 179 Wash. 177, 36 P. 2d 533.

The exception to the refusal of the motion for nonsuit likewise raises this question: Was the plaintiff guilty of contributory negligence barring his recovery as a matter of law?

The test for determining whether the question of contributory negligence is one of law for the court or one of fact for the jury is restated in the recent case of *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307, where this is said: "Contributory negligence is an affirmative defense which the defendant must plead and prove. G.S. 1-139. Nevertheless, the rule is firmly embedded in our adjective law that a defendant may take advantage of his plea of contributory negligence by a motion for a compulsory judgment of nonsuit under G.S. 1-183 when the facts necessary to show the contributory negligence are established by the plaintiff's own evidence. . . . A judgment of involuntary nonsuit cannot be rendered on the theory that the plea of contributory negligence has been established by the plaintiff's evidence unless the testimony tending to prove contributory negligence is so clear that no other conclusion can be reasonably drawn therefrom. . . . If the controlling or pertinent facts are in dispute, or more than one inference may reasonably be drawn from the evidence, the question of contributory negligence must be submitted to the jury."

When the plaintiff's testimony is laid alongside this test, it is manifest that the question whether plaintiff was contributorily negligent was one of fact for the jury, and not one of law for the court. *Graham v. Charlotte,* 186 N.C. 649, 120 S.E. 466; *Crane Co. v. Mathes,* 42 F. 2d 215; *Agnew v. Wenstrand,* 33 Cal. App. 2d 21, 90 P. 2d 813; *Chapman v. Pickwick Stages System,* 117 Cal. App. 560, 4 P. 2d 283; *Wirth v. Pokert,* 19 La. App. 690, 140 So. 234; *Nichols v. Rougeau,* 284 Mass. 371, 187

N.E. 710; *Breger v. Feigenson Bros. Co.*, 264 Mich. 37, 249 N.W. 493; *Clifton v. Caraker* (Mo. App.), 50 S.W. 2d 758.

The evidence does not compel the single conclusion that the plaintiff had actual control and direction of the operation of the truck at the time of the accident, and in consequence participated in any negligence of the defendant in its management. It justifies the opposing inference that the defendant drove the truck over the rough and bumpy highway at an excessive speed in violation of the positive command of the plaintiff "to drive slow," and that the relative positions of the parties in the vehicle robbed the plaintiff of the physical power to protest against such speed or to order the defendant to reduce it.

Furthermore, the testimony does not impel the sole deduction that it was necessarily negligent for the plaintiff to fail to fasten the building materials to the truck, and to ride on the vacant place at the rear of the truck to prevent the windows from falling and breaking. It supports these contrary inferences: That there was no practical way to fasten the concrete blocks, doors, and windows to the platform of the truck; that the plaintiff reasonably anticipated that the concrete blocks and doors would be held in place by gravity, and that he could ride on the rear of the platform and prevent the windows from falling and breaking without substantial risk to himself provided the truck should be driven at a proper speed; that he ordered the defendant to drive the truck slowly, and reasonably anticipated that his order would be obeyed; that the plaintiff took no risk in loading the truck or in riding thereon beyond that inherent in the ordinary activities of the business in which he was engaged; and that the unanticipated and disobedient act of the defendant in driving the truck at an excessive speed was the sole proximate cause of the plaintiff's injury.

The third question posed by the appeal is whether the negligence of the defendant is imputable in law to the plaintiff so as to bar the plaintiff from suing the defendant for his personal injury. This problem arises on the exception to the refusal of the motion for nonsuit, an exception to the denial of a request for instruction, and a demurrer *ore tenus*.

The defendant insists initially on this phase of the litigation that the defendant operated the truck as a servant of the plaintiff, and that any negligence on his part in the management of the truck is imputable in law to his master, the plaintiff, and defeats this action.

When J. W. Cowell furnished his truck with its driver, the defendant, to the plaintiff for the performance of the latter's work, he placed the defendant under the control of the plaintiff. As a consequence, the defendant became the servant of the plaintiff while performing the plaintiff's work. *Leonard v. Transfer Co.*, 218 N.C. 667, 12 S.E. 2d 729; *Shapiro v. Winston-Salem*, 212 N.C. 751, 194 S.E. 479.

The doctrine of imputed negligence visits upon one person legal responsibility for the negligent conduct of another. It applies, however, only in limited classes of cases. In its application to the law of master and servant, it appears in these two rules:

1. The master is liable to a third person for an injury caused by the actionable negligence of his servant acting within the scope of his employment. *Dickerson v. Refining Co.,* 201 N.C. 90, 159 S.E. 446; 35 Am. Jur., Master and Servant, sections 532, 543; Michie: The Law of Automobiles in North Carolina (3d Ed.), section 139.

2. The master is barred from recovery from a negligent third person by the contributory negligence of his servant acting within the scope of his employment. *Hampton v. Hawkins,* 219 N.C. 205, 13 S.E. 2d 227; 38 Am. Jur., Negligence, section 236; Am. Law Inst. Restatement, Torts, Vol. 2, section 486.

The doctrine of imputed negligence has no application, however, to actions brought by the master against the servant to recover for injuries suffered by the former as a result of the latter's actionable negligence. *Branch v. Chappell,* 119 N.C. 81, 25 S.E. 783; *Shaker v. Shaker,* 129 Conn. 518, 29 A. 2d 765; *Donohue v. Jette,* 106 Conn. 231, 137 A. 724; *Rosenfield v. Matthews,* 201 Minn. 113, 275 N.W. 698; *Darman v. Zilch,* 56 R.I. 413, 186 A. 21, 110 A.L.R. 826, and cases collected in the ensuing annotation; Michie: The Law of Automobiles in North Carolina (3d Ed.), section 58; 65 C.J.S., Negligence, section 161.

These differing applications of the doctrine of imputed negligence are clearly understandable if due heed is paid to a fundamental truth. One of the basic concepts of our jurisprudence is embodied in the ancient Latin maxim *ratio legis est anima legis; mutata legis ratione, mutatur et lex,* meaning "reason is the soul of law; the reason of law being changed, the law is also changed."

Inasmuch as the master undertakes to manage his affairs through his servant, it is just that he be charged in law with the negligent conduct of his servant acting within the scope of his employment where the rights or liabilities of third persons are involved. But it would offend justice and right to impute the negligence of a servant to his master and thus exempt him from the consequences of his own wrong-doing where the negligence proximately causes injury to a master who is without personal fault.

The defendant contends secondarily on the present phase of the controversy that he and the plaintiff were engaged in a joint enterprise in the operation of the truck, and that any negligence on his part in its management is imputable in law to his fellow adventurer, the plaintiff, and defeats this action.

The legal standing of the defendant is not improved a whit by the assumption that he and the plaintiff were engaged in a joint enterprise

in the operation of the truck; for the relevant legal rule in such case is as follows: "The doctrine of joint enterprise whereby the negligence of one member of the enterprise is imputable to others, resting as it does upon the relationship of agency of one for the other, does not apply in actions between members of the joint enterprise and does not, therefore, prevent one member of the enterprise from holding another liable for personal injuries inflicted by the latter's negligence in the prosecution of the enterprise. In other words, the doctrine of common or joint enterprise as a defense is applicable only as regards third persons and not parties to the enterprise. Ordinary negligence on the part of a member of a joint enterprise, resulting in injury to the other member, renders him liable for the injury." 38 Am. Jur., Negligence, section 238. See, also, these accordant authorities: *Legerwood v. Legerwood,* 114 Cal. App. 538, 300 P. 144; *Mencher v. Goldstein,* 269 N.Y.S. 846, 240 App. Div. 290; *Smith v. Williams,* 180 Or. 626, 178 P. 2d 710, 173 A.L.R. 1220; 65 C.J.S., Negligence, section 158; Blashfield: Cyclopedia of Automobile Law and Practice (Perm. Ed.), sections 2373, 2868.

The legal questions presented by the remaining exceptions have been decided adversely to defendant in well considered precedents, and require no discussion.

The judgment of the Superior Court will not be disturbed; for there is in law

No error.

BARNHILL, J., dissenting: I concur in the conclusion that the doctrine of imputed negligence has no application here. The record, however, leads me to disagree on the question of contributory negligence of the plaintiff. He was familiar with the condition of the road. He had charge of and supervised the loading of the truck. He knew that loose, unfastened doors and windows were on the top of the load, unprotected by any railing, and were likely to slip and slide about as the truck progressed. With this knowledge he voluntarily assumed a standing position on a restricted area of the rear of the truck platform with nothing to hold to or lean against except the loose windows he was attempting to keep from falling. The position he thus assumed was obviously dangerous, and he assumed the risk incident thereto. His unfortunate injuries grew out of those risks and resulted, in part at least, from his own failure to exercise proper care for his own safety.

A review of plaintiff's own testimony, it seems to me, demonstrates the soundness of this conclusion. He himself testified to facts in substance as follows:

The truck was loaded under his supervision. The concrete blocks, shingles, and composition roof were at the bottom. Six or seven doors

and about fifteen windows were on the top, the doors being to the front and the windows to the rear. The doors and windows were not fastened because he had no rope with which to tie them. The railings of the truck extended back from the cab only about one-third the length of the truck platform so that there was no railing or other protection where the windows were loaded and he was standing.

He knew that the doors and windows were unfastened and were likely to shift about and fall off. That is the very reason he assigned for assuming an insecure position on the truck platform. "We didn't have any rails around the truck, and I knew the windows could easily fall and break; we didn't have any rope to tie the load on, and so I . . . decided I would get off and hold the windows on."

While he testified defendant drove about 25 m.p.h. until he passed through Stonewall and then speeded up, this is not his full testimony in respect of the speed. He testified that he estimated the speed at the time the truck hit the "bump" at about 40 m.p.h.; he was not disturbed by defendant's driving other than the wind was blowing rather fast and getting in his face, and he had tears in his eyes and was getting cold; there was nothing unusual in the way the truck was being operated; the load was not jumping up and down for he had not been going fast enough for that.

The plaintiff was familiar with the road and knew it was rough. The "bump" in the road was not a sharp ridge. It was flat, being about 15 or 18 inches wide and several inches high, formed by the repair of a break in the pavement.

The wind was blowing, and it was the wind which caused the untied door and windows to strike plaintiff. When the truck passed over the bump "the wind caught up under one of those doors and lifted it like this and sailed it back on me. . . . The windows sailed onto me and knocked me off backwards on the hard surface road." It requires a liberal construction of this testimony to support a finding that defendant was guilty of any act of negligence which proximately caused plaintiff's injuries. Grant negligence on the part of the defendant and the fact remains that plaintiff, with full knowledge of all the facts, assumed a standing position on a narrow ledge of the platform of an overloaded truck when he had nothing to which he could hold or balance himself other than the loose windows he was attempting to hold in place.

The general rule is stated in *Smith v. Mills Co.*, 238 S.W. 573, as follows: "Where a person voluntarily assumes a position of imminent danger when there is at hand and accessible to him a place of safety, and by reason of having taken the dangerous position he is injured, he can have no recovery against another who is also negligent because such person's negligence in taking the dangerous position is one of the direct and

proximate causes of the injury and contributes thereto. In such cases it becomes the duty of the court to direct a verdict."

A person who, by his own act, subjects himself unnecessarily to danger, violates the duty imposed upon all men to exercise ordinary care for their own safety. *Terminal Co. v. Hancock,* 78 N.E. 964, 6 L.R.A. ns 997, 38 A.J. 859. One cannot voluntarily put it out of his power to use due care to protect himself and then recover from others for the consequences. *Covington v. Lee,* 89 S.W. 493, 2 L.R.A. ns 481. One who rashly and unnecessarily exposes himself to danger cannot recover for injuries thus brought upon himself. *Norris v. R. R.,* 152 N.C. 505.

The combination of facts and circumstances which invoke the application of the same principle of law are sometimes as variable as the wind. My search has disclosed two cases substantially similar. Factually neither is quite so conclusive as here; yet both are in point. In *Crider v. Coke Co.,* 89 So. 285, the plaintiff was riding on the platform of defendant's truck in a standing position, with his arm on the top of the cab. The truck ran into a hole in the road and plaintiff was thrown out and injured. The court concluded he was guilty of contributory negligence as a matter of law. In *Zavodnick v. Rose & Son,* 146 A. 455, one Zavodnick was standing on the open platform of a truck, holding or "hanging" to a stake or stanchion. A wheel of the truck struck a depression some six inches in depth. He was thrown to the pavement, receiving injuries which caused his death. Plaintiff, the widow, sued and recovered in the lower court. On appeal the Court reached the same conclusion as in the *Crider case* and reversed on that and other grounds.

In the instant case there were the additional dangers of restricted space in which to stand, the loose window sash on top of the load, and the nearness to the open, unprotected rear of the platform.

This is not a case where an employee was directed or, in the course of his employment, was required to assume a position of great hazard. If it were, I might be inclined to a different conclusion, for in such cases it is sometimes difficult to appreciate or to appraise the economic pressure which compels a wage earner, in discharging his duties, to assume risks his better judgment tells him he should avoid.

The plaintiff was in full charge. He was the master. He knew the load should be fastened but he did not have the necessary rope and did not care to take the time to procure it. Instead, with full knowledge of the hazards he himself had created and being aware that the road to be traveled was rough, he voluntarily left a place of safety and assumed a precarious position, the attendant hazards of which must have been apparent to any man of ordinary prudence. *Atkins v. Transportation Co.,* 224 N.C. 688. He thus put it out of his power to use due care to protect himself. In my opinion the question of contributory negligence

should be resolved against him. *Bailey v. R. R.*, 223 N.C. 244; *Daughtry v. Cline*, 224 N.C. 381; *Bundy v. Powell*, 229 N.C. 707. I therefore vote to reverse.

ROBERT E. VAIL, WILLIAM C. VAIL, S. PERRY VAIL, AND WINNIE VAIL YOW, V. V. B. VAIL AND WIFE, FAY VAIL.

(Filed 2 February, 1951.)

1. Fraud § 1—

While fraud may not be defined, it embraces the taking of undue or unconscionable advantage of another through breach of legal or equitable duty by acts, omissions, or concealments.

2. Same—

To constitute actionable fraud there must be a false representation or concealment of a material fact, which is reasonably calculated to deceive and made with the intent to deceive, which does deceive to the hurt of the injured party.

3. Same—

The breach of duty by a fiduciary to disclose all material facts constitutes fraud.

4. Same—

A fiduciary relationship exists whenever there is special confidence on the one side which results in superiority or influence on the other, and the relationship exists as between an agent and his principal.

5. Fraud § 5—

The general rule that a literate party who signs an instrument is charged with knowledge of its contents, does not apply when the party offering the instrument for signature stands in a fiduciary relationship and there are elements of positive fraud and deception justifying the person signing the instrument in not discovering its contents.

6. Cancellation and Rescission of Instruments §§ 2, 12—Evidence held sufficient for jury in this action to cancel deed for fraud.

Plaintiffs' evidence tending to show that defendant was accustomed to looking after his aged mother, running a great many errands and performing many personal services for her, and helping in collecting her rents, that she directed him as her agent to prepare a conveyance of a certain lot to himself as a gift, that he surreptitiously substituted the description of a larger and more valuable tract and by silently pretending that the deed was written as directed, procured his mother's signature without her discovering the substitution of descriptions, with evidence that shortly after her death he admitted to others his subterfuge, *is held* sufficient to make out a *prima facie* case of fraud sufficient to overrule defendant's motion to nonsuit.

7. Limitation of Actions § 16—

Upon defendant's plea of the applicable statute of limitations, the burden is upon plaintiffs to show their claim is not barred.

8. Limitation of Actions § 5b—

A cause of action based on fraud does not accrue and the statute of limitations does not begin to run until the facts constituting the fraud are known or should have been discovered in the exercise of due diligence.

9. Same—

Where the person perpetrating the fraud is a fiduciary, the party defrauded is under no duty to make inquiry until something happens which reasonably excites his suspicion that the fiduciary has breached his duty to disclose all the essential facts and to take no unfair advantage.

10. Same—

The mere registration of a deed, standing alone, will not be imputed for constructive notice to the grantor that a description other than the one intended had been surreptitiously substituted therein, in the absence of facts and circumstances sufficient to put the defrauded person upon inquiry, certainly where the person preparing the deed stands in a fiduciary relationship to the grantor.

11. Same—Facts constituting fraud held not discoverable in exercise of due diligence by defrauded grantor.

Defendant was directed by his mother to prepare a conveyance to himself of a certain tract of land. Defendant surreptitiously substituted a description of a larger and more valuable tract, which deed reserved therein, as directed, a life estate in the grantor. The grantor died some three years and seven months thereafter. There was nothing to rebut the inference that she retained possession of the property until her death. *Held:* There being nothing to excite the grantor's suspicion or to put her upon inquiry during her lifetime, the statute did not begin to run against her, and the action of the devisees of the property to set aside the conveyance for fraud, instituted within three years of the grantor's death, is not barred. G.S. 1-52 (9).

12. Same—

Knowledge by a devisee that the grantee in a deed executed by his ancestor had perpetrated a fraud by substituting a different description in the deed, the statute not having begun to run against the grantor in her lifetime, *held* not to bar the devisee's action to set aside the conveyance for fraud instituted within three years of the grantor's death, since the devisee had no cause of action until the grantor's death.

APPEAL by plaintiffs from *Bennett, Special Judge*, February Term, 1950, of GUILFORD.

Civil action to set aside a deed from the late Minnie P. Vail, mother of the plaintiffs, to her son, Victor B. Vail, for fraud and deceit allegedly practiced by him upon his mother in causing to be inserted in the deed to

him the description of a lot different from and of greater value than the one intended by the mother to be conveyed.

Plaintiffs allege in their complaint: That on 2 October, 1944, the late Minnie P. Vail executed and delivered to her son, Victor B. Vail, a deed to a certain lot located on South Main Street in the city of High Point, known as the Vail home place; that at that time Minnie P. Vail was a widow approximately seventy-eight years of age; that her son, the defendant Victor B. Vail, frequently acted as her agent in handling her rental real estate; that sometime prior to 2 October, 1944, Mrs. Minnie P. Vail, mother of the plaintiffs, authorized her son, Victor B. Vail, to lay off a small lot with a house thereon, located on Vail Alley some distance from the Vail home place, and obtain an accurate description so she could convey the house and lot to him as a gift; that Victor B. Vail failed to carry out the instructions of his mother; that, instead, and contrary to her wishes and directions, and without her knowledge, he caused to be inserted in the deed to him the description of the Vail home place on South Main Street, embracing property of much greater value than the small lot and house intended by the mother to be conveyed. Plaintiffs further allege that they are residuary legatees under the will of their mother and as such are entitled to have the deed made by her to Victor B. Vail set aside.

The defendants filed answer denying the material allegations of the complaint and setting up the three-year statute of limitations. G.S. 1-52, subsection 9, in bar of plaintiffs' right to recover.

Upon the trial in the court below, the plaintiffs offered evidence in pertinent part as follows: for the purpose of attack, the deed from Minnie P. Vail to Victor B. Vail, dated 2 October, 1944, filed for registration in the Public Registry of Guilford County 3 October, 1944, conveying the Vail home place located on South Main Street in the city of High Point. The following reservation appears in the deed: "The grantor, Minnie P. Vail, retains the use, control and ownership of the premises during the period of her natural life." Plaintiffs also offered portions of the will of Minnie P. Vail, showing that, subject to small bequests of personal property to two children not parties to this action, she devised and bequeathed the residue of her property of every kind to her "other children to be divided equally, share and share alike, among them, their names being S. Perry Vail, Robert E. Vail, Victor (B.) Vail, Winnie Vail Yow, and William C. (Sam) Vail." The summons was offered in evidence showing that the action was instituted 15 December, 1948. The following portion of the defendants' further answer was admitted in evidence: "That the mother of the defendant Victor B. Vail, the late Minnie P. Vail, was a widow and lived for many years alone and that the defendant Victor B.

Vail was accustomed to looking after his mother, running a great many errands and performing many personal services for her."

Testimony was offered by the plaintiffs showing that Minnie P. Vail died 10 May, 1948, about eighty-two years of age; that on 2 October, 1944, the date of the deed to Victor B. Vail, Minnie P. Vail owned the Vail home place described in the deed, and that she also owned at that time the small lot on Vail Alley referred to in the pleadings. The testimony of the witnesses also tended to establish that the Vail home place was worth $16,000.00 or more, whereas the property on Vail Alley was worth only about $1,200.00.

S. Perry Vail, one of the plaintiffs, testified to a conversation he had with the defendant Victor B. Vail in the presence of W. C. (Sam) Vail and Mrs. S. Perry Vail the second day after the funeral of the mother, when the children were discussing some of the details of the settlement of the estate. The witness, S. Perry Vail, in the course of his testimony related that: "Sam (William C. Vail) said to Vic (Victor B. Vail): 'Vic, tell Perry and Meely (Mrs. S. Perry Vail) just how you come by the old home place'; and Vic broke down and commenced crying and he said: 'Well, I tell you, I gave the wrong description and had the deed made out for the home place instead of the little place that Mother told me I could have on Vail Alley. I come by this property wrong—I got it wrong. I will deed it back to the estate just any time you all say so.'" There was testimony of other witnesses cumulative to and corroborative of the foregoing statements of Perry Vail. The plaintiff, Perry Vail, further testified that sometime later he approached Victor about deeding the property back to the estate and that Victor refused, stating: "It is mine and I am not going to turn it back. I am going to keep it."

The plaintiff, Winnie Yow, testified in part as follows: ". . . he (Victor B. Vail) helped to collect some of the rents . . . as to mother's business ability, well, in the last four or five years of her life she was tired—she was old and she was tired. Yes, she could have been influenced by others in signing or executing papers. In the latter years of my mother's life she was subject to being influenced by other parties in the transaction of her affairs."

There was further evidence tending to show that Victor B. Vail lived near his mother and was in and out of her home at frequent intervals during the last years of her life.

At the close of the plaintiffs' evidence, the defendants demurred to the evidence and moved for judgment of nonsuit. The motion was allowed, and from judgment based on such ruling, the plaintiffs appealed, assigning errors.

Clyde E. Gooch and Roberson, Haworth & Reese for plaintiffs, appellants.

J. J. Shields and Thomas Turner for defendants, appellees.

JOHNSON, J. The evidence in this case tends to show these determinative factors: (1) that the defendant, Victor B. Vail, the grantee in the deed, stood in a confidential or fiduciary relation with the grantor, Mrs. Minnie P. Vail; and (2) that she retained possession and control of the lands embraced in the deed during the remainder of her life. These crucial circumstances being made to appear, along with the rest of the evidence offered below, made out a *prima facie* case entitling the plaintiffs to go to the jury on both the issue of fraud and that of the statute of limitations.

The issue of fraud: Fraud has no all-embracing definition. Because of the multifarious means by which human ingenuity is able to devise means to gain advantages by false suggestions and concealment of the truth, and in order that each case may be determined on its own facts, it has been wisely stated "that fraud is better left undefined," lest, as *Lord Hardwicke* put it, "the craft of men should find a way of committing fraud which might escape a rule or definition." *Furst v. Merritt,* 190 N.C. 397 (p. 404), 130 S.E. 40. However, in general terms fraud may be said to embrace "all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another, or the taking of undue or unconscientious advantage of another." 37 C.J.S., Fraud, Section 1, p. 204.

These essential facts must appear in order to establish actionable fraud: "(1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with intent to deceive; (4) and which does, in fact, deceive; (5) to the hurt of the injured party." *Ward v. Heath,* 222 N.C. 470, 24 S.E. 2d 5. The material elements of fraud, a commission of which will justify the court in setting aside a contract or other transaction, are stated by *Barnhill, J.,* in *Ward v. Heath, supra,* as follows: "First, there must be misrepresentation or concealment. Second, an intent to deceive or negligence in uttering falsehoods with intent to influence the acts of others. Third, the representations must be calculated to deceive and must actually deceive. And, fourth, the party complaining must have actually relied upon the representations."

The nature and extent of the proofs required to establish fraud depend to a large extent on the relationship of the parties, and ordinarily, "a greater degree of proof is required to show fraud as between parties dealing at arm's length than is necessary where the fraud feasor sustains a

confidential relation toward his alleged victim." 37 C.J.S., Fraud, Section 114, p. 432.

Where a relation of trust and confidence exists between the parties, "there is a duty to disclose all material facts, and failure to do so constitutes fraud." 37 C.J.S., Fraud, Section 16, p. 247.

23 Am. Jur., Fraud and Deceit, Section 14, p. 765, states the rule thus: "Where a confidential or fiduciary relationship exists, it is the duty of the person in whom the confidence is reposed to exercise the utmost good faith in the transaction and to refrain from abusing such confidence by obtaining any advantage to himself at the expense of the confiding party. Should he obtain such an advantage, he will not be permitted to retain the benefit; and the transaction will be set aside even though it could not have been impeached had no such relation existed, whether the unconscionable advantage was obtained by misrepresentations, concealment or suppression of material facts, artifice, or undue advantage."

The rule is amplified in 23 Am. Jur., Fraud and Deceit, Section 81, p. 858, as follows: "It is a well-settled principle of the law of fraud, applied particularly by courts of equitable jurisdiction, that it is the duty of a person in whom confidence is reposed by virtue of the situation of trust arising out of a confidential or fiduciary relationship to make a full disclosure of any and all material facts within his knowledge relating to a contemplated transaction with the other party to such relationship, and any concealment or failure to disclose such facts is a fraud. This principle is universally observed, although the transaction cannot be impeached if no such relationship exists."

For a comprehensive discussion of what constitutes a confidential or fiduciary relation, see *Abbitt v. Gregory,* 201 N.C. 577 (p. 598), 160 S.E. 896. In general terms, a fiduciary relation is said to exist "Wherever confidence on one side results in superiority and influence on the other side; where a special confidence is reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence." 37 C.J.S., Fraud, Section 2, p. 213. Suffice it to say, without more, that as between principal and agent, the relation applies with all of its rigor in all of its implications. *McNeill v. McNeill,* 223 N.C. 178, 25 S.E. 2d 615; 37 C.J.S., Fraud, Section 16, pp. 248 and 249; Am. Jur., Fraud and Deceit, Section 14, p. 763 *et seq.*

The defendants, contending that the evidence was insufficient to take the case to the jury on the issue of fraud, urge that there is no evidence showing that Victor B. Vail said or did anything at the time the deed was signed to prevent his mother from reading it, and that in the absence of some proof that she did not read the deed, or was prevented from reading it, she being literate, is presumed to have read it. On this premise,

defendants contend that the evidence does not justify the inference that Minnie P. Vail was deceived by anything her son Victor said or did. Defendants say the case is governed by the rule which ordinarily precludes a literate person who signs an instrument from asserting, in the absence of fraud, that he did not read the instrument and was ignorant of its purport. The defendants rely on the decisions in *Ward v. Heath, supra; Colt Co. v. Kimball,* 190 N.C. 169, 129 S.E. 406, and cases therein cited.

The defendants' position is untenable and the authorities relied on are distinguishable. In the cases cited, the parties were dealing at arm's length, and in neither of the cases was the complaining party lulled into security by fraud or artifice of the other party and thereby prevented from reading the instrument. In the instant case the parties stood in a confidential relation, and the evidence tends to show elements of positive fraud and deception, reasonably calculated to dull the mother's call to vigilance and justify her in not discovering the contents of the deed: It appears in evidence that Mrs. Vail was a widow about seventy-two years of age when she made the deed; that she lived alone; that "Victor was accustomed to looking after his mother, running a great many errands and performing many personal services for her"; that he helped collect her rents. It is also in evidence that two days after his mother's funeral Victor confessed to some of the plaintiffs that: . . . "I gave the wrong description and had the deed made out to the old home place instead of the little place that mother told me I could have on Vail Alley. I came by this property wrong. . . . I got it wrong. I will deed it back to the estate just any time you all say so."

The evidence here, standing as it does undenied and unexplained, is sufficient to support these findings and inferences: that Mrs. Vail, reposing confidence in her son, Victor, directed him, as her agent, to have the small Vail Alley lot run off and deed thereto prepared so she might convey it to him as a gift; that he, in breach of his trust, surreptitiously substituted the description of the larger, more valuable Vail home place on South Main Street; that by fraudulently suppressing the true state of facts while silently pretending that the deed contained the Vail Alley property, he thereby procured from his mother lands not intended by her to be conveyed, and that she, under the circumstances of the confidential relation with her son, was lulled into security by his fraud and signed the deed without discovering, in the exercise of due diligence, the true state of facts. In short, we conclude that the evidence, measured by the applicable rules of law, is sufficient to sustain, though not necessary to impel, a finding of all the essential elements of fraud. That makes it a *prima facie* case for the jury.

The issue of the statute of limitations: The defendants having set up the three-year statute of limitations, G.S. 1-52, subsection 9, in bar of plaintiffs' right to recover, the burden of proof devolved upon the plaintiffs to show that their cause of action was not barred, *i.e.*, the burden was upon the plaintiffs to show that their cause of action did not accrue until sometime within the period of three years next before the commencement of the action. *Taylor v. Edmunds,* 176 N.C. 325, 97 S.E. 42; *Sanderlin v. Cross,* 172 N.C. 234, 90 S.E. 213; *Hooker v. Worthington,* 134 N.C. 283, 46 S.E. 726; 54 C.J.S., Limitations of Actions, Section 388, p. 527.

Under the statute pleaded here, a cause of action, like this one, to set aside an instrument for fraud, accrues, and limitations begin running, when the aggrieved party discovers the facts constituting the fraud, or when, in the exercise of reasonable diligence, such facts should have been discovered. *Blankenship v. English,* 222 N.C. 91, 21 S.E. 2d 891; *Wimberly v. Furniture Stores,* 216 N.C. 732, 6 S.E. 2d 512, and cases therein cited. See also 34 Am. Jur., Limitations of Actions, Section 165, p. 132.

And it is the accepted rule that "knowledge by the defrauded person of facts which in the exercise of proper diligence would enable him to learn of the fraud ordinarily is equivalent to discovery of fraud." 54 C.J.S., Limitations of Actions, Section 189, p. 188. The rule is concisely stated by *Stacy, C. J.,* in *Blankenship v. English, supra:* "A party having notice must exercise ordinary care to ascertain the facts, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired, had he made the necessary effort to learn the truth of the matters affecting his interests." In this respect the law regards the means of knowledge as knowledge itself. *Hargett v. Lee,* 206 N.C. 536, 174 S.E. 489; *Pasquotank County v. Surety Co.,* 201 N.C. 325, 160 S.E. 176; 54 C.J.S., Limitations of Actions, Section 189, p. 190. However, it is generally held that "the failure of the defrauded person to use diligence in discovering the fraud may be excused where there exists a relation of trust and confidence between the parties." 54 C.J.S., Limitations of Actions, Section 194, p. 198. This is so for the reason that a confidential or fiduciary relation imposes upon the one who is trusted the duty to exercise the utmost of good faith and to disclose all material facts affecting the relation. Also, a confidential relation by its very nature presupposes that the confiding party, in deference to the confidence and trust reposed in the other party, may in a measure relax his faculties of vigilance and act upon the assumption, until notice to the contrary, that the person in whom confidence is reposed will disclose, in the honest performance of his duty, all of the essential facts connected with the relation and take no unfair advantage. Accordingly, it is generally held that when it appears that by reason of the confidence reposed the confiding party is actually deterred from sooner suspecting

or discovering the fraud, he "is under no duty to make inquiry until something occurs to excite his suspicions." 54 C.J.S., Limitations of Actions, Section 194, p. 199.

In *Small v. Dorsett,* 223 N.C. 754, bot. p. 761, 28 S.E. 2d 514, quoting from 34 Am. Jur., Limitation of Actions, Section 168, p. 135, the applicable rule is stated as follows: "Where a confidential relationship exists between the parties, failure to discover the facts constituting fraud may be excused. In such a case, so long as the relationship continues unrepudiated, there is nothing to put the injured party on inquiry, and he cannot be said to have failed to use due diligence in detecting the fraud. . . . Similarly, an agent, sued for fraud, cannot set up that the principal should have suspected him."

Our decisions hold that the mere registration of a deed, containing an accurate description of the *locus in quo* and indicating on the face of the record facts disclosing the alleged fraud, will not, standing alone, be imputed for constructive notice of the facts constituting the alleged fraud, so as to set in motion the statute of limitations. In addition to the record, there must be facts and circumstances sufficient to put the defrauded person on inquiry which, if pursued, would lead to the discovery of the facts constituting the fraud. *Tuttle v. Tuttle,* 146 N.C. 484, 59 S.E. 1008; *Modlin v. Railroad,* 145 N.C. 218, 58 S.E. 1075; *Stubbs v. Motz,* 113 N.C. 458, 18 S.E. 387. All the more is this so where the parties stand in the confidential relation of principal and agent, wherein the duty of the principal to investigate becomes subordinate to that of the agent to disclose the true state of facts.

It appears in evidence that Minnie P. Vail lived only three years, seven months, and eight days after the deed was executed. The action was instituted by the plaintiffs seven months and five days after her death. The deed shows on its face that the "use, control and ownership" of the property was reserved for Mrs. Vail during the rest of her life. This reservation, nothing else appearing, supports the inference that she retained possession of the property until her death. And such evidence of possession becomes a relevant circumstance bearing heavily on the issue of the statute of limitations. It, when considered in connection with the confidential relation of the parties, is sufficient on this record to sustain the inference and conclusion that after the deed was made by Mrs. Vail nothing occurred during the rest of her life to excite her suspicion or put her on such inquiry as should have led, in the exercise of due diligence, to a discovery of the fraud, and that therefore the plaintiffs' action is not barred by the statute of limitations.

The defendants contend that the nonsuit below should be affirmed on authority of the decisions in *Massengill v. Oliver,* 221 N.C. 132, 19 S.E. 2d 253; *Blankenship v. English,* 222 N.C. 91, 21 S.E. 2d 891; and

Sanderlin v. Cross, 172 N.C. 234, 90 S.E. 213. These cases are distinguishable. No confidential relation appears to have existed in either of them. In *Sanderlin v. Cross, supra,* and in *Massengill v. Oliver, supra,* the grantors did not, as in the instant case, retain possession of the *locus in quo.* In the *Sanderlin case* the grantees immediately went into and remained in the open, notorious possession of the lands for more than thirteen years before the death of the grantor. It also appears that the timber was cut and removed from a large portion of the land seven or eight years before the suit was instituted. The *Massengill case* involved farm lands. There, the grantee went immediately into and remained in open, undisputed possession for more than nine years before the suit was commenced. In the *Blankenship case,* the plaintiff acquired title to real property, subject to a contract of record permitting the timber to be cut within three years, thinking the time for cutting was eighteen months. At the trial he admitted he was told a week after the purchase that the time was three years. After being so put on notice, he failed to examine the public records or bring suit for wrongful cutting within three years. Therefore, having slept on his rights for more than three years after notice, clearly his action was barred by limitations.

The defendants stress the evidence tending to show that one of the plaintiffs, W. C. Vail, knew his brother Victor had a deed for the home place before his mother's death. However, it is not made to appear when W. C. Vail received notice, nor does it appear that he ever passed on to his mother his information about the deed. Be that as it may, the wrong here complained of was solely against Minnie P. Vail. She alone had the right to maintain an action for redress in her lifetime; as long as she lived, limitations could run only against her. No right of action accrued to the plaintiffs until her death, and therefore until then limitations did not run against them. *Holt v. Holt,* 232 N.C. 497, 61 S.E. 2d 448. See also 9 Am. Jur., Cancellation of Instruments, Section 45, p. 389. What is here said, of course, is not at variance with the rule that when the statute of limitations has started running against the ancestor, but at his death the action is not barred, the statute continues to run against the heir or devisee. *Frederick v. Williams,* 103 N.C. 189, 9 S.E. 298.

With the case going back for a new trial, we refrain from further comment or discussion, since the defendants' evidence, as indicated in aspects of the cross-examinations, may develop a different state of facts surrounding the execution of the deed and subsequent events from what now appears on the *prima facie* level.

The judgment of the court below is

Reversed.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION v. QUEEN CITY COACH COMPANY.

(Filed 2 February, 1951.)

1. Carriers § 5—

The policy of the law controlling the granting of bus franchises is to provide adequate, economical and efficient bus service at reasonable cost to all communities of the State, without discrimination, undue privileges or advantages or unfair or destructive competitive practices, all to the end of promoting the public interest. G.S. 62-121.44.

2. Utilities Commission § 5—

Appeals from the Utilities Commission are confined to questions of law upon grounds specifically set forth in appellant's petition for rehearing by the Commission. G.S. 62-26.10.

3. Utilities Commission § 3—

The holder of a certificate operating buses serving communities included in the application of another company may intervene and protest the granting of the application. G.S. 62-121.52 (5).

4. Same: Carriers § 5—

The Utilities Commission is without authority to grant a franchise over a route served by another carrier except upon a finding that public convenience and necessity requires additional service over the proposed route, and then only after opportunity is afforded the other carrier to remedy such inadequacy, which it refuses or is financially unable or otherwise disqualified to do. G.S. 62-121.52 (7).

5. Same—

In order to grant an application by a carrier to serve communities then being served by another carrier, who intervenes and protests the application, as distinguished from an application for duplication of routes, it is not required that the Utilities Commission find that the existing carrier's service is inadequate and afford such existing carrier opportunity to remedy the inadequacy. G.S. 62-121.52 (7).

6. Same—

Where an existing carrier intervenes and protests another carrier's application to serve the same communities, the determinative question is the public convenience and necessity, and while the Commission is required to consider whether the proposed operations would unreasonably impair the efficient public service of the protesting carrier, this is not determinative unless it would so seriously endanger and impair the operations of the existing carrier as to be contrary to the public interest.

7. Same—

"Route" as used in Chap. 1132, Session Laws of 1949, means the highway or road traveled in serving communities, districts, or territories adjacent to it, and is not synonymous with "territory."

8. Same—

G.S. 62-121.52 (7) does not purport to protect against all competition but is designed to protect authorized carriers against ruinous competition, and the statute does not prohibit service of the same points by different carriers over separate routes when such duplicate service is in the public interest.

9. Same—

G.S. 62-121.52 (7) prohibits the granting of a franchise over any part of the route of an existing carrier except upon the prescribed conditions, and not merely a duplication of the same route from *terminus* to *terminus*, but the application to serve communities being served by the intervening carrier need not be denied *in toto* because there would be a duplication of routes along a short distance, since the existing carrier may be protected as to the duplication in route by proper restrictions in the certificate. G.S. 62-121.53, G.S. 62-121.54.

APPEAL by defendant from *Clement, J.*, September Term, 1950, GUILFORD.

Application by Gate City Transit Lines, Inc., before the Utilities Commission for a passenger bus franchise, heard in the court below on appeal from the Utilities Commission.

The defendant, Queen City Coach Company (hereinafter referred to as Queen City), is a franchise carrier of passengers, and as such operates buses from Greensboro over Highway 22 south through Ramseur to Coleridge. It also operates buses from Greensboro south over Highway 421 through Julian and Liberty to Siler City and Fayetteville. The Gate City Transit Lines, Inc. (hereinafter referred to as Gate City), now holds a franchise to operate buses over an entirely different route from Greensboro to Kimesville. It applied for and obtained, over the protest of Queen City, a franchise certificate to operate buses over a route branching off from its Greensboro-Kimesville route along an unnumbered road 4.4 miles to Highway 62, thence on Highway 62, 2.7 miles to Julian, thence on Highway 421, 7.5 miles to Liberty, thence along Highway 49, 9 miles to Ramseur.

Thus the proposed new route duplicates the route of Queen City from Julian to Liberty and also duplicates service rendered the Ramseur-Greensboro and also the Liberty-Julian-Greensboro communities.

Queen City intervened and protested the granting of the application for that the proposed route (1) will duplicate in part its bus line from Greensboro through Julian and Liberty to Siler City; (2) will duplicate the service now rendered by it to the community of Ramseur, and (3) will provide harmful competition and be destructive of its present service now being rendered to the communities the proposed route is designed to serve.

The hearing commissioner granted the franchise extension from the Greensboro-Kimesville route to and from Julian and declined to permit the extension from Julian to Ramseur. On appeal, the full Commission found (1) that convenience and necessity are clearly established in respect of that part of the proposed route allowed by the examining commissioner, (2) "all the testimony indicates an adequacy of service between Liberty and Julian, a distance of 7.5 miles on Highway 421," (3) it is "apparent that revenues derived between said points would be insufficient to adversely affect the over-all operations of the protestants or enhance the over-all operation of the applicant," and (4) "that extending the applicant's route southeastwardly along Highway 421, 7.5 miles, to the town of Liberty; thence southwardly 9 miles along Highway 49 to the town of Ramseur, would provide transportation for those people who live along the boundaries of Highway 49 between Liberty and Ramseur, which is now not provided by any other certified carrier . . ."

It then made the following finding or conclusion: "The Commission is of the opinion that generally the type of operation and the type of service applied for by the applicant is in the interest of the public and in accordance with the provisions of the Bus Act of 1949 . . ."

Queen City duly filed exceptions. The exceptions were overruled, and it appealed to the Superior Court.

The cause was heard in the Superior Court on the record certified by the Utilities Commission, and being heard, the court entered judgment affirming the order of the Commission. Queen City excepted and appealed.

Attorney-General McMullan and Assistant Attorney-General Paylor for plaintiff appellee.

Welch Jordan for Gate City Transit Lines, Inc., appellee.

Brooks, McLendon, Brim & Holderness, Shearon Harris, and Vaughan Winborne for defendant appellant.

BARNHILL, J. The Legislature, by c. 989, Session Laws 1949, revamped Art. 2 of c. 62 of the General Statutes prescribing the procedure in hearings before the Utilities Commission. The statute, as revised, makes substantial changes in the method of procedure before this agency of the State.

Likewise the law controlling the granting of certificates for the operation of buses for the transportation of passengers was completely revised by c. 1132, Session Laws 1949. Art. 6 of c. 62 of the General Statutes was repealed and a new statute, now G.S. c. 62, Art. 6c, was enacted. The provisions of these new statutes render some of our former decisions of doubtful value.

The policy of the State in respect of the transportation of passengers for hire as declared in s. 2 of c. 1132, Session Laws 1949, now G.S. 62-121.44, is to provide adequate, economical, and efficient bus service at reasonable cost to all the communities of the State, without discrimination, undue privileges or advantages or unfair or destructive competitive practices. The dominant object of the legislation is to promote the public interest.

Appeals from the Utilities Commission are confined to questions of law, and on appeal the appellant may not rely upon any grounds for relief which are not set forth specifically in his petition for rehearing by the Commission. G.S. 62-26.10.

Any holder of a certificate now operating buses which serve communities included in the proposed bus route may intervene and protest the granting of the application, G.S. 62-121.52 (5), and the Commission "shall give due consideration to . . . (b) whether the proposed operations will unreasonably impair the efficient public service of carriers operating under certificates." G.S. 62-121.52 (10). "No certificate shall be granted to an applicant proposing to serve a route already served by a previously authorized motor carrier unless and until the commission shall find from the evidence that the service rendered by such previously authorized motor carrier or carriers on said route is inadequate to meet the requirements of public convenience and necessity;" and in no event before the certificate holder operating on said route or routes shall be given reasonable time to remedy such inadequacy. G.S. 62-121.52 (7).

The applicant must show that "public convenience and necessity" requires additional service over the proposed route. If that fact is made to appear, then the Commission must first afford the protesting bus company operating over the same route an opportunity "to remedy such inadequacy." If the authorized carrier refuses, or is financially unable, or otherwise disqualified, to render the service "found by the commission (to be necessary) to meet the requirements of public convenience and necessity" then, and only then, may the Commission issue a certificate to the applicant to operate over the route already served by the protesting carrier. G.S. 62-121.52 (7).

The petition of appellant for a rehearing by the Commission is bottomed squarely on the contentions that (1) the evidence discloses that it now serves the Ramseur-Greensboro, Liberty-Greensboro, and Julian-Greensboro territories over its bus lines operated on Highways 421 and 22; that G.S. 62-121.52 (7) relates to point-to-point service; and that therefore the Commission erred in authorizing additional service between these points "without a finding of fact that the existing service is inadequate and affording this protestant an opportunity of remedying the inadequacy"; (2) the Commission authorized a duplication of service

over one of its routes between Liberty and Julian upon the finding "that the revenue derived between said points would be insufficient to adversely affect the over-all operation of the protestant or enhance the over-all operation of the applicant" when the statute makes inadequacy of existing service and refusal to remedy such inadequacy the basis for granting a certificate to the applicant; and (3) the Commission failed to give consideration to its exceptions to the recommended order of the examining commissioner.

The appellant is limited to these contentions on this appeal. G.S. 62-26.10. Any other question of law raised by its exceptions entered in the court below may not be considered here.

Thus it appears that the appellant relies on the assertion that the order of the Commission is in excess of statutory authority and affected by errors of law. G.S. 62-26.10.

It is true the statute affords authorized carriers serving the communities which compose links in the proposed route an opportunity to intervene and oppose the application, and requires the Commission to consider whether the proposed operations will unreasonably impair the efficient public service of other carriers. But the effect upon other carriers is directed to the question of public convenience and necessity. It is not determinative of the right of the Commission to grant the application.

The grant of a franchise is predicated upon public convenience and necessity, as that term is defined in *Utilities Commission v. Trucking Co.*, 223 N.C. 687, 28 S.E. 2d 201. An affirmative finding thereof is a condition precedent. If the proposed operations would endanger or seriously impair the operations of existing carriers contrary to the public interest, the certificate should not be issued. But here we have passed that hurdle. The Commission found that the proposed service is in the public interest.

That Queen City now serves the same communities over routes other than the one proposed by the applicant does not require the Commission, upon the finding of public convenience and necessity, to afford the authorized carrier, protestant, an opportunity to remedy the inadequacy. That is, service of the same communities between the same points but over different routes does not constitute service of a route already served, within the meaning of the Act.

The original bill which, as revised in the Legislature, became c. 1132, Session Laws 1949, required the Commission to deny duplicate service in the same territory, but "territory" was stricken and "route" was inserted in its stead. For us now to construe the Act to accord with the contention of Queen City would necessitate the adoption of the identical meaning which the Legislature expressly rejected. The General Assembly fixes the policy of the State, and it was unwilling to go further than to prohibit a duplication of service over the same route unless the existing

authorized carrier is unwilling to remedy the inadequacy found by the Commission. The policy as thus expressed must control decision here.

"Route" as used in the statute means the course of way which is traveled; the road. Webster's New Int. Dic., 2d Ed. "Route" is the direction of travel from one place to another. *Virginia Stage Lines v. Commonwealth,* 45 S.E. 2d 318. As used in statutes regulating motor carriers "route" means the highway or highways over which motor vehicles operate and not areas between terminal points. *Consolidated Freightways v. U. S.,* 136 F. 2d 921.

Carriers are not certified to operate in a certain "territory" but over a designated "route." The route or road to be traveled serves the communities, districts, or territories adjacent to it. It follows that "route" and "territory" are not synonymous. *Virginia Stage Lines v. Commonwealth, supra.*

The area of protection against duplication afforded by the statute is the specific route covered by the certificate of the authorized carrier rather than the territory it serves.

So then, the Commission, having found that public convenience and necessity require the additional service, was not required to give Queen City an opportunity to render the additional service between the Ramseur-Greensboro, Liberty-Greensboro, and Julian-Greensboro points, which are common to both routes.

While the statute is designed to protect authorized carriers against ruinous competition, it does not purport to protect against all competition. There is nothing in the statute to prohibit the service of the same points by different carriers over separate routes when it is found by the Commission that such duplicate service is in the public interest.

But there is a duplication of routes as well as of service between Liberty and Julian. The Commission has found that existing conditions do not demand this duplication. "All the testimony indicates an adequacy of service between Liberty and Julian." This being true, the Commission was without statutory authority to permit the duplication. The prohibition is positive. "No certificate shall be granted to an applicant proposing to serve a route already served by a previously authorized motor carrier unless and until the commission shall find from the evidence that the service rendered by such previously authorized motor carrier . . . on said routes is inadequate . . ." G.S. 62-121.52 (7).

To hold that this provision applies only when there is a duplication over the same route from terminus to terminus would require an unrealistic construction of the statute. If other carriers can invade the route of an authorized carrier, piecemeal fashion, then the Legislature completely failed to accomplish one of its declared objectives—the prevention of destructive competition. If the statute authorizes a duplica-

tion between points only 7.5 miles apart, it likewise permits such duplication between points 50 or 100 miles apart, including all intermediate points. Considering the provision in the light of the policy set forth in the Act, any such construction is precluded.

The revenue derived from passengers traveling between these two points is nominal. Only a very short distance is involved. Neither carrier would be seriously affected if it lost all the business the two points provide. Therefore, frankness compels us to say that if this case stood alone we would be strongly inclined to pass the question as too insignificant to command our attention. But such is not the case. Our decision here will become a precedent and control decision in other cases of much greater moment. No doubt this is what Queen City had in mind in contesting the decision of the Commission.

The mere fact that the two carriers will use the same highway for a short distance does not require the denial of the application *in toto*. A traversing of the same highways for certain distances by competing carriers may readily become necessary in the public interest and in such an instance, more than one certificate may be granted, subject to such restrictions as will protect the authorized carrier in respect of that part of the highway to be traversed by both. G.S. 62-121.53 and .54. Under a proper construction of the statute, with public convenience and necessity for bus service from Ramseur to Greensboro over the proposed route fully established, grounds for granting of the proposed application, subject to the indicated restrictions, are made to appear.

The exception for that the Commission failed to give consideration to its exceptions to the report of the examining commissioner, contained in its petition for a rehearing, is not brought forward. In any event, on this record, it is without substantial merit.

The cause is remanded with instructions that the proceeding be recommitted to the Commission for consideration of the proper restrictions to be imposed upon the proposed certificate in accord with this opinion.

Error and remanded.

WRIGHT'S CLOTHING STORE, INC., v. ELLIS STONE & COMPANY, INC. (ORIGINAL PARTY DEFENDANT), AND H. L. COBLE CONSTRUCTION CO. (ADDITIONAL PARTY DEFENDANT).

(Filed 2 February, 1951.)

1. Torts § 6—

Upon equitable principles, apart from the provisions of G.S. 1-240, a person who is sued alone, and whose negligence is passive, is entitled to join and to set up by cross-action the liability of the person whose positive and active negligence produced the injury, in order that the primary and secondary liability as between the joint tort-feasors may be adjudged in the one action, notwithstanding that both are equally liable to the injured person.

2. Negligence § 4h—

Defendant was sued by the owner of adjacent property to recover damages to his property resulting from excavation for a building on defendant's property. *Held:* Defendant is entitled to join and set up the primary liability of his contractor predicated upon the contractor's active negligence and the indemnity agreement contained in the contract of construction.

3. Pleadings § 10—

The rule that a new and independent action may not be set up by cross-action does not preclude the owner of property sued for damage to adjacent property caused by excavation for the erection of a building, from joining and setting up the primary liability of his contractor on the theory that the contractor was guilty of positive and active negligence producing the damage, since such cross-action is relevant and germane to the main action, and is also sanctioned by statute. G.S. 1-222.

4. Appeal and Error § 40f—

Upon appeal from the refusal of the court to strike allegations from a pleading, the Supreme Court will not attempt to chart the course of trial in advance of the hearing.

APPEAL by defendant H. L. Coble Construction Company from *Clement, J.*, August Term, 1950, of GUILFORD, Greensboro Division. Affirmed.

Civil action to recover for damages to property due to alleged negligence of landowner in the erection of a building on an adjoining lot, heard on motion to strike allegations of original defendant's answer and cross complaint.

The plaintiff, Wright's Clothing Store, Inc., instituted this action against the defendant Ellis Stone & Company, Inc. (hereinafter referred to as Ellis Stone), to recover damages to plaintiff's store building, fixtures, and merchandise located in the city of Greensboro. Ellis Stone is the owner of a lot lying adjacent to the plaintiff's lot and building. It is alleged in plaintiff's complaint, in substance, that Ellis Stone in the early

part of 1949 . . . "acting through its architects, contractor and other agents and servants," demolished a building then standing on its lot, made various excavations, including an excavation under the south wall of the plaintiff's building, and erected a new department store building on its lot; that Ellis Stone in excavating upon its property and in erecting its new department store building negligently caused the south wall of plaintiff's building to settle, crack, and lean, thereby damaging plaintiff's property in a substantial amount. The complaint further alleges that Ellis Stone failed to give plaintiff any notice "of the nature, character and extent of the excavations to be made" next to plaintiff's property, and also that Ellis Stone caused to be placed on its lot, in close proximity to plaintiff's wall, heavy machines which when in use caused great vibrations of the building in its weakened condition, due to the excavations, thereby adding further to plaintiff's damages,—in all to the amount of $50,000.

The defendant Ellis Stone answered, denying negligence on its part and alleging a special contract with H. L. Coble Construction Company (hereinafter designated Coble), under which all work in connection with the excavations and the erection of the new building was under the exclusive and sole control of Coble.

Simultaneously with the filing of its answer, Ellis Stone filed a cross complaint against Coble, who on motion was made a party defendant. In apt time, Coble moved to strike certain allegations and prayers for relief from the cross complaint of Ellis Stone as being irrelevant, redundant, and not germane either to the main action or the cross-action. The pertinent parts of the cross complaint are as follows, with the allegations which are sought to be stricken being set out in italics:

"AND BY WAY OF CROSS-ACTION AGAINST H. L. COBLE CONSTRUCTION COMPANY this defendant avers:

"3. That Ellis Stone & Company, Inc. was, and is, the owner of a certain tract of land situate on South Elm Street in the City of Greensboro, North Carolina, known as the Benbow Arcade site, which said property was acquired by this defendant from Richardson Realty, Inc., under and by virtue of the terms of a certain merger agreement recorded in the office of the Clerk of the Superior Court of Guilford County in Book of Corporations 5, page 448, to which reference is hereby made as a part hereof as fully as if here quoted.

"4. That Ellis Stone & Company, Inc. and H. L. Coble Construction Company entered into a contract in the early part of 1949 whereby and under the terms of which the said H. L. Coble Construction Company agreed to furnish all materials and perform all of the work shown on the drawings and described in the specifications for the general construction and mechanical work of a new building at the site described in para-

graph 3 hereof for the consideration therein named; that said contract consisted of the Agreement, the General Conditions of the Contract and the Drawings; that the H. L. Coble Construction Company now has and has had a duplicate original of said contract; *that this defendant specifically pleads said contract and will produce the same at the trial of this cause.*

"5. *That among other things, the contract hereinabove referred to between Ellis Stone & Company, Inc., and H. L. Coble Construction Company provided as follows:*

"(a) *Article XI. 'The contractor shall give all notices and comply with all laws, ordinances, rules and regulations bearing on the conduct of the work as drawn and specified.'*

"(b) *Article XII. 'He (contractor) shall adequately protect adjacent property as provided by law and the contract document.'*

"(c) *Division 1, Paragraph 4(a). 'The contractor shall conduct all negotiations with adjoining property owners or obtain their consents for the protection of their property.'*

"(d) *Division 2, Paragraph 17(a). 'In addition to the stipulations under Article XII of the General Conditions of the Contract, the contractor shall repair any and all damage or injury to the adjoining property caused by his work and leave the property in as good condition as before work was started, and he shall relieve the owner of all responsibilities for any claims due to such injury and must defend any action of law brought by reason thereof.'*

"6. *That at the time of the alleged injury and damage to the plaintiff, the H. L. Coble Construction Company was engaged in the performance of its contract with this defendant, and this defendant avers that the performance of the work under said contract was under the sole and exclusive control of the H. L. Coble Construction Company for the excavation at the site, construction and erection of said building, and this defendant avers that under the terms and provisions of the contract hereinbefore referred to, the H. L. Coble Construction Company agreed that it would relieve this defendant of all responsibilities for any claims due to injury to adjoining property owners and defend any action of law brought by reason thereof; that if plaintiff has a cause of action, which is denied, then and in that event the plaintiff's cause of action is based upon and arises out of the contract hereinbefore referred to between this defendant and H. L. Coble Construction Company, and any damage or injury sustained by plaintiff was directly and proximately caused by the failure of H. L. Coble Construction Company to properly perform and carry out the terms and conditions of said contract; that upon the institution of this action by plaintiff against this defendant, this defendant gave notice of said suit and furnished a copy of the summons and complaint to H. L.*

Coble Construction Company by registered mail in apt time, and requested said H. L. Coble Construction Company to assume the defense of said action in accordance with its contract with this defendant; that said H. L. Coble Construction Company refused and failed to assume the defense of said action as it was required to do under its contract with this defendant; that if a recovery is allowed against this defendant for any amount or amounts, then and in that event this defendant is entitled to have and recover judgment over against H. L. Coble Construction Company under its liability under the contract agreement hereinabove alleged for the full amount or amounts so recovered of this defendant together with its costs and expenses incurred in conducting its defense.

"That at the time of the alleged injury and damage to plaintiff, H. L. Coble Construction Company was engaged in the performance of its contract with this defendant and defendant avers that the performance of the work under said contract was under the sole and exclusive control of H. L. Coble Construction Company for the excavation at the site, construction and erection of said building; that this defendant avers that even if it was negligent or omitted any duty owed plaintiff in any of the particulars alleged in the complaint, which is hereby expressly denied, and that even if such negligence or omission of duty was a proximate cause of damage and injury to the plaintiff as alleged by it, which is also denied, then and in that event H. L. Coble Construction Company was negligent in that it failed to take the necessary precautions to protect the plaintiff's wall and premises and failed to provide adequate support for plaintiff's building as it was required to do, *and if this defendant is liable to plaintiff for any amount, which is denied, this defendant's liability is secondary to the liability of H. L. Coble Construction Company and the liability of H. L. Coble Construction Company is primary for that the negligence of H. L. Coble Construction Company was active and directly and proximately caused plaintiff's injury; if this defendant is liable to plaintiff for its damage and injury, which is denied, then and in that event this defendant is entitled to have and recover judgment over against H. L. Coble Construction Company under its primary liability as a joint tort-feasor for the full amount or amounts so recovered of this defendant together with its costs and expenses incurred in conducting its defense and that this defendant has a right to have the liability of the said H. L. Coble Construction Company determined and enforced in this action in accordance with the contract hereinbefore alleged and under the General Statutes of North Carolina.*

"WHEREFORE, the defendant prays:

"(2) That if a recovery is allowed against it for any amount, that it have and recover judgment against H. L. Coble Construction Company under its primary liability as a joint tort-feasor for the full amount or

amounts so recovered of this defendant with its costs and expenses incurred in conducting its defense.

"(3) That if a recovery is allowed against it for any amount, that it have and recover judgment over against H. L. Coble Construction Company under the liability of H. L. Coble Construction Company under the contract alleged for the full amount or amounts so recovered of this defendant with its costs and expenses incurred in conducting its defense."

The court below declined to strike any part of the allegations challenged by Coble's motion, and from the order denying the motion the defendant Coble excepted and appealed.

Frazier & Frazier for plaintiff, appellee.

Huger S. King for original defendant Ellis Stone & Company, Inc., appellee.

Brooks, McLendon, Brim & Holderness, G. Neil Daniels, and Smith, Wharton, Sapp & Moore for defendant H. L. Coble Construction Company, appellant.

JOHNSON, J. The question for decision here is: Has Ellis Stone pleaded itself beyond the permissive bounds of the rule which permits the adjustment in one action of primary and secondary liability between joint tort-feasors? We think not.

Our decisions adhere to the rule that where two parties are jointly liable in damages for negligence, one of them for the reason that he is "only passively negligent, but is exposed to liability through the positive acts and actual negligence of the other, the parties are not in equal fault as to each other, though both are equally liable to the injured person. . . . The further general principle is announced, however, in many cases, that where one does the act which produces the injury, and the other does not join in the act, but is thereby exposed to liability and suffers damage, the latter may recover against the principal delinquent, and the law will inquire into the real delinquency, and place the ultimate liability upon him whose fault was the primary cause of the injury." *Johnson v. Asheville,* 196 N.C. 550, 146 S.E. 229; *Bowman v. Greensboro,* 190 N.C. 611, 130 S.E. 502; *Guthrie v. Durham,* 168 N.C. 573, 84 S.E. 859; *Gregg v. Wilmington,* 155 N.C. 18, 70 S.E. 1070.

Strictly speaking, this principle springs from equity and is an exception to the general rule that there can be no indemnity or contribution between joint tort-feasors. *Taylor v. Construction Company,* 195 N.C. 30, 141 S.E. 492.

The rule we are dealing with here operates in this jurisdiction quite apart from and independent of the 1929 statute permitting contribution between joint tort-feasors, Chapter 68, Public Laws of 1929, now incor-

porated in G.S. 1-240. McIntosh, North Carolina Practice and Procedure, p. 245. Moreover, a defendant secondarily liable, when sued alone, may have the person primarily liable brought in to respond to the original defendant's cross-action. *Bowman v. Greensboro, supra; Guthrie v. Durham, supra;* 39 Am. Jur., Parties, Section 91, p. 962. See also 25 N.C.L., p. 3.

The entry of judgment fixing primary and second liability as between joint tort-feasors finds statutory sanction under G.S. 1-222.

A cross-action by a defendant against a codefendant or third party must be germane to the claim alleged by the plaintiff, *i.e.*, the cross-action must be in reference to the plaintiff's claim and based upon an adjustment of that claim. *Bowman v. Greensboro, supra.*

Independent and unrelated causes of action cannot be litigated by cross-action. *Horton v. Perry,* 229 N.C. 319, 49 S.E. 2d 734; *Schnepp v. Richardson,* 222 N.C. 228, 22 S.E. 2d 555; *Montgomery v. Blades,* 217 N.C. 654, 9 S.E. 2d 397.

The challenged portions of the cross complaint appear to be relevant and germane to the main action. They inject into the case no new or independent cause of action. Nor should the cross complaint, if properly interpreted in connection with the admission of evidence in the trial below, extend the scope of defendant-liability as fixed by the plaintiff's complaint. *Parker v. Duke University,* 230 N.C. 656, 55 S.E. 2d 189; *Hill v. Stansbury,* 221 N.C. 339, 20 S.E. 2d 308; *Pemberton v. Greensboro,* 205 N.C. 599, 172 S.E. 196.

We refrain from discussing the principles of law, referred to in the briefs, dealing with the subject of third party beneficiaries and other phases of substantive law, including the rules governing the liability of an independent contractor in respect to an obligation to perform another person's nondelegable duty. In the trial of the case below, the pertinency of these principles of law, in their many refinements, may vary, depending upon the manner in which the case is developed and made to unfold. Hence, the fundamental soundness of the rule that it is not "the province of an appeal in such cases to have this Court chart the course of the trial in advance of the hearing." *Terry v. Coal Co.,* 231 N.C. 103, 55 S.E. 2d 926. See, however, these authorities: *Gorrell v. Water Supply Co.,* 124 N.C. 328, 32 S.E. 720; Annotation: 38 A.L.R., 403 (545). *Davis v. Summerfield,* 133 N.C. 325, 45 S.E. 654; *S. H. Kress Co. v. Reaves,* 85 F. 2d 915; 1 Am. Jur. Adjoining Landowners, Sections 36 and 37, pp. 526 and 527; 27 Am. Jur., Independent Contractors, Sec. 52, p. 530; Annotations: 23 A.L.R., 984 (pp. 985, 1005, 1038); 29 A.L.R. 736; 38 A.L.R. 566 (579); *Harrison v. Transit Co.,* 192 N.C. 545, 135 S.E. 460.

Affirmed.

MYRTLE KING AND HUSBAND, B. H. KING, v. MARY E. NEESE, WIDOW OF J. H. NEESE, C. G. NEESE AND WIFE, AGNES NEESE, C. B. NEESE AND WIFE, BESSIE NEESE, ARTIS L. NEESE AND WIFE, AUDREY NEESE, J. HERMAN NEESE AND WIFE, MAGGIE NEESE, D. D. NEESE AND WIFE, MINNIE NEESE, OPAL TROLLINGER AND HUSBAND, CHAMBLISS TROLLINGER, ALMA TROLLINGER AND HUSBAND, W. AUSLEY TROLLINGER.

(Filed 2 February, 1951.)

1. Judgments § 32—

A judgment is *res judicata* and bars a subsequent action between the same parties as to all matters actually litigated and determined therein and also as to all matters which properly could have been litigated and determined.

2. Same—

It is incumbent upon the party pleading estoppel by judgment to show that the particular point or question presented in the subsequent action was embraced in the former action.

3. Same—Judgment relating solely to advancements in personalty held not to bar subsequent proceeding to determine advancements in realty.

Petition was filed by the administrator under G.S. 28-165 for direction in the distribution of the surplus of personalty in view of advancements made by intestate to the heirs and distributees either in money, or land, or both. Judgment was entered that intestate had advanced money in a certain sum to certain of the distributees and directing the administrator to disburse the personalty after adjustment for such advances, with further provision that the order was made without prejudice to the interests of the heirs at law in the realty. There was no allegation that any heir had been advanced realty over and above the share of realty which might come to the other heirs. *Held:* The question of advancements of realty was neither presented nor could it have been properly determined in the administrator's proceeding for direction in the distribution of the personalty, and therefore it does not bar a subsequent proceeding by some of the heirs to charge others in the partition of the lands of the estate with advancements in realty.

4. Descent and Distribution § 13—

The personalty of the estate is made the primary fund for the equalization of advancements of personalty, and the realty is made the primary fund for the equalization of advancements in realty, and it is only when and to the extent that there is an excessive advancement in either category of property over and above the share which may come to the other beneficiaries that such excess may be considered in the distribution of the other category. G.S. 28-150, G.S. 29-1 (2).

5. Executors and Administrators § 20—

It is the duty of the administrator to make distribution of the surplus of his intestate's personal property among those entitled thereto, G.S. 28-149, but it is not his function to partition the real estate of his decedent among the heirs.

KING *v.* NEESE.

APPEAL by petitioners from *Williams, J.*, at the June Term, 1950, of ALAMANCE.

Special proceeding under Chapter 46 of the General Statutes to partition the real property of an intestate among his eight children, and to charge two of such children in such partition with advancements of realty allegedly made to them by the intestate in his lifetime.

The facts are as follows:

1. J. H. Neese, a resident of Alamance County, died intestate 29 December, 1940, owning both real and personal property. He was survived by his wife, Mary E. Neese, and eight children, namely, the petitioner, Myrtle King, and the respondents, C. G. Neese, C. B. Neese, Artis L. Neese, J. Herman Neese, D. D. Neese, Opal Trollinger, and Alma Trollinger.

2. J. Herman Neese qualified as administrator of the intestate before the Clerk of the Superior Court of Alamance County. Inasmuch as the personal property of the intestate was sufficient to pay his debts in full and all costs of administration of his estate, none of his lands were sold for assets. After assignment of a year's allowance to the widow and payment of all debts and costs of administration out of the personal assets of the intestate, the administrator had a surplus of $872.62 in money for distribution among his widow and children. On 23 March, 1942, he filed his final account for settlement with the Clerk of the Superior Court of Alamance County, showing in specific detail all of his receipts and disbursements as administrator and proposing to distribute the surplus of $872.62 among the widow and children of the intestate in these amounts: Mary E. Reese, $52.51; Myrtle King, $252.51; C. G. Neese, $52.52; C. B. Neese, $52.52; Artis L. Neese, $52.52; J. Herman Neese, $52.52; D. D. Neese, $52.51; Opal Trollinger, $52.52; and Alma Trollinger, $252.52.

3. Shortly thereafter, to wit, on 21 April, 1942, the administrator filed a petition against the widow and children of the intestate before the Clerk of the Superior Court of Alamance County under G.S. 28-165 for an account and settlement of the personal estate of the decedent. The petition set forth the matters stated in the two preceding paragraphs of this statement of facts. It further averred that all of the distributees other than Myrtle King and Alma Trollinger had received "advancements, either in money, or land, or both, . . . in the sum of at least $200.00" from the intestate in his lifetime; that the administrator proposed to distribute $200.00 to both Myrtle King and Alma Trollinger in excess of the amounts to be distributed to the other distributees in order to equalize them with the other distributees; and that Myrtle King "protested the proposed distribution, claiming that larger amounts had been advanced to certain of the children and that she was entitled to

a larger sum in order to equalize her." The petition called upon "each . . . of the children as heirs at law and beneficiaries . . . to answer in this cause and furnish the petitioner as administrator and the court . . . an inventory under oath, setting forth therein the real estate and personal property and the values thereof . . . received by such distributees from their father, the said J. H. Neese, during his lifetime," and concluded with this prayer: "Wherefore, your petitioner prays for an account and settlement of the estate committed to his charge and the direction of the court as to how he shall distribute the same and the determination of what advancements, if any, the said J. H. Neese has made to each and every of his heirs at law and distributees during his lifetime and the value thereof, and directing him in what manner and in what amounts and to whom he shall pay out and distribute the balance of the assets in his hands as administrator, and for such other and further relief as in law and equity he may be entitled to."

4. Although they were served with process in the proceeding brought by the administrator for an account and settlement of the estate of the intestate, the widow and children of the intestate did not answer or otherwise enter an appearance therein. No inventories were furnished by any of the children to either the administrator or the court.

5. On 18 January, 1943, the Clerk of the Superior Court of Alamance County entered a final decree in the proceeding brought by the administrator for an account and settlement. The Clerk found as a fact that the intestate made advancements in his lifetime "to each and every of his children, who are now distributees of his estate, other than Myrtle King and Alma Trollinger, in the *sum* of at least $200.00" and directed that the administrator "pay to Mrs. Myrtle King the sum of $200.00 and to Mrs. Alma Trollinger the sum of $200.00 from the assets now in his hands for the purpose of equalizing them with the advancements heretofore made by the said J. H. Neese to each of his other children and distributees, and that in addition thereto, he will hereafter make equal distribution of the balance remaining in his hands for distribution to the widow and all of the children as the distributees of J. H. Neese." The Clerk's decree ended with this provision: "This order and decree is made without prejudice to the several interests of the widow and heirs at law of the said J. H. Neese in and to the real property, which descended upon them from their father, all of which they may own as tenants in common, or otherwise, as may be determined." In consequence of the Clerk's decree, the administrator distributed the surplus of $872.65 among the widow and children of the intestate in the proportions proposed in the final account mentioned in the second paragraph of this statement of facts.

6. Subsequent to the events set forth above, to wit, on 6 March, 1943, the petitioner, Myrtle King, with the joinder of her husband, B. H.

King, brought this special proceeding against the widow of the intestate and the respondents under Chapter 46 of the General Statutes, praying that the lands descended from the intestate be partitioned by sale among his children subject to the dower of the widow and that two of the children, namely, the respondents, C. B. Neese and Artis L. Neese, be charged in the division of the proceeds of the sale with the value of specified parcels of realty as advancements settled upon them by the intestate in his lifetime. The dower of the widow terminated by her death during the pendency of this proceeding. The respondents were served with process in this proceeding, and two of them, namely, C. B. Neese and Artis L. Neese, answered, alleging that all questions relating to advancements to the children of the intestate in real estate as well as in personal property had been litigated and determined in the special proceeding by the administrator for an account and settlement of the personal estate of the intestate, and pleading the decree entered by the Clerk in that proceeding on 18 January, 1943, as a bar or estoppel against the prosecution of the claim of the petitioners that the respondents, C. B. Neese and Artis L. Neese, should be charged in the division of the proceeds of the sale of the lands descended from the intestate with any parcels of realty as advancements allegedly settled upon them by the intestate in his lifetime. The petitioners filed a reply, denying the validity of the factual averments and legal conclusions set out in the answer of the respondents, C. B. Neese and Artis L. Neese. Under consent orders entered by the Clerk of the Superior Court of Alamance County in this proceeding, the lands descended from the intestate were sold for partition among his heirs by designated Commissioners, who still retain the portion of the proceeds of sale representing the shares claimed by the respondents, C. B. Neese and Artis L. Neese, and the issue joined between the petitioners and the respondents, C. B. Neese and Artis L. Neese, was transferred to the civil issue docket of the Superior Court of Alamance County for determination in term time.

7. This issue came on to be heard before his Honor, Clawson L. Williams, the Presiding Judge, at the June Term, 1950, of the Superior Court of Alamance County. The petitioners admitted at that time that the Clerk had entered his decree of 18 January, 1943, under the circumstances set forth above, and Judge Williams rendered judgment upon this admission that the decree so entered by the Clerk constituted a bar or estoppel against the prosecution of the claim now presented by the petitioners that the respondents, C. B. Neese and Artis L. Neese, were chargeable with advancements of realty in the division of the proceeds of the sale of the lands descended from the intestate, and that as a consequence the respondents, C. B. Neese and Artis L. Neese, were entitled to share equally with the petitioner, Myrtle King, and the other children

in the division of the proceeds of the sale of the lands descended from the intestate. The petitioners excepted to this judgment and appealed, assigning these adjudications as error.

Allen & Allen and Thos. C. Carter for petitioners, appellants.
Long & Long for respondents, appellees.

ERVIN, J. The trial judge based his judgment on the doctrine of *res judicata,* which may be epitomized for the purpose of this particular appeal in these words:

Where a second action or proceeding is between the same parties as a first action or proceeding, the judgment in the former action or proceeding is conclusive in the latter not only as to all matters actually litigated and determined, but also as to all matters which could properly have been litigated and determined in the former action or proceeding. *Distributing Company v. Carraway,* 196 N.C. 58, 144 S.E. 535; *Moore v. Harkins,* 179 N.C. 167, 101 S.E. 564, rehearing denied in 179 N.C. 525, 103 S.E. 12; *Clothing Co. v. Hay,* 163 N.C. 495, 79 S.E. 955; *Tuttle v. Harrill,* 85 N.C. 456.

It appears, therefore, that this precise question arises at the threshold of the appeal: Was the claim now presented by the petitioners that the intestate made advancements of real estate to the respondents, C. B. Neese and Artis L. Neese, in his lifetime actually litigated and determined in the prior proceeding brought by the administrator against the widow and children of the intestate under G.S. 28-165 for an account and settlement of the personal estate of the intestate?

It is incumbent upon a party pleading a judgment in a prior action or proceeding as an estoppel to show that the particular point or question as to which he claims the estoppel was actually in issue and determined in the former action or proceeding. 50 C.J.S., Judgments, section 843. See, also, in this connection: *Jones v. Beaman,* 117 N.C. 259, 23 S.E. 248. His plea of *res judicata* necessarily fails if it rests on mere assertion or speculation. *Argo v. Commissioner of Internal Revenue,* 150 F. 2d 67; *Leicht v. Commissioner of Internal Revenue,* 137 F. 2d 433; *Wolfson v. Northern States Management Co.,* 221 Minn. 474, 22 N.W. 2d 545.

The respondents, C. B. Neese and Artis L. Neese, do not undertake to specify how or by whom the question now presented by the petitioners was raised in the former proceeding, or what decision the Clerk made in respect to it. They merely invoke the record in the prior proceeding to sustain their general averment that such question was actually in issue and determined in the proceeding by the administrator for an account and settlement.

An analytical examination of the record in that proceeding discloses that it does not support this allegation. While the ambiguous averments of the petition of the administrator indicate that he was willing to charge the distributees other than Myrtle King and Alma Trollinger with advancements "either in money, or land, or both" in the distribution of the surplus of the personal assets of the intestate, the decree of 18 January, 1943, makes it plain that the claim now presented by the petitioners, *i.e.*, that the intestate made advancements of real estate to the respondents, C. B. Neese and Artis L. Neese, during his lifetime, was not actually litigated and determined before the Clerk in the former proceeding. The Clerk simply decided that the intestate made advancements of personal property in his lifetime to all of the distributees other than Myrtle King and Alma Trollinger, and directed that such advancements of personal property be charged against the distributees receiving them in the distribution of the personal estate of the intestate. These conclusions find complete support in this provision of the decree itself: "This order and decree is made without prejudice to the several interests of the widow and heirs at law of the said J. H. Neese in and to the real property, which descended upon them from their father, all of which they may own as tenants in common or otherwise, as may be determined."

This brings us to this final question: Could the claim now presented by the petitioners, *i.e.*, that the intestate made advancements of real estate to the respondents, C. B. Neese and Artis L. Neese, in his lifetime, have been properly litigated and determined in the prior proceeding brought by the administrator against the widow and children of the intestate under G.S. 28-165 for an account and settlement of the personal estate of the intestate?

The answer to this question is to be found in the statutory enactments governing the accountability of children for advancements from parents.

G.S. 28-150 provides that "children who shall have any estate by the settlement of the intestate, or shall be advanced by him in his lifetime, shall account with each other for the same in the distribution of the estate in the manner as provided by the second rule in the chapter entitled descents, and shall also account for the same to the widow of the intestate in ascertaining her child's part of the estate."

The second rule in the chapter entitled descents is now embodied in G.S. 29-1. Accountability for advancements is regulated by the proviso to this rule, which is couched in this language: "Provided, that when a parent dies intestate, having in his or her lifetime settled upon or advanced to any of his or her children any real or personal estate, such child so advanced in real estate shall be utterly excluded from any share in the real estate descended from such parent, except so much thereof as will, when added to the real estate advanced, make the share of him who

is advanced equal to the share of those who may not have been advanced, or not equally advanced. And any child so advanced in personal estate shall be utterly excluded from any share in the personal estate of which the parent died possessed, except so much thereof as will, when added to the personal estate advanced, make the share of him who is advanced equal to the share of those who may not have been advanced, or not equally advanced. And in case any one of the children has been advanced in real estate of greater value than an equal share thereof which may come to the other children, he or his legal representatives shall be charged in the distribution of the personal estate of such deceased parent with the excess in value of such real estate so advanced as aforesaid, over and above an equal share as aforesaid. And in case any of the children has been advanced in personal estate of greater value than an equal share thereof which shall come to the other children, he or his legal representatives shall be charged in the division of the real estate, if there be any, with the excess in value, which he may have received as aforesaid, over and above an equal distributive share of the personal estate."

It has been said by a great jurist, *Chief Justice Ruffin,* that the Legislature enacted the proviso "to establish a perfect equality in the division of the intestate's whole estate, real and personal, amongst his children, excepting only, that no property given by a parent to a child is in any case to be taken away." *Headen v. Headen,* 42 N.C. 159. Nevertheless, the personal property is made the primary fund for the equalization of advancements in personalty, and the real property the primary fund for the equalization of advancements in realty. The proviso establishes these two methods of accounting for advancements:

1. A child advanced may be charged in the distribution of the personal estate of his deceased parent with these items: (1) An advancement of personalty; and (2) an *excessive* advancement of realty. *Headen v. Headen, supra.*

2. A child advanced may be charged in the division of the real estate of his deceased parent with these items: (1) An advancement of realty; and (2) an *excessive* advancement of personalty. *Headen v. Headen, supra.*

It is the duty of an administrator to make distribution of the surplus of his intestate's personal property among those named in the statute of distribution. G.S. 28-149. It is not his function, however, to partition the real estate of his decedent among the heirs.

The administrator of J. H. Neese instituted the former proceeding under G.S. 28-165 to obtain a decree from the Clerk directing the distribution of the sum of $872.62, which constituted the surplus of the personal assets of the intestate, among the widow and children of the intestate. The decree of the Clerk determined what each of these persons was

entitled to receive out of the sum in the hands of the administrator. Under the petition in the prior proceeding, the Clerk properly took into account advancements of personalty in determining the amounts of the various distributive shares. He rightly refrained, however, from considering or determining the question now presented by the petitioners.

Under the proviso regulating accountability for advancements, that claim could not have been properly litigated and determined in the former proceeding; for it was not alleged by any party therein that the respondents, C. B. Neese and Artis L. Neese, received any *excessive* advancements of realty from the intestate during his lifetime. *Ludwick v. Penny,* 158 N.C. 104, 73 S.E. 228.

Moreover, the claim of the petitioners could not have been concluded in its entirety in the prior proceeding even if such allegation had been made therein. The proviso regulating accountability for advancements does not make a child advanced in realty chargeable in the distribution of the personal estate of his deceased parent with the full value of his advancements in realty. It renders him accountable in such distribution only for "the excess in value" of his advancements in realty "over and above an equal share . . . which may come to the other children."

Inasmuch as the claim now presented by the petitioners was not and could not have been litigated and determined in the former proceeding, the judgment sustaining the plea of *res judicata* is reversed, and this proceeding is remanded to the Superior Court of Alamance County with directions that such claim be determined and that appropriate action be taken thereon. *Scott v. Life Association,* 137 N.C. 516, 50 S.E. 221.

Reversed.

ALBERT E. McLEAN v. RUTH STUDTMAN McLEAN.

(Filed 2 February, 1951.)

1. Courts § 11: Divorce § 3—

The general county court of Alamance County is given jurisdiction by statute of actions for divorce.

2. Courts § 4b—

The jurisdiction of the Superior Court upon appeal from a general county court is limited to rulings on exceptions duly noted and brought forward, and the Superior Court is without authority to make additional findings of fact.

3. Same—

The findings of fact made by a general county court upon the hearing of a motion are conclusive on the Superior Court upon appeal and on the

Supreme Court upon further appeal when the findings are supported by evidence.

4. Divorce § 22: Judgments § 27g—

The statutory right of a nonresident against whom judgment has been rendered on substituted service to come in and defend at any time within five years, does not apply to actions for divorce. G.S. 1-108.

5. Divorce § 22: Constitutional Law § 21: Courts § 2½—

The courts of this State have jurisdiction to alter the marriage status of a resident of this State even though the other spouse be a nonresident provided the form and nature of the substituted service on the nonresident meet the requirements of due process of law.

6. Judgments §§ 18, 27b—

If a fraud is perpetrated on the court whereby jurisdiction is apparently acquired when jurisdiction is in fact lacking, the court's judgment is a nullity and may be vacated on motion in the cause.

7. Same: Divorce § 22—Divorce decree rendered on substituted service held nullity for fraud upon jurisdiction.

It appeared that plaintiff instituted action for divorce in a county of this State in which he resided, notifying the nonresident defendant by mail, and that when defendant appeared with counsel to defend he took a nonsuit. It further appeared that thereafter, with full knowledge of defendant's whereabouts, he instituted a second divorce action in another county of the State without attempting to obtain personal service, procured service by publication in a weekly newspaper of limited circulation, and obtained decree of divorce without her knowledge. *Held:* The facts compel the conclusion that plaintiff perpetrated a fraud upon the jurisdiction of the court, and defendant's motion in the cause to set aside the decree should have been granted. Whether the evidence was sufficient to show that plaintiff, a soldier on active duty, acquired a domicile in this State, *quære?*

8. Divorce § 22: Constitutional Law § 21—

It is required that an adjudication affecting the marital status and finally determining personal and property obligations of the parties shall be preceded by notice and an opportunity to be heard. Constitution of N. C., Art. I, Sec. 17. 14th Amendment to the Constitution of the U. S.

9. Process § 6—

The order of service of summons by publication in this case *held* to conform to the statutory requirements. G.S. 1-99.

APPEAL by plaintiff from *Harris, J.*, April Term, 1950, of ALAMANCE. Affirmed.

Motion by defendant to set aside a divorce decree rendered in the General County Court of Alamance County, heard on appeal in the Superior Court.

The defendant supported her motion, filed February, 1949, by affidavit alleging that plaintiff and defendant, then residents of Chicago, Illinois, were married in 1933, and continued to live there as husband and wife until 1942 when plaintiff was drafted into the United States Army. Thereafter in 1946 plaintiff re-enlisted in the United States Air Force and since has continued to serve as a professional soldier moving from place to place as ordered, and that for this reason plaintiff and defendant did not maintain a residence together. Defendant continued to live in Chicago though she visited her husband once in Atlantic City where he was stationed, and he visited her in Chicago. In 1944 plaintiff went overseas, and upon his return in September, 1945, he went to Chicago and told defendant that as soon as he had a permanent assignment he would send for her, but subsequently he returned to Chicago and told her he had found a state where he could obtain a divorce after two years' separation. Thereafter he refused to take defendant with him or to provide her a place to live, though allotment continued to be regularly made to her from his pay. Plaintiff served at different stations according to military assignment. In April, 1946, he was in Greensboro and from September, 1946, to May, 1947, was at Camp Kilmer in New Jersey, and was thereafter transferred to Durham, North Carolina. 18 July, 1946, plaintiff instituted action for divorce in the Superior Court of Guilford County. Notice of suit was mailed by plaintiff to the defendant in Chicago, and she appeared in Guilford Court in person and with attorney, and indicated her intention of defending the action, expressing her willingness to resume marital association. No further proceedings were had and 19 August, 1946, plaintiff took a nonsuit in that action. Thereafter, 24 September, 1947, plaintiff instituted this action in the County Court of Alamance County. No notice was given the defendant and she had no knowledge of the action until May, 1948, when she received notice from United States Government that her allotment from plaintiff's pay had been terminated. She alleged plaintiff was not a legal resident of North Carolina; that there had been no permanent or complete separation between the parties for two years; that notice of summons was published in the *Alamance Gleaner*, a weekly newspaper published in Alamance County with a circulation according to the affidavit of the printer of five hundred copies, only three of which went to Chicago and only one to a subscriber there; that the publication of summons was not made in a newspaper designated as most likely to give notice to the defendant, and plaintiff having previously instituted action in Guilford Superior Court, defendant had no reason to believe or expect an action for divorce would be brought in the County Court of Alamance; that plaintiff had personal knowledge of her address in Chicago, and concealed that fact from the court for the purpose of perpetrating a fraud upon the court. She asked that the judgment be set aside.

The adverse examination of the plaintiff, taken in an independent action between the parties, was by consent admitted in evidence. From this it appears that plaintiff at the time he re-enlisted in January, 1946, was permitted choice of station and chose Greensboro, North Carolina; that thereafter though transferred temporarily to other stations in and out of the State, he regarded Greensboro in Guilford County as his place of residence, where he kept his personal belongings; that he registered and voted there in 1946 and again in 1947; that he paid personal property taxes there and had North Carolina license plates attached to his automobile. He further testified that since shortly after his marriage he had not lived with defendant as husband and wife.

The Judge of the County Court in ruling on defendant's motion found that the summons in the divorce action was issued out of that Court 24 September, 1947, and complaint filed alleging that plaintiff and defendant had not lived together as husband and wife since 11 October, 1944; that upon plaintiff's affidavit that defendant could not after due diligence be found in the State of North Carolina publication of notice of summons was ordered to be made in the *Alamance Gleaner,* a newspaper published in Alamance County; that publication was duly made; that plaintiff had resided in the state more than six months prior to the institution of the action; that defendant was and is a resident of Illinois; that prior to this action, plaintiff had instituted an action for divorce in Guilford County, and subsequently submitted to voluntary nonsuit; that the *Alamance Gleaner* was a weekly newspaper of limited circulation published in Alamance County; that the action was tried in the County Court 16 December, 1947, and on oral testimony verdict was returned and judgment thereon entered dissolving the bonds of matrimony between the parties. The Judge of the County Court concluded that that court had acquired jurisdiction of the action; that service of summons was effected by publication as shown in the evidence; that the proceedings were regular and the judgment duly and properly entered. Defendant's motion to set aside the judgment was denied. Defendant excepted and appealed to the Superior Court, assigning errors.

Defendant excepted to the failure of the County Judge to find and set out the facts as shown in evidence that plaintiff had given defendant notice by mail of the prior action in Guilford, and that when defendant appeared and indicated purpose to contest the action plaintiff took a nonsuit. Defendant also excepted to the failure of the County Judge to find the facts as to the circulation of the *Alamance Gleaner* as shown by the publisher's affidavit. Defendant also excepted to each and all of the findings, and to the conclusions of law of the County Judge.

In the Superior Court the exceptions to the failure of the County Judge to set out the facts as to the prior action and as to the circulation

of the newspaper in which notice of summons was published were sustained as being supported by the uncontradicted evidence. The defendant's exception to the finding that plaintiff was a resident of North Carolina was also sustained. The court expressed the opinion that the affidavit attached to plaintiff's complaint was defective, and that the order of publication did not comply with the statute. The defendant's exceptions to the conclusions of law set out in the order of the Judge of the County Court were sustained, the Court being of opinion that the judgment was void.

Whereupon the order of the Judge of the County Court denying defendant's motion was reversed and the cause remanded to the County Court, with leave to the defendant to answer.

Plaintiff excepted and appealed.

Young, Young & Gordon and Dameron & Dameron for plaintiff, appellant.

Anthony M. Anzalone and W. R. Dalton, Jr., for defendant, appellee.

DEVIN, J. At the outset we note that the action was instituted in the General County Court of Alamance County, and that jurisdiction to try and determine divorce actions was conferred on that court by statute, and, further, that appeals from that court to the Superior Court are upon exceptions duly noted and assigned as error, and that the power of the Judge hearing the case on appeal is limited to ruling on the exceptions brought forward. Exercising only appellate jurisdiction, he is without authority to make additional findings of fact as the basis of judgment. G.S. 7-279; *Jenkins v. Castelloe,* 208 N.C. 406, 181 S.E. 266; *Starnes v. Tyson,* 226 N.C. 395, 38 S.E. 2d 211.

In the complaint two years' separation was alleged as grounds for divorce. G.S. 50-6. *Byers v. Byers,* 222 N.C. 298, 22 S.E. 2d 902; *Taylor v. Taylor,* 225 N.C. 80, 33 S.E. 2d 492. In defendant's absence judgment was rendered in the County Court dissolving the bonds of matrimony between the parties for the reasons alleged. When the defendant learned of this result she sought relief by a motion in the cause that the judgment be vacated. She based her motion on the ground that plaintiff had not been a resident of North Carolina for six months preceding the institution of his action; that the service of summons by publication was inadequate and not made in a manner likely to give notice to the defendant; that the method employed by the plaintiff for obtaining substituted service under the circumstances here described constituted a fraud upon the court; that the absence of notice and opportunity to defend had resulted in the deprivation of personal and property rights of the defendant without due process of law.

In the hearing on defendant's motion in the County Court, the Judge of that court found that plaintiff was a resident of North Carolina and concluded that the service of summons on the defendant was effected by the publication in the local newspaper, and that the County Court had properly acquired jurisdiction to hear and determine the action and to render judgment dissolving the marriage tie. Upon this conclusion from the facts in evidence, the Judge denied defendant's motion to set aside the judgment, and the defendant appealed to the Superior Court assigning the ruling and order of the court as error.

We note that Judge Harris in the Superior Court was of opinion that the affidavit attached to the complaint was fatally defective, but this conclusion is not borne out by the record. The court also concluded that the order of publication was inadequate, but we perceive no substantial failure to conform to the statute in this respect. G.S. 1-99; *Scott & Co. v. Jones*, 230 N.C. 74, 52 S.E. 2d 219; *Simmons v. Simmons*, 228 N.C. 233, 45 S.E. 2d 124.

The Judge of the County Court found from the evidence offered that the plaintiff had been a resident of North Carolina for a sufficient length of time to entitle him to maintain in that court an action for divorce under the statute. Though the Superior Court on appeal sustained defendant's exception thereto, the finding of the trial judge must be held conclusive and binding on the Superior Court and on this Court if there be evidence to support the finding. *Bryant v. Bryant*, 228 N.C. 287, 45 S.E. 2d 572. The defendant, however, with some reason contends that the plaintiff admittedly was a professional soldier, at all times under military orders, and that his sojourn in North Carolina was subject to transfer, and lacked that degree of permanence sufficient to afford evidence of the acquisition of domicile. 106 A.L.R. 32 (note); 17 A.J. 287. It is argued that evidence of the *animus manendi* is insufficient (*Owens v. Chaplin*, 228 N.C. 705, 47 S.E. 2d 12; *S. v. Williams*, 224 N.C. 183, 29 S.E. 2d 744; *Reynolds v. Cotton Mills*, 177 N.C. 412, 99 S.E. 240), and that the place in which the plaintiff was a resident at the time of his induction into the Armed Forces would continue to be his legal domicile while in the service. *Hiles v. Hiles*, 164 Va. 131; 106 A.L.R. 1. But conceding that there may be some evidence in the record to take this case out of the rule and to show that the plaintiff's physical presence in this jurisdiction was accompanied by such acts and definite expressions of intention and purpose to remain indefinitely as to support the County Court's findings, *Bryant v. Bryant, supra*, we think the ruling of Judge Harris in the Superior Court should be upheld upon another ground.

The exception to the conclusions of law of the County Judge in denying defendant's motion and the ruling thereon in the Superior Court sustaining the exceptions squarely present the question of the integrity of

the divorce decree procured by plaintiff in the County Court upon substituted service by publication in the manner and by the means here shown.

It may be observed that the statute (G.S. 1-108), which permits a nonresident against whom judgment has been rendered on substituted service to come in and defend at any time within five years, does not apply to actions for divorce. While a suit for divorce is not strictly an action *in rem,* yet it differs in some respects from an action *in personam.* It involves the marital status of two persons, and the domicile of one of the parties in the State creates a relationship to the State adequate for the exercise of the State's power to alter the marriage status of the resident though the other spouse be a nonresident, and there is no constitutional barrier if the form and nature of the substituted service meet the requirements of due process of law. *Williams v. North Carolina,* 317 U.S. 287; *Williams v. North Carolina,* 325 U.S. 226.

The defendant presents the view that not only was the service in this case invalid because not reasonably calculated to give notice (*Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 94 L. Ed. 865), but that the plaintiff's attempt to secure a divorce decree by the means employed was a fraud upon the court. The rule is that if a fraud is perpetrated on the court whereby jurisdiction is apparently acquired when jurisdiction is in fact lacking, the judgment rendered thereon is a nullity and may be vacated on motion in the cause. *Fowler v. Fowler,* 190 N.C. 536, 130 S.E. 315; *Hatley v. Hatley,* 202 N.C. 577, 163 S.E. 593; *Young v. Young,* 225 N.C. 340, 34 S.E. 2d 154; *Henderson v. Henderson,* 232 N.C. 1, 59 S.E. 2d 227. Here the fact of the plaintiff's knowledge of the residence and post office address of the defendant in the city where he had lived with her as his wife and where she has continued to live, and his apparently purposeful failure so to advise the court when he prayed for service of summons by publication in a local newspaper of limited circulation, together with his knowledge that defendant had employed counsel and was prepared to and would defend the action if by any means she had notice, compels the necessary inference that plaintiff had contrived to conceal his action from the defendant and the facts from the court, and to prevent defendant from appearing and defending the suit, thus constituting a fraud upon the court. *Fowler v. Fowler,* 190 N.C. 536, 130 S.E. 315; *Poole v. Poole,* 210 N.C. 536, 187 S.E. 777; *S. v. Williams,* 224 N.C. 183, 29 S.E. 2d 744; *Young v. Young,* 225 N.C. 340, 34 S.E. 2d 154. See also G.S. 1-104.

The mere fact of instituting suit for divorce in a county other than that of plaintiff's residence would not be regarded as affecting the jurisdiction of the court over the action on proper service, but rather as affecting only the question of venue. *Davis v. Davis,* 179 N.C. 185, 102 S.E. 270; *Smith v. Smith,* 226 N.C. 506, 39 S.E. 2d 391. But where the

plaintiff, as here, institutes an action in the county in which he is residing, notifies the nonresident defendant by mail and when she appears with counsel to defend takes a nonsuit, and then with full knowledge of her whereabouts has another summons issued in a court of limited jurisdiction in another county, and, without attempting to obtain personal service, procures service by publication in a weekly newspaper of limited circulation, and, without other notice, has divorce decree entered, the conclusion seems inevitable that plaintiff was seeking to obtain a divorce from his wife without her knowledge and to deprive her of her right to support and to marital association by a fraudulent imposition upon the court. *Young v. Young,* 225 N.C. 340, 34 S.E. 2d 154. The facts in this case seem to evince a purpose on the part of plaintiff to arrange the outward forms of substituted service and regularity of procedure, but in such a way that by no reasonable probability could defendant obtain notice or knowledge of his suit for divorce until after the decree had been entered. The form may not be exalted over the substance.

The defendant also asserts as reason for vacating the judgment of the County Court that she has thereby been deprived of personal and property rights without due process of law. We do not reach that question, but it may be observed that under the provisions of the Constitution of North Carolina, Art. I, sec. 17, that no person be deprived of property "but by the law of the land," as well as under the parallel provisions of the 14th Amendment to the Constitution of the United States, it is required that an adjudication affecting the marital status and finally determining personal and property obligations shall be preceded by notice and opportunity to be heard. *Markham v. Carver,* 188 N.C. 615, 125 S.E. 409; *Bowie v. West Jefferson,* 231 N.C. 408, 57 S.E. 2d 369; *Truax v. Corrigan,* 257 U.S. 312. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306.

The plaintiff points to the language in the judgment of Judge Harris that defendant's exceptions "based on the choice of a newspaper for publication are not well taken," and contends this expression should be interpreted as overruling defendant's exception to the adequacy of the publication, but in view of the court's ruling sustaining all defendant's exceptions to the findings and conclusions of the County Judge, we do not think the expression quoted should be given significance. *Elias v. Commissioners of Buncombe County,* 198 N.C. 733, 153 S.E. 323.

For the reasons stated, the judgment of the Superior Court is

Affirmed.

HETTIE S. PERKINS v. E. P. SYKES.

(Filed 2 February, 1951.)

1. Judgments § 27a—

In order to be entitled to have a default judgment set aside under G.S. 1-220, motion must be made in apt time and movant must show not only surprise or excusable neglect but also a meritorious defense.

2. Appeal and Error § 40d—

The findings of the trial court upon motion to set aside a default judgment for surprise or excusable neglect are conclusive on appeal when supported by evidence.

3. Same—

Facts found by the trial court under a misapprehension of law are not binding on appeal, and in such instance the facts will be set aside and the cause remanded to the end that the evidence be considered in its true legal light.

4. Appeal and Error § 6c (3)—

A general exception to the findings of fact is insufficient, but appellant must point out with particularity the findings excepted to.

5. Same—

An exceptive assignment of error to the judgment presents only whether the facts found are sufficient to support the judgment and whether error in matters of law appears upon the face of the record.

6. Attorney and Client § 8—

An attorney retained generally to conduct an action enters into an entire contract to follow the proceeding to its termination, and he may not withdraw from the case except by leave of court for sufficient cause after reasonable notice has been given the client.

7. Judgments § 27a—

The withdrawal of defendant's attorney from the case by leave of court when the case is called for trial without notice to the client constitutes "surprise" within the meaning of G.S. 1-220.

8. Same—

Where the answer and record disclose a meritorious defense the denial of the trial court of a motion to set aside the judgment under G.S. 1-220 because defendant had offered no evidence of a meritorious defense, is erroneous.

APPEAL by defendant from *Harris, J.*, at May Term, 1950, of ORANGE.

Civil action to recover on three different causes of action set out in plaintiff's complaint, to which defendant filed a verified answer,—denying all liability to plaintiff and pleading a cross-action against her,—all as recited in opinion by *Ervin, J.*, on former appeal to this Court

reported in 231 N.C. at page 488, 57 S.E. 2d 645, to which reference is here made for the details as to pleadings, issues and judgment then under consideration. The appeal there was from a judgment entered at May Term, 1949, of Superior Court of Orange County. This Court dismissed the appeal as being fragmentary and premature, but ruled that when the whole action is tried an appeal would lie from the final judgment upon the whole controversy.

The present appeal is from a judgment denying defendant's motion to set aside a judgment entered in his absence at May Term, 1950, on the ground of excusable neglect,—he having a meritorious defense.

The judgment from which former appeal was taken declares that six issues were submitted to the jury; that "after several hours of deliberation, the jury reported about 10 p.m. Friday in open court that they had agreed on issues Nos. 5 and 6 but were unable to agree as to the first four issues"; that the court accepted the verdict on the 5th and 6th issues, and entered judgment thereon in favor of plaintiff, but ordered a mistrial as to the matters and things covered by the first four issues, and a new trial as to them. Defendant appealed therefrom to Supreme Court. And these recitals appear in the statement of the case in the opinion of this Court on such appeal: "Trial began on Monday morning and ended at ten o'clock on the ensuing Friday night. The parties offered voluminous testimony in support of their respective pleadings."

Thereafter the case was calendared for trial at the May Term, 1950, of Superior Court of Orange County as the first case on Tuesday, 16 May, 1950, and it was so heard. At this hearing defendant was not present nor was he represented by his attorneys of record,—the court having permitted them to withdraw from the case on the morning of 16 May, 1950,—about one or two hours before the case was heard and judgment rendered. The court submitted the case to the jury on the four issues as to which the jury, on former trial, had failed to agree. The jury answered all these issues in favor of plaintiff. And thereupon the court entered judgment in accordance with the verdict in favor of plaintiff and against defendant, and also against his sureties on a bond filed by him.

The next morning, 17 May, 1950, at 9:30 o'clock the defendant moved in open court that the judgment so entered against him on 16 May, 1950, be set aside on the ground of excusable neglect,—he having a meritorious defense. And at the hearing which then followed defendant testified, and offered the testimony of three others, including one of his attorneys of record, Mr. Lee, in support of the motion. The gist of the testimony of defendant is as follows: That two or three months prior thereto he moved from Hillsboro, N. C., to Apex, N. C.; that he did not have a mail box at Apex, but got his mail through the box of his father-in-law, J. W. Lassiter, to which he did not know the dial combination; that hence he did

not go to the box at all—his mail being brought to him by his father-in-law; that he did not receive any notice from his attorneys that the case was calendared for trial on May 16th; that the first he knew of the case being on the calendar for trial at that time was when R. D. Caldwell called him by long distance telephone about 9 o'clock on the morning of May 16th; that he immediately communicated with one of his attorneys by long distance telephone and went by car to Durham, got his attorney and went with him on to Hillsboro, arriving there between 11:30 and 12 o'clock for the purpose of looking after the case; that when they arrived, court had already adjourned for the day; that it took four or five days to try the case when it was first tried, and he had a meritorious defense to the action; that he wanted an opportunity to present his defense; and "that his lawyers were already employed in the case."

The testimony of defendant's attorney, Mr. Lee, so given on the hearing of the motion as above stated, is substantially the following: That he was employed as original counsel in the matter; that he and Mr. Gantt represented the defendant in the first trial, and in the Supreme Court; "that he by letter advised the defendant that his case was on the calendar for trial on May 16, 1950, and enclosed a copy of the court calendar in said letter, addressing the defendant at Apex, N. C., in the care of J. W. Lassiter; that he did not hear from defendant in reply to this letter and that his Honor W. C. Harris permitted him and R. M. Gantt to withdraw as counsel for the defendant on the morning of May 16th at the opening of court; that he (J. Grover Lee) advised Judge Harris on the morning of May 16, 1950, when he was discussing this matter that he and Mr. Gantt would be pleased to represent the defendant should he later see them and arrange with them to represent him; that a short time after he saw Judge Harris with reference to withdrawing, the defendant did call him by telephone and arrange with him to represent him further in the matter and advised him at the time that he had not received any previous notice from him or any one else that the case was on the calendar for trial on May 16"; that on morning of May 16, R. D. Crawford called him (Lee) by phone from Hillsboro and he advised Mr. Crawford that he had written Mr. Sykes and had heard nothing from him; that a short time after this defendant called him in Durham and advised him that he did not know the case was on the calendar for May 16th and wanted him to represent him; that defendant immediately came to see him and took him to Hillsboro that morning; "that Mr. Sykes had paid him for his services in this matter up to date on different occasions the sum of $400.00, and that he was still willing and was representing the defendant."

After hearing parol testimony and argument offered by Mr. Lee, the court found facts, in material part, as follows: That the opinion of the

Supreme Court, 1 March, 1950, was filed on 4 April, 1950, in office of Clerk of Superior Court of Orange County; that the present action was calendared as the first case for trial on Tuesday morning, 16 May, 1950; that a copy of the calendar was mailed by the Clerk to each of defendant's attorneys, J. Grover Lee and R. M. Gantt, both of whom, at the time, were attorneys of record; that the attorneys received the calendar more than two weeks prior to the convening of said court on 15 May, 1950; that following receipt of copies of the calendar, each of the attorneys wrote letters to defendant at his correct address in Apex, N. C., "although the defendant contends that he did not receive either of said letters"; that, from the testimony offered, defendant was indebted to each of his attorneys "for balance of attorney's fees due on account of appearance in Supreme Court, and that no payment was made to said attorneys for representation at May Term, 1950, of Superior Court"; that neither "defendant nor either of his attorneys made any preparation for the trial of this action at May 1950 Term and no witnesses were summoned on the part of said defendant"; "that on Tuesday, May 16, 1950, each of defendant's attorneys . . . appeared before the undersigned Judge and asked permission to retire as attorneys for defendant in the above entitled action; that this request of said attorneys was duly entered on the minutes of the proceedings of the May Term of Orange Superior Court had on Tuesday, May 16, 1950, by the Clerk of said court; that no request for change of this motion was made to the court and no application for reinstatement as attorneys was made by either J. Grover Lee or R. M. Gantt"; that "from testimony offered the court finds as a fact that the bondsman, to wit, R. D. Crawford, was notified on Monday evening, May 15, 1950, that the above entitled action would be tried the next morning, to wit, May 16, 1950, and that said bondsman notified defendant . . . by phone at 7 o'clock a.m. on Tuesday, May 16, 1950, that this action would be tried in court that morning"; "that on convening of court on Tuesday, May 16, 1950, the above entitled case was regularly reached for trial, the plaintiff with witnesses being present in court and also represented by attorneys . . .; that the defendant . . . was duly called in court by the sheriff, and after waiting a reasonable time and the defendant failing to appear, the court proceeded with the trial of this action, etc."; "that the court completing the hearing of cases calendared for Tuesday, May 16, 1950, by 12 o'clock noon on said day accordingly adjourned court until the next morning, to wit, May 17, 1950"; that "from testimony offered the court finds as a fact that the defendant . . . in company with attorney J. Grover Lee, went to the courthouse in Hillsboro on Tuesday, May 16, 1950, after the adjournment of court as above set forth"; "that on Wednsday, May 17, 1950, during the morning session of the Superior Court of Orange County, E. P. Sykes, accompanied by

attorney J. Grover Lee, appeared and made oral motion for the setting aside of the judgment rendered on the preceding day in this action on the grounds of excusable neglect and a meritorious defense," and that "the court heard four witnesses offer oral testimony, to wit: E. P. Sykes, the defendant, J. W. Lassiter, R. D. Crawford (the bondsman) and J. Grover Lee, attorney, and from the facts as above set forth, the court holds that the defendant has failed to show sufficient grounds for setting aside the judgment on account of excusable neglect, and further holds that no evidence of meritorious defense has been shown."

Thereupon the court entered judgment denying the motion of defendant to set aside the judgment rendered on 16 May, 1950.

These entries follow: "To the above findings of facts, for errors assigned and to be assigned the defendant excepts. To the signing of this judgment the defendant in apt time excepts."

Defendant appeals to Supreme Court and assigns error.

A. H. Graham and L. J. Phipps for plaintiff, appellee.

J. Grover Lee and R. M. Gantt for defendant, appellant.

WINBORNE, J. The decisions of this Court uniformly hold that a party, moving in apt time and under the provisions of G.S. 1-220 to set aside a judgment taken against him, on the ground of surprise or excusable neglect, not only must show surprise or excusable neglect, but also must make it appear that he has a meritorious defense to plaintiff's cause of action. *Dunn v. Jones,* 195 N.C. 354, 142 S.E. 320; *Hooks v. Neighbors,* 211 N.C. 382, 190 S.E. 236; *Johnson v. Sidbury,* 225 N.C. 208, 34 S.E. 2d 67; *Craver v. Spaugh,* 226 N.C. 450, 38 S.E. 2d 525; *Whitaker v. Raines,* 226 N.C. 526, 39 S.E. 2d 266; *Hanford v. McSwain,* 230 N.C. 229, 53 S.E. 2d 84, and numerous other cases.

The findings of fact made by the court in respect to the elements so required, surprise or excusable neglect and meritorious defense, when supported by evidence, are conclusive on appeal, and binding on this Court. *Craver v. Spaugh, supra; Hanford v. McSwain, supra.*

But facts found under misapprehension of the law are not binding on this Court and will be set aside, and the cause remanded to the end that the evidence should be considered in its true legal light. *McGill v. Lumberton,* 215 N.C. 752, 3 S.E. 2d 324. See also *Hanford v. McSwain, supra,* where decisions to like effect are cited.

Indeed, in *Calaway v. Harris,* 229 N.C. 117, 47 S.E. 2d 796, the principle has been aptly re-stated in this manner: "Where rulings are made under a misapprehension of the law or the facts, the practice is to vacate such rulings and remand the cause for further proceedings as to justice appertains and the rights of the parties may require," citing *McGill v.*

Lumberton, supra. And this principle is applied in *Hanford v. McSwain, supra.*

While on the present appeal defendant, appellant, bases an assignment of error upon a general exception to the findings of fact on which the challenged judgment rests, "a shot at the covey," so to speak, it fails to hit any particular fact. Hence it is not well taken, and cannot be considered. See *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351.

Moreover, the only assignment of error properly presented for consideration is founded on an exception to the judgment. Such assignment, as recently re-stated in *Simmons v. Lee,* 230 N.C. 216, 53 S.E. 2d 79, and numerous cases there cited, raises only the questions (1) as to whether the facts as found by the judge are sufficient to support the judgment, and (2) as to whether error in matters of law appears upon the face of the record. See also *Hanford v. McSwain, supra.*

In this connection it is apparent, from a reading of the pleadings, the judgment on former trial, and the opinion of the Supreme Court on the former appeal in connection with defendant's motion to set aside the judgment of 16 May, 1950, that the facts found by the court in respect to the essential elements, surprise or excusable neglect, and meritorious defense, were made under a misapprehension of the law and the facts.

First, as to the withdrawal of defendant's attorneys: Appropriate treatment of the subject is found in these decisions of this Court: *Gosnell v. Hilliard,* 205 N.C. 297, 171 S.E. 52, and in *Roediger v. Sapos,* 217 N.C. 95, 6 S.E. 2d 801. In the *Gosnell case, Adams, J.,* writing for the Court, in pertinent part, had this to say: "An attorney who is retained generally to conduct a legal proceeding enters into an entire contract to follow the proceeding to its termination, and hence cannot abandon the service of his client without sufficient cause and without giving proper notice of his purpose . . . Weeks states the rule as follows: 'An attorney who undertakes the conduct of an action impliedly stipulates to carry it to its termination and is not at liberty to abandon it without reasonable cause and reasonable notice.'

"The dual relation sustained by an attorney imposes upon him a dual obligation—the one to his client, the other to the court. He is an officer of the court . . . and can withdraw from a pending action in which he is retained only by leave of the court . . . and only after having given reasonable notice to his client. This Court has held that if an attorney wishes to withdraw from a case in which he has been employed he must inform his client of his intention, and that he cannot terminate the contractual relation between them without such information. . . . No rule of universal application has been formulated with respect to facts or conditions which would justify an attorney in withdrawing from pending litigation; but it is generally held that the client's failure to pay or to

secure the payment of proper fees upon reasonable demand will justify the attorney in refusing to proceed with the case. . . . In *Spector v. Greenstein,* 85 Pa. Sup. L. 177, it was held that while an attorney may sever his relation with a client who refuses to pay a fee, his withdrawal should not be allowed in the absence of the client, without notice to him, and without his having an opportunity to be heard. The decisive question is whether the defendant was entitled to specific notice that her attorney would not represent her at the trial. It is held generally that she was entitled to such notice . . . She was entitled either to specific notice in advance that her counsel would retire from the case or, after his withdrawal, that he had retired, and to a reasonable opportunity to obtain other professional assistance."

To like effect is the case of *Roediger v. Sapos, supra.* There this Court, in opinion by *Barnhill, J.,* states: "When defendant's counsel undertook to withdraw from the case at the moment the cause was ordered to trial the court below should have denied him the right to do so. If counsel insisted upon withdrawing or declined to participate in the trial in defense of his client's rights, he being an officer of the court, the judge had ample authority to require him to proceed in good faith. The conduct of the attorney in withdrawing from the case under the circumstances disclosed by this record, inadvertently participated in by the judge in allowing such conduct, if the defendant had no notice of such purpose, constitutes 'surprise' under C.S. 600," citing cases.

Applying these principles to the case in hand, it appears on the face of the record that the attorneys of record for defendant appeared generally in the conduct of his defense to the action in both Superior and Supreme Courts. And there is no showing or finding, in connection with their withdrawal from the case, or otherwise, that they had given defendant notice that they, or either of them, intended to withdraw from the case. Under such circumstance, their request to be permitted to retire from the case should have been denied. Their conduct in withdrawing under the circumstances disclosed by the record, inadvertently participated in by the judge in allowing such conduct, constitutes "surprise" under G.S. 1-220, formerly C.S. 600.

Second: As to the holding that "no evidence of meritorious defense has been shown," patently this ruling was made under misapprehension (1) as to the averments in defendant's answer denying the allegations of plaintiff's complaint, (2) of the judgment on former trial, and (3) of opinion of the Supreme Court, all of which appear upon the face of the record. See *Hanford v. McSwain, supra; Cagle v. Williamson,* 200 N.C. 727, 158 S.E. 391.

For reasons pointed out, the findings of fact and rulings thereon made by the judge below will be and are set aside, and the cause is remanded

for further proceedings as to justice appertains and the rights of the parties may require. *Hanford v. McSwain, supra.*

Error and remanded.

DANIEL W. HOOPER v. MARYLAND CASUALTY COMPANY.

(Filed 2 February, 1951.)

1. Insurance § 43d—

The extended coverage of a liability policy to persons operating vehicles owned by the named insured provided such use is with the permission of the named insured, operates regardless of whether such permission be expressed or implied, but in either case such permission must be predicated upon the language or conduct of the named insured or someone having authority to bind him in that respect.

2. Same—

Whether an employee operating the truck of the named insured has expressed or implied permission from the insured for that particular trip, perforce cannot be established by the acts or declarations of the employee.

3. Same—Evidence held insufficient to establish liability under extended coverage clause.

Evidence tending to show merely that insured's employee had driven plaintiff to the home of plaintiff's sister and that the accident in suit occurred after they had left the house of plaintiff's sister and were traveling on a road which was not on the direct nor customary route of travel between the points the employee was authorized to drive the truck in the usual performance of his duties, without evidence of implied permission to the employee to use the truck for personal purposes, *is held* insufficient to be submitted to the jury on the question of insurer's liability under the clause of the policy extending coverage to the operation of the vehicle by persons with the permission of the named insured.

4. Same—

Testimony of a passenger in a truck that at the time in question he and the employee-driver had started to the employer's plant to load the truck with brick, *is held* simply a statement of mental intent, and is without probative value as to the state of mind of the employee.

5. Evidence § 27½—

While a person may testify as to the intent with which he performs a particular act, no one else can have any personal knowledge in respect thereto, and therefore testimony of another as to such person's intent is without probative force.

6. Insurance § 43d—

In order to show that an employee has implied permission from insured to use insured's truck for personal purposes, there must be some evidence

that the employee had theretofore used the truck for personal purposes or that on the occasion in question the employer knew he was so using it.

7. Appeal and Error § 3—

Defendant has no right of appeal from a judgment which is entirely in its favor.

APPEAL by plaintiff from *Clement, J.*, at the May Term, 1950, of FORSYTH.

Civil action by plaintiff against an automobile liability insurer to subject an automobile liability policy to the satisfaction of a judgment for personal injuries recovered by the plaintiff against the employee of the insured.

The facts stated in the next six paragraphs are not in dispute:

The Pine Hall Brick and Pipe Company, a dealer in bricks, maintains a sales office and storage yard at Winston-Salem in Forsyth County, and a manufacturing plant at Pine Hall in Stokes County. The distance between these places is about twenty-five miles. They are connected by an excellent hard-surfaced highway, which runs northeastwardly from Winston-Salem *via* Walkertown to Pine Hall. The first part of the highway, *i.e.*, the seven miles stretch between Winston-Salem and Walkertown, consists of two widely separated alternate routes, one called "old 311" and the other "new 311," which come together and merge at or near Walkertown. These alternate routes are connected at some point near Winston-Salem by a narrow, unpaved, and winding road, at least a mile in length, known as the Whitfield Road.

In February, 1947, the Pine Hall Brick and Pipe Company owned several trucks, which it used to haul bricks from its manufacturing plant in Pine Hall to its storage yard at Winston-Salem, and to transport bricks from both of these places to its customers. One of these motor vehicles, to wit, a 1946 Chevrolet truck, was covered by a policy of automobile liability insurance which the defendant, Maryland Casualty Company, had issued to the Pine Hall Brick and Pipe Company as the named insured, and which contained an omnibus or extended coverage clause in these words: "The unqualified word 'insured' wherever used includes not only the named insured but also any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, Provided the actual use is with the permission of the named insured, and also any executive officer of the named insured with respect to the use of a non-owned automobile in the business of the named insured."

Robert H. Glenn was employed by the Pine Hall Brick and Pipe Company as the regular driver of the Chevrolet truck, which he was allowed to keep at his home in Winston-Salem during the work-week to facilitate

his going to work. He "was given permission to take the truck to his home on the night before the accident . . . for his convenience in making an early start to get a load of brick at Pine Hall the next morning."

At sometime between 4:00 and 4:30 o'clock on the morning of 15 February, 1947, Glenn was driving the Chevrolet truck, which was empty, along the Whitfield Road. The plaintiff was riding with him. Glenn suddenly lost control of the truck and ran off the road, inflicting disabling and lasting personal injuries upon the plaintiff.

On 9 December, 1947, the plaintiff sued the Pine Hall Brick and Pipe Company and Glenn for damages for his personal injuries. He failed to prove that Glenn was acting within the course and scope of his employment at the time of the accident, and as a consequence the Pine Hall Brick and Pipe Company was dismissed from the action upon a compulsory nonsuit under G.S. 1-183. But the plaintiff recovered judgment against Glenn for $15,000.00. Execution was issued thereon, and was returned unsatisfied. Glenn is insolvent, and the judgment cannot be collected from him.

On 11 February, 1950, the plaintiff brought this action against the defendant upon the automobile liability policy issued by the defendant to the Pine Hall Brick and Pipe Company, covering the Chevrolet truck which was being operated by Glenn on the occasion of the injury to the plaintiff. The complaint alleges that at the time of the accident the actual use of the Chevrolet truck by Glenn was with the permission of the Pine Hall Brick and Pipe Company within the purview of the omnibus or extended coverage clause of the policy, and that by reason thereof the defendant is obligated to pay the judgment recovered by plaintiff against Glenn in the former action. The answer denies the material allegations of the complaint, and pleads certain defenses not presently germane.

The plaintiff was the only witness called to the stand at the trial. After presenting documentary evidence of the uncontroverted facts set forth above, he testified in substance as follows: That the plaintiff, an insurance collector, was a near neighbor of Glenn in Winston-Salem; that Glenn drove the Chevrolet truck to the plaintiff's residence in Winston-Salem "around 4:00 o'clock A. M. on February 15, 1947"; that the plaintiff seated himself in the truck, and rode with Glenn *via* "new highway 311" and Whitfield Road to the home of the plaintiff's sister on Whitfield Road, where they stopped and visited for about fifteen minutes; that they then re-entered the truck, and proceeded along Whitfield Road towards "old highway 311" with Glenn driving; and that the accident occurred when the truck had reached a point on Whitfield Road a quarter of a mile from the home of the plaintiff's sister.

The plaintiff was permitted by the court to testify over the objection and exception of the defendant that he and Glenn had "started to Pine Hall to load the truck with brick."

The plaintiff offered to testify to extra-judicial statements of Glenn, indicating that Glenn had solicited the plaintiff to accompany him to Pine Hall and to assist him in loading the Chevrolet with bricks, and had promised to pay the plaintiff for so doing. The proposed testimony was rejected by the court upon objection of the defendant, and the plaintiff reserved exceptions to its exclusion.

The action was dismissed upon a compulsory judgment of nonsuit under G.S. 1-183 after the plaintiff had introduced his evidence and rested his case, and both the plaintiff and the defendant appealed. The plaintiff assigns as errors the exclusion of the extra-judicial statements of Glenn and the entry of the nonsuit, and the defendant assigns as error the admission of the testimony of the plaintiff that he and Glenn had "started to Pine Hall to load the truck with bricks."

Higgins & McMichael for plaintiff, appellant and appellee.

Deal & Hutchins for defendant, appellant and appellee.

ERVIN, J. Omnibus or extended coverage clauses in policies of automobile liability insurance have provoked much litigation in other jurisdictions in cases where employees were driving motor vehicles belonging to their employers. Annotation: 5 A.L.R. (2d) 600-668. But diligent research by counsel and the Court fails to uncover any North Carolina decision directly pertinent to the problems posed by the plaintiff's appeal. Since the present record makes these problems so fundamentally factual in nature, however, there is no occasion at this time for us to choose between the differing constructions put upon such clauses by other courts, or to mark out for ourselves the precise legal boundaries of the clause embodied in the policy in suit. We even refrain from voicing any preference between the exact meaning accorded by some courts to the specific requirement that "the *actual use* is with the permission of the named insured" (*Johnson v. Maryland Casualty Co.*, 34 F. Supp. 870, reversed on other grounds in 125 F. 2d 337; *Gulla v. Reynolds*, 82 Ohio App. 243, 81 N.E. 2d 406, affirmed in 151 Ohio St. 147, 85 N.E. 2d 116; *Brown v. Kennedy*, 141 Ohio St. 457, 48 N.E. 2d 857; *Laroche v. Farm Bureau Mut. Automobile Ins. Co.*, 335 Pa. 478, 7 A. 2d 361; *Conrad v. Duffin*, 158 Pa. Super. 305, 44 A. 2d 770; *Troiano v. Cook*, Pa. Com. Pl., 20 Lehigh Leg. J. 159), and the indefinite sense assigned by other tribunals to that requirement (*Vezolles v. Home Indemnity Co., New York*, 38 F. Supp. 455, affirmed in 172 F. 2d 116; *Stanley v. Cryer Drilling*, 213 La. 980, 36 So. 2d 9; *Donovan v. Standard Oil Co. of Louisiana* (La.

App.), 197 So. 320; *Farnet v. DeCuers* (La. App.), 195 So. 797; *Haeuser v. Aetna Casualty & Surety Co.* (La. App.), 187 So. 684.

The major question raised by the plaintiff's appeal is whether the plaintiff produced sufficient evidence at the trial to warrant a finding by a jury that the employee, Glenn, was operating the Chevrolet truck at the time of the accident with the permission of the employer and named insured, the Pine Hall Brick and Pipe Company. The minor question relates to the admissibility of the extra-judicial statements of Glenn to the plaintiff.

The permission which puts the omnibus or extended coverage clause of the policy into operation may be either express or implied. *Hodges v. Ocean Accident & Guarantee Corporation,* 66 Ga. App. 431, 18 S.E. 2d 28. But whether the permission be expressly granted or impliedly conferred, it must originate in the language or the conduct of the named insured or of someone having authority to bind him in that respect. *Fox v. Employers' Liability Assurance Corporation, Limited, of London, England,* 243 App. Div. 325, 276 N.Y.S. 917, affirmed in 267 N.Y. 607, 196 N.E. 604; *Hunter v. Western and Southern Indemnity Co.,* 19 Tenn. App. 589, 92 S.W. 2d 878; *Locke v. General Accident Fire & Life Assurance Corporation, Limited, of Perth, Scotland,* 227 Wis. 489, 279 N.W. 55; *Brochu v. Taylor,* 223 Wis. 90, 269 N.W. 711.

The answer to the minor question presented by the plaintiff's appeal is to be found in this principle. Glenn could not define or enlarge the scope of his permitted use of his employer's truck by anything said or done by him without the knowledge of his employer, or its proper representatives. In consequence, the trial judge rightly rejected the extra-judicial statements of Glenn to the plaintiff. The proffered testimony had no relevancy to the issue of whether Glenn was using the truck at the time of the plaintiff's injury with the permission of the Pine Hall Brick and Pipe Company. In the very nature of things, that issue had to be determined from evidence of the words of those having authority to grant permission for the Pine Hall Brick and Pipe Company, or from evidence of dealings between the Pine Hall Brick and Pipe Company and Glenn.

In passing on the sufficiency of the plaintiff's evidence to carry the case to the jury, we are confronted by the paradoxical circumstance that such evidence is more significant for the things it conceals than it is for the things it reveals. It does not indicate that Glenn had authority to carry others in his employer's truck, or to engage others to labor for his employer, or to delegate to others tasks he was obligated to perform for his employer. It commits to pure speculation these important matters: What hours did the Pine Hall Brick and Pipe Company observe in the conduct of its business? What working hours did it assign to Glenn?

Was Glenn required by the terms of his employment to begin his day's work "around four o'clock in the morning"?

The Pine Hall Brick and Pipe Company gave Glenn express permission to use its truck in its business. The plaintiff asserts that Glenn was en route to the manufacturing plant of his employer at Pine Hall for a load of bricks at the time of the accident, and as a consequence was then acting within the scope of this express permission. When all is said, the testimony respecting the use of the truck at the time in controversy comes simply to this: That Glenn, the regular driver of the named insured, and the plaintiff, an insurance collector, were near neighbors in Winston-Salem; that at "around 4:00 o'clock A. M., on February 15, 1947," Glenn drove the plaintiff in the named insured's truck from the home of the plaintiff in Winston-Salem to the residence of the plaintiff's sister on Whitfield Road near Winston-Salem, where they stopped and visited for fifteen minutes; that they thereupon re-entered the truck and were proceeding along Whitfield Road towards "old highway 311" with Glenn driving, when the accident happened; that Whitfield Road was neither the direct nor the customary route of travel between Winston-Salem and Pine Hall; and that "old highway 311" afforded persons reaching it *via* Whitfield Road access to Winston-Salem, Pine Hall, and many other places. We are compelled to hold that these circumstances are not sufficient to show that at the time of the accident Glenn was going to the named insured's manufacturing plant at Pine Hall for a load of brick. They rather give rise to the inference that Glenn was using the truck for his own convenience and that of the plaintiff.

In reaching this conclusion, we do not overlook the testimony of the plaintiff, which was received over the objection and exception of the defendant, that he and Glenn had "started to Pine Hall to load the truck with brick." This statement is simply evidence by the plaintiff as to his state of mind, and that of Glenn. It is without probative value. There is no logical relation between the plaintiff's state of mind and the matter in issue, *i.e.*, whether Glenn was using the truck with the permission of the Pine Hall Brick and Pipe Company. While the act of Glenn in driving the truck along the Whitfield Road was equivocal in character, and Glenn could have testified directly as a witness in the case as to the intent with which that act was done by him, the plaintiff could not possibly possess any personal knowledge in respect to Glenn's intention.

The Pine Hall Brick and Pipe Company entrusted the truck to Glenn for a strictly business purpose. There is not a word in the record to indicate that he used it for any other purpose before the morning of the accident, or that his employer knew that he was using it at all on that occasion. These things being true, the testimony offers no basis for an inference that the Pine Hall Brick and Pipe Company had impliedly

extended to Glenn permission to use the truck for his own convenience and that of the plaintiff. *Brochu v. Taylor, supra.*

It follows, therefore, that the trial judge did not err in nonsuiting the action. This conclusion finds complete support in many well considered decisions in other jurisdictions. *Jordan v. Shelby Mut. Plate Glass & Casualty Co.*, 142 F. 2d 52; *Standard Acc. Ins. Co. v. Rivet*, 89 F. 2d 74; *Globe Indemnity Co. v. Nodlere*, 69 F. 2d 955; *Maryland Casualty Co. v. Matthews*, 237 Ala. 650, 188 So. 688; *Mycek v. Hartford Acci. & Indem. Co.*, 128 Conn. 140, 20 A. 2d 735; *Byrne for Use of King v. Continental Co.*, 301 Ill. App. 447, 23 N.E. 2d 175; *Wilson v. Farnsworth* (La. App.), 4 So. 2d 247; *Stephenson v. List Laundry & Dry Cleaners* (La. App.), 168 So. 317; *Waddell v. Langlois* (La. App.), 158 So. 665; *Gearin v. Walsh*, 299 Mass. 145, 12 N.E. 2d 66; *Dickinson v. Great American Indemnity Co.*, 296 Mass. 368, 6 N.E. 2d 439; *Sauriolle v. O'Gorman*, 86 N.H. 39, 163 A. 717; *Penza v. Century Indem. Co.*, 119 N.J.L. 446, 197 A. 29; *Nicholas v. Independence Indem. Co.*, 11 N. J. Misc. 344, 165 A. 868; *Fox v. Employers' Liability Assurance Corporation, Limited, of London, England, supra; Kazdan v. Stein*, 26 Ohio App. 455, 160 N.E. 506, affirmed in 118 Ohio St. 217, 160 N.E. 704; *Denny v. Royal Indemnity Co.*, 26 Ohio App. 566, 159 N.E. 107; *Powers v. Wells*, 115 Pa. Super. 549, 176 A. 62; *Indemnity Co. v. Jordan*, 158 Va. 834, 164 S.E. 539; *Cypert v. Roberts*, 169 Wash. 33, 13 P. 2d 55.

Inasmuch as the judgment rendered in the court below was entirely in favor of the defendant, it has no right to appeal. As a consequence, its appeal must be dismissed. *McCullock v. R. R.*, 146 N.C. 316, 59 S.E. 882; *Lenoir v. South*, 32 N.C. 237.

Judgment affirmed on plaintiff's appeal.

Defendant's appeal dismissed.

ALICE D. RIGGS v. AKERS MOTOR LINES, INC., AND HARRY B. CHASE

and

HATTIE D. BREEZE v. AKERS MOTOR LINES, INC., AND HARRY B. CHASE.

(Filed 2 February, 1951.)

1. Automobiles § 18g (5)—

The physical facts at the scene of an accident may disclose that the operator of the vehicle was traveling at excessive speed.

2. Automobiles § 12a—

A motorist is required to operate his vehicle with due regard to the conditions and hazards existing and to reduce speed in accordance with the requirements of due care under the circumstances, and therefore the fact that he did not exceed the statutory limit in regard to speed is not conclusive when the evidence discloses special hazards or dangerous conditions.

3. Automobiles § 18h (2)—Evidence of excessive speed held for jury.

Evidence tending to show that defendant's tractor-trailer was being operated on a wet highway in a drizzling rain, and that after a collision with another vehicle it jumped a road ditch bank about 1½ feet high, went 200 feet, tore down a cedar fence post six or eight inches in diameter, proceeded about 250 feet further and broke down an iron pipe post, knocked down a gas pump and crashed into a cinder block wall of a store and came to rest some eight or ten feet inside the store, *is held* sufficient to be submitted to the jury upon the question of whether the tractor-trailer was being operated at an excessive speed under the existing conditions notwithstanding defendant's evidence that it was traveling under 45 miles per hour.

4. Negligence § 7—

Whether the independent negligent act of a third party insulates the negligence of defendant is dependent upon the question of proximate cause, and in order to exculpate defendant's negligence it must break the sequence or causal connection between defendant's negligence and the injury so as to exclude it as a proximate cause thereof; while if it is only a condition on or through which the negligence of defendant operates to produce the injury and merely diverts the effect of defendant's negligence temporarily or merely accelerates the result, it does not exculpate defendant's negligence.

5. Negligence § 19d—

Nonsuit on the ground of intervening negligence is proper only when it clearly appears from the evidence, considered in the light most favorable to plaintiff, that the injury complained of was independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person.

6. Automobiles § 18h (4)—Nonsuit for intervening negligence held properly denied.

The evidence tended to show that defendant's truck was being operated at an excessive speed under the circumstances and that after a collision with another vehicle it careened into a store by the side of the highway, injuring plaintiffs. *Held:* Nonsuit on the ground of intervening negligence of the driver of the vehicle with which the truck collided was properly denied, since if the excessive speed of the truck was the reason or one of the reasons why it could not be stopped before crashing into the store, then such negligent speed was at least one of the proximate causes of the injuries and the negligence of the operator of the other vehicle was only a contributing or concurring cause.

7. Automobiles § 18i—

An instruction to the effect that the negligence of an independent third party would not insulate defendant's negligence if, in the natural and usual course of events, defendant could have foreseen the act of negligence on the part of such third person, constitutes prejudicial error, since a motorist is never required to foresee or anticipate negligence on the part of other motorists on the highway.

8. Same—

Plaintiff predicated defendant's negligence upon evidence of excessive speed and defective brakes upon defendant's vehicle. *Held:* Defendant was entitled, upon his supporting evidence, to an unqualified instruction that if the jury should fail to find by the greater weight of the evidence that defendant's truck was being operated at excessive speed or without adequate brakes, to answer the issue of negligence in the negative, and an instruction which in each instance qualified a negative finding, in whole or in part, upon a finding that defendant could not have anticipated the negligent act of an independent agency or third party, constitutes prejudicial error.

APPEAL by defendants from *Williams, J.*, September Term, 1950, ALAMANCE.

Civil actions to recover damages for personal injuries, consolidated for trial.

Plaintiffs were in a combination filling station and store located on the north side of Highway 70, about one mile east of Mebane. The trailer-truck belonging to defendants left the highway and crashed into the building, injuring each plaintiff. It was admitted that the defendant Chase was at the time the agent and employee of the corporate defendant.

In the trial below the customary issues were submitted to and answered by the jury in favor of plaintiffs. The court entered judgment on the verdict, and defendants excepted and appealed.

Bonner D. Sawyer and Allen & Allen for plaintiff appellees.

Edwards & Sanders and Cooper, Sanders & Holt for defendant appellants.

BARNHILL, J. The evidence, considered in the light most favorable to the plaintiffs, tends to establish the following facts: the McBane filling station and store is located about one mile east of Mebane on the north side of Highway 70 and about 85 feet back from the center of the highway; about 3:00 p.m. on the afternoon of 22 January 1949 the defendant Chase was operating a loaded tractor-trailer, going west on Highway 70 between Efland and Mebane; shortly after the truck came over a rise in the road some distance east of the store, witnesses heard the sound of what seemed to be screaming brakes. The truck was trying

to pass a car. The truck cut back behind the car and then bumped into it two or three times. The truck then cut to the right of the road across the shoulder, jumped the road ditch bank about 1½ feet high, went about 200 feet, tore down the corner cedar post of a fence about six or eight inches in diameter, and proceeded on across the store yard about 250 feet further, broke an iron pipe post, knocked down a gas pump, and crashed into the cinder block wall of the store. The truck was eight or ten feet inside the store when it finally stopped. It had been raining off and on all day and was drizzling at the time. The highway was damp and the soil along the road and across the store yard was wet and muddy. Just before the truck reached the point it left the highway, it was traveling at from 55 to 60 m.p.h. From the point the truck left the road to the store was slightly up grade, "a gentle rise." When the truck crashed into the building, each plaintiff was seriously injured.

The defendants' evidence is the same in respect to the general setting of the accident. It tends to show further that the truck, the over-all weight of which exceeded 38,000 pounds, was traveling about 40 m.p.h., or a little more, but under 45 m.p.h., going from New York to Gastonia. A Dodge auto undertook to pass the truck about 250 feet back from the McBane store driveway. It swerved to its right and struck the front portion of the left front wheel of the truck. The truck was "pushed" off the road, the trailer jackknifing and skidding down the highway. Chase, the driver, pulled down the hand valve which controlled the air brakes, trying to straighten the trailer. The air brakes would not work. He then used the foot brakes, but they too were out of order. He tried diligently to control the truck, by the use of the steering wheel, but that would not respond. He next endeavored to turn the truck over on its side so it would not go into the building. He then put the truck in fourth gear (the lowest) to try to slow it down. The truck traveled in the ditch until it hit the driveway to the McBane store and proceeded on and crashed into the building. The brakes of the truck were in good working order just before the collision with the Dodge. An examination after the wreck disclosed that the brake hose was broken off, the steering mechanism was bent, and the tie rod was bent. These damages, which occurred either when the Dodge hit the truck or when the truck hit the road ditch, rendered the brakes and steering gear useless. The front fender of the Dodge was "pushed in, crumpled up . . . dragging the right front wheel." Its left rear wheel had been torn off over the lugs. After collision with the Dodge, the truck buzzer was "going . . . signifying there were no air brakes."

There is evidence that Chase was operating his truck at a speed greater than was reasonable and prudent under the circumstances then existing. The physical facts tends to so show. *Etheridge v. Etheridge,* 222 N.C.

616, 24 S.E. 2d 477; *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88. That he may not have been traveling at a speed in excess of 45 m.p.h. is by no means conclusive. It was drizzling rain and the pavement was wet. The tractor-trailer is a vehicle difficult to control when the trailer begins to skid. It was the duty of Chase to pay due regard to these conditions and the hazards thereby created and to reduce his speed in accord with the requirements of due care under the circumstances then existing. G.S. 20-141; *Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355; *Allen v. Bottling Co.,* 223 N.C. 118, 25 S.E. 2d 388; *Hoke v. Greyhound Corp.,* 226 N.C. 692, 40 S.E. 2d 345; *Rollison v. Hicks, ante,* 99. Thus the issue of negligence was for the jury.

But the defendants rely also on the doctrine of insulated negligence and contend the causes should be dismissed as of nonsuit for that the evidence discloses an independent, intervening, superseding act of negligence on the part of Smith (the driver of the Dodge) which insulates any negligence on the part of the defendants and relieves them from any liability for the resulting injuries.

This contention is untenable. Evidence tending to establish negligence on the part of Smith comes exclusively from the witnesses for defendants. The weight and credibility of the testimony is for the jury.

That there was a collision between the Dodge and the truck is uncontradicted. The conflict in the testimony concerns the exact nature of the collision. Plaintiffs' testimony tends to show that the truck bumped into the rear of the Dodge two or three times before leaving the highway. The defendants offered evidence tending to show that Smith, in attempting to pass the truck, swerved his car to the right and against the left front wheel of the truck.

We may concede that the testimony of defendants correctly portrays the occurrence. Even so, on this record, the conduct of Smith does not, necessarily and as a matter of law, constitute an independent, intervening act of negligence, insulating any negligence of defendants.

An intervening agency may be concurrent, successive, or intervening in its operation, with respect to the negligent act or omission upon which liability is sought to be predicated. *Mahoney v. Beatman,* 147 A. 762, 66 A.L.R. 1121, 38 A.J. 721.

A superseding intervening cause is one which operates, in succession to a prior wrong, as the proximate cause of an injury. 38 A.J. 722. The test of the sufficiency of an intervening cause to defeat recovery for negligence is not to be found in the mere fact of its existence, but rather in its nature and the manner in which it affects the continuity of operation of the primary cause, or the connection between it and the injury. *Sandel v. State,* 104 S.E. 567, 13 A.L.R. 1268, 38 A.J. 722.

Evidence of an independent, negligent act of a third party is directed to the question of proximate cause. *Boyd v. R. R.*, 200 N.C. 324, 156 S.E. 507; *Butner v. Spease*, 217 N.C. 82, 6 S.E. 2d 808. To exculpate a negligent defendant the intervening cause must be one which breaks the sequence or causal connection between defendant's negligence and the injury alleged. The superseding act must so intervene as to exclude the negligence of the defendant as one of the proximate causes of the injury. *Butner v. Spease, supra; Hinnant v. R. R.*, 202 N.C. 489, 163 S.E. 555; *Ballinger v. Thomas*, 195 N.C. 517, 142 S.E. 761; *Harton v. Telephone Co.*, 141 N.C. 455.

If the intervening cause is in reality only a condition on or through which the negligence of the defendant operates to produce an injurious result, it does not break the line of causation so as to relieve the original wrongdoer from responsibility for the injury. 38 A.J. 723. A superseding cause cannot be predicated on acts which do not affect the final result of negligence otherwise than to divert the effect of the negligence temporarily, or of circumstances which merely accelerate such result. *Hansen v. Clyde*, 56 P. 2d 1366, 104 A.L.R. 943, 38 A.J. 723.

"The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury." *Ry. Co. v. Kellogg*, 94 U.S. 469, 24 L. Ed. 258; *Hardy v. Lumber Co.*, 160 N.C. 113, 75 S.E. 855; *Butner v. Spease, supra.*

A demurrer to the evidence on the grounds that there was an independent act of negligence which intervened and insulated the negligence, if any, of defendant may be sustained only when it clearly appears from the evidence, considered in the light most favorable to plaintiff, that the injury complained of was independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person. *Smith v. Sink*, 211 N.C. 725, 192 S.E. 108.

Non constat Chase could not reasonably foresee, and was not required to anticipate, the negligence of Smith, if he was at the time operating his truck without due regard to the conditions then existing and at a speed which, under the circumstances, was not reasonable and prudent, and such unlawful speed was the reason, or one of the reasons, why he could not stop before crashing into the store, then and in that event his negligence constitutes at least one of the proximate causes of the injuries to the plaintiffs. If the jury should so find, then the negligence, if any, of Smith did not break the line of causation, but merely accelerated the result of Chase's negligence. It was only a contributing or concurring cause. *Banks v. Shepard*, 230 N.C. 86, 52 S.E. 2d 215.

The court properly overruled the motions to dismiss as in case of nonsuit.

After instructing the jury that where two or more persons are using the same highway at the same time "the duty of care is mutual, and each may assume that the other on the highway will comply with the obligation," the court further charged to the effect that "if you are satisfied . . . that the driver of the truck, in the natural and usual course of events, could reasonably have foreseen that the driver of the automobile did or might turn into and collide with the truck," the conduct of the driver of the Dodge would not constitute an independent, intervening cause of the injuries to the plaintiffs. The converse was stated with equal emphasis.

The court then instructed the jury as follows: "So that, Gentlemen, resolves itself into a question of whether or not the driver of the truck . . . might reasonably have foreseen that the driver of the Dodge automobile or any vehicle coming up from the rear would turn the motor vehicle into and strike the truck, thus causing the driver to lose control over it on the highway . . ."

This was an erroneous application of the law. A motorist is never required to foresee or anticipate negligent conduct on the part of other users of the highway. *Cox v. Lee, supra; Holderfield v. Trucking Co.*, 232 N.C. 623, and cases cited.

Since the negligence of a responsible third party, to constitute an intervening cause under the doctrine of insulated negligence, must be palpable and gross, *Herman v. R. R.*, 197 N.C. 718, 150 S.E. 361; *Hinnant v. R. R., supra,*—here "the extraordinarily negligent act of a careless driver," *Powers v. Sternberg, supra,*—and unforeseeable by the author of the primary negligence, *Harton v. Telephone Co., supra; Butner v. Spease, supra,* the error, of necessity, was prejudicial.

If the jury should fail to find by the greater weight of the evidence that Chase was operating the truck without adequate brakes or at a speed greater than was reasonable and prudent under the circumstances then existing, they should answer the first issue "no." The defendants were entitled to an unqualified instruction to that effect as an essential part of the law of the case.

It is true the court instructed the jury a number of times that, upon the findings enumerated, the jury should answer the first issue in the negative. In each instance, however, such answer was made to depend, in whole or in part, upon a finding that Chase could not have reasonably foreseen or anticipated the negligence of Smith, and was couched in language which, seemingly, placed the burden of so showing on defendants. It inadvertently overlooked charging that upon a failure to find negligence on the part of Chase, they should answer the issue in favor of defendants.

For the reasons stated there must be a

New trial.

MISS BONNIE ETHEL DICKSON v. QUEEN CITY COACH COMPANY AND JAMES Q. LINKER

and

MRS. J. T. CHAPPELL v. QUEEN CITY COACH COMPANY AND JAMES Q. LINKER.

(Filed 2 February, 1951.)

1. Negligence § 19d—

On motion to nonsuit on the ground of intervening negligence, the evidence must be considered in the light most favorable to plaintiff.

2. Carriers § 21b—Nonsuit on ground of intervening negligence held properly denied in passengers' actions for negligent injury.

The evidence tended to show that defendant's bus was being operated at an excessive and unlawful speed, that the driver was watching a vehicle immediately in front of him which was turning right at the intersection, that the driver swerved to the left to avoid this vehicle, and, 25 feet past the intersection, collided with another vehicle approaching from the opposite direction which had turned to its left, slightly over the center line of the highway, in order to go around a vehicle in front of it which was waiting to make a left turn into the intersection, and that after the collision the bus traveled some 300 feet, ran off the highway and stopped at the foot of an embankment, causing injury to plaintiffs, passengers in the bus, with further evidence that the driver of the bus made no effort to apply the hand brake, although he testified it was in good condition. *Held:* Defendant carrier's motions to nonsuit on the ground of intervening negligence of the driver of the other vehicle involved in the collision, were correctly denied.

3. Negligence § 7—

Intervening negligence of a third party will not insulate defendant's negligence unless it entirely supersedes the operation of the negligence of the defendant, so that the intervening negligence, without the negligence of the defendant, produces the injury.

4. Automobiles § 18i—Instruction held not prejudicial upon the evidence in this case.

An instruction as to the law in passing a vehicle at an intersection when the left side of the highway is not free of oncoming traffic for a sufficient distance to permit the movement to be made in safety, *is held* not prejudicial upon the evidence in this case which showed that the driver of defendant's bus, traveling upon a four lane highway, had suddenly swerved to the left to go around a car in front of him, which was turning right at the intersection, and completely diverted his attention from the direction in which he was traveling, and collided on his right of the center of the highway with a vehicle approaching from the opposite direction 25 feet after the bus had cleared the intersection.

5. Appeal and Error § 6c (6)—

An exception to the statement of the contentions of the opposing party will not be considerd when the matter is not brought to the court's attention by the aggrieved party in time to afford opportunity for correction.

6. Damages § 13a—

An instruction for the jury to answer the issue of damages in the amount it found justified from the greater weight of the evidence will not be held erroneous as inadequate when the court follows such instruction by a correct charge as to the measure of damages.

7. Damages § 11—

While plaintiffs' loss of time from their occupation must be limited to that which has occurred up to the time of trial, subsequent loss of time being included in a recovery for decreased earning capacity, where plaintiffs' evidence discloses that they were public school teachers and had contracts to teach for the year ensuing after the accident on 2 June, and that the cases were tried in June of the year following the accident, during which time they had not recovered sufficiently to return to work, evidence of their loss of salary for the school year is properly admitted.

8. Same—

Expert medical testimony as to the probable cost of surgical operations and medical attention still needed by plaintiffs at the time of trial *is held* without error.

9. Evidence § 48—

A medical expert may testify as to the probable cost of further surgical operations needed by plaintiffs at the time of trial.

APPEAL by defendants from *Crisp, Special Judge,* Extra May 29th Civil Term, 1950, of MECKLENBURG.

Civil actions to recover damages for personal injuries, consolidated for trial.

The plaintiffs, fare-paying passengers, were seriously and permanently injured on 2 June, 1949, when the bus of the defendant Queen City Coach Company ran off the highway and down an eight-foot embankment and came to rest approximately 300 feet from the point of and after a collision with another vehicle.

The usual issues of negligence and damages were submitted to and answered by the jury in favor of the respective plaintiffs. And from the judgments entered on the verdicts, the defendants appeal and assign error.

G. T. Carswell and Shannonhouse, Bell & Horn for plaintiff, Miss Bonnie Ethel Dickson.

Helms & Mulliss, Robinson & Morgan, and James B. McMillan for plaintiff, Mrs. J. T. Chappell.

McDougle, Ervin, Horack & Snepp for defendants.

DENNY, J. The evidence tends to show the following facts: The collision occurred on Wilkinson Boulevard near the intersection with Green Boulevard, about one block West of the Charlotte City limits. Wilkinson Boulevard is an extremely heavily traveled public highway. It has four lanes and is 37 feet wide. The maximum speed limit on this highway in that area is 40 miles per hour. The area is a business and industrial district. Green Boulevard, a paved highway 28 feet wide, intersects Wilkinson Boulevard to the North, and at the point of intersection the paved portion or mouth of Green Boulevard is 65 to 70 feet wide.

The Queen City bus, operated by the defendant James Q. Linker, with the plaintiffs aboard, was traveling west on Wilkinson Boulevard, between 8:15 and 8:30 p.m., on 2 June, 1949, according to the plaintiffs' evidence, at a speed of between 60 and 65 miles per hour. A car headed west was parked on the north side of Wilkinson Boulevard, a foot or so from the pavement and some 10 or 15 feet east of the intersection. A car operated by C. B. Wilkinson, eastbound, had stopped in the intersection and Linker, driver of the bus, saw Wilkinson signal for a left turn into Green Boulevard in front of the oncoming bus some 300 feet or so before the bus reached the intersection. Immediately ahead of the bus the driver of a westbound car traveling 10 or 15 miles per hour gave a signal for a right turn into Green Boulevard. The signal was given when the bus was 75 or 100 feet away, and the car started to turn off when the bus was about 50 feet from it. According to the plaintiffs' evidence, the bus swerved suddenly to the left and "immediately after the swerving" the witness heard a noise about the center of the highway, from the front of the bus. The bus collided with an eastbound car operated by one Hairston, which had pulled up behind the Wilkinson car. The left front wheel of the Hairston car was knocked off and the axle was imbedded in the asphalt something like three-quarters of an inch, four feet north of the center line between the east and west traffic lanes, but slightly over half of the Hairston car was on its right-hand side of the highway going towards Charlotte. Some of the debris from the wreck, such as oil, mud and glass, was on both sides of the center line of the highway. The point where the axle of the Hairston car was buried in the asphalt was approximately 25 feet west of the western edge of Green Boulevard, and no vehicle going west was immediately in front of the bus in either of the westbound lanes, when the collision with the Hairston automobile occurred. After the bus collided with the Hairston car, it ran a short distance up the road, then cut to the left at an angle of about 45 degrees across the left side of the highway, plunged off an eight-foot embankment and came to rest approximately 75 feet from the edge of the highway, 300 feet from the point of the collision. The plaintiffs were injured by

the sudden impact of the bus when it stopped at the bottom of the depression after leaving the highway.

The defendants' evidence tends to show that immediately before the collision the Queen City bus was being operated astride the line between the passing lane and the extreme right lane, headed towards Gastonia, at a speed of about 35 or 40 miles per hour; that the driver of the bus, James Q. Linker, was watching the driver of the car who had given a signal to turn right into Green Boulevard. Linker testified that he "heard the tires hollering on an automobile" and he "glanced at the side" and the automobile hit the bus on the left-hand side and damaged the steering gear to such an extent he could not control the bus. . . . "I did not see the car that I had the collision with until about the time of the collision. . . . I was watching the man that was making the right-hand turn and this other fellow hit me." The driver of the bus further testified he never attempted to use the emergency brakes after the collision with the Hairston car, but tried to keep the bus in the road; that the emergency brakes were in good condition, and the regular brakes were in good condition before the accident; that after the accident he couldn't get the brakes on because his foot was caught between the brake and the accelerator; that he was not sure whether the brakes were damaged or not. "The tires on the bus were in good condition. It is my opinion if I had applied the brakes that traveling about 35 miles an hour I could have stopped, using the power brakes, in 75 feet." Walter E. Byers, a passenger on the bus and a witness for the defendants, testified: "There was an eastbound vehicle on Wilkinson Boulevard, (which) had either stopped or very nearly come to a stop, attempting a left turn into Green Boulevard off Wilkinson, and as the bus approached the intersection a vehicle came up traveling in the same direction as this automobile that was attempting to turn left into Green Boulevard . . .; I heard the squeal of rubber on pavement. I was looking out the windshield and I saw this vehicle approaching going east swing around to the left of the car that was stopped . . . and come over into the westbound section of Wilkinson Boulevard. . . . I saw this car coming from across the center line 75 to 100 feet away from the bus."

The defendants assign as error the failure of the court below to grant their motion for judgments as of nonsuit. They insist that the conduct of Hairston caused the collision which resulted in the injuries to the plaintiffs, and that the negligence of the driver of the Queen City bus, if any, was insulated by the negligence of Hairston, citing *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808, and similar cases. These authorities are not controlling on the facts disclosed by the record on this appeal. On the contrary, we think when the evidence adduced in the trial below is considered in the light most favorable to the plaintiffs, as it must be

on motion for judgment as of nonsuit, it is sufficient to withstand such motion. *Riggs v. Motor Lines, ante,* 160; *Atlantic Greyhound Corporation v. McDonald,* 125 Fed. 2d 849. The identical question presented by this assignment of error was considered and disposed of adversely to the defendants in an opinion written by *Barnhill, J.,* in *Riggs v. Motor Lines, supra,* in which he discusses intervening and concurring negligence and the effect of such negligence with respect to proximate cause, citing numerous authorities.

In the case of *Atlantic Greyhound Corp. v. McDonald, supra,* the bus collided with an automobile and the steering apparatus was broken as a result of the collision and the air was let out of the airbrakes so that they would not work; but the hand brake with which the bus was provided was in good condition and no effort was made to use it. The bus proceeded down the road for 124 feet, went 50 feet across a soft shoulder, climbed a six foot embankment to the west of the highway, went 70 feet further, crashed into a signboard and overturned, injuring the plaintiff. According to the evidence, just before the collision with the automobile the driver of the bus rose in his seat for the purpose of adjusting his trousers. *Parker, J.,* speaking for the Fourth Circuit Court, in passing on the identical question which is now before us, said: "The excessive and unlawful speed on a narrow pavement where construction work precluded the use of one of the shoulders, the failure to slow down when approaching an oncoming car in the dangerous situation thus presented, the diversion of attention of the driver by the adjustment of his garments while in such a situation,—all of these were circumstances from which the jury might reasonably have inferred that the collision and resulting injury to plaintiff were due in part, at least, to the failure of the driver of the bus to use the high degree of care required of one to whom a bus load of helpless passengers had intrusted their safety. When to this is added the failure to use the hand brake to arrest the wild flight of the bus after the collision had occurred, there can be no question as to the propriety of submitting the question of negligence to the jury."

In the instant case, according to the evidence of the plaintiffs, the bus was being operated at an excessive and unlawful speed, and according to the defendants' evidence, the driver of the bus was not looking in the direction in which he was traveling until a moment before the collision, but was watching a car that was making a right-hand turn into Green Boulevard—this evidence, together with the fact that no effort was made to apply the hand brake while the bus proceeded 300 feet after the collision with the automobile, and then stopped so suddenly as to inflict the injuries sustained by the plaintiffs, entitled the plaintiffs to have their cases submitted to the jury.

It is well settled in this jurisdiction, that in order for the intervening negligence of a third party to insulate the negligence of a defendant, the intervening negligence must entirely supersede the operation of the negligence of the defendant, so that the intervening negligence, without the negligence of the defendant, produced the injury. *Riggs v. Motor Lines, supra; Butner v. Spease, supra; Hinnant v. R. R.*, 202 N.C. 489, 163 S.E. 555; *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761; *Harton v. Telephone Co.*, 141 N.C. 455, 54 S.E. 299.

The defendants except and assign as error that portion of the charge in which the trial judge instructed the jury as follows: ". . . if you find from the evidence and by its greater weight that the defendants, in the operation of their said bus, negligently undertook to overtake and pass another vehicle proceeding in the same direction, at an intersection, that that would constitute negligence on the part of the driver of the bus, and if you further find that the driver of the bus drove the bus to its left side of the highway when the left side of the highway was not free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety, the court charges you that that sort of conduct, if you find that to be the fact from the evidence and by its greater weight, would constitute negligence on the part of the driver of the bus."

There is evidence to support the inference that in passing a slow moving vehicle which was turning into Green Boulevard, the bus came in such close proximity to it that the driver suddenly swerved it to the left, and considered his proximity to such car to be of sufficient importance to divert his attention from the highway, in the direction in which he was traveling, until a moment before the collision between the bus and the Hairston car. Consequently, we do not think the instruction with respect to passing a vehicle at an intersection, even on a four lane highway, in the light of the evidence disclosed by this record, was prejudicial. The further instruction with respect to driving the bus on the left side of the highway when the left side of the highway was not free of oncoming traffic, was correct as an abstract statement of the law and would seem to have been prejudicial if the bus and the Hairston car had collided on the defendant's side of the road while the bus was passing the car in the intersection of Wilkinson and Green Boulevards. However, the collision between the bus and the Hairston car did not occur in the intersection, but occurred at or near the center of the highway 25 feet west of the western edge of Green Boulevard. Therefore, in our opinion this instruction was not sufficiently harmful or prejudicial to justify disturbing the verdicts found by the jury in the trial below.

The defendants also except and assign as error certain portions of the charge with respect to the plaintiffs' contentions, on the ground that the contentions were not supported by the evidence. These exceptions are

without merit. The record discloses that the trial judge at the close of his charge made inquiry as to whether any further instructions were desired. Counsel for the defendants replied: "No, sir, that's all right." Whereupon, the court made further inquiry as to his statement of the evidence and the contentions. To this inquiry there was no response.

It is well settled that if the trial judge in charging the jury fails to state the contentions correctly, it is the duty of the aggrieved party to call such failure to his attention, before the case is finally given to the jury, so that it may be corrected. McIntosh, N. C. Practice and Procedure, Section 580, p. 642; *Hardy v. Mitchell,* 161 N.C. 351, 77 S.E. 225; *Sears v. R. R.,* 178 N.C. 285, 100 S.E. 433; *Walker v. Burt,* 182 N.C. 325, 109 S.E. 43; *S. v. Johnson,* 193 N.C. 701, 138 S.E. 19; *Hayes v. Ferguson,* 206 N.C. 414, 174 S.E. 121; *Switzerland Co. v. Highway Com.,* 216 N.C. 450, 5 S.E. 2d 327; *S. v. McNair,* 226 N.C. 462, 38 S.E. 2d 514; *Shipping Lines v. Young,* 230 N.C. 80, 52 S.E. 2d 12.

An exception to the following portion of the charge is assigned as error: "Now, the court charges you that in answering the second issue in Miss Dickson's case (and a similar charge was given in Mrs. Chappell's case), that you will answer it in such amount as you think is justified from the greater weight of the evidence, as the evidence applies to her case."

If this were the only instruction on the issue of damages, it would certainly be inadequate. However, the trial judge in his charge to the jury followed the rule as to the measure of damages the plaintiffs were entitled to recover, if anything, as laid down by *Stacy, J.* (now *C. J.*), in *Ledford v. Lumber Co.,* 183 N.C. 614, 112 S.E. 421.

The defendants further contend it was error to permit the plaintiffs to testify on the issue of damages as to the amounts they would have received under their respective contracts as public school teachers for the 1949-50 school year, had they taught during that period; and to permit a medical expert to testify as to the probable cost of further surgical operations needed by each plaintiff as a result of her injuries.

In cases like these, the plaintiffs, if entitled to recover at all, are entitled to recover damages for all injuries, past and prospective, sustained as a result of the defendants' wrongful and negligent acts. "These are understood to embrace indemnity for actual nursing and medical expenses and loss of time, or loss from inability to perform ordinary labor, or capacity to earn money." *Ledford v. Lumber Co., supra.*

Both plaintiffs prior to their injuries had taught in the public schools of this State for many years. Both were under contract to teach during the 1949-50 school year, Miss Dickson at a salary of $341.00 per month and Mrs. Chappell at a salary of $304.00 per month. They were injured 2 June, 1949, and their cases were tried early in June, 1950. In the

meantime neither plaintiff had recovered sufficiently to return to work. And each plaintiff, according to the evidence, sustained approximately 50% permanent disability as a result of her injuries. We cannot conceive of a more accurate and less speculative method of proving damages for loss of time than to show the actual salary or wages lost, as the result of an injury, from the date of the injury to the time of the trial. The school year 1949-50 had virtually, if not actually, expired at the time of the trial below. *Johnson v. R. R.*, 140 N.C. 574, 53 S.E. 362; *Wallace v. R. R.*, 104 N.C. 442, 10 S.E. 552; *Leave v. Boston Elevated Railway*, 306 Mass. 391, 28 N.E. 2d 483; *Phoenix Baking Co. v. Vaught*, 62 Ariz. 222, 156 P. 2d 725.

"The element of loss of time is held properly to include only such loss as has occurred up to the time of trial; a subsequent loss of time is to be included in a recovery for decreased earning capacity." 25 C.J.S., Damages, Section 38, p. 511.

Likewise, the jury is entitled to take into consideration on the issue of damages, in cases like these, not only the expenses incurred for nursing, medical services, loss of time and earning capacity, mental and physical pain and suffering, but also for such further expense for nursing and medical services, as the evidence tends to show the condition of the injured party will require in the future as a result of the injury inflicted by the negligence of a defendant. *Williams v. Stores Co., Inc.*, 209 N.C. 591, 184 S.E. 496.

It is permissible for a medical expert to testify as to the probable consequences of an injury, and as to proper methods of treatment. *Dulin v. Henderson-Gilmore Co.*, 192 N.C. 638, 135 S.E. 614; *Alley v. Pipe Co.*, 159 N.C. 327, 74 S.E. 885. Consequently, it would seem to be in order for such expert to testify as to the approximate cost of the treatment. We do not think the evidence complained of was harmful or prejudicial to the defendants, particularly in view of the fact that the charge on damages laid down the proper rule for the jury to follow in determining the amount the plaintiffs were entitled to recover, if anything.

We have carefully considered all the exceptions and assignments of error set out in the record, and brought forward and argued in the briefs, and in our opinion no prejudicial error is shown; therefore, in law we find

No error.

R. M. SANDERS v. J. B. HAMILTON, ET AL.

(Filed 2 February, 1951.)

1. Payment § 8—

Where a mortgage is given to secure two debts, nothing else appearing, the law does not perforce prefer one over the other in foreclosure.

2. Trial § 30—

In passing upon whether defendant is entitled to a directed verdict, plaintiff's evidence should not only be taken as true, but also should be considered in its most favorable light to plaintiff, giving plaintiff every reasonable intendment and legitimate inference fairly deducible therefrom.

3. Limitation of Actions § 12a: Payment § 8—Whether creditor was entitled to remit interest on one note to make part payment on others held for jury.

Plaintiff's testimony was to the effect that the chattel mortgage executed by defendants was given as security for money loaned and as additional security for notes secured by a deed of trust theretofore executed by defendants. In plaintiff's action to foreclose the chattel mortgage, defendants paid a certain sum under a compromise agreement. Plaintiff deducted from the sum recovered the amount actually loaned on the chattel mortgage, without interest, and applied the balance *pro rata* to the notes secured by the deed of trust. *Held:* The prayer for relief in the action to foreclose the chattel mortgage is not controlling, and whether plaintiff was entitled to make the credits in this manner so as to constitute a part payment on the notes secured by the deed of trust and thus prevent the bar of the statute of limitations should have been submitted to the jury, and a directed verdict for defendant is error.

4. Mortgages § 38—

In a suit to recover on purchase money notes and to foreclose deed of trust given as security therefor, defendants may not set up as a counterclaim embarrassment resulting from foreclosure of a prior mortgage executed by plaintiffs before their conveyance of the land to defendants, since defendants could have paid the prior lien and avoided the suit to foreclose.

BARNHILL, J., dissenting.

ERVIN, J., concurs in dissent.

APPEALS by plaintiff and defendants from *Godwin, Special Judge*, July Term, 1950, of PENDER.

Civil action to recover on six promissory notes and to foreclose deed of trust on land given as security for the payment of the notes.

The notes in suit, each for the sum of $500.00, were executed 24 December, 1926, and matured serially thereafter on 1 November, 1927, '28, '29, '30, '31, '32, respectively.

Thereafter, on 5 February, 1927, the defendants executed and delivered to plaintiff another note in the sum of $400.00 due and payable 1 Novem-

ber, 1927, secured by chattel mortgage, $114.85 of which was for money loaned and the balance of $285.15 "was to better secure these real estate notes," according to plaintiff's unchallenged testimony.

In October, 1937, plaintiff brought an action to foreclose this chattel mortgage, and resulted in a compromise settlement of $162.50, which defendants paid to plaintiff's attorney on 12 January, 1938. Plaintiff's attorney retained $12.50 as his fee and remitted the balance of $150.00 to plaintiff. The plaintiff credited the chattel mortgage note with $114.85, the loan represented therein, and the balance of $35.15 was credited ratably on the six real estate notes involved herein. (Plaintiff concedes that defendants are entitled to a further credit of $12.50 which his counsel retained as his fee.) Plaintiff testified, without objection, "I did not charge, receive or collect any interest on the $114.85." This present action was instituted 8 January, 1948.

The defendants set up in bar of plaintiff's right to recover the ten-year statute of limitations and also allege that they have been damaged in the sum of $1,000.00 over and above plaintiff's claim, by reason of a suit brought by a prior lienholder to foreclose prior mortgage on the land here involved.

The plaintiff demurred *ore tenus* to the allegation of damages in the defendants' answer.

The court held as a matter of law that the notes in suit were barred by the ten-year statute of limitations and so instructed the jury. Exception by plaintiff.

The court also sustained the plaintiff's demurrer to the allegation of damage in the defendants' answer. Exception by defendants.

From the judgment entered dismissing the action, both sides appeal, assigning errors.

John C. Best and J. C. Sedberry for plaintiff, appellant.

Moore & Corbett and Isaac C. Wright for defendants, appellants, appellees.

STACY, C. J. The correctness of the ruling on the statute of limitations turns on the validity of the credits entered by plaintiff on the notes in suit 12 January, 1938. This was a matter for the jury under proper instructions from the court. *Lee v. Manley*, 154 N.C. 244, 70 S.E. 385; *Miller v. Womble*, 122 N.C. 135, 29 S.E. 102; *Young v. Alford*, 118 N.C. 215, 23 S.E. 973.

The contention that the whole of the compromise settlement should first be used to repay the money loaned *with interest* before any part of the settlement could be applied to the real estate notes would seem to overlook the testimony of the plaintiff that he neither charged nor received

any interest on the money loaned, and the further circumstance that the chattel mortgage was also given "to better secure these real estate notes," which were then unbarred by the 10-year statute of limitations. Where a mortgage is given to secure two debts, nothing else appearing, the law would not perforce prefer one over the other in foreclosure, since ordinarily there can be but one foreclosure of a security lien. *Layden v. Layden,* 228 N.C. 5, 44 S.E. 2d 340. Moreover, on motion to nonsuit or for directed verdict the plaintiff is not only entitled to have the evidence making for his cause taken as true, but also to have it considered in its most favorable light, together with every reasonable intendment and legitimate inference fairly deducible therefrom, the ultimate weight and credibility of the evidence, of course, including any reconciliation of discrepancies or contradictions in plaintiff's own testimony, being for the jury. *Brafford v. Cook,* 232 N.C. 699; *Williams v. Kirkman,* 232 N.C. 609, 61 S.E. 2d 706. It is true the jury may reject the favorable intimations of plaintiff's testimony and accept the unfavorable ones, still this is a matter for them and it is not for the court to determine. *Journigan v. Ice Co., post,* 180.

Nor is the prayer of a complaint necessarily controlling in the disposition of a recovery where the plaintiff recovers not according to his prayer, but by compromise, or by agreement *dehors* the prayer. Recovery is usually determined by evidence, or agreement, and not by the plaintiff's demand.

The plaintiff admits that the first note—the one that matured 1 November, 1927—was already barred at the time of the credit of 12 January, 1938, hence under the decision in *Bond v. Wilson,* 129 N.C. 387, 40 S.E. 182, he abandons any further right to recover on this note.

No error has been made to appear on defendants' appeal. They could have avoided any embarrassment by paying the prior encumbrance rather than allowing suit to be brought to enforce it. Moreover, it may be doubted whether the allegations of the answer are sufficient to state a counterclaim. *Smith v. McGregor,* 96 N.C. 101, 1 S.E. 695.

On plaintiff's appeal, New trial.

On defendants' appeal, Affirmed.

BARNHILL, J., dissenting: At the time the defendant made compromise settlement of the claim and delivery proceeding instituted on the chattel mortgage, the note secured thereby was more than ten years old. The note was for $400. Plaintiff testified it was given for $114.85, money advanced, and the balance was additional security for real estate notes. The plaintiff, in his complaint in the claim and delivery action, demanded interest on the debt. That demand has never been withdrawn. Nor, on this record, have the defendants ever been notified of his decision (appar-

ently made after he received the money) not to charge interest. It constituted a part of his claim when settlement was made. The money advanced on the note with interest exceeded the $162.50 paid in settlement thereof. The payment was made in the settlement of the pending suit, and nothing was said about crediting any part of the payment on the real estate notes.

When defendant purchased the land, he conveyed to plaintiff, in part payment, property valued at $1,300. There was an undisclosed outstanding mortgage on the property conveyed to defendants in the sum of $3,500, together with taxes for five years, which defendants were compelled to satisfy in order to save the property.

In August 1927 plaintiff instituted an action to enjoin the defendants from cutting timber standing on the land conveyed to them. In his complaint he swore that he held no security for his notes other than the real estate mortgage. After defendants learned of the outstanding first mortgage, they made no further payment on the real estate notes and resisted a suit on the $700 note. In 1928 plaintiff undertook to foreclose his real estate mortgage.

These facts, in my opinion, repel any suggestion that defendants paid the $162.50 in recognition of the alleged debt represented by the real estate notes, or with the intent that any part thereof should be credited thereon.

This is not a case where the debtor made a payment without directions as to its application, leaving the creditor to credit it on either debt. The payment was made for the specific purpose of settling the claim and delivery action and protecting the defendants' personal property conveyed in the chattel mortgage. The payment was not sufficient to cover the money advanced with interest thereon which was the primary consideration of the mortgage. The balance, if any, was to secure the real estate notes, or so plaintiff testified.

A payment sufficient to arrest the statute of limitations must be made by the debtor as a part payment on a larger indebtedness, known to and recognized by him and under circumstances which raise an implied promise to pay the balance. 34 A.J. 267. To have the effect of tolling the statute, the payment must be made and accepted as payment of part of the particular indebtedness in question under circumstances such as warrant a clear inference that the debtor recognizes the whole of the debt as an existing liability and indicates his willingness, or at least his obligation, to pay the balance. The payment must be distinct, unequivocal, and without qualification, and the debt or obligation must be definitely pointed out by the debtor and an intention to discharge it in part made manifest. 34 A.J. 265.

This rule has been adopted in this jurisdiction and is fully supported by decisions of this Court. *Hewlett v. Schenck,* 82 N.C. 234; *Young v. Alford,* 113 N.C. 130, and cases cited; *Battle v. Battle,* 116 N.C. 161; *Supply Co. v. Dowd,* 146 N.C. 191; *Piano Co. v. Loven,* 207 N.C. 96; *Bryant v. Kellum,* 209 N.C. 112; *Saieed v. Abeyounis,* 217 N.C. 644; Anno. 36 A.L.R. 352, 156 A.L.R. 1084.

The subject is fully discussed by *Walker, J.,* in *Supply Co. v. Dowd, supra.* And in *Nance v. Hulin,* 192 N.C. 665, *Adams, J.,* after stating the abbreviated rule, says: "It is necessary that the payment be voluntary, that it be such as to imply in law that the debtor acknowledges the debt and distinctly promises to pay it; but a payment made under circumstances which repel such implied promise will not stop the running of the statute. (Citing cases.)"

It may be that "recovery is usually determined by evidence, or agreement, and not by the plaintiff's demand." But here plaintiff has no evidence of any agreement other than the one contained in the written contract. He himself testified: "I have not got anything where anybody has agreed that any part of this (payment) should be credited on the real estate notes." In my opinion there is not a single fact or circumstance tending to show that the payment was "voluntary" in the sense it was intended as a payment on these notes, or was made in acknowledgment of that debt, or from which a promise to pay those notes may be implied. All the circumstances point in the other direction.

Plaintiff admits that the payment made to satisfy the first mortgage is not sufficient to toll the statute. Had the personal property been sold under order in the claim and delivery action and the proceeds credited on the real estate notes, this would not suffice. That the amount was paid to save the personal property from sale does not, in my opinion, change this result.

I vote to affirm on both appeals.

ERVIN, J., concurs in dissent.

No. C-6254—HORACE JOURNIGAN v. LITTLE RIVER ICE COMPANY.
No. C-6255—DORIS MAY JOURNIGAN, ADMX., v. LITTLE RIVER ICE COMPANY.
No. C-6256—ALICE JOURNIGAN, ADMX., v. LITTLE RIVER ICE COMPANY.

(Filed 2 February, 1951.)

1. Executors and Administrators § 9d: Death § 5—

Where in an action for wrongful death it is admitted that plaintiff had not qualified as administratrix, the court properly allows defendant to withdraw the admission in the answer of due qualification, to take voluntary nonsuit on its cross-action, and thereupon to dismiss plaintiff's action.

2. Trial §§ 22a, 22b—

On motion to nonsuit, plaintiff's evidence is to be taken as true and defendant's evidence in conflict therewith is to be rejected.

3. Automobiles §§ 13, 18h (3)—Nonsuit on ground of contributory negligence held properly denied.

Plaintiffs' evidence was to the effect that defendant's truck was traveling over the crest of a hill and speeded up in an effort to get around cars parked partly on the hard surface on its right side of the road and get back on its right side of the road before meeting the plaintiffs' vehicle, and that the driver of plaintiffs' vehicle, traveling at a lawful speed, was forced to apply his brakes so that the car skidded to its left, and that the collision occurred on its left of the center of the highway, but before the back of the truck had crossed the center line to its right. *Held:* The fact that the collision occurred slightly to plaintiffs' left of the center line of the highway is not conclusive upon the issue of contributory negligence, and nonsuit on the ground of contributory negligence was properly denied.

4. Death § 8—

In an action for wrongful death it is error to permit plaintiff administratrix to testify that intestate, who was her husband, had just come out of military service, as to the length of time he had been in the service, that they had a child two years old at the time of his death, and that she lost the home place to the mortgage people after his death, and that she paid his hospital and doctors' bills and burial expenses.

5. Same—

The measure of damages for wrongful death is the present worth of the net pecuniary value of the life of deceased, to be ascertained by deducting the probable cost of his own living and his usual or ordinary expenses from his probable gross income which might have been expected from his own exertions during his life expectancy, taking into consideration his age, health, earning capacity, habits, ability, skill and his employment.

APPEALS by defendant in first two cases and by plaintiff in third case, from *Grady, Emergency Judge,* March Term, 1950, of WAKE.

Civil actions to recover damages for personal injuries and for wrongful deaths alleged to have been caused by the negligence of the defendant in a truck-automobile collision.

As all three cases arose out of the same collision and are grounded on the same state of facts, they were, by consent, consolidated and tried as one case. However, as each case presents here a different question for decision, it will be necessary to separate them, in part at least, after stating the basic facts.

The record discloses that on the afternoon of 13 February, 1948, Milton Journigan invited his two brothers, Horace Journigan and Clyde Louis Journigan, and his uncle, Genie M. Journigan, to go with him to Wake Forest to see a show. They were traveling in Milton Journigan's Kaiser automobile, Milton driving, in a northerly direction along the Rolesville-Wake Forest paved highway when they collided with defendant's 1946 Chevrolet two-ton truck, loaded with coal, and being driven in a southerly direction by defendant's employee and agent, Paul Leslie Brown. The scene of the collision was in front of the Robert Edwards house, which stands near the road on the western side at the crest of a hill. A death had occurred in the Edwards home, and several automobiles were standing or parked on the western shoulder of the road and partly on the hard-surface. A heavy snow had fallen some days before, and there were spots of snow and ice on the highway. A heavy fog prevailed and visibility was low.

As the plaintiffs approached the Edwards house they saw the defendant's truck loom up over the crest of the hill on their side of the road. Apparently the truck speeded up in an effort to get around the parked cars and back on its side of the road before meeting the plaintiffs. In this it failed. Milton Journigan put on his brakes which caused his automobile to skid sideways and slightly to his left and the two vehicles collided somewhat over the center line on the plaintiffs' left, but before the truck had entirely cleared the center of the highway.

During the trial of the consolidated causes and before the evidence was closed, it was made to appear to the court that in No. C-6256 Alice Journigan had never qualified as administratrix of the estate of her deceased husband, Genie M. Journigan. Whereupon the court allowed the defendant to withdraw the admission made in its answer to plaintiff's allegation of due qualification and to suffer a voluntary nonsuit on its cross-action and counterclaim, and dismissed the plaintiff's action. Exception.

The defendants denied all allegations of negligence made by the plaintiffs, filed a cross-action and counterclaim against Horace Journigan and the administratrix of Milton Journigan and also pleaded contributory negligence in bar of their right to recover.

Upon issues thus joined and raised by the pleadings in the first two cases, Nos. C-6254 and C-6255, the jury returned the following verdicts:

"1. Was Milton Journigan killed and Horace Journigan injured in his person by the negligence of the defendant, Little River Ice Company, Inc., as alleged in the complaint? Answer: Yes.

"2. If so, was Milton Journigan also guilty of negligence which contributed to his death, as alleged in the answer? Answer: No.

"3. Was the defendant's truck injured by the negligence of Milton Journigan, as alleged in the defendant's cross-bill and counterclaim? Answer: No.

"4. What amount of damages, if anything, is Doris M. Journigan, Administratrix of Milton Journigan, deceased, entitled to recover of the defendant because of the wrongful death of her husband, Milton Journigan? Answer: $5,000 plus $607.00.

"5. What amount of damages, if anything, is Doris M. Journigan, Administratrix, entitled to recover of the defendant because of injuries to the Kaiser automobile belonging to her deceased husband? Answer: $2100.00.

"6. What amount of damages, if anything, is Horace Journigan entitled to recover of the defendant? Answer: $1250.00 plus $1249.77.

"7. What amount of damages, if anything, is the defendant entitled to recover of Doris M. Journigan, Administratrix of Milton Journigan, deceased, because of injuries to and damages incident to the injuries to its Chevrolet truck? Answer: None."

From the order of the court dismissing the plaintiff's action in No. C-6256, she appeals, assigning error; and from judgment on the verdict in the first two cases, Nos. C-6254 and C-6255, the defendant appeals, assigning errors.

Bickett & Banks for plaintiff, appellant, and plaintiffs, appellees.

A. J. Fletcher and F. T. Dupree, Jr., for defendant, appellant, appellee.

STACY, C. J. Three separate questions are presented for decision in the appeals herein.

First. Plaintiff's Appeal in No. C-6256—Alice Journigan Case:

In the face of the admission that Alice Journigan has not in fact qualified as administratrix of Genie M. Journigan's estate and that no personal representative has ever been appointed to administer thereon, it is difficult to perceive how Alice Journigan finds any ground upon which to stand as an appellant. She denominates herself on appeal as "The plaintiff,"

but there is no such plaintiff as "Alice Journigan, administratrix of Genie M. Journigan, deceased," and she may not prosecute the action in her individual capacity. *Howell v. Comrs.*, 121 N.C. 362, 28 S.E. 362; *Hood v. Tel. Co.*, 162 N.C. 70, 77 S.E. 1096. "Under the statute, the only person who can sue is the personal representative of the deceased." *Howell v. Comrs., supra; Hall v. R. R.*, 149 N.C. 108, 62 S.E. 899; *Brown v. R. R.*, 202 N.C. 256, 162 S.E. 613, 74 A.L.R. 1273; *Whitehead v. Branch*, 220 N.C. 507, 17 S.E. 2d 637; *McCoy v. R. R.*, 229 N.C. 57, 47 S.E. 2d 532.

Indeed, where one sues as administrator, upon denial of his right to recover, he may be required to produce on the trial his letters of administration as evidence of his title. *Kesler v. Roseman*, 44 N.C. 389.

If and when Alice Journigan does in fact qualify as administratrix of her husband's estate, will be time enough to hear her as such representative. *Harrison v. Carter*, 226 N.C. 36, 36 S.E. 2d 700; *Snipes v. Estates Administration*, 223 N.C. 777, 28 S.E. 2d 495; *Reynolds v. Cotton Mills*, 177 N.C. 412, 99 S.E. 240.

On the record as it now appears, there was no error in dismissing her action.

Second. Defendant's Appeal in No. C-6254—Horace Journigan's Case.

The principal question for decision in this case is whether the plaintiff's evidence, taken in its most favorable light, survives the demurrer, carries the case to the jury, and suffices to sustain the judgment for plaintiff.

The plaintiff's evidence is in sharp conflict with that of the defendant in respect of the speed of the two vehicles, especially as it relates to the speed of the Journigan car. The plaintiff's witnesses place the speed of the truck at 30 miles an hour and that of the car at 30 or 35 miles an hour. Defendant's witnesses, on the other hand, testified that the truck was traveling approximately 15 or 20 miles an hour, "not over 25 to 30" miles an hour before the collision, and had stopped or was not going over five miles an hour at the moment of impact, and that the Journigan car was running between 70 and 90 miles an hour, which caused it to skid on the slippery road when the driver applied his brakes.

On demurrer to the evidence or motion for judgment as in case of nonsuit we take the plaintiff's evidence as true and reject the defendant's evidence in conflict therewith. *Brafford v. Cook*, 232 N.C. 699.

The fact the impact occurred slightly over the center line and on the western side, which was to the plaintiff's left, is not controlling or conclusive on the issue of contributory negligence. It is the position of plaintiff that the truck looming up over the hill on its left side of the road and speeding up in order to get around the parked cars before returning

to its right side of the road, forced the driver of the Journigan car to apply his brakes and thus produced the collision.

The trial court properly overruled the demurrer to the evidence and submitted the case to the jury. *Williams v. Kirkman,* 232 N.C. 609, 61 S.E. 2d 706; *Howard v. Bell,* 232 N.C. 611.

We find no error in No. C-6254—Horace Journigan's Case.

Third. Defendant's Appeal in No. C-6255—Doris May Journigan's Case:

This case stands on a parity with No. C-6254—Horace Journigan's Case, so far as the question of nonsuit is concerned. What has just been said in that case applies equally here.

There is a bit of evidence in this case, however, which requires some additional and separate consideration.

Over objection, the plaintiff was allowed to testify that her husband, Milton Journigan, had just come out of the military service and the length of time he had been in the service; that they had a child, two years old, at the time of his death; that she lost the home place to the mortgage people after his death, and that she paid his hospital and doctors' bills and burial expenses amounting to $655.00. Motion to strike; overruled; exception.

Under the pertinent decisions, it would seem that this evidence was incompetent on the measure of damages. *McCoy v. R. R.,* 229 N.C. 57, 47 S.E. 2d 532.

It is provided by G.S. 28-174 that in an action for wrongful death the plaintiff may recover such damages "as are a fair and just compensation for the pecuniary injury resulting from such death." It is further provided in G.S. 28-173 that the amount recovered in such action is not liable to be applied as assets of the estate of the deceased, except as to burial expenses, "but shall be disposed of" according to the statute of distributions of personal property in case of intestacy. *Hanks v. R. R.,* 230 N.C. 179, 52 S.E. 2d 717.

The measure of damages in actions for wrongful death is the present worth of the net pecuniary value of the life of the deceased to be ascertained by deducting the probable cost of his own living and usual or ordinary expenses from his probable gross income which might be expected to be derived from his own exertions during his life expectancy. *Carpenter v. Power Co.,* 191 N.C. 130, 131 S.E. 400; *Gurley v. Power Co.,* 172 N.C. 690, 90 S.E. 943. In arriving at the net pecuniary value of the life of the deceased, the jury is at liberty to take into consideration the age, health and expectancy of life of the deceased, his earning capacity, his habits, his ability and skill, the business in which he was employed and the means he had for earning money, the end of it all being, as

expressed in *Kesler v. Smith,* 66 N.C. 154, to enable the jury fairly to arrive at the net income which the deceased might reasonably be expected to earn from his own exertions, had his death not ensued, and thus assess the pecuniary worth of the deceased to his family, had his life not been cut short by the wrongful act of the defendant. *Burns v. R. R.,* 125 N.C. 304, 34 S.E. 495; *Burton v. R. R.,* 82 N.C. 505.

A new trial will be ordered in this case, limited, however, to the issues of damages.

The results, then, are:

In No. C-6256—Alice Journigan's Case, Affirmed.

In No. C-6254—Horace Journigan's Case, No error.

In No. C-6255—Doris May Journigan's Case, Partial new trial.

WILLIAM HOWARD TUCKER (EMPLOYEE)—PLAINTIFF, v. C. V. LOWDERMILK (EMPLOYER) AND FIDELITY & CASUALTY COMPANY OF NEW YORK (CARRIER), DEFENDANTS.

(Filed 2 February, 1951.)

1. Master and Servant § 40c—

Where it is in evidence that defendants agreed that plaintiff employee's disability resulted from the accident and there is evidence that a subsequent disability was accompanied by similar pain in the employee's back and chest, and there is expert opinion testimony that plaintiff had injured an intervertebral disc, which injury would not show up on an X-ray, *held* the evidence supports the finding that the subsequent disability resulted from the accident notwithstanding testimony by other expert witnesses that they were unable to find any definite and conclusive cause for plaintiff's subsequent condition.

2. Master and Servant § 55d—

If there is any competent evidence to support a finding of fact by the Industrial Commission, such evidence is conclusive on appeal, even though there is evidence that would support a finding to the contrary.

3. Master and Servant § 53a—

An agreement for the payment of compensation which is approved by the Commission is as binding as an award. G.S. 97-87.

4. Master and Servant § 53c—

The parties entered into an agreement for payment of compensation, approved by the Industrial Commission, which provided for payment of compensation "for necessary weeks" and stipulated that the employee had theretofore returned to work. The employer notified the Commission of final payment under such agreement, G.S. 97-18 (e). *Held:* A request for review of the award for changed condition made some sixteen months

thereafter is barred, G.S. 97-47, since the disability for which compensation was agreed to be paid presumably terminated when the employee returned to work prior to the execution of the agreement, and therefore the phrase of the agreement "for necessary weeks" cannot be enlarged to include the subsequent disability.

5. Same—

Where the parties agreed to the payment of compensation, approved by the Industrial Commission, the twelve month period for the filing of request for review of the award for changed condition expires twelve months after the last payment of compensation under the agreement, notwithstanding that the last payment for medical expenses may have been made at an appreciably later date.

APPEAL by defendants from *Sink, J.*, August Special Term, 1950, of GUILFORD.

This is a proceeding for compensation, under the provisions of the North Carolina Workmen's Compensation Act, for an injury by accident arising out of and in the course of the employment of the plaintiff by the defendant, C. V. Lowdermilk, on 26 March, 1948. The defendant Fidelity & Casualty Company of New York, was the insurance carrier of its codefendant at the time of the accident.

The plaintiff, William Howard Tucker, was employed as a brickmason. On the above date a scaffold on which the plaintiff was working collapsed and he fell to the ground, landing on his feet. He did not appear to be hurt, declined medical attention, and worked the following week. On 5 April, 1948, he was taken to the hospital, at which time he was suffering with pneumonia and severe pain in his back and chest. Careful medical examination failed to disclose any apparent reason for the severe pain. X-rays of the chest and back failed to reveal any fracture or other injury.

The employer reported the accident to the Industrial Commission on 22 April, 1948, and on 30 April, 1948, the plaintiff, the employer and the carrier executed an agreement for compensation for disability on the Commission's Form 21, which was received by the Commission on 2 May, 1948, and approved by it on 12 May, 1948. The parties agreed upon the following facts: (1) The date of the accident; (2) that the disability resulted from an injury by accident arising out of and in the course of the employment; (3) that disability began 5 April, 1948; (4) that plaintiff's actual average weekly wage was $55.00; (5) that the employer "shall pay to the said William H. Tucker compensation at the rate of $24.00 per week, payable now beginning from 13 April, 1948, and continuing for necessary weeks"; and (6) that the employee had theretofore returned to work on 19 April, 1948.

The plaintiff signed a final settlement receipt on the Commission's Form 27, on 28 April, 1948, covering compensation at the rate of $24.00

per week from 13 April, 1948, to 18 April, 1948, subject to review as provided by law. This Form contained a statement to the effect that the report closed the case. The report was signed by the defendant carrier on 14 May, 1948; and according to the record this receipt was received by the North Carolina Industrial Commission on 15 May, 1948.

In accordance with the above agreement and the final settlement receipt, the defendant carrier paid compensation to the plaintiff on 28 April, 1948, covering the period from 13 April, through the 18th. No other compensation payments have been made to the plaintiff. The defendant carrier also paid certain medical bills for services rendered to the plaintiff before and after the execution and approval of the agreement for compensation. All of these bills were paid with the approval of the Commission, some of them as late as December, 1948.

After the plaintiff recovered from pneumonia he returned to work and worked continuously, with the exception of four days in August, until 12 October, 1948, when he entered Wesley-Long Hospital, at which time he was suffering with severe pain in the mid-thoracic portion of the back. The pain was of such severity as to require the use of narcotics to relieve it. He lost about six weeks' time and thereafter returned to work, but re-entered the hospital for further treatment in April, 1949.

A request for a hearing before the Industrial Commission "to determine what additional compensation, if any, was due him," was made by the plaintiff on 6 September, 1949.

The hearing before the Commissioner resulted in an award in favor of the plaintiff. The defendants appealed to the full Commission. The Commission set aside the findings and award made by the hearing Commissioner and found the facts and made its conclusions of law.

The Commission found as a fact that as a result of the accident on 26 March, 1948, the plaintiff had a recurrence of disability on 12 October, 1948, and was temporarily totally disabled for a period of five weeks and six days; that he was again temporarily totally disabled as a result of said accident for a period of five weeks prior to the date of the hearing, and as a result of the aforesaid accident the plaintiff has suffered a permanent injury to his back, chest and spine, which injury had not reached its maximum improvement at the time of the hearing.

The Commission held as a matter of law the plaintiff's claim for compensation was not barred by G.S. 97-47, and awarded compensation, retaining the cause for final order until the permanent disability of the plaintiff could be ascertained and rated.

The defendants appealed to the Superior Court. The award of the Commission was affirmed, and the defendants appealed to the Supreme Court.

Hughes & Hines for plaintiff.

Smith, Wharton, Sapp & Moore for defendants.

DENNY, J. The defendants seriously contend the evidence is insufficient to support a finding that the plaintiff is disabled, and, if so, that such disability is the result of the accident of 26 March, 1948.

It is true the plaintiff has been examined and re-examined by a number of medical experts, and they are unable to find any definite and conclusive cause for the plaintiff's condition. But in the original agreement for compensation, these defendants agreed that plaintiff's disability resulted from an injury by accident arising out of and in the course of his employment, and his complaint then with respect to severe pain in his back and chest was similar to the condition which incapacitated him later. Moreover, one physician who examined the plaintiff on 5 April, 1948, and reported that in his opinion the plaintiff had no permanent injury, testified in the hearing below that he had changed his mind and is now of the opinion the plaintiff has some injury to his intervertebral disc. And, according to the testimony adduced in the hearing below, such an injury would not show in an X-ray.

We think the finding of the Commission in this respect must be upheld; since under our practice, if there is any competent evidence to support a finding of fact of the Industrial Commission, such finding is conclusive on appeal, even though there is evidence that would have supported a finding to the contrary. *Creighton v. Snipes,* 227 N.C. 90, 40 S.E. 2d 612; *Rewis v. Ins. Co.,* 226 N.C. 325, 38 S.E. 2d 97; *Hegler v. Mills Co.,* 224 N.C. 669, 31 S.E. 2d 918; *Kearns v. Furniture Co.,* 222 N.C. 438, 23 S.E. 2d 310; *Buchanan v. Highway Com.,* 217 N.C. 173, 7 S.E. 2d 383; *Knight v. Body Co.,* 214 N.C. 7, 197 S.E. 563; *Swink v. Asbestos Co.,* 210 N.C. 303, 186 S.E. 258.

The more serious question presented for determination, is whether or not, under the facts and circumstances disclosed by the record, the plaintiff's claim for compensation was barred under the provisions of G.S. 97-47, at the time he requested a hearing. This statute limits the right of review to twelve months from the date of the last payment of compensation pursuant to an award, except in cases in which only medical or other treatment bills are paid. In such cases review is limited to twelve months from the date of the last payment of such bills for medical or other treatment, paid pursuant to the provisions of the Compensation Act.

An agreement for the payment of compensation when approved by the Commission is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal. G.S. 97-87.

The Commission concluded as a matter of law that the plaintiff is entitled to additional compensation, notwithstanding he made no request for a hearing, or for additional compensation, until after the expiration of more than sixteen months from the date of the last payment of compensation. The Commission construed the agreement to pay compensation beginning from 13 April, 1948, *and continuing for necessary weeks* to require the defendants to pay compensation to the claimant for his period of temporary total disability beginning 12 October, 1948, which period coupled with his previous period of disability exceeded 28 days, making the defendants also liable for the deducted waiting period from 5 April through the 12th. G.S. 97-28. Therefore, the Commission held the defendants had not made final payment for the "necessary weeks" as required by the agreement.

In support of the above interpretation of the agreement executed by the parties and approved by the Commission, the Commission relies upon its Rule #13, promulgated pursuant to the authority contained in G.S. 97-80 (a), the pertinent part of which reads as follows: "Compensation cannot be discontinued after an award has been made or an agreement between parties approved until the full award has been paid, except that in case the award is made during disability, such disability is presumed to last until the employee returns to work . . ."

We do not concur in the conclusion of law with respect to the payments required under the agreement for the payment of compensation, nor do we think the Commission's Rule #13 has any material bearing on the question before us. However, if an award is made, payable during disability, and there is a presumption that disability lasts until the employee returns to work, there is likewise a presumption that disability ended when the employee returned to work.

We construe the agreement to pay compensation beginning with 13 April *and continuing for necessary weeks,* to direct the payment of compensation to the claimant only from the 13th April until he returned to work; since the agreement at the time of its execution set forth the fact that the claimant had already returned to work.

Furthermore, G.S. 97-18 (e), requires the employer within sixteen days after final payment of compensation has been made to notify the Commission that such final payment has been made, the total amount of compensation paid, etc. The report required by this statute was signed by the claimant on 28 April, 1948, by the defendant carrier on 14 May, 1948, and according to the record, received by the Commission on 15 May, 1948. And while the Commission finds as a fact that the first knowledge it had of the existence of this report was when it was introduced before the hearing Commissioner on 12 October, 1949, the finding is not supported by the record. The following statement appears on the face of

the report: "Received 5-15-48, N. C. Industrial Commission." And the certificate of the Secretary to the Commission, in certifying the original records in the proceeding to the Superior Court of Guilford County, contains the following statement: "That on 15 May, 1948, the Commission received from the insurance carrier a final settlement receipt signed by the plaintiff on 28 April, 1948, showing compensation was paid in the amount of $20.57 and medical expense in the amount of $20.00, and that plaintiff had returned to work on 19 April, 1948, at his original wage of $55.00 per week."

We think the provisions of G.S. 97-47 are controlling on this appeal. And since the plaintiff's request for a review was not made until after the expiration of more than twelve months from the last payment of compensation, made pursuant to the agreed settlement, his claim for additional compensation by reason of his changed condition is barred. *Lee v. Rose's Stores, Inc.*, 205 N.C. 310, 171 S.E. 87; *Knight v. Ford Body Co., supra.* And the payment of medical bills by the carrier did not extend the time for review, since compensation had been agreed upon and paid. See *Whitted v. Palmer-Bee Co.*, 228 N.C. 447, 46 S.E. 2d 109.

The case of *Hanks v. Utilities Co.*, 210 N.C. 312, 186 S.E. 252, upon which the appellee is relying, dealt with an entirely different factual situation from that presented on the present appeal, and is therefore not controlling in the instant case.

The judgment entered below affirming the award of the Commission, is Reversed.

THE BOARD OF COMMISSIONERS OF ROXBORO v. MAGGIE BUMPASS, ELSIE BUMPASS, L. M. CARLTON, TRUSTEE, AND PERSON COUNTY, ORIGINAL DEFENDANTS, ROXBORO BUILDING & LOAN ASSOCIATION, T. F. DAVIS, TRUSTEE, JOHN D. CLAY AND WIFE, GERTRUDE M. CLAY, ALSTON B. CLAY AND MRS. ALSTON B. CLAY AND DEE A. CLAY, INTERVENORS, AND HUBERT LUNSFORD, ADDITIONAL DEFENDANT.

(Filed 2 February, 1951.)

1. Taxation § 40c—

The owner of the remainder subject to a life estate is a necessary party in an action to foreclose a tax lien under G.S. 105-414.

2. Same: Process § 6—

Service of process by publication is in derogation of the common law and every statutory prerequisite must be observed. G.S. 1-98, G.S. 105-391.

3. Same—

The affidavit sufficient in form to support an order for service by publication is jurisdictional, and the affidavit must state the cause of action with

sufficient particularity to disclose its nature and to enable the court to determine its sufficiency, G.S. 1-98.

4. Same—

Failure of the affidavit for service by publication to state the cause of action cannot be cured by the complaint filed in the action when the affidavit and complaint are not filed simultaneously and it appears affirmatively that the complaint was not considered as the basis of the clerk's findings. Whether a complaint which does not mention the remainderman in its body and is ambiguous in setting out her interest, states a cause of action against her in a tax foreclosure, G.S. 105-414, *quœre?*

5. Taxation § 40g—

A remainderman who has been served only by publication based upon a fatally defective affidavit, may attack the tax foreclosure more than one year afterward since neither G.S. 105-393, nor any statute of limitations can bar the right to attack a judgment for want of jurisdiction.

6. Constitutional Law § 21: Judgments § 18—

Notice and an opportunity to be heard are prerequisites of jurisdiction, and jurisdiction is prerequisite to a valid judgment.

7. Judgments § 27b—

No statute of limitations can bar the right of a litigant to attack a judgment on the ground that he had not been served with summons or brought into court in any manner sanctioned by law.

APPEAL by movant Elsie Bumpass Doggett from *Hatch, Special Judge,* September Special Term 1950, PERSON. Reversed.

Civil action to foreclose tax lien, heard on motion of Elsie Bumpass Doggett and her husband to vacate the decree of confirmation and the deed executed pursuant thereto.

On 18 December 1919, William Bumpass conveyed the land described in the complaint to Maggie Bumpass, his wife, for life, with remainder in fee to his daughter, Elsie Bumpass, by deed duly recorded in Person County 9 February 1920.

During the years 1934 to 1941, both inclusive, the property was carried on the tax books of the town of Roxboro under the name "William Bumpass' estate." Taxes assessed for said years being in default, plaintiff, on 29 September 1942, instituted this action under G.S. 105-414 to foreclose its tax lien on said property.

Feme movant's maiden name appears in the caption to the action but it nowhere appears in the complaint. It is not alleged that she is the owner of a remainder interest in the property, and it nowhere appears, save from the mere description of the property itself, that the action is to foreclose a tax lien on property of which the *feme* movant is the owner,

subject to the life estate of Maggie Bumpass. The nearest approach to an allegation of that type is as follows:

"6. That the defendant(s) .....claim interest in said property as mortgagee
trustee
owners."

On 1 October 1942, the sheriff of the county returned the original summons endorsed "Elsie Bumpass NOT TO BE FOUND in Person County."

On 15 October 1942, the plaintiff filed with the clerk an affidavit for publication of summons in which it is stated that "Elsie Bumpass cannot be found in Person County, a diligent search has been made and the plaintiff is unable to locate the said defendant, Elsie Bumpass, in the State of North Carolina." No reference is made therein to the existence of a cause of action or the nature thereof.

On the said date the clerk entered an order of publication reciting that said defendant, after due diligence, cannot be found in the State and "It appearing . . . from the affidavit of the plaintiff . . . that a cause of action exists in favor of the plaintiff against the said defendant, Elsie Bumpass, and it further appearing from said affidavit that 'the subject of the action is real property in this state, and the defendant, Elsie Bumpass, has or claims, or the relief demanded consists wholly or in part in excluding her from any actual or contingent liens or interest therein.'" Pursuant to said order, notice of the action was duly published.

On 7 December 1942 the clerk entered judgment by default in the sum of $48.34 with penalties and appointed a commissioner to make sale. The property was sold, after statutory advertisement, and the sale thereof was reported to and confirmed by the clerk. The commissioner executed deed as directed in the decree of confirmation.

The property, worth at the time about $2,000, sold for $425.

Elsie Bumpass, on 29 May 1928, married J. W. Doggett and since that time has resided in Guilford County. Since her marriage she has visited her stepmother, her uncles, and cousins living in Roxboro about once a month and is well known in Person County.

On or about 2 April 1949, she and her husband made a special appearance before the clerk and moved to vacate the decree of confirmation and the commissioner's deed executed pursuant thereto, in so far as they affect her title to the premises, for the reason that they had never been made parties to said proceeding in their own proper names and were never served with process therein. The motion was supported by affidavit setting forth the facts.

The clerk denied the motion. On appeal, the judge below, after finding the essential facts, entered judgment vacating the proceeding as to the

male movant and denying the same as to the *feme* movant. She excepted and appealed.

A. A. McDonald, Victor S. Bryant, and Robert I. Lipton for appellant, Elsie Bumpass Doggett.

Robert E. Long for the Board of Commissioners of Roxboro.

Davis & Davis for Roxboro Building & Loan Association.

Melvin H. Burke for Dee A. Clay.

BARNHILL, J. The *feme* movant is the owner of the property described in the complaint, subject to the life estate of Maggie Bumpass. She is therefore a necessary party to this action. *Wilmington v. Merrick,* 231 N.C. 297; *Eason v. Spence,* 232 N.C. 579.

The plaintiff sought to bring her in and subject her to the jurisdiction of the court by service of summons by publication. Whether the proceeding in this respect was sufficient for that purpose is the primary question.

The service of process by publication is in derogation of the common law and the statute making provision therefor must be strictly construed. The court must see that every prerequisite prescribed exists in the particular case before it grants the order of publication. *Spiers v. Halstead,* 71 N.C. 209; *Windley v. Bradway,* 77 N.C. 333; *Wheeler v. Cobb,* 75 N.C. 21; *Faulk v. Smith,* 84 N.C. 501; *Bacon v. Johnson,* 110 N.C. 114; *Rodriguez v. Rodriguez,* 224 N.C. 275, 29 S.E. 2d 901.

The statute prescribes, with particularity and caution, the cases and causes in which, and the conditions upon which, such service will be authorized. G.S. 1-98 and 105-391. It expressly designates the facts which must be made to appear to the court by affidavit as the basis for an order of service by publication. The affidavit required to support an order for service of summons by publication is jurisdictional. The omission therefrom of any of the essential averments on which an order for substitute service is predicated is fatal. *Groce v. Groce,* 214 N.C. 398, 199 S.E. 388; *Rodriguez v. Rodriguez, supra; Simmons v. Simmons,* 228 N.C. 233, 45 S.E. 2d 124.

"Everything necessary to dispense with personal service of the summons must appear by affidavit." *Davis v. Davis,* 179 N.C. 185, 102 S.E. 270.

The affidavit must make it appear that a cause of action exists in favor of the plaintiff against the defendant upon whom such service is sought, G.S. 1-98, and the cause of action must be stated with such clearness and comprehension as may enable the court to determine its sufficiency. *Spiers v. Halstead, supra; Bacon v. Johnson, supra; Martin v. Martin,* 205 N.C. 157, 170 S.E. 651. While the statement of the cause

of action as set out in the affidavit may be abbreviated, it must be sufficient to disclose the nature of the action.

Here the affidavit contains no reference to a cause of action. It merely makes it appear that Elsie Bumpass cannot, after a diligent search, be found in this State. It is insufficient to support the order of publication.

But the plaintiff stressfully contends that any defect in the affidavit is cured by the complaint which was on file when the affidavit was presented. It relies on the decisions in *Davis v. Davis, supra; Bank v. Tolbert,* 192 N.C. 126, 133 S.E. 558; and *Martin v. Martin, supra.* But these decisions can afford plaintiff little comfort, for they are clearly distinguishable.

In the *Davis case* a verified complaint and the affidavit were filed contemporaneously. Both were presented to the clerk with the proposed order for service by publication.

The court in the *Tolbert case* concluded that the affidavit was sufficient. It commented that, in that case, the jurisdiction of the court, as to the subject of the action, need not be shown by affidavit, and that, in any event, jurisdiction of the subject matter appears from the facts alleged in the complaint. The complaint was not used to supplement the affidavit.

In the *Martin case* the plaintiff requested the court to consider the complaint as an affidavit upon which an order for service by publication should be issued. The court in its opinion stated the rule followed in the *Davis case* as follows: ". . . if a verified complaint containing the necessary allegations be filed simultaneously with the affidavit, the complaint may be treated as an amendment or complement which cures the defect." This rule applies when it appears that the clerk considered the complaint as the basis, in whole or in part, of his order.

But in this case the complaint and affidavit were not filed simultaneously. At the time the affidavit was presented, the complaint had been on file more than fifteen days. The clerk was not required to search his files to ascertain whether there was some pleading of record which might supplement the defective affidavit. It affirmatively appears that he did not do so. He expressly cites the affidavit as the basis of his findings.

Furthermore, even if we resort to the complaint, it is at least doubtful whether that states the cause of action the plaintiff now asserts it relied upon. While it appears in the caption as one of the defendants, the name of Elsie Bumpass is not contained in the body of the complaint. The one allegation of her interest in the controversy—if it may be so considered—is ambiguous and misleading.

The plaintiff likewise relies on G.S. 105-393, which provides that no proceeding to contest the title conveyed in a tax foreclosure action, or

motion to reopen or set aside the judgment therein, shall be entertained after the expiration of one year. But this statute will not avail here.

Notice and an opportunity to be heard are prerequisites of jurisdiction, *Wilmington v. Merrick, supra; Eason v. Spence, supra,* and jurisdiction is a prerequisite of a valid judgment. *McRary v. McRary,* 228 N.C. 714, 47 S.E. 2d 27. The Legislature is without authority to dispense with these requirements of due process, and lapse of time cannot satisfy their demands. No statute of limitations, therefore, can bar the right of a litigant to assert that he is not bound by a judgment entered in a cause of which he had no legal notice.

The decree of confirmation of the sale, entered by the clerk in the original foreclosure proceeding, does not suffice to bar Elsie Bumpass Doggett, the movant, or to authorize the conveyance of her remainder interest in the property. Therefore, the judgment entered in the court below, in so far as it affects her interest in the property, must be

Reversed.

LILLIE MAE CHAMBERS, *by* HER NEXT FRIEND, ROSE CHAMBERS, v. MRS. BARNA ALLEN, JOHN ALLEN, MARY FRANKLIN, MRS. W. I. FARRELL, MRS. JANE ALLEN ROSS, MRS. KATHERINE A. MASHBURN, GEORGE C. ALLEN AND JAMES B. ALLEN, CO-PARTNERS, TRADING AS BARNA ALLEN COMPANY,

and

GENEVA CHAMBERS, BY HER NEXT FRIEND, ROSE CHAMBERS, v. MRS. BARNA ALLEN, JOHN ALLEN, MARY FRANKLIN, MRS. W. I. FARRELL, MRS. JANE ALLEN ROSS, MRS. KATHERINE A. MASHBURN, GEORGE C. ALLEN AND JAMES B. ALLEN, CO-PARTNERS, TRADING AS BARNA ALLEN COMPANY.

(Filed 2 February, 1951.)

1. Automobiles § 18h (2)—

Plaintiffs' evidence tending to show that the driver of defendants' truck passed the truck in which plaintiffs were riding on its right and turned right into a driveway, causing the rear of the truck, which was loaded with lumber, to whip around and hit the radiator of the truck in which plaintiffs were riding, causing the injuries in suit, *is held* sufficient to overrule defendants' motion to nonsuit notwithstanding that defendants' evidence was in sharp conflict with that of plaintiffs.

2. Automobiles § 18i: Trial § 31b—

The action of the trial court in reading pertinent statutes regulating the operation of motor vehicles upon the public highways, without applying the law to the evidence in the case fails to comply with G.S. 1-180, and a new trial is awarded upon exceptions to the charge.

CHAMBERS *v.* ALLEN.

APPEAL by defendants from *Phillips, J.*, February Term, 1950, of MOORE.

These are civil actions instituted for and on behalf of the minor plaintiffs by their father, Rose Chambers, as next friend, to recover damages for personal injuries sustained by the minor plaintiffs as a result of the alleged negligence of the defendants.

These cases were consolidated by consent of the parties for the purpose of trial.

The plaintiffs allege that on 6 December, 1947, they were riding with their father, Rose Chambers, in his pick-up truck along the highway, which truck was being operated in a careful, prudent and lawful manner, when the defendants' truck, while being operated in a fast and unlawful manner was driven past the vehicle of Rose Chambers and was suddenly cut sharply to the right and caused to run into the Chambers truck, thereby causing serious injuries to the plaintiffs.

The defendants denied the material allegations of the respective complaints and alleged as a further answer and defense thereto that the collision and the injuries sustained by the plaintiffs, if any, were solely and proximately caused by the careless, negligent and unlawful conduct of Rose Chambers in the operation of his truck. The defendants further alleged that the Chambers truck, at the time of the collision, was being operated in violation of various statutes, the alleged violations and applicable statutes being duly pleaded.

According to the plaintiffs' evidence, the driver of the defendants' truck undertook to pass the Chambers truck on its right and to turn into a 20-foot driveway. In making the turn the left rear end of the body of the defendants' truck, which was loaded with lumber, whipped around and hit the radiator of the Chambers truck, causing considerable damage thereto and injurying the plaintiffs.

The evidence of the defendants is in sharp conflict with that of the plaintiffs. The driver of defendants' truck testified that he passed the truck driven by Rose Chambers, and after going around the Chambers truck he was about 150 to 175 yards or further from the driveway he intended to enter, which leads to a workshop; that when he was about 35 or 40 yards from the driveway he gave a signal indicating he was going to turn right; that just as he turned and the right rear wheels got off the payment, the Chambers truck hit the left rear corner of the defendants' truck. The defendants' evidence also tended to show the brakes of the Chambers truck were defective.

From verdicts in favor of the plaintiffs and the judgments entered pursuant thereto, the defendants appeal and assign error.

Seawell & Seawell for plaintiffs.

David H. Armstrong for defendants.

DENNY, J. The defendants except and assign as error the failure of the trial court to sustain their motion for judgments as of nonsuit, made at the close of the plaintiffs' evidence and renewed at the close of all the evidence.

We think the evidence introduced in the trial below, when considered in the light most favorable to the plaintiffs, as it must be on motion for judgment as of nonsuit, is sufficient to withstand such motion. *Carson v. Doggett,* 231 N.C. 629, 58 S.E. 2d 609; *Winfield v. Smith,* 230 N.C. 392, 53 S.E. 2d 251; *Thomas v. Motor Lines,* 230 N.C. 122, 52 S.E. 2d 377; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307; *Pascal v. Transit Co.,* 229 N.C. 435, 50 S.E. 2d 534.

By exception duly brought forward to the charge, the defendants contend the court below failed to comply with G.S. 1-180, in that it failed to declare and explain the law arising on the evidence with respect to the defendants' Further Answer and Defense, and the statutes pleaded therein; and to explain the law applicable to the facts as they might be found by the jury from the evidence.

The General Assembly in 1949 rewrote G.S. 1-180, which now reads as follows: "No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. He shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided the judge shall give equal stress to the contentions of the plaintiff and defendant in a civil action, and to the state and defendant in a criminal action."

A careful examination of the charge discloses that the court defined actionable negligence and proximate cause in general terms; that the court instructed the jury that it would give it certain statutes which the jury would apply to the facts as found by it from the evidence in the case. Whereupon the court read to the jury certain statutes applicable to the operation of motor vehicles on the public highways, with respect to brakes, signals on starting, stopping or turning, reckless driving, speed restrictions, overtaking a vehicle, and the duty of a driver to give way to overtaking vehicle. However, no application of the law embodied in the statutes was made to the evidence given in the case. Briefly stated, the jury was instructed that the violation of any one or more of these statutes by the driver of the defendants' truck would constitute negligence *per se,* and if the jury should find from the evidence and by its greater weight that the driver of the defendants' truck violated one or more of these statutes which the court read to the jury, the plaintiffs would be entitled to have the jury answer the first issue Yes, if the plaintiffs had satisfied

the jury from the evidence and by its greater weight that such negligence on the part of the driver of the defendants' truck was the proximate cause of the plaintiff's injuries. The remainder of the charge dealt exclusively with the burden of proof, damages and the contentions of the parties. Nowhere in the charge did the court explain the law applicable to the evidence upon which the defendants' contentions were based, should the jury find the facts from the evidence to be as contended by them. Such omission constitutes a failure to comply with the provisions of G.S. 1-180. *Collingwood v. R. R.*, 232 N.C. 724, 62 S.E. 2d 87; *S. v. Ardrey*, 232 N.C. 721, 62 S.E. 2d 53; *S. v. Herbin*, 232 N.C. 318, 59 S.E. 2d 635; *S. v. Sutton*, 230 N.C. 244, 52 S.E. 2d 921; *S. v. Fain*, 229 N.C. 644, 50 S.E. 2d 904; *Lewis v. Watson*, 229 N.C. 20, 47 S.E. 2d 484, and cases cited; *Spencer v. Brown*, 214 N.C. 114, 198 S.E. 630; *Nichols v. Fibre Co.*, 190 N.C. 1, 128 S.E. 471; *Bowen v. Schnibben*, 184 N.C. 248, 114 S.E. 170. "Where a statute appertaining to the matters in controversy provides that certain acts of omission or commission shall or shall not constitute negligence, it is incumbent upon the judge to apply to the various aspects of the evidence such principles of the law of negligence as may be prescribed by statute, as well as those which are established by common law. *Orvis v. Holt*, 173 N.C. 233; *Matthews v. Myatt*, 172 N.C. 232." *Bowen v. Schnibben, supra.* It is not sufficient merely for the court to read a statute bearing on the issues in controversy and leave the jury unaided to apply the law to the facts. *S. v. Sutton, supra; Lewis v. Watson, supra.* It is the duty of the court to state the evidence "to the extent necessary" and to declare and explain the law as it relates to the pertinent aspects of the testimony offered. *Smith v. Kappas*, 219 N.C. 850, 15 S.E. 2d 375. And the duty of the court to declare and explain the law arising on such evidence remains unchanged by the present provisions of G.S. 1-180.

For the error pointed out there must be a new trial, and it is so ordered.

New trial.

ELIZABETH M. WILLARD v. ROBERT B. RODMAN.

(Filed 2 February, 1951.)

Divorce and Alimony § 16: Constitutional Law § 28—Right to enforce payment of alimony due under decree rendered by another state.

Plaintiff brought suit in this State upon a judgment decreeing the payment of alimony to her rendered by the court of another state in her action for divorce *a vinculo*. *Held:* Judgment for the amount of alimony admitted to be due under the decree of such other state was properly entered

under the full faith and credit clause of the Federal Constitution, even though our laws do not authorize alimony upon divorce *a vinculo*, but it was error to enter judgment here directing defendant to pay the future installments of alimony as they become due under the foreign decree, even though our court adopts the foreign decree as its judgment, since the original decree is subject to modification by the court rendering it, and the full faith and credit clause does not require enforcement by our courts as to future installments of alimony. The foreign decree may be used here for suit or suits to collect unpaid installments when they have accrued thereunder subject to any modification of the original decree. Judgments for alimony accrued are enforceable by execution but not by contempt proceedings.

APPEAL by defendant from *Grady, Emergency Judge,* September Term, 1950, of NEW HANOVER.

This action was based on a judgment rendered in the State of Florida.

The plaintiff alleges in her complaint that she instituted an action for absolute divorce from the defendant in 1941, in a court of competent jurisdiction in Bradford County, in the State of Florida; that the plaintiff and defendant were parties to the action and that the defendant appeared by his attorney and filed an answer to her complaint; that a final judgment or decree was rendered in favor of plaintiff and against the defendant, granting to the plaintiff a divorce *a vinculo matrimonii,* and the right to resume the use of her maiden name, to wit, Elizabeth M. Willard, and further decreeing that "said defendant shall pay or cause to be paid to the said plaintiff the sum of $100.00 monthly, as support and maintenance of the said plaintiff, in the amounts and upon the dates respectively fixed therefor in that certain agreement of the parties, dated 3 July, 1941, to wit, on or before the 5th day of each month, but that the sums hereby decreed to be paid by the said defendant are awarded in accordance with and by way of approval of the said agreement, which said agreement is to remain in full force and effect, irrespective of the terms of this final decree."

The plaintiff also alleges that the Florida judgment is still in full force and effect, and she attaches to her complaint an exemplified copy of the record in said suit in the Circuit Court of Bradford County, Florida, in Chancery, including the pleadings, evidence, report of Master and decree or judgment, and she alleges further that there is due and payable to her by the defendant under said judgment the sum of $8,400.00 accrued alimony for months beginning with August, 1943, to date, with interest at the rate of 6% per annum on each installment due thereunder; that no part has been paid except $50.00 on 20 August, 1943, $50.00 on 12 November, 1943, and $50.00 on 24 February, 1944.

The defendant moved to strike certain allegations of the complaint and during the hearing on the motion to strike, according to the record,

counsel for defendant (not defendant's present counsel), upon being questioned by the court, admitted that the judgment or decree referred to herein was and is a valid judgment and that the Florida Court which entered the judgment had jurisdiction of the subject matter and jurisdiction of the parties. He also admitted in open court that the defendant has not paid the amounts due under said judgment and that he still owes the plaintiff the amounts set forth in the complaint; thereupon counsel for plaintiff, in open court, moved for judgment upon the admissions of defendant's counsel. By consent in open court, of counsel for plaintiff and defendant, it was agreed that judgment might be signed out of term, and out of the county.

Whereupon, the court allowed the defendant's motion to strike in part and denied it in part, and also entered judgment for the plaintiff and against the defendant for the past due and unpaid installments payable under the Florida judgment, with interest as prayed for in the complaint, and further ordered, adjudged and decreed that the judgment of the Florida Court, dated 23 October, 1941, be, and the same hereby is adopted and made the judgment of the Superior Court of New Hanover County, North Carolina. The court thereupon entered an order directing future payments of alimony, as follows:

"Ordered and Adjudged that the defendant pay, or cause to be paid to the Clerk of the Superior Court, for the use and benefit of the plaintiff, the sum of One Hundred Dollars on September 3, 1950, and on the 3rd day of each month thereafter so long as the plaintiff may live, or until she remarries; and the costs of this action as taxed by the Clerk.

"This cause will be retained upon the docket for such other and further decrees as may be entered from time to time."

The defendant appeals and assigns error.

Thomas W. Davis for plaintiff.

John F. Crossley and Rountree & Rountree for defendant.

DENNY, J. The defendant contends the court below was without authority to enter judgment upon the admissions of his counsel. This contention is without merit. Moreover, it was admitted in this Court by counsel for defendant that the defendant owes the plaintiff the amounts alleged to be due her in the complaint and for which judgment was entered below. Nor was it suggested by counsel that the defendant has a meritorious defense to the action. Therefore, under the full faith and credit clause of the Constitution of the United States, the plaintiff is entitled to a money judgment for the past due and unpaid installments which had accrued under the Florida decree at the time of the institution of this action. *Barber v. Barber,* 323 U.S. 77, 89 L. Ed. 82, 65 S. Ct.

137, 157 A.L.R. 163; *Sistare v. Sistare,* 218 U.S. 1, 54 L. Ed. 905, 30 S. Ct. 682; *Lynde v. Lynde,* 181 U.S. 183, 45 L. Ed. 810, 21 S. Ct. 555; *Webb v. Webb,* 222 N.C. 551, 23 S.E. 2d 897; *Lockman v. Lockman,* 220 N.C. 95, 16 S.E. 2d 670; *Arrington v. Arrington,* 127 N.C. 190, 37 S.E. 212; *Thomas v. Thomas,* 14 Cal. 2d 355, 94 P. 2d 810; *Van Loon v. Van Loon,* 132 Fla. 535, 182 So. 205; *Campbell v. Campbell,* 28 Okla. 838, 115 P. 1111; *Armstrong v. Armstrong,* 117 Ohio St. 558, 160 N.E. 34, 57 A.L.R. 1108; *Rosenberg v. Rosenberg,* 152 Md. 49, 135 A. 840; A.L.I. Restatement, Conflict of Laws, Section 464. Consequently, the judgment entered below, in so far as it relates to past due and unpaid installments, accruing under the Florida decree, will not be disturbed.

The defendant presents a more serious question by his exception to that portion of the judgment entered below which directs the defendant to pay into the office of the Clerk of the Superior Court (of New Hanover County), for the use and benefit of the plaintiff, the sum of One Hundred Dollars on 3 September, 1950, and a like sum on the 3rd day of each month thereafter so long as the plaintiff may live, or until she remarries.

The full faith and credit clause in our Federal Constitution does not obligate the courts of one state to enforce an alimony decree rendered in another state, with respect to future installments, when such future installments are subject to modification by the court of original jurisdiction. *Sistare v. Sistare, supra; Lynde v. Lynde, supra; Biewend v. Biewend,* 17 Cal. 2d 117, 109 P. 2d 701, 132 A.L.R. 1264; *Kossower v. Kossower* (N.J.), 142 A. 30; *German v. German,* 122 Conn. 155, 188 A. 429; 17 Am. Jur., Sec. 762, p. 576.

It is said in the last cited authority: "Where a foreign decree is subject to modification by the court in which it was entered, neither the Federal Constitution nor the principle of comity requires the courts of another state to enforce it, since no court, other than that having jurisdiction in the original suit, can undertake to administer the relief to which the parties may be entitled without bringing about a conflict of authority and a condition of chaos."

We have examined the law applicable to the facts in this case, and find that a decree for the payment of alimony entered by any court of competent jurisdiction in the State of Florida, whether based upon an agreement of separation, a voluntary property settlement, or in connection with an action for divorce or separate maintenance, is subject to modification as to future installments under the provisions of Chapter 16780, Acts of 1935, Codified as Section 65.15, Florida Statutes 1949.

There is no statute in this State which authorizes a judgment to be entered for the payment of alimony, in an action for divorce *a vinculo matrimonii.* Even so, this does not prevent the institution of an action on a judgment of another state for the collection of past due installments

of alimony awarded in a decree for absolute divorce in accord with the laws of such state. *Lockman v. Lockman, supra.*

However, we know of no authority, statutory or otherwise, in this jurisdiction, which authorizes or requires the entry of a decree requiring the payment of alimony based on a judgment rendered in another state, when such judgment is subject to modification in this respect by the courts of the other state. And whatever may be the rule in some jurisdictions as to comity in such cases, such a judgment as to future installments of alimony is not entitled to enforcement under the full faith and credit clause of our Federal Constitution. 27 C.J.S., Sec. 328, p. 1281. *Biewend v. Biewend, supra; Bamboschek v. Bamboschek,* 270 N.Y.S. 741, 150 Misc. 885.

The adoption of the Florida judgment as the judgment of the Superior Court of New Hanover County does not change the existing rights of the parties thereunder. It may be used, however, as a basis for a suit or suits to collect unpaid installments which may accrue under the Florida decree in the future, subject to any modification of the original decree which may have been made in the meantime. *Lynde v. Lynde, supra; Kossower v. Kossower, supra;* Keezer—Marriage and Divorce, 3rd Ed., Sec. 676, p. 723.

It follows, therefore, the plaintiff is not entitled to a judgment in this jurisdiction, directing the defendant to pay future installments of alimony. She is entitled only to a money judgment for past due and unpaid installments due her under the Florida decree, which judgment is enforceable by execution and not by contempt proceedings. 27 C.J.S., Sec. 328, p. 1282; Nelson—Divorce and Annullment, Vol. 2, Sec. 16.05, p. 296 *et seq.; Lynde v. Lynde, supra; German v. German, supra; Harrington v. Harrington,* 233 Mo. App. 390, 121 S.W. 2d 291.

The judgment entered below will be modified in conformity with this opinion.

Modified and affirmed.

STATE v. CLYDE BROWN.

(Filed 2 February, 1951.)

1. Grand Jury § 1: Jury § 8—

The fact that the county commissioners in selecting the jury list used only the tax returns for the preceding year without a list of names of persons not appearing thereon who were residents of the county and over twenty-one years of age, as stipulated by the amendment to G.S. 9-1, does not sustain defendant's contention that the list was not selected from the

legally prescribed source, since the provisions of the statute are directory and not mandatory.

2. Same: Constitutional Law § 33—

The fact that the county commissioners in selecting the jury list used only the tax returns for the preceding year without a list of names of persons not appearing thereon who were residents of the county and over twenty-one years of age, as stipulated by the amendment to G.S. 9-1, does not tend to show racial discrimination in the selection of prospective jurors, and defendant's objection on this ground cannot be sustained in the absence of any evidence tending to show prejudice, bad faith, or the inclusion or exclusion of persons from the list because of race.

3. Same—

The intentional, arbitrary and systematic exclusion or inclusion of any portion of the population from jury service, grand or petit, on account of race, color, creed, or national origin, is at variance with the fundamental law and cannot stand.

4. Same—

A defendant does not have the right to be tried by a jury of his own race, or to have a representative of any particular race on the jury, or to have any proportional representation of the races thereon, but he is entitled to be tried by a jury from which there has been neither inclusion nor exclusion because of race.

5. Criminal Law § 56—

A motion in arrest of judgment is inappropriate to present the contention that the jury list was not selected from the legally prescribed source, since the matters sought to be challenged are not apparent on the face of the record.

6. Criminal Law § 33—

That defendant is under arrest, held without warrant, or in custody at the time of making a confession, singly or collectively, does not render the confession involuntary as a matter of law unless the circumstances amount to coercion.

7. Same—

A free and voluntary confession is admissible in evidence against the one making it, but a confession wrung from the mind by the flattery of hope or the torture of fear is incompetent. A confession is voluntary in law when, and only when, it is in fact voluntarily made.

8. Same—

Where the trial court's ruling that the defendant's confession is voluntary and competent is supported by defendant's own testimony on the preliminary hearing, defendant's contention of error in its admission is untenable.

9. Criminal Law § 79—

Exceptions not brought forward in defendant's brief and in support of which no argument is advanced or authority cited, are deemed abandoned. Rule of Practice in the Supreme Court 28.

STATE *v.* BROWN.

APPEAL by defendant from *Moore, J.*, September Term, 1950, of FORSYTH.

Criminal prosecution on indictment charging the defendant with rape upon one Betty Jane Clifton, a female.

On the morning of 16 June, 1950, between 8:00 a.m. and noon, some man entered the radio shop of Thomas E. Clifton on West Seventh Street, Winston-Salem, N. C., found Betty Jane Clifton, 16 or 17-year-old daughter of the proprietor alone in charge, assaulted her in a cruel and fiendish manner, raped her, and left her in a helpless condition. She was found unconscious by her father when he came into the shop around 12 o'clock.

The defendant was arrested on suspicion and held for investigation. He told various stories of his whereabouts on the morning in question. These were checked by the officers and found to be false. Finally the defendant sent for the officers of his own accord and confessed to them that he went into the radio shop, assaulted, beat and raped Betty Jane Clifton.

The defendant was indicted, tried, convicted and sentenced as the law commands in such case. The details of the crime are omitted as they are not material on the questions raised by the appeal.

Before pleading to the bill of indictment the defendant moved to quash the indictment on the ground of jury defect in the grand jury which returned a true bill in the case. The alleged defects were that the grand jury was "unlawfully constituted" in violation of defendant's constitutional rights; and further that it was drawn with a view of "limiting representation thereon of Negroes or persons of African descent."

On the hearing of the motion to quash, nothing was said about the failure of the Commissioners to comply with what is now called the "mandatory provisions" of G.S. 9-1 in selecting the jury list from which the grand jury was drawn, and not until the case was tried and the defendant found guilty did counsel advance this contention of jury defect. Thus he now seeks to bring this forward on what he says is a motion in arrest of judgment. Both motions—the one to quash and the other in arrest of judgment—were overruled. Exceptions.

The defendant also contended on the trial that his confession was involuntary, and should have been excluded. Exception.

Verdict: Guilty as charged in the bill of indictment.

Judgment: Death by asphyxiation.

The defendant appeals, assigning errors.

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

Hosea V. Price and Harold T. Epps for defendant.

STACY, C. J. Putting aside any consideration of formal matters, which are not without substance, however, the only real questions sought to be presented on the appeal are: first, whether the jury list was selected from the legally prescribed source; and, secondly, whether the defendant's confession was voluntary.

First. The Jury List. Prior to 1947, it was provided by G.S. 9-1 that the tax returns of the preceding year for the county should constitute the source from which the jury list should be drawn, and this was then the only prescribed source. To meet the constitutional change of the previous election making women eligible to serve on juries, the statute was amended in 1947 enlarging the source to include not only the tax returns of the preceding year but also "a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age," to be prepared in each county by the Clerk of the Board of Commissioners.

It was made to appear on the hearing that the Commissioners used only the tax returns of the county for the preceding year in selecting the jury list for the September Term, 1950, Forsyth Superior Court, from which the grand jury was drawn that performed the accusation against the defendant. This circumstance, the defendant contends, resulted in discrimination against Negroes or jurors of African descent, the race to which he belongs. The conclusion, it seems to us, is far-fetched and clearly a *non sequitur*. It rests only in imagination or conjecture. The defendant must show prejudice, other than guess or surmise, before any relief could be granted on such gossamer or attenuate ground. There was no challenge to any member of the jury, grand or petit, and no suggestion that any was disqualified. Indeed, the trial court was at pains to see that every opportunity was afforded for the selection of a fair and impartial jury.

Negroes were neither excluded nor discriminated against in the selection of either the grand or petit jury which performed in this case. One Negro woman served on the grand jury and at least one prospective Negro juror was tendered to the defendant for the petit jury and was excused or rejected by his counsel. It has been the consistent holding in this jurisdiction, certainly since the case of *S. v. Peoples*, 131 N.C. 784, 42 S.E. 814, that the intentional, arbitrary and systematic exclusion of any portion of the population from jury service, grand or petit, on account of race, color, creed, or national origin, is at variance with the fundamental law and cannot stand. On the other hand, it has also been the holding with us, consistent with the national authorities, *Akins v. Texas*, 325 U.S. 398, 89 L. Ed. 1692, that it is not the right of any party to be tried by a jury of his own race, or to have a representative of any particular race on the jury. It is his right, however, to be tried by a

competent jury from which members of his race have not been unlawfully excluded. *S. v. Speller,* 231 N.C. 549, 57 S.E. 2d 759; *S. v. Koritz,* 227 N.C. 552, 43 S.E. 2d 77; *Ballard v. U. S.,* 329 U.S. 187, 91 L. Ed. 181. No such exclusion appears here. "The law not only guarantees the right of trial by jury, but also the right of trial by a proper jury; that is to say, a jury possessing the qualifications contemplated by law," and in the selection of which there has been neither inclusion nor exclusion because of race. *Hinton v. Hinton,* 196 N.C. 341, 145 S.E. 615; *Cassell v. Texas,* 339 U.S. 282.

Whatever may be the holdings in other jurisdictions, it is thoroughly settled by our decisions that the provisions of the statute now in focus are directory, and not mandatory, in the absence of proof of bad faith or corruption on the part of the officers charged with the duty of selecting the jury list. *S. v. Mallard,* 184 N.C. 667, 114 S.E. 17, and cases there cited. Not only has no bad faith or corruption been shown on the part of the officers here, but none has so much as been suggested. *S. v. Smarr,* 121 N.C. 669, 28 S.E. 549. Hence, the motions to quash and in arrest were properly overruled. It may be added, also, that the motion in arrest was inappropriate for defendant's present purpose, as the matters sought to be challenged are not apparent on the face of the record. *S. v. Sawyer, ante,* 76, 62 S.E. 2d 515; *S. v. McKnight,* 196 N.C. 259, 145 S.E. 281, and cases there cited.

Finally, and in conclusion of this phase of the case, it may be said the defendant has shown no error affecting any of his substantial rights. He has pointed out no racial discrimination in the selection of the jury list, the grand jury or the petit jury which considered the indictment against him. Nor does he specifically so contend. He only says or suggests that there might have been discrimination against his race. He concedes that neither equal nor proportional representation of race is a constitutional requisite in the selection of juries. *Akins v. Texas, supra.* Indeed, proportional racial limitation is actually forbidden. *Cassell v. Texas, supra.* The defendant's position is one of possible discrimination, not one of racial imbalance in jury composition. A person accused of crime is entitled to have the charges against him performed by a jury in the selection of which there has been neither inclusion nor exclusion because of race. *Cassell v. Texas, supra.* This, the defendant has had in respect of both the grand and petit juries which performed in the case, or, at least, the contrary in respect of neither has been made to appear on the record. Hence, his claim of jury defect or irregularity is unavailing.

Second. The Defendant's Confession. The only basis of challenge to the competency of defendant's confession is that he was under arrest, being held without warrant, and was in custody at the time it was given. These circumstances, taken singly or all together, unless they amounted

to coercion, were not sufficient in and of themselves to render a confession, otherwise voluntary, involuntary as a matter of law and incompetent as evidence. *S. v. Stefanoff,* 206 N.C. 443, 174 S.E. 411; *S. v. Gray,* 192 N.C. 594, 135 S.E. 535; *S. v. Thompson,* 224 N.C. 661, 32 S.E. 2d 24; *S. v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84; *S. v. Speller,* 230 N.C. 345, 53 S.E. 2d 294; *S. v. Brown,* 231 N.C. 152, 56 S.E. 2d 441.

After a preliminary investigation, pursuant to the procedure outlined in *S. v. Whitener,* 191 N.C. 659, 132 S.E. 603, the trial court ruled the confession to be voluntary, and permitted the solicitor to offer it in evidence against the prisoner. *S. v. Grass,* 223 N.C. 31, 25 S.E. 2d 193; *S. v. Hammond,* 229 N.C. 108, 47 S.E. 2d 704. The ruling is fully supported by the evidence, as witness especially the following questions propounded by the court and the answers of the defendant:

"Q. Clyde, let me ask you a question. From the time you were put in custody on the 19th of June, up until after Mr. Price was employed, came over there to the jail to see you, after you made all the statements you made in this case, were you ever mistreated in any manner by these officers, any of the officers? A. No.

"Q. Was any violence used or threatened to be used against you? A. No sir.

"Q. Did anybody hit you or threaten to hit you? A. No sir.

"Q. Did anybody threaten to do you any physical injury of any kind? A. No. sir.

"Q. Did anybody offer you any reward or hope of reward to make any statement? A. No sir.

"Q. Did anybody tell you that you'd get out lighter, they'd try to help you get out lighter if you'd make a statement? A. No.

"Q. And were you, at different times—at least on two occasions, I believe you said—warned that you did not have to make a statement? A. Yes sir.

"Q. You were warned at least once before you made this final statement? Is that correct? A. Yes sir.

"Q. At that time you were told that any statements which you might make would be used against you? A. Yes sir."

It is well understood that a free and voluntary confession is admissible in evidence against the one making it, because it is presumed to flow from a strong sense of guilt or from a love of the truth, both of which are, at times, compelling motives and powerful aids in the investigation of crimes. Just the reverse is true, however, in the case of an involuntary confession, since a statement wrung from the mind by the flattery of hope or by the torture of fear, comes in such questionable manner as to afford no assurance of its verity, and merits no consideration. *S. v. Anderson,* 208 N.C. 771, 182 S.E. 643; *S. v. Patrick,* 48 N.C. 443. A confession is

voluntary in law when—and only when—it was in fact voluntarily made. *S. v. Jones,* 203 N.C. 374, 166 S.E. 163; *Ziang Sung Wan v. United States,* 266 U.S. 1, 69 L. Ed. 131.

The observations of *Henderson, J.,* in *S. v. Roberts,* 12 N.C. 259, are sound and presently pertinent: "Confessions are either voluntary or involuntary. They are called voluntary when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breast of every man, not operated upon by other motives more powerful with him, and which, it is said, in the perfectly good man cannot be countervailed. These confessions are the highest evidences of truth, even in cases affecting life. But it is said, and said with truth, that confessions induced by hope or extorted by fear are, of all kinds of evidence, the least to be relied on, and are therefore entirely to be rejected."

The court's ruling on the voluntariness of the confession is supported by the defendant's own testimony given on the preliminary inquiry. The contentions of error in its admission are without force or substance.

The remaining exceptions, noted by the defendant on the trial, have been abandoned by him as they are not brought forward in his brief and no argument has been advanced, or authority cited, in support thereof. Hence, under the rule, they are deemed feckless or without merit and are treated as abandoned. Rule 28 of the Rules of Practice in the Supreme Court, 221 N.C. 562.

On the record as presented, the verdict and judgment will be upheld.

No error.

HAZEL ATWOOD, ADMINISTRATRIX OF DEAN ATWOOD, DECEASED, v. JIMMIE ATWOOD.

(Filed 2 February, 1951.)

1. Process § 2—

When summons is not served within ten days after its issuance it becomes *functus officio,* and service and return by the sheriff thereafter is tantamount to a return of non-service. G.S. 1-89.

2. Process § 4—

Where the sheriff has served summons more than ten days after its issuance, his return is sufficient evidence of non-service to enable plaintiff to sue out an *alias* summons. G.S. 1-95.

3. Process § 12—

What constitutes service of process, and whether upon a given state of facts service has been made, are questions for the court.

4. Same—

While ordinarily the sheriff's return implies service as the law requires, this implication does not stand when the process itself discloses the contrary, as when the sheriff's return discloses that it was served more than ten days after its issuance.

APPEAL by defendant from *Crisp, Special Judge,* at May Term, 1950, of ALLEGHANY.

Civil action to recover for alleged wrongful death of her intestate on 14 July, 1948.

These facts appear of record on this appeal:

(1) A summons, dated 2 July, 1949, and in proper form, as prescribed by statute, G.S. 1-89, issued out of the Superior Court of Alleghany County, directed to, and commanding the sheriff of said county to summon Jimmie Atwood, the defendant, etc. It was returned bearing an endorsement signed by a deputy sheriff reading: "Received..... 19....., served 16 July, 19..... by delivering a copy of the within summons and a copy of the complaint to each of the following defendants: Jimmie Atwood."

(2) Thereafter on 5 August, 1949, defendant Jimmie Atwood, through his attorneys, entered a special appearance, and moved to dismiss the action for that the court has not in this action properly acquired jurisdiction over the person of defendant in that the original summons shows (1) on its face that it was issued on 2 July, 1949, and (2) by the return of the sheriff that it was not served until 16 July, 1949, more than ten days after the institution of the action.

(3) Thereafter, on 11 August, 1949, the acting sheriff, who was the deputy sheriff who signed the return on the summons as above stated, filed an affidavit in which he states that the summons for defendant was delivered to him on 2 July, 1949; that an attempt was made by him to serve it on 16 July, 1949, under a misapprehension of the law as to the time in which he could legally serve the summons; and that now, being informed that said attempted service has no legal effect and constitutes no service of the summons, he asks permission to amend the return of the summons to show that it was not served for the reason that he had permitted more than ten days to elapse before attempting to serve the same.

(4) And thereafter, on 15 August, 1949, Mrs. Hazel Atwood, by affidavit filed, petitioned the court that an order be entered authorizing and directing the issuance of an *alias* summons in the above entitled action for that the original summons was not served within ten days. Thereupon on 16 August, 1949, the clerk of Superior Court of Alleghany County entered an order that an *alias* summons be issued in the action, and it was done on the same day. The *alias* summons was returned bear-

ing endorsement of the sheriff that it was "Received August 16, 1949" and "Served August 18, 19....., etc."

(5) Thereafter, on 6 September, 1949, defendant, through his counsel, again entered special appearance and moved to dismiss this action for that the court has not in this action properly acquired jurisdiction over the person of defendant in that (1) the original summons shows (a) upon its face that it was issued by the clerk of Superior Court of Alleghany County on 2 July, 1949, and (b) by the return of the sheriff that service thereof was made on 16 July, and (2) the purported *alias* summons issued in this cause "states that the original summons was not served, when in fact the same is not in evidence upon the original summons."

When the motions so made came on for hearing the court entered order, finding, and reciting that the record discloses that the summons issued 2 July, 1949, and was delivered on that day to the sheriff of Alleghany, that the sheriff attempted to serve it on the defendant, as shown by his return thereon, on 16 July, 1949, and that an *alias* summons was issued on 16 August, 1949, dismissed defendant's motions,—holding that the attempted service of the original summons by the sheriff on 16 July was invalid, and, in fact, no service, and the *alias* summons issued 16 July "was within the ninety days from the original summons."

The court further granted defendant time within which to answer or demur to the complaint served on defendant at the time the *alias* summons was served.

To this order the defendant objects and excepts "to each and every part thereof" and appeals to Supreme Court, assigning as error "that the court below erred in its order overruling defendant's motions, and in signing same, as appears in the record."

R. F. Crouse and Higgins & McMichael for plaintiff, appellee.

Trivette, Holshouser & Mitchell for defendant, appellant.

WINBORNE, J. This is the basic question raised by defendant, the appellant, on this appeal, and on which decision here rests:

When a summons in a civil action, commenced in Superior Court, is not served upon defendant therein by the sheriff, to whom it is directed, within ten days after the date of its issue, but is later returned by the sheriff with an endorsement thereon that it was served upon defendant on a date more than ten days after the date of its issue, is such return sufficient evidence of non-service to enable plaintiff to sue out an *alias* summons under the provisions of G.S. 1-95? Applicable statutes pertaining to civil procedure in this State, as interpreted and applied in decisions of this Court, afford an affirmative answer. Hence, the challenge to the judgment from which this appeal is taken may not be sustained.

Under the civil procedure in this State: Civil actions shall be commenced by issuing a summons, G.S. 1-88. Such "summons must be served by the sheriff to whom it is addressed for service within ten (10) days after the date of its issue; and . . . if not served within ten (10) days after the date of its issue upon every defendant, must be returned by the officer holding the same for service, to the clerk of the court issuing the same, with notation thereon of its non-service and the reasons therefor as to every defendant not served." G.S. 1-89.

And "when the defendant in a civil action . . . 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 . . . at any time within ninety (90) days after the date of issue of the next preceding summons in the chain of summonses."

The provisions of these statutes are summarized in *Green v. Chrismon,* 223 N.C. 724, 28 S.E. 2d 215, in opinion by *Devin, J.,* in this manner: "It seems clear that the rule prescribed by these statutes is that in order to bring a defendant into court and hold him bound by its decree, in the absence of waiver or voluntary appearance, a summons must be issued by the clerk and served upon him by the officer within ten days after date of issue, and that if not served within that time the summons must be returned by the officer to the clerk with proper notation. Then, if the plaintiff wishes to keep his case alive, he must have an *alias* summons issued. In the event of failure of service within the time prescribed, the original summons loses its vitality. It becomes *functus officio.* There is no authority in the statute for the service of that summons on the defendant after the date therein fixed for its return, and if the plaintiff desires the original action continued, he must cause *alias* summons to be issued and served." It thus appears that an *alias* summons may issue only when the summons has not been served. It is so held in *Powell v. Dail,* 172 N.C. 261, 90 S.E. 194.

In the light of these statutes it is the contention of defendant, as we understand it, that the return of the sheriff, as endorsed on the summons here being considered, shows actual service of it upon defendant after the expiration of the ten days after the date of its issue, rather than non-service of it within the said ten days period, and that so long as this return stands, there is no basis on which plaintiff may sue out an *alias* summons under the provisions of G.S. 1-95. This position may not be sustained.

The authority of the sheriff to serve the summons is derived from the statute, G.S. 1-89, and this statute limits the exercise of this authority to the ten-days period after the date of the issue of the summons. And, as held in *Green v. Chrismon, supra,* upon failure of service within the time prescribed, the original summons lost its vitality. It had become *functus*

officio. Hence it appears from the return of the sheriff that what he did as to service of the summons was at a time when the life of the summons had expired, and when he had no authority to serve it. Thus, the return, in a legal sense, is tantamount to a return of non-service.

What constitutes service of process, and whether upon a given state of facts service has been made are questions for the court. *Williamson v. Cocke,* 124 N.C. 585, 32 S.E. 963.

Moreover, while ordinarily when a sheriff returns that he has served the summons, this implies that he has discharged his official duty in that respect. But where, as here, he specifies the date of service, and it appears that that date was more than ten days after the date of issue of the summons, the force of such implication is entirely destroyed. See *Strayhorn v. Blalock,* 92 N.C. 292; *Isley v. Boon,* 113 N.C. 249, 18 S.E. 174; and *Powell v. Dail, supra.*

In *Strayhorn v. Blalock, supra,* decided when the statute (The Code 214) required that summons should be served by reading same to defendant, the Court held that the term "served," as applied to summons, *ex vi termini,* implies that it was read to the defendant named in it. And again, "It is to be taken where he returns it "served" that it was served as the statute requires until the contrary is made to appear . . ."

But in *Isley v. Boon, supra,* after referring with approval to the principle so declared in *Strayhorn v. Blalock, supra,* the Court added: "Of course where the officer undertakes to set forth the manner of service, and it appears that he has not complied with the requirements of the law, the force of such implication is entirely destroyed."

In the light of these principles applied to the case in hand, the judgment below is

Affirmed.

DON H. BENNETT, BY HIS NEXT FRIEND, PAUL D. BENNETT, v. SOUTHERN RAILWAY COMPANY.

(Filed 2 February, 1951.)

Railroads § 4—

Plaintiff's evidence tending to show that there was sufficient light at the *locus* to see defendant's engine, which approached on a spur track across a street intersection at five or ten miles per hour, but that plaintiff was blinded by the lights of automobiles at the place and did not see the engine until it struck him, *is held* to disclose contributory negligence barring recovery as a matter of law, notwithstanding negative testimony of witnesses that they did not see a headlight on the engine or hear any warnings of its approach.

BENNETT *v.* R. R.

APPEAL by plaintiff from *Clement, J.*, May Term, 1950, of FORSYTH.

This is an action to recover for personal injuries sustained by the plaintiff.

According to the evidence Don H. Bennett, a minor, 19 years of age, prior to the time of his injury, worked on a night shift of R. J. Reynolds Tobacco Company, at Factory No. 12, in Winston-Salem, N. C. On the night of 12 August, 1949, the plaintiff parked his automobile on the east side of Patterson Avenue, a short distance from where Second Street intersects Patterson Avenue. The plaintiff had finished his work at the Reynolds plant, about 2:00 a.m., and was returning to where he had parked his car. He was walking east on the south side of Second Street and started to cross the defendant's sidetrack, which is located on the west side of Patterson Avenue, when he was struck by the defendant's diesel shifting engine. Patterson Avenue runs north and south, Second Street runs east and west. The defendant's sidetrack is located on the western edge of Patterson Avenue and adjacent to a loading platform at the southwestern intersection of Second Street and Patterson Avenue.

The plaintiff testified he was familiar with the crossing; that he usually parked his car on the east side of Patterson Avenue; that he had worked for Reynolds for one year when he got hurt; that during that one year period he had made it a practice to park on Patterson Avenue near the intersection, and had gone there to get his car most of the nights, except when he did not work; that when he approached the sidetrack he looked both ways and listened; that it was dark, he did not see any signs of a train, did not hear a bell, or a whistle, or see a light; that there were cars parked along the east side of Patterson Avenue, facing north and at least 15 or 20 on each side of Second Street in that block. "As I went down the street, about to cross the crossing, the cars were cranking up there and flashing on their lights. The lights blinded me. . . . I would say the train was going five or ten miles an hour. It went about half way across the street after it hit me. . . . I did not see it (the engine) until it had done hit me. . . . I could see up the sidewalk to the west on Second Street when I was lying on the ground . . . I could also see south on Patterson."

At the time the engine struck the plaintiff, it was proceeding northward on Patterson Avenue, slightly downgrade and was not pulling anything.

B. L. Willard, a witness for the plaintiff, testified his car was parked about 50 feet from where the plaintiff was hit; that he did not hear any signal given by the ringing of a bell or blowing of a whistle, but he would not say such signals were not given; that he did not know whether the head-light on the engine was burning or not, but he saw the engine hit the boy and there was plenty of light, from the automobiles starting up, to see the engine. "I heard a noise as I was fixing to get in my car, and

I looked around, and then I saw it hit him. . . . I am familiar with the crossing. Trains come in there and leave cars at night to be loaded during daytime every day of the week."

There was a street light at the intersection of Patterson Avenue and Second Street, but none of the witnesses was positive as to whether or not it was burning at the time of the accident.

Mrs. Helen Bailey, a witness for the plaintiff, testified she was about a half a block away from the crossing at the time the plaintiff got hit. "I did not see the engine hit him. . . . I don't know whether it was car lights or what, . . . I could see the engine from half way up the block."

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

Jno. D. Slawter and Joe W. Johnson for plaintiff.

Womble, Carlisle, Martin & Sandridge for defendant.

DENNY, J. We think, if it be conceded the defendant was negligent in the operation of its engine, the plaintiff failed to use reasonable care for his own safety, and thereby contributed to his injury. *Coleman v. R. R.*, 153 N.C. 322, 69 S.E. 251; *Bailey v. R. R.*, 196 N.C. 515, 146 S.E. 135; *Tart v. R. R.*, 202 N.C. 52, 161 S.E. 720; *Rimmer v. R. R.*, 208 N.C. 198, 179 S.E. 753; *Bullock v. R. R.*, 212 N.C. 760, 194 S.E. 468.

"A railroad crossing is itself a notice of danger, and all persons approaching it are bound to exercise care and prudence, and when conditions are such that a diligent use of the senses would have avoided the injury, a failure to use them constitutes contributory negligence and will be so declared by the court." *Coleman v. R. R., supra.*

And while the plaintiff testified it was dark and he did not see any signs of a train, did not hear a bell or whistle, or see a light, he further testified that when he was about to cross the crossing, the cars were cranking up there and flashing on their lights, and the lights blinded him. He also testified he never saw the engine until after it hit him, but "I could see up the sidewalk to the west on Second Street when I was lying on the ground. . . . I could see south on Patterson."

The shifting engine came from the south and if the plaintiff could see to the south on Patterson Avenue after he was hit, and while lying on the ground, it is difficult to understand why he could not see in that direction before he attempted to cross the sidetrack, if he looked, unless he was, as he testified, blinded by the lights from automobiles at the time he attempted to cross the defendant's sidetrack. *Lee v. R. R.*, 180 N.C. 413, 105 S.E. 15.

In the last cited case, the plaintiff admitted he left a place of safety and walked a distance of some eight feet on to the southbound main line track, while he was enveloped in smoke from a northbound train, where he was hit by a southbound train. The court held the plaintiff was guilty of contributory negligence on his own evidence.

In the instant case it is well to note the plaintiff never testified he could not see the approaching engine. He simply stated he did not see it. And his witnesses who were at the scene of the accident testified with respect to light as follows: "There was a lot of light there. . . . There was plenty of light around there. . . . I don't know where the light was coming from, but there was plenty of light to see a person. I could see that it was a boy that was hit. . . . I could see the engine from half way up the block." Furthermore, all the testimony with respect to warnings and the headlight on the defendant's engine and the street light, was in the negative. The witnesses simply testified they did not remember seeing a headlight, or hearing a bell or a whistle, or whether or not the street light was burning. However, there is positive evidence from the plaintiff that he was blinded by lights from automobiles when he was "about to cross the crossing," but he testified that after he was hit he could see down Patterson Avenue, which was the direction from which the engine came. *Herman v. R. R.*, 197 N.C. 718, 150 S.E. 361. From the facts and circumstances disclosed by plaintiff's evidence, we think the judgment as of nonsuit should be upheld.

Affirmed.

EDWARD OSBORNE, ADMINISTRATOR OF HOWARD S. ROOP, DECEASED, v. NORFOLK AND WESTERN RAILWAY COMPANY.

(Filed 2 February, 1951.)

1. Railroads § 5—

A person who enters on a railroad track without license, invitation, or other right, occupies the *status* of a trespasser.

2. Same—

A railroad company is not liable for the death of a contributorily negligent trespasser killed upon its track unless the doctrine of last clear chance or discovered peril applies.

3. Same—

In order for the doctrine of last clear chance or discovered peril to apply to a trespasser upon a railroad track who is struck by an engine, it must be made to appear (1) that he was struck by defendant's engine, (2) that at the time he was down or in an apparently helpless condition upon the

track, (3) that the train crew either saw or by the exercise of ordinary care could have seen him in such condition in time to have enabled them, by the exercise of ordinary care, to stop the train before striking him, and (4) that they failed to exercise such care and thereby proximately caused the injury.

4. Same—

Evidence tending only to show that intestate was last seen sitting on the end of a crosstie in an intoxicated condition an hour before his fatal injury, that at the place in question the engineer could have seen a man sitting on the track for 380 feet, and that the train which struck intestate could have been stopped within a distance of from two to three hundred feet, *is held* insufficient to invoke the doctrine of last clear chance or discovered peril.

APPEAL by plaintiff from *Moore, J.*, at the July Term, 1950, of ASHE.

Civil action in which an administrator seeks to hold a railroad company liable for the death of his intestate under the last clear chance or discovered peril doctrine.

The complaint alleges in specific detail that the operatives of the defendant's train negligently struck and killed the intestate after actual or constructive discovery that he "was sitting or lying on the defendant's track in an apparently helpless and unconscious condition."

The plaintiff offered testimony tending to show that the defendant, Norfolk and Western Railway Company, operates a line of railway between West Jefferson, North Carolina, and Abingdon, Virginia; that his intestate, Howard S. Roop, an industrious man, was last seen in an uninjured state by the plaintiff's witness, Claude Spencer, in a mountainous section of Ashe County, North Carolina, sometime "between two and three o'clock" on the afternoon of 3 November, 1947; that the intestate was then sitting on the east end of a cross-tie underlying the rails of the defendant's track with his back toward the rails; that the intestate then had some whiskey in his possession, and was intoxicated to an undetermined degree; that none of the witnesses saw the intestate or had any personal knowledge of any of his actions between the time he was last seen by Claude Spencer and four o'clock on the same afternoon, when he was struck and fatally injured by the lead engine of the defendant's train, which was moving northward over the track at a speed of fifteen miles an hour; that none of the operatives of the defendant's train except the engineer in charge of the lead engine saw the intestate until after his body had come to rest in a ditch to the east of the railroad track immediately after the accident; that "there was a two-inch cut on his head just back of the right ear, and a one-inch cut on the top of his head, (and) his right thigh was broken about six inches below the hip joint"; that no blood or "anything" appeared on the railroad track after the accident, but some blood was then observed in the ditch "a foot or two or three" to the east of the end of the cross-ties; that virtually the same quantity of whiskey

as that possessed by the intestate when Claude Spencer left him "sitting on the cross-tie . . . sometime between two and three o'clock" was discovered at the scene of the accident just after its occurrence; and that in the opinion of the plaintiff's witness, Howard Steelman, who did not see the accident, the engineer on a northbound train "approaching the point indicated by . . . Spencer as the point at which he left Howard Roop sitting could see a man sitting for 380 feet or a little more," and the train which struck the intestate could have been stopped "with safety to its crew and passengers within a distance of two or three hundred feet."

The plaintiff also offered in evidence an adverse examination in which the engineer in charge of the lead engine of the defendant's northbound train deposed as follows: "I could not tell whether Howard Roop was struck by the train I was operating. . . . The first time that I saw him, and the only time I saw him, was when he came straight out from the front of the engine. . . . He looked sort of like he was stooped in a jumping position. . . . He was in the air . . . When I first saw him, I put on the air brakes . . . After the train was stopped, he was lying down in the ditch line on a sloping rock."

The action was dismissed upon a compulsory judgment of nonsuit in the court below after the plaintiff had introduced his evidence and rested his case, and the plaintiff thereupon appealed, assigning that ruling as error.

Higgins & McMichael and Bowie & Bowie for plaintiff, appellant.
Craige & Craige and Johnston & Johnston for defendant, appellee.

ERVIN, J. Inasmuch as he entered upon the railroad track of the defendant without license, invitation, or other right, the intestate occupied the status of a trespasser at the time of his fatal injury. 44 Am. Jur., Railroads, section 424; 52 C.J., Railroads, section 2105. Under the evidence, he was clearly guilty of contributory negligence which will preclude his administrator from recovering damages from the defendant for his death unless the facts warrant the application of the last clear chance or discovered peril doctrine. *Long v. R. R.*, 222 N.C. 523, 23 S.E. 2d 849.

When recovery is sought of a railroad company for the death of a trespasser on its railroad track under the doctrine of last clear chance or discovered peril, the personal representative of the deceased trespasser must offer evidence sufficient to establish these four elements:

1. That the decedent was killed by the railroad company's train.

2. That at the time of his fatal injury, the decedent was down or in an apparently helpless condition on the railroad track.

3. That the operatives of the railroad company's train either actually saw, or by the exercise of ordinary care in keeping a proper lookout could have seen, the decedent in such condition on the railroad track in time to have enabled them, by the exercise of ordinary care, to stop the train and avoid the killing.

4. That the operatives of the railroad company's train failed to exercise such care, and thereby proximately caused the death of the decedent. *Battle v. R. R.*, 223 N.C. 395, 26 S.E. 2d 859; *Long v. R. R., supra; Justice v. R. R.*, 219 N.C. 273, 13 S.E. 2d 553; *Mercer v. Powell*, 218 N.C. 642, 12 S.E. 2d 227; *Cummings v. R. R.*, 217 N.C. 127, 6 S.E. 2d 837; *Draper v. R. R.*, 161 N.C. 307, 77 S.E. 231; *Henderson v. R. R.*, 159 N.C. 581, 75 S.E. 1092; *Clegg v. R. R.*, 132 N.C. 292, 43 S.E. 836; *Upton v. R. R.*, 128 N.C. 173, 38 S.E. 736.

When the testimony presented by the plaintiff in the court below is appraised at its full probative value, it is insufficient in law and logic to establish the second, third, and fourth elements set out above. As a consequence, the plaintiff is not entitled to invoke the last clear chance or the discovered peril doctrine, and the compulsory judgment of nonsuit must be

Affirmed.

STATE v. ROBERT A. EAGLE.

(Filed 2 February, 1951.)

1. Criminal Law § 48c—

When the interests of justice require, evidence may be offered even after the argument of counsel, but perforce the solicitor is not entitled to exhibit to the jury in his argument an object which has not been identified and introduced in evidence.

2. Automobiles § 30d: Criminal Law § 50f—

Where the quantity of whiskey remaining in a bottle taken from defendant after his arrest is stressed by both sides in a prosecution for drunken driving as having a material bearing upon defendant's condition at the time of his arrest, but the bottle is not introduced in evidence, the statement of the solicitor in his argument that he had the bottle in a paper sack and was willing to show it to the jury, is improper, and upon defendant's objection thereto, the error is not rendered harmless by an instruction that the solicitor had offered to let the bottle be offered *in evidence* at that time but that defendant's counsel objected to this statement and that the jury should not consider the argument at all.

APPEAL by defendant from *Clement, J.*, February Term, 1950, of FORSYTH.

STATE *v.* EAGLE.

Criminal action tried upon a warrant charging the defendant with operating a motor vehicle upon the public highways of North Carolina while under the influence of intoxicating liquor or narcotics.

The State offered evidence tending to show the defendant drove his automobile upon a public highway of the State, while under the influence of intoxicating liquor.

The arresting officer testified he took a fifth Schenley bottle from the defendant's car at the time he arrested him, on 16 December, 1949; that it was about one-third full of whiskey, and that he sealed the bottle and had kept it in his car ever since. "I brought it up here today with me. . . . I have it in the Patrol car. It is not up here." The bottle was never identified or offered in evidence.

The defendant denied that he was under the influence of liquor at the time of his arrest; but admitted he and three friends, shortly before his arrest, had taken two drinks each from the fifth of Schenley whiskey he had in his car. He testified the bottle was more than half full of whiskey when it was taken by the arresting officer; that he had been on a deer hunt in Maryland with one of his business associates; that he had not slept in approximately 38 hours, and was en route to his home in Statesville at the time of his arrest.

After the evidence was closed and counsel for the defendant had concluded his argument, and while the Solicitor for the State was arguing the case, the Solicitor stated in reply to an argument by defendant's counsel as to why the whiskey bottle the officer had testified he took out of the defendant's car had not been produced and offered in evidence, that he had sent for the bottle while defendant's counsel was arguing the case, and now had it in a paper sack and was willing for it to be shown to the jury. The defendant objected to the Solicitor's argument on the ground that it was prejudicial and improper, and moved the court to instruct the jury not to consider it. Whereupon, the court stated: "Well, he says that he is willing for them to see it now." Defendant's counsel in reply to the court, said: "I know he does, your Honor, but that is highly prejudicial to this defendant for the Solicitor to go outside of the record and to try to mend his licks after he has heard my argument and contentions."

Motion denied, and defendant in apt time excepted.

The defendant then moved for a mistrial on the ground that there was no testimony in the record that the bottle referred to by the Solicitor was the bottle the defendant had on the occasion in question. Motion denied. Exception.

From a verdict of guilty and the judgment imposed, the defendant appeals and assigns error.

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

Higgins & McMichael for defendant.

DENNY, J. The question posed for decision is whether the failure of the trial judge to sustain the defendant's objection to the proposal of the Solicitor to exhibit an unidentified bottle of whiskey to the jury for its inspection and examination for the evident purpose of bolstering the State's evidence against the defendant, constitutes prejudicial error in light of the following instruction given by the trial judge in his charge to the jury: "There is some evidence in the trial of the case here about a bottle of whiskey being found in the car. The Solicitor, in his argument, stated to counsel for the defendant that he would be willing to let the bottle be offered in evidence at that time. The defendant's counsel objected to the statement. You will not consider that argument at all; just disregard that."

It is apparent counsel for defendant argued strenuously to the jury that the defendant and his three friends had consumed less than half of a fifth of whiskey during the afternoon in question, and in support of his argument had pointed out the State's failure to introduce the bottle of whiskey taken from the defendant's car. Of course the real question before the jury was whether or not the defendant had driven his automobile upon a public highway of the State while under the influence of an intoxicating liquor. However, the Solicitor and counsel for the defendant choose to stress their respective contentions as to the amount of whiskey the defendant and his three friends had consumed during the afternoon, prior to the arrest of the defendant, emphasizing the evidence of their respective witnesses as to the amount of liquor remaining in the bottle at the time it was taken from the defendant's car, as having a material bearing on the defendant's condition at the time of his arrest. The offer by the Solicitor to exhibit the unidentified bottle of whiskey to the jury, for the purpose of refuting the argument made by defendant's counsel and in effect to bolster the State's contentions, was improper and the objection thereto by the defendant should have been sustained, and the jury instructed not to consider it.

If in the opinion of the Solicitor the ends of justice required the exhibition to the jury of the bottle of whiskey taken from the defendant's car at the time of his arrest, the bottle should have been identified and introduced in evidence at the proper time during the course of the trial, or a motion made to reopen the case and permit its identification and introduction in evidence. *S. v. Perry,* 231 N.C. 467, 57 S.E. 2d 774; *Miller v. Greenwood,* 218 N.C. 146, 10 S.E. 2d 708; *Ferrell v. Hinton,* 161 N.C. 348, 77 S.E. 224; *Dupree v. Insurance Co.,* 93 N.C. 237; *S. v. Harris,*

63 N.C. 1. When the ends of justice require it, evidence may be offered even after the argument of counsel, *Williams v. Averitt,* 10 N.C. 308, or after the jury has retired, *S. v. Noblett,* 47 N.C. 418.

Now, as to the charge, it is clear that his Honor did not understand what the Solicitor proposed to do in connection with the bottle of whiskey he had sent for during the argument of defendant's counsel, or inadvertently stated that the Solicitor proposed to offer the bottle of whiskey in evidence. The Solicitor at no time, according to the record, proposed to offer the bottle of whiskey in evidence, but merely to exhibit it to the jury. The further statement by the court to the effect that "defendant's counsel objected to the statement," may have given the jury the impression that defendant's counsel had objected to the introduction of the bottle of whiskey in evidence, which was not the case. This may have prejudiced the jury against the defendant, and the fact that the Solicitor abandoned his proposal to exhibit the bottle of whiskey to the jury, is immaterial. The damage, if any, was done. And while ordinarily an error such as that complained of may be cured in the charge, *S. v. Brackett,* 218 N.C. 369, 11 S.E. 2d 146, we think the mere statement "You will not consider that argument at all; just disregard that," was insufficient to cure the error in failing to sustain the defendant's objection and exception theretofore interposed.

As to what constitutes improper argument, and the effect of the rulings of the trial court with respect thereto, see *S. v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466; *S. v. Correll,* 229 N.C. 640, 50 S.E. 2d 717; *S. v. Tucker,* 190 N.C. 708, 130 S.E. 720, and cited cases.

We think the defendant is entitled to a new trial, and it is so ordered.

New trial.

ESTELLE HARRIS, ADMX., v. E. R. DRAPER.

(Filed 2 February, 1951.)

1. Automobiles § 18g (4)—

The driver of a car hit by another at right angles at an intersection is competent to testify as to his opinion of the speed of such other car when it struck the car he was driving, the weight and credibility of his testimony being for the jury.

2. Appeal and Error § 39b—

Where excluded evidence is germane to the issues of negligence and contributory negligence, error in its exclusion cannot be rendered harmless by the verdict when only one of these issues is answered in favor of the party offering the testimony.

3. Trial § 31b: Appeal and Error § 6c (6)—

The court misquoted the testimony of a witness on a crucial point. Plaintiff's counsel called the matter to the court's attention and the court replied that the statement was in accord with its recollection, at which counsel for defendant interjected agreement. *Held:* The failure of the court to correct the inadvertence must be held for prejudicial error upon exception and assignment of error properly presented.

4. Appeal and Error § 39f—

Where the court, instead of correcting an inadvertence in the statement of the testimony upon a crucial point, states that the narrative was in accordance with the court's recollection, and the error is emphasized by the interjection of counsel for the opposing party that the narrative was in accordance with his recollection also, the error cannot be held cured by the court's instruction that the jury should take its own recollection of the evidence and not that of the court or counsel.

5. Automobiles § 20b—

Where the owner of a car permits another to drive it for exclusive personal purposes of such other person, and rides in the car solely for the purpose of returning the car to his home after such other person has completed his trip, whether the driver is the agent of the owner while making the trip, *quære*, but it would seem to be a question for the jury.

APPEAL by plaintiff from *Sharp, Special Judge,* February-March Term, 1950, of DURHAM.

Civil action to recover damages for alleged wrongful death of plaintiff's intestate and for damages to his automobile when plaintiff's car, under the control and operation of Ervin Lee Green, collided with or was struck by defendant's automobile at the intersection of U. S. Highway 15-A and N. C. Highway 264.

On Sunday afternoon, 31 October, 1948, plaintiff's intestate allowed Ervin Green to use his Ford Sedan to take a girl friend from Durham to Raleigh and then to go on over U. S. Highway 15-A to his home in Creedmoor, plaintiff's intestate going along in order to bring the automobile back from Creedmoor to Durham.

At the same time the defendant, E. R. Draper, was traveling in his Hudson Sedan over N. C. Highway 264 from Wake Forest to Durham. Both drivers were quite familiar with these highways, having traveled them frequently, and especially where they intersect about fifteen miles north of Raleigh.

Ervin Green testified that he approached the intersection at a speed of 30 or 35 miles per hour and "as I entered the intersection," the overhead traffic signal light "was green for me." He saw the defendant's car approaching from the east on 264, but he was first to enter the intersection. "I was just about under the light when I was struck by the other car. . . . The front of the other car struck the right door of my

car. I could tell at the time the other car struck me how fast it was going." "Q. How fast?" Objection sustained. Exception No. 1. If allowed to answer, the witness would have said "About 60 miles an hour." The Ford Sedan was knocked a distance of five or six feet by the impact and damaged considerably. Plaintiff's intestate, who was sitting next to the right-hand door, was cut by flying glass and died on the way to the hospital.

The defendant testified that he had a conversation with Ervin Green just after the collision. "I asked him if he didn't see the red light and he said he didn't see the light until just before he went under it—he glanced up and saw the light. . . . He said he saw it just before he went under it."

In charging the jury, the trial court quoted the defendant several times as saying Green told him "he did not see the light was red . . . or the red light until he was right under it."

Whereupon counsel interposed:

"Mr. Bryant: Of course, as you instructed the jury, it is their recollection of the evidence, but it was my impression that Mr. Draper did not testify Green told him the light was red or he did not see the red light, but that he did not see the light until he got into the intersection, without making any statement as to its color.

"Court (resuming): Well, gentlemen, it is my recollection he said Green told him that when he ran under it he saw the light was red."

"Mr. Fuller: That was my recollection, too." Exception No. 4.

"(Court—resuming): However, you will go by your own recollection and not by mine or by counsel. In any event, gentlemen, you will remember what the witness said."

The issues of negligence and contributory negligence were both answered in the affirmative, and from judgment thereon dismissing the action, plaintiff appeals, assigning error.

Victor S. Bryant, Robert I. Lipton, and Victor S. Bryant, Jr., for plaintiff, appellant.

Fuller, Reade, Umstead & Fuller for defendant, appellee.

STACY, C. J. The question for decision is whether the trial and judgment can be sustained in the face of the exceptions shown in the record and debated on brief. We are constrained to answer in the negative.

First. Exception to Exclusion of Evidence: The witness, Ervin Green, if allowed to testify, would have said the defendant's car was traveling about 60 miles an hour when it struck the car he was driving. This proffered testimony was competent, its weight and credibility, of course, being for the jury. *Hicks v. Love,* 201 N.C. 773, 161 S.E. 394;

Jones v. Bagwell, 207 N.C. 378, 177 S.E. 170; *Tyndall v. Hines Co.,* 226 N.C. 620, 39 S.E. 2d 828; *Brafford v. Cook,* 232 N.C. 699.

True it is, the jury answered the issue of negligence in favor of the plaintiff, and this ordinarily might have cured the error. In the instant case, however, the proffered testimony was also competent on the issue of plaintiff's alleged contributory negligence or the sole negligence of the defendant. The vital question, debated on the hearing, was whether Green or the defendant entered the intersection against the red light.

Second. The Misquotation of Evidence in the Court's Charge: After the court had stated to the jury for the third time that, according to the defendant's testimony, the driver of plaintiff's intestate's car told the defendant immediately after the collision, "he did not see the light was red . . . or the red light until he was right under it," counsel for plaintiff arose and called the court's attention to what he conceived an inadvertent misquotation of the evidence. Instead of referring to the record which would have borne out plaintiff's contention, the court replied: "It is my recollection that he said Green told him that when he ran under it he saw that the light was red." And counsel for defendant also interjected: "That was my recollection, too." Thus, instead of correcting the inadvertence, it was emphasized and fortified by the recollection of defendant's counsel, which rendered the plaintiff's last state worse than his first.

The fact the jury was immediately told they would not take the court's recollection, or that of counsel, but would rely on their own memory of what the witness had said was hardly sufficient to meet the objection interposed by counsel. The prejudicial emphasis and effect had already been given and were allowed to stand without any change, modification, or correction.

It is the rule with us that when counsel deem the recitals of the court incorrect as to the facts of the case or the contentions arising thereon, the matter must be called to the court's attention, either at the time or perhaps more appropriately at the close or just before the close of the charge, so as to afford an opportunity of correction; and where this is done, as here, and no correction is made, the party aggrieved must be given a hearing on appeal, if properly presented by exception and assignment of error. *S. v. McNair,* 226 N.C. 462, 38 S.E. 2d 514; *S. v. Sinodis,* 189 N.C. 565, 127 S.E. 601; *S. v. Barnhill,* 186 N.C. 446, 119 S.E. 894, 85 A.L.R. 541.

Then, too, it must be remembered the matter here complained of was deadly on the issue of contributory negligence, for an admission from Green that he entered the intersection against the red light was fatal to plaintiff's cause under the theory of the trial.

Moreover, it may be doubted whether the court was justified in assuming Ervin Green to be the agent of plaintiff's intestate and acting in the scope of such agency on the occasion in question. Plaintiff contends that her intestate was a guest in the car at the time and that he went along only to drive the car back to Durham after Green had reached his home in Creedmoor. The evidence appears to be susceptible of either interpretation, which would seem to require or indicate its submission to the jury on the point. Anno. 80 A.L.R. 291.

A new trial is made necessary by the exceptions. It is so ordered.

New trial.

STATE v. OLLIE FULTON SALLY.

(Filed 2 February, 1951.)

1. Homicide § 11—

A person in his own home or place of business, where he has a right to be, and acting in defense of himself and his habitation, is not required to retreat in the face of a threatened assault, regardless of its character, but is entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault, although he may not use excessive force in repelling the attack.

2. Homicide § 27f—

An instruction which in effect requires defendant to retreat when an assault is made upon him in his own place of business, unless the assault be violent and the circumstances such that retreat would be dangerous, *is held* to constitute prejudicial error.

APPEAL by defendant from *Harris, J.*, May Term, 1950, of DURHAM.

Criminal prosecution on indictment charging the defendant with the murder of one Everett L. Justice.

Upon the call of the case for trial the solicitor announced that he would not press the capital charge, but would ask for a verdict of murder in the second degree or manslaughter as the evidence should warrant.

The defendant lives in a one-story building at 313 McMannen Street in the City of Durham. His sleeping quarters are in the rear and he conducts a combination grocery store and lunch counter in the front part of the building, which has only one entrance and that in the front. There is no rear exit or entrance.

On the morning of 23 December, 1949, the defendant was in his place of business, waiting on customers, when Everett L. Justice entered the store in a somewhat intoxicated condition. His presence soon became objectionable to the defendant and several of his customers; whereupon

the defendant ordered him out the store. A brief struggle ensued between the two, during the course of which the defendant was either thrown or knocked to his knees. Justice then went out of the store. He came back in four or five minutes, still intoxicated, and the defendant again ordered him out, saying, "If you come back in here, in my place of business, I'll blow your brains out."

Mrs. M. W. Adams, clerk and cafe worker in defendant's place of business, was present and heard the conversation between the two. She says, "there were no words spoken after he (Justice) came back in the last time. . . . He (the defendant) shot one time. When he fired the pistol Justice just keeled over and dropped dead."

The defendant testified that Justice remarked, "I don't like it because you run me out awhile ago," and started at him "with his hand in his hip pocket, like this," and when he was within about four feet of me I shot him in the breast, causing his death.

It was the contention of the defendant that he shot the deceased in his own self-defense.

Verdict: Guilty of manslaughter.

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

The defendant appeals, assigning errors.

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

Fuller, Reade, Umstead & Fuller for defendant.

STACY, C. J. On the defendant's plea of self-defense, which is supported by evidence, the court instructed the jury as follows:

"The right of self-defense rests upon necessity, real or apparent, and cannot be exercised if there be a reasonable opportunity to retreat and avoid the difficulty, but if the assault in which the killing is brought about be violent and the circumstances are such that the retreat would be dangerous, he is not required even to retreat." (Exception entered by later stipulation, discussed on brief and while there is no assignment of error based on the exception, undoubtedly the stipulation was intended to cover this also.)

The instruction is correct as a general statement of the law of self-defense, but as applied to the defendant's evidence in the subject case, it would seem to be incomplete, if not inapplicable, and misleading. *S. v. Bryson,* 200 N.C. 50, 156 S.E. 143; *S. v. Lee,* 193 N.C. 321, 136 S.E. 877; *S. v. Waldroop,* 193 N.C. 12, 135 S.E. 165. The defendant being in his own home and place of business where he had a right to be, and acting in defense of himself and his habitation, was not required to retreat in

the face of a threatened assault, regardless of its character, but was entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault. *S. v. Roddey,* 219 N.C. 532, 14 S.E. 2d 526; *S. v. Harman,* 78 N.C. 515; *S. v. Pennell,* 224 N.C. 622, 31 S.E. 2d 857. This, of course, would not excuse the defendant if he used excessive force in repelling the attack. *S. v. Jernigan,* 231 N.C. 338, 56 S.E. 2d 599; *S. v. Robinson,* 188 N.C. 784, 125 S.E. 617.

The above instruction, as here applied, would seem to be less than the defendant's full measure of protection. Hence, a new trial appears necessary. *Suum cuique tribuere.*

New trial.

STATE v. EVERETT LLOYD.

(Filed 2 February, 1951.)

Automobiles § 29b: Criminal Law § 52a (3)—Evidence of defendant's identity as the perpetrator of the offense held insufficient.

In this prosecution for reckless driving, the officers identified one of four speeding cars as a Mercury which one of them testified belonged to defendant, but the officers could not see who was driving the car. Defendant admitted he was the only person who drove his car on the night in question, but in the same statement denied that he was driving at the place in question and testified that he was at the time in a city some distance away, in which later statement he was corroborated by three other witnesses. *Held:* The evidence of defendant's identity as the driver of the speeding car is insufficient to be submitted to the jury.

APPEAL by defendant from *Harris, J.,* June Term, 1950, of ORANGE. Reversed.

The defendant was charged with driving an automobile recklessly and at a greater rate of speed than 55 miles per hour. There was verdict of guilty and from judgment imposing sentence, the defendant appealed.

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

R. M. Gantt for defendant, appellant.

DEVIN, J. The only question presented by this appeal was whether the identity of the defendant as the person who committed the offense charged was sufficiently shown to warrant submission of the case to the jury.

It was not controverted that on the evening of 10 March, 1950, about 11:30 p.m. four automobiles were being driven west on highway 70 be-

tween Hillsboro and Mebane at a speed of 75 to 90 miles per hour. The highway patrolman with a local officer in his automobile set out in pursuit. The speeding automobiles turned left at Cheek's crossing and proceeded south and east on an unpaved road. The officers were unable to overtake the automobiles but succeeded in getting the number of one of the speeding cars—a Ford—and later learned that it belonged to William Godfrey. Another car was identified as a Mercury which the patrolman testified belonged to defendant Lloyd. Neither officer could see who was driving the Mercury, or either of the other automobiles. Godfrey admitted he was driving the Ford automobile. Warrant was issued for him 13 March, and he was tried 20 March in the Recorder's Court. Several days thereafter defendant Lloyd in conversation with the patrolman stated he was the only driver of his automobile the night of 10 March. The State contended that this admission, together with the patrolman's testimony that defendant's automobile was one of the speeding vehicles, was sufficient to carry the case to the jury, but defendant's statement must be considered in connection with his denial in the same connection that he was on the road west of Hillsboro at the time of the alleged offense, and the further testimony offered by defendant on this point in explanation that he drove to Durham that night and did not leave Durham until after twelve o'clock. In this he was corroborated by three witnesses who testified they saw and conversed with him that night in Durham and one of them serviced his automobile there about 11:30 p.m. Godfrey also testified he did not see defendant Lloyd the night of 10 March. Warrant was issued for defendant Lloyd 6 April, 1950.

From an examination of the evidence appearing in the record, of which the foregoing is a summary, we are inclined to the view that the defendant's motion for judgment of nonsuit should have been allowed. Though we observe the rule that on this motion the evidence should be considered in the light most favorable for the State, nevertheless the identification of the defendant Lloyd as the operator of one of the recklessly driven automobiles seems lacking. Hence we think the judgment should be reversed, and it is so ordered.

Reversed.

STATE v. NATHANIEL FOY.

(Filed 2 February, 1951.)

Criminal Law § 81c (4)—

Where but one sentence is imposed upon a verdict of guilty as to both counts in an indictment, alleged error relating to one count only cannot entitle defendant to a new trial when no error is found as to the other

count, and the sentence imposed is within the limits prescribed for such offense.

APPEAL by defendant from *Clement, J.*, February Term, 1950, of FORSYTH.

Criminal action tried upon an indictment charging the defendant with a conspiracy to sell intoxicating liquor and with the unlawful sale of intoxicating liquor.

The jury returned the following verdict: "Guilty of conspiracy to sell intoxicating liquors as charged in the bill of indictment, and guilty of selling unlawful liquors as charged in the bill of indictment."

The court did not enter separate judgments on the respective counts for the purpose of punishment, but entered one judgment on the verdict, committing the defendant to the county jail for 18 months, to be assigned to work under the supervision of the State Highway and Public Works Commission.

Defendant appeals, assigning error.

Attorney-General McMullan, Assistant Attorney-General Bruton, and John R. Jordan, Jr., Member of Staff, for the State.

Higgins & McMichael for defendant.

PER CURIAM. The defendant assigns as error the refusal of the trial court to sustain his motion for judgment as of nonsuit. We concur in the ruling below as to both counts in the bill of indictment.

The defendant also challenges the validity of the verdict on the second count, on the ground that the jury found him "guilty of selling 'unlawful liquors' as charged in the bill of indictment," instead of finding him guilty of selling "intoxicating liquors" as charged in the bill of indictment. We consider the exception without merit; but, if it were otherwise, the judgment should be upheld on this record.

The exception to the failure of the court below to sustain the defendant's motion for judgment as of nonsuit is the sole exception in the record bearing on the first count, and that exception having been disposed of adversely to the defendant, and the sentence imposed being within the limit prescribed by statute for such offense, the judgment will be upheld. *S. v. Graham,* 224 N.C. 347, 30 S.E. 2d 151, and cited cases. Therefore the judgment entered below is

Affirmed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1951

RUTH CROOK BAILEY v. GEORGE A. McPHERSON T/A McPHERSON MOTOR LINES, AND M. H. WINKLER T/A M. H. WINKLER MANUFACTURING COMPANY.

(Filed 28 February, 1951.)

1. Constitutional Law § 21—

Notice and an opportunity to be heard are essential to due process of law.

2. Process § 14: Pleadings § 22b—

Under the broad discretionary powers of the trial court to permit amendment of process and pleading, the court may allow amendment to correct a misnomer or mistake in the name of a party provided the amendment does not amount to a substitution or entire change of parties. G.S. 1-163.

3. Same—

The sole proprietor of a business carried on in the trade name of "M. H. Winkler Manufacturing Company" was served with process in accordance with G.S. 1-105. The process ran in the name of "M. H. Winkler Manufacturing Company, Inc.," a nonexistent corporation, but the individual personally signed for the registered letter containing the summons and complaint so that he was advised that he was the party intended to be sued and was in nowise misled or prejudiced by the mistake in name. *Held:* The court acquired jurisdiction over the person of the individual without service of new process, and had discretionary power to permit an amendment to the process and pleading to correct the name of defendant.

4. Process § 10—

Where service of process on a nonresident motorist is had in strict accordance with the procedural requirements of G.S. 1-105, such process and pleading is subject to amendment in accordance with the general rules.

5. Same: Constitutional Law § 21—

Where summons and complaint sent by registered mail are signed for by an individual carrying on a business under a firm name, and the papers give him unmistakable notice that he was intended to be sued, although the process runs against a nonexistent corporation of the same name as the firm operated by him, *held:* the service in strict accord with G.S. 1-105 is sufficient to meet the requirements of due process of law.

6. Appeal and Error § 6c (2)—

A sole assignment of error to the rendering and signing of an order presents the single question whether the facts found are sufficient to support the order, and does not bring up for review the findings or the evidence upon which they are based.

7. Appeal and Error § 14—

The signing by the presiding judge of the appeal entries, fixing and settling the contents of the case on appeal, *eo instanti* removes the matters involved from the jurisdiction of the Superior Court and transfers jurisdiction to the Supreme Court pending appeal, and thereafter the Superior Court is *functus officio* and has no jurisdiction to consider a second motion involving the same matters, and an order upon such second motion is a nullity.

8. Appeal and Error § 37—

Where it is apparent on the record that the lower court was without jurisdiction to enter an order, the Supreme Court will declare it a nullity *ex mero motu.*

APPEAL by defendant M. H. Winkler, trading as M. H. Winkler Manufacturing Company, from *Clement, J.*, at the August Mixed Term, 1950, of DAVIDSON. Affirmed.

Civil action to recover damages for personal injuries alleged to have been caused by the concurrent negligence of the defendants George A. McPherson, trading as McPherson Motor Lines, and M. H. Winkler, trading as M. H. Winkler Manufacturing Company, when an automobile in which plaintiff was riding as a guest collided with a tractor-trailer being operated allegedly by both defendants on State Highway No. 49 in Davidson County, North Carolina. Other material facts are stated in the opinion.

The defendant M. H. Winkler, trading as M. H. Winkler Manufacturing Company, a nonresident of the State of North Carolina, entered a special appearance and moved to quash the summons on jurisdictional grounds. Whereupon the plaintiff moved to amend the summons and

complaint to correct the variance suggested in the defendant Winkler's motion.

From an interlocutory order denying the motion to quash the summons and allowing plaintiff's motion to amend, the defendant M. H. Winkler, trading as M. H. Winkler Manufacturing Company, excepted and appealed.

Hubert E. Olive and Stoner & Wilson for plaintiff, appellee.

Smith, Wharton, Sapp & Moore for defendant George A. McPherson, trading as McPherson Motor Lines, appellee.

Don A. Walser for M. H. Winkler and M. H. Winkler, trading as M. H. Winkler Manufacturing Company, appellant.

JOHNSON, J. On or about 16 September, 1949, M. H. Winkler, trading as M. H. Winkler Manufacturing Company, of Baton Rouge, Louisiana, through his agent, Ray Williams, caused his Federal tractor to be attached to a Hobbs trailer, both owned by him, for the purpose of transporting bleachers to a customer in Norfolk, Virginia. The next day, while traveling north and at a place on State Highway No. 49 in Davidson County, North Carolina, approximately twenty miles south of Asheboro, the tractor owned by the defendant Winkler became disabled. The tractor and trailer were then parked in a farmyard. Winkler's agent, Williams, called him over the 'phone and advised him of the breakdown. Williams was instructed by Winkler to contact the Federal tractor agent in Greensboro, who was John Robbins, and secure assistance so the journey could be continued. As a result of arrangements cleared by 'phone between Williams and Robbins, the defendant George McPherson sent his Ford tractor, with his brother James McPherson driving, to the scene of the breakdown for the purpose of moving the trailer and bleachers on to Norfolk. Williams and James McPherson together detached the trailer from the Federal tractor and attached the trailer to the Ford tractor owned by George McPherson. After the attachment had been made, the tractor and trailer were backed into the highway and headed north, preparatory to going to Greensboro to pick up George McPherson and proceed on to Norfolk, with James McPherson then driving and Williams riding in the cab, when a car operated by plaintiff's husband collided with the trailer, resulting in injuries to the plaintiff which are the basis of this action.

The action was originally instituted against George McPherson, trading as McPherson Motor Lines, and M. H. Winkler Manufacturing Company, Inc. McPherson was served with process by the Sheriff of Guilford County on 14 July, 1950, and thereafter filed answer to the complaint.

Summons dated 13 July, 1950, was issued against M. H. Winkler Manufacturing Company, Inc., Baton Rouge, Louisiana, and forwarded to the Sheriff of Wake County for service on L. C. Rosser, Commissioner of Motor Vehicles of North Carolina, process agent of the nonresident defendant under G.S. 1-105. The Sheriff's return indicates service as directed on the Commissioner of Motor Vehicles. The return receipt card filed with the plaintiff's compliance affidavit required by the statute, shows that copies of the summons and complaint, sent by registered mail, were signed for and received by "M. H. Winkler," in person, in Baton Rouge, Louisiana, "7-19-50." The record shows compliance with all other procedural requirements of the statute (G.S. 1-105) and that M. H. Winkler had actual notice of the pendency of the action.

On 8 August, 1950, M. H. Winkler, through counsel entered a special appearance and moved that the summons be quashed and that the attempted service thereof on M. H. Winkler Manufacturing Company, Inc., be set aside, for that there is no such corporation known as M. H. Winkler Manufacturing Company, Inc. It is alleged in the motion that Mose H. Winkler, a resident of East Baton Rouge, Louisiana, is the sole proprietor of the business operated under the trade name of M. H. Winkler Manufacturing Company.

On the disclosures made in the special appearance, the plaintiff filed motion to amend the summons and complaint to conform to the defendant's true name, M. H. Winkler, trading as M. H. Winkler Manufacturing Company.

M. H. Winkler's motion to quash and plaintiff's counter motion to amend came on for hearing and were heard together at the August, 1950, term of court before Judge Clement, who found facts and entered an order denying Winkler's motion to quash and allowing plaintiff's motion to amend, by directing that the process and pleadings be corrected by interlineation by "striking out the words 'M. H. Winkler Manufacturing Company, Inc.' wherever they may appear, and inserting the words 'M. H. Winkler, trading and doing business as M. H. Winkler Manufacturing Co.'" The defendant Winkler was allowed forty days within which to file answer.

It is manifest that the court below possessed plenary general powers to correct the mistake in the name of the defendant and allow the amendments granted below. The determinative question here presented is whether the court under the original summons acquired jurisdiction over the person of M. H. Winkler so that he may be held by the court without service of new process. Here, we are at grips with the constitutional guaranty of due process of law, the essence of which is notice and opportunity to be heard before trial and judgment. 42 Am. Jur., Process, section 4, p. 7.

G.S. 1-163 confers upon the trial court broad discretionary powers to allow amendments. The pertinent provisions of this statute are as follows: "The judge or court may . . . in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party, by correcting a mistake in the name of a party or a mistake in any other respect . . ."

The broad discretionary powers of amendment conferred upon the courts by this statute have been sustained in numerous decisions of this Court. *Clevenger v. Grover,* 212 N.C. 13, 193 S.E. 12, and cases cited; *Propst v. Trucking Co.,* 223 N.C. 490, 27 S.E. 2d 152, and cases cited.

Ordinarily, an amendment of process and pleading may be allowed in the discretion of the court to correct a misnomer or mistake in the name of a party. *Propst v. Trucking Co., supra; Clevenger v. Grover, supra; Gordon v. Gas Co.,* 178 N.C. 435, 100 S.E. 878; *Fountain v. Pitt County,* 171 N.C. 113, 87 S.E. 990. But not so where the amendment amounts to a substitution or entire change of parties. *Hogsed v. Pearlman,* 213 N.C. 240, 195 S.E. 789; *Bray v. Creekmore,* 109 N.C. 49, 13 S.E. 723; *Plemmons v. Improvement Co.,* 108 N.C. 614, 13 S.E. 188; *Jones v. Vanstory,* 200 N.C. 582, 157 S.E. 867.

The general rule is stated in 42 Am. Jur., Process, section 21, p. 22, as follows: ". . . if the misnomer or misdescription does not leave in doubt the identity of the party intended to be sued, or, even where there is room for doubt as to identity, if service of process is made on the party intended to be sued, the misnomer or misdescription may be corrected by amendment at any stage of the suit."

In *Propst v. Trucking Co., supra,* this Court in a nonresident motorist case upheld the lower court in allowing an amendment conforming the summons and complaint to defendant's true name, "Hughes Transportation, Inc.," in place of "Hughes Trucking Company," without requiring the service of new process.

Similarly, in *Clevenger v. Grover, supra,* the lower court was sustained in changing, without the issuance of new process, the defendant's name from "Knott Hotel Company" to "Knott Management Company," it appearing that no exception was taken to the finding below "that the corporation intended to be sued was the corporation managing and in charge of the operation of the Battery Park Hotel," which the Court found was the Knott Management Corporation, it being further found that its managing agent, P. H. Branch, was served with process and fairly advised that the management corporation was the party intended to be sued.

In *Gordon v. Gas Co., supra,* this Court affirmed the order of the lower court in allowing an amendment, after judgment by default final, correcting and changing the name of the defendant from "Pintsch Gas

Company" to "Pintsch Compressing Company," it appearing that the original service was such as to have given the true defendant unmistakable notice that it was the entity intended to be sued.

In *Fountain v. Pitt County, supra,* the summons was against "The Board of County Commissioners of the County of Pitt." Service was made on the individual commissioners. They demurred on the ground that the action should have been against the County of Pitt in its corporate capacity, and not against the board of commissioners, since the complaint did not allege any personal liability of the commissioners. Judge Daniels overruled the demurrer and ordered that the County of Pitt be made a party. New summons issued against the County on 18 May, 1914. The defendant County demurred and set up the statute of limitations, alleging that more than three years had elapsed between the time of the accrual of the action and the date on which the new summons was issued against the County of Pitt. The defendant's plea of the statute of limitations was sustained in the lower court. On appeal, however, the ruling was held erroneous, on the ground that the amendment was properly allowed below as a correction in the name of the defendant, rather than as an entire change of parties, and that therefore the original service of summons on the individual commissioners was sufficient to confer upon the court jurisdiction over the County of Pitt. *Justice Walker,* speaking for the Court, makes this observation which is pertinent to the instant case: "The object of our present system of procedure is to try cases upon their merits, regardless of those technicalities which do not promote but defeat justice, at the same time preserving the substantial rights of parties. We do not think the plaintiff (defendant) could reasonably have been misled in this case. Any one looking at the process and pleadings would not fail to understand that the county was the alleged debtor and was sued for the debt. Revisal, sec. 509 (now G.S. 1-165), provides: 'The court, or judge thereof, shall in every stage of the action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.' But we put our decision on the broad ground that this was in effect, and from the beginning, an action against the county, and the misnaming of the defendant could not have misled the defendant as to the nature of the action or as to the party who was sued. Judge Daniels took the right view of the matter when he allowed the amendment. We do not think, though, that fresh process against the county was necessary to carry out that view. The original process had already been properly served and was sufficient to bring the county into court, and the amendment, as to the name, if necessary at all, was only so for the sake of conformity in process and pleadings."

In *Electric Membership Corporation v. Grannis Brothers,* 231 N.C. 716, 58 S.E. 2d 748, cited in the briefs of both sides, the basic facts are different from those in the instant case. There, the defendant was sued as a corporation, "Grannis Brothers, Inc.," when in fact the defendant was a partnership composed of C. K. Grannis, K. Sloan, and Mary G. McCloud, trading as E. W. Grannis Company. C. K. Grannis was served with summons, and the lower court ruled that the partnership was before the court. There, the trade name was materially different from the name of the nonexistent corporation, and the plaintiff did not move to amend, nor did the court order an amendment of the process and pleadings so as to make appellants "parties to the action by substitution or otherwise." Accordingly, it was held on appeal that, in the absence of an amendment, the variance was too great and that the motion to dismiss should have been allowed.

In the instant case, it is significant that the plaintiff in apt time moved to amend, and the motion was allowed, inserting the name of the individual defendant for that of the nonexistent corporation. While the facts in the *Electric Membership Corporation case* are different from those in the case at hand, the law laid down in the cited case supports with relevant pertinency the decision below in the instant case. In the cited case *Justice Denny,* in discussing the scope of the trial court's power to amend process and pleadings, states: "Under the comprehensive power to amend process and pleadings, where the proper party is before the court, although under a wrong name, an amendment will be allowed to cure the misnomer. . . . It seems to be the general rule that where individuals are doing business as partners under a firm name and such firm is described or designated in the action, as a corporation, and the process is served on a member of the partnership, the members of the partnership may be substituted by amending the process and allowing the pleadings to be amended."

The decisions holding that the procedural requirements of G.S. 1-105 as to service of summons on a nonresident motorist must be strictly construed are not applicable to this case. Here, all of the procedural requirements of the statute were strictly followed, and the court below so found. Therefore this case is on the same footing as if the defendant were a resident of this State and had been served under our general statute regulating the service of process. The procedural machinery prescribed by our nonresident motorist statute (G.S. 1-105) for giving notice has been declared adequate and constitutional. This statute is modeled after the Massachusetts statute (*Ashley v. Brown,* 198 N.C. 369, 151 S.E. 725), which, when attacked as being violative of the Fourteenth Amendment to the Federal Constitution for failure to provide adequate notice to the party sued, was upheld by the Supreme Court of the United States,

with the Court stressing the controlling importance of the provision of the statute under which it is required that the defendant shall actually receive and receipt for notice of service and a copy of the process. *Hess v. Pawloski,* 274 U.S. 352, 71 L. Ed. 1091, bot. p. 1094. See also Annotations and cases cited therewith: 35 A.L.R. 951; 57 A.L.R. 1239; and 99 A.L.R. 131.

In the instant case, not only does our statute (G.S. 1-105) prescribe adequate provisions for giving notice, but here, the defendant Winkler, the person who is the sole owner and proprietor of the entity intended to be sued, received by registered mail and personally receipted for the notice of service with a copy of the summons and complaint, the contents of which gave unmistakable notice that it was he who was intended to be sued.

In the instant case, the facts found by the court below are of controlling importance. They are not controverted. The defendant Winkler's sole assignment of error is to "the action of Clement, Judge, in rendering and signing the Order dated August 22, 1950." This exceptive assignment of error brings up and presents the single question whether the facts as found are sufficient to support the order. It does not bring up for review "the findings of fact or the evidence upon which they are based." *Hoover v. Crotts,* 232 N.C. 617; *Carter v. Carter,* 232 N.C. 614; *Greensboro v. Black,* 232 N.C. 154; *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351; *Henderson County v. Johnson,* 230 N.C. 723, 55 S.E. 2d 502. Judge Clement found, among other things, these facts:

"1. That in the process and pleadings . . . the name, M. H. Winkler Manufacturing Company, Inc., was erroneously used.

"3. That . . . the Commissioner of Motor Vehicles mailed notice of . . . service and copy of the process to M. H. Winkler Manufacturing Company, Inc., Baton Rouge, Louisiana, by registered mail and received return receipt signed by 'M. H. Winkler (signature or name of addressee), date of delivery, 7-19-50.'

"4. . . . that M. H. Winkler is the sole proprietor of said business under the trade name of M. H. Winkler Manufacturing Company.

"5. That the defendant intended to be sued was the individual or company that was involved in a collision by reason of the operation for him of a motor vehicle on the public highways of this State, which the Court finds was M. H. Winkler, trading and doing business as M. H. Winkler Manufacturing Company.

"6. That service of process was had on M. H. Winkler, and said M. H. Winkler, trading and doing business as M. H. Winkler Manufacturing Company, was sufficiently identified in the summons and copy of the complaint attached, served upon said M. H. Winkler so as to sufficiently advise him that he was the party sued, and intended to be sued, and that

said M. H. Winkler, trading and doing business as M. H. Winkler Manufacturing Company, was in nowise misled or prejudiced by the mistake in the name."

Here, the court below has found that M. H. Winkler was the party intended to be sued, that he has been properly served with process, and that he was sufficiently identified in the copies of the summons and complaint served on him, and that he "was in nowise misled or prejudiced by the mistake in the name." These facts appearing, and being found by the court, are sufficient to meet the requirements of the constitutional guaranty of due process of law. They sustain the order of Judge Clement in allowing the amendment and holding the individual defendant amenable to the jurisdiction of the court. See Annotation: 121 A.L.R. 1325, p. 1335, *et seq.; World F. & M. Ins. Co. v. Alliance Sandblasting Co.,* 105 Conn. 640, 136 A. 681; 39 Am. Jur., Parties, section 126, p. 1005.

We do not reach for review on its merits the interlocutory order of Sharp, Special Judge, entered at the succeeding October, 1950, term of court. This order denied the defendant Winkler's motion, filed under a second special appearance, in which he again requested that the summons be quashed and in which he also asked that the former order of Judge Clement, then pending on appeal in this Court, be set aside (necessarily by another judge), for that (a) there is no such corporation known as M. H. Winkler Manufacturing Company, Inc., and (b) that at the time of the collision complained of no motor vehicle was being operated on a highway in this State by the defendant Winkler within the meaning of G.S. 1-105. Nor is it necessary for us to discuss the question of whether the matters sought to be raised by this second motion stand adjudicated by the order of Judge Clement. Of necessity we do not reach these questions because it appears upon the face of the record that the lower court was without jurisdiction to hear and determine the second motion of the defendant Winkler. When the previous order was entered by Judge Clement at the August, 1950, term of court, the defendant Winkler excepted to the order and in open court gave notice of appeal. The appeal entries signed at that time by the presiding judge fixed and settled the contents of the case on appeal. These entries effectively removed the matters involved from the jurisdiction of the Superior Court and transferred jurisdiction to this Court pending appeal. *Cameron v. Cameron,* 231 N.C. 123, 56 S.E. 2d 384; *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377; *Lawrence v. Lawrence,* 226 N.C. 221, 37 S.E. 2d 496; *Vaughan v. Vaughan,* 211 N.C. 354, 190 S.E. 492. When these entries were noted, the appeal became effective *eo instanti,* notwithstanding the appeal bond may not have been filed until later. *Hoke v. Greyhound Corporation,* 227 N.C. 374, 42 S.E. 2d 407. There was no withdrawal of the appeal; therefore, the court below was *functus officio* to consider the second

motion, and it follows that the second order is a nullity. "Where such defect of jurisdiction is apparent on the record the Court will of necessity so declare it *ex mero motu.*" *Ridenhour v. Ridenhour,* 225 N.C. 508, 35 S.E. 2d 617; *Henderson County v. Smyth,* 216 N.C. 421, 5 S.E. 2d 136; *S. v. King,* 222 N.C. 137, 22 S.E. 2d 241.

The order entered at the October Term, 1950, will be vacated. The order entered at the August Term, 1950, is

Affirmed.

H. L. PERKINS ET AL. v. B. L. LANGDON.

(Filed 28 February, 1951.)

1. Pleadings § 22b—

The power to permit amendments under G.S. 1-163 is divided into two categories: first, amendments before trial or during trial when the adverse party is given opportunity to investigate and rebut any new matter, in which case the court may allow the insertion of allegations "material to the case," and second, amendments offered during or after trial, in which case the power to allow amendments is limited to those making the allegations conform to the evidence and does not extend to those bringing in a new cause of action or changing substantially the form of action originally sued on.

2. Same—

The power of the court to allow amendments "material to the case" is a broad and discretionary power, and the phrase should be construed in connection with G.S. 1-123 so as to permit amendments relating to the cause alleged and to causes of action arising out of the same transaction or transactions dealing with the same subject of action, subject to the limitations that a wholly different cause of action may not be set up by amendment and that inconsistent causes of action may not be joined. In regard to a related new cause of action set up by amendment, the statute of limitations operates as of the time of the amendment and not the institution of the action.

3. Same—

In an action by a tenant against his landlord for selling the leased premises during the term to the tenant's damage, the court may permit an amendment that the landlord covenanted not to sell the premises during the term of the lease and that he breached the covenant by selling during the term to a *bona fide* purchaser, since the allegations of the amendment are relevant and germane to the subject of the action set out in the complaint.

4. Same—

In an action by a tenant against his landlord for selling the leased premises during the term to the tenant's damage, the court has no power to permit an amendment alleging that the parties were engaged in a joint

adventure in the operation of the premises, since the new matter alleges a wholly different cause of action arising from a different and distinct legal relationship, and further such cause based upon obligations arising from the relation of joint adventurers is inconsistent with and contradictory to the original cause based upon the relationship of landlord and tenant.

APPEAL by defendant from *Carr, Resident Judge,* in Chambers, 30 May, 1950. From ALAMANCE. Modified and affirmed.

Civil action to recover damages for alleged breach of contract, heard on motion to strike allegations of amended complaint.

This case was tried first at the regular May Civil Term, 1949, of the Superior Court of Alamance. From a verdict and judgment in favor of the plaintiffs, the defendant appealed and in this Court demurred *ore tenus* to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. By decision reported in 231 N.C. 386, 57 S.E. 2d 407, the Court sustained the demurrer *ore tenus,* set aside the judgment below, and remanded the cause to the Superior Court, where the plaintiffs were given leave to amend their pleadings. Thereafter the plaintiffs filed an amendment and in apt time the defendant moved to strike certain allegations thereof as being "irrelevant, inconsistent and in conflict with, and repugnant to, the former pleadings of the plaintiffs and the record herein."

The amendment to the complaint is as follows, with the allegations which are sought to be stricken being set out in italics:

"The plaintiffs, by leave of the Court first obtained, filed this amendment to their pleadings herein.

"1. That prior to July 15, 1947, the plaintiffs and the defendant entered into a contract and agreement for the *operation* of the two tobacco warehouses owned by the defendant for the tobacco market seasons of 1947, 1948 and 1949; that the defendant agreed to furnish said warehouses and the necessary equipment, consisting of tobacco baskets, trucks and scales, *and to assist the plaintiffs in the solicitation of patronage and with any information possessed by him which would be valuable or helpful in the successful operation of said warehouses;* that the plaintiffs, as experienced and skillful warehousemen, were to operate the said warehouses *as managers,* finance the operations and pay to the defendant as *his share of the proceeds from said operations,* the amount set forth in the original complaint herein and to be responsible, as in the original complaint alleged, to the defendant for the loss and damage of personal property furnished by the defendant. That it was understood and agreed between the parties that said contract was to remain in force and effect for the three tobacco market seasons, as aforesaid, *and during said term, the defendant would retain ownership of the warehouses and equipment therein and not sell the same.* That on or about July 15, 1947, a written

memorial of said agreement was drafted by the defendant's attorney, *but said memorial did not contain the entire verbal agreement theretofore made by the plaintiffs and defendant.*

"2. That upon the presentation of the said written memorial to the defendant, he demanded that the prior oral agreement between the parties be amended so as to permit him to sell the warehouses, at his election, at any time after the first market season of 1947. The plaintiffs refused to amend or change their oral agreement as requested by the defendant and retained possession of the warehouses and the personal property of the defendant located therein and operated the same in compliance with the *aforesaid* contract between them and the defendant for the market season of 1947, and upon the expiration of one week after the official closing of the Fayetteville tobacco market for the season of 1947, they surrendered possession of said warehouses and personal property to the defendant in accordance with the terms of said contract with him. That thereafter, on or about the 14th day of January 1948, while the plaintiffs were not in possession, in accordance with the terms of the contract, the defendant, in violation of said contract, conveyed said warehouses and the personal property constituting the equipment thereof, and embraced in said contract with the plaintiffs, by warranty deed to R. H. Barber and wife and P. L. Campbell and wife, and surrendered immediate possession of all of said property to said purchasers. *That the defendant violated his contract with the plaintiffs that he would retain ownership of said warehouses and personal property and would not sell the same during the three year term of said contract by selling said property as herein alleged.* That the plaintiffs are advised, informed and allege that the said purchasers had no notice of the existence of the aforesaid contract between the plaintiffs and the defendant for the use and occupancy of said warehouses and the equipment therein, and that they purchased said warehouses for value, in good faith, and without notice of said contract and have at all times since said purchase retained the possession thereof.

"WHEREFORE, the plaintiffs renew their prayers for relief as set forth in their complaint and amended complaint heretofore filed."

The court below, hearing the motion by consent, declined to strike any part of the challenged allegations, and from the order denying the motion the defendant excepted and appealed.

Brooks, McLendon, Brim & Holderness and James R. Nance for plaintiffs, appellees.

Robert H. Dye and Cooper, Sanders & Holt for defendant, appellant.

JOHNSON, J. The pertinent allegations of the plaintiffs' complaint are succinctly summarized by *Denny, J.*, in stating the facts in connection

with the opinion in the decision on the former appeal. 231 N.C. 386, 57 S.E. 2d 407. There, it appears that the plaintiffs originally set up and declared upon a parol contract by the terms of which they alleged the defendant agreed to lease to them two tobacco sales warehouses in the city of Fayetteville for a term of three years. The plaintiffs further alleged that the defendant breached the contract by selling the warehouses after the end of the first year. However, the complaint was silent on the question as to whether the defendant covenanted with the plaintiffs that he would not sell the warehouses during the term of the lease. Therefore, since a sale of leased property, in the absence of a stipulation against alienation, does not *ipso facto* work a breach of contract, the defendant's demurrer *ore tenus,* lodged in this Court, was sustained.

When the case went back to the court below, the plaintiffs, under leave there granted, amended their complaint. An analysis of the amended pleading discloses that the amendments allowed below fall into two classes: first, allegations in effect that (a) the defendant covenanted not to sell the warehouse properties during the three-year term of the lease, and (b) that the defendant breached his covenant against sale by selling the properties after the end of the first year to a *bona fide* purchaser; second, allegations to the effect that the original contract between the plaintiffs and the defendant provided for the operation of the warehouses under a joint adventure arrangement between the parties, whereby the plaintiffs "as managers" were to operate the warehouses for the joint account of the plaintiffs and the defendant for a period of three years.

The amendments in both of the foregoing classes are challenged by the defendant's motion to strike. Therefore the defendant's appeal presents this question for decision: Are the amendments to the complaint relevant and material to the case, within the meaning of the statute and decisions prescribing and interpreting the rules under which pleadings may be amended in cases like this one?

G.S. 1-163 is the statute which fixes the scope of the court's power in allowing amendments. It provides in pertinent part as follows: "The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading . . . by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the fact proved. . . ."

An analysis of this statute lends support to the view that the scope of the court's power to allow amendments is broader when dealing with amendments proposed before trial than during or after trial. The statute contains alternate provisions: the court "may, before and after judgment, . . . amend any pleading, . . . by inserting other allegations material to the case; *or* when the amendment does not change substan-

tially the claim . . . by conforming the pleading or proceeding to the fact proved." It would seem that a fair interpretation of the alternate provision, *"or when the amendment does not change substantially the claim . . . by conforming the pleading or proceeding to the fact proved,"* is referable to amendments offered during or after trial for the purpose of conforming the pleadings to the facts proffered or admitted in evidence. The power to grant such tardily proposed amendments necessarily should be and is more restricted in scope than is the power to allow amendments offered prior to trial under circumstances which afford the other litigant ample opportunity to investigate and answer the new matter set up. 41 Am. Jur., Pleading, section 296, top p. 495. The portion of the statute dealing with the power to allow these delayed amendments by its very language excludes amendatory allegations which are calculated to "change substantially the claim" sued on. This language of the statute is clear. Ordinarily it calls for literal interpretation and application, so as to exclude proffered amendments which would either bring in a new cause of action or change substantially the form of the action originally sued on.

The other part of the statute confers upon the court the power to *"amend any pleading . . . by inserting other allegations material to the case."* We interpret this portion of the statute as being intended to regulate the allowance of amendments before trial (or during trial under circumstances affording the adverse litigant fair opportunity to investigate and rebut any new matters brought in by way of amendment, even to the extent, if needs be, of granting a continuance for the term). This section of the statute confers upon the court broad, sweeping discretionary powers of amendment. The language of this part of the statute gives the court the power to insert other allegations *"material to the case."* Here, the word *"case"* should be construed ordinarily in its broader, more comprehensive sense, as embracing the relevant facts arising out of or connected with the transactions forming the subject of action declared upon in the complaint. It would seem that this phase of the statute is necessarily referable to and should be construed and applied, in the exercise of a sound judicial discretion, in connection with the provisions of G.S. 1-123, which prescribes the rules under which several causes of action may be united in the same complaint, and which permits a plaintiff, as a matter of right, to unite in the original complaint "several causes of action, of legal or equitable nature, or both, where they all arise out of . . . the same transaction, or transaction connected with the same subject of action." (See also another related statute, G.S. 1-164.)

The foregoing dual aspect of the statute under consideration (G.S. 1-163) is recognized in a number of our more discriminating decisions. *Nassaney v. Culler*, 224 N.C. 323, 30 S.E. 2d 226; *Hatcher v. Williams*,

225 N.C. 112, p. 114, 33 S.E. 2d 617; *Capps v. R. R.*, 183 N.C. 181, 111 S.E. 533, and cases cited therein; *Bank v. Sturgill*, 223 N.C. 825, 28 S.E. 2d 511. See also *Hylton v. Mount Airy*, 227 N.C. 622, 44 S.E. 2d 51. The foregoing general principles also seem to be in accord with better reasoned authorities from other code jurisdictions. See 41 Am. Jur., Pleading, sections 296, 297, 304, 305, 306, 308, 309, and 310.

It is observed that the powers of amendment conferred by this statute (G.S. 1-163) are by its very terms left to be exercised in the discretion of the court. Therefore no inflexible rule applicable to all cases can be laid down. Necessarily each case must to some extent be decided upon its particular facts. However, the power of the court to allow amendments is subject to recognized limitations, among which are these:

(1) A litigant may not set up by amendment a wholly different cause of action, *i.e.*, one which does not arise out of or connect itself in a material aspect with the transaction set out in the original complaint. *Nassaney v. Culler, supra.* In 41 Am. Jur., Pleading, section 308, bot. p. 503 and top p. 504, it is said that "the test is whether an attempt is made to state facts which give rise to a wholly distinct and different legal obligation against the defendant, or set up another cause of controversy . . . A test generally laid down for a departure is whether proof of the existence of additional facts will be required."

(2) Inconsistent causes of action may not be joined in the same complaint. *Lykes v. Grove*, 201 N.C. 254, 159 S.E. 360; *Hatcher v. Williams, supra.* This rule is amplified and explained in 1 Am. Jur., Actions, section 83, p. 469, as follows: "Causes of action which are in their nature incongruous or inconsistent cannot be united in the same petition, even though they arise out of the same transaction or out of transactions connected with the same subject of action. Causes of action are inconsistent with each other when they cannot stand together; when, if one is true, the other cannot be; or when one defeats the other."

(3) Where a related "new cause of action may be introduced by way of amendment to the original pleadings, . . . the established limitation on the operation of its relation to the commencement of the suit is that if the amendment introduce a new matter, or a cause of action different from the one first propounded, and with respect to which the statute of limitations would then operate as a bar, such defense or plea will have the same force and effect as if the amendment were a new and independent suit." *Stacy, J.* (now *C. J.*) in *Capps v. R. R., supra.* See also 34 Am. Jur., Limitation of Actions, section 260, p. 212.

In the light of the foregoing principles, we now examine the amendments allowed in the instant case:

First, as to the allegations to the effect that (a) the defendant covenanted not to sell the warehouse properties during the term of the lease,

and (b) that he breached the covenant by selling after the end of the first year to a *bona fide* purchaser. These allegations appear to be material to the case. They merely amplify the cause of action originally declared upon; they are relevant and germane to the subject of action set out in the complaint. These allegations are consistent "with the gravamen of the complaint." *Hatcher v. Williams, supra; Davis v. Rhodes,* 231 N.C. 71, 56 S. E. 2d 43; *Baker v. Baker,* 230 N.C. 108, 52 S.E. 2d 20; *Ely v. Early,* 94 N.C. 1; *Nassaney v. Culler, supra.*

Second, as to the amendments to the effect that the original contract between the parties provided for the "operation" of the warehouses under a joint adventure arrangement between them, whereby the plaintiffs "as managers" were to operate the warehouses for the joint account of the parties for a period of three years. These allegations appear to bring into the case a wholly different cause of action. True, the new matter is connected in a sense with the original subject of action, but only remotely so, and not in a material or relevant sort of way. The establishment of these allegations would require the proof of additional facts and give rise to a wholly distinct and different legal obligation against the defendant. This will not do. *Cooper v. R. R.,* 165 N.C. 578, 81 S.E. 761; 41 Am. Jur., Pleading, section 308; *Casstevens v. Casstevens,* 231 N.C. 572, 58 S.E. 2d 368; *Clevenger v. Grover,* 212 N.C. 13, 193 S.E. 12; *Jones v. Vanstory,* 200 N.C. 582, 157 S.E. 867. Moreover, the joint adventure allegations bring into the case a contradictory cause of action,—one that is inconsistent with the cause declared upon in the complaint. The allegations of the complaint seek to establish the relation of landlord and tenant as the basis of recovery. By these amendments, the plaintiffs are endeavoring to set up the alternate relation of joint adventurers. If the one is true, the other cannot be. These allegations should be stricken. *Lykes v. Grove, supra; Clark v. Lumber Co.,* 158 N.C. 139, 73 S.E. 793; 1 Am. Jur., Actions, section 83.

Decision here will be effectuated by modifying the order below so as to allow paragraphs (a), (b), (c), (d), and (g) of the motion to strike, and by striking:

(a) the word "operation";

(b) the term "and to assist the plaintiffs in the solicitation of patronage and with any information possessed by him which would be valuable or helpful in the successful operation of said warehouses";

(c) the term "as manager";

(d) the term "his share of the proceeds from said operations";

(g) the word "aforesaid."

And subject to these modifications, the order below is affirmed.

Modified and affirmed.

T. RALPH YOUNG AND SARAH C. YOUNG v. T. P. YOUNG AND GWENDOLYN J. YOUNG.

(Filed 28 February, 1951.)

Partnership § 12—

Where consent judgment entered in an action for dissolution of a partnership provides that the real estate should be divided by agreement of the parties, or, if the parties failed to agree, the property should be sold for division, *held:* a proposal for division submitted in writing by the attorney of one of the partners in accordance with a written memorandum drawn up by the partner, and accepted in writing by the attorney for the other partner, may be specifically enforced by such other partner upon motion and petition in the cause.

APPEAL by defendants from *Rousseau, J.,* September Term, 1950, of BUNCOMBE. Affirmed.

This was suit for the dissolution of a partnership between T. Ralph Young and T. Plato Young and for the settlement of individual property rights incident thereto.

At June Term, 1950, a consent judgment was entered by Judge Pless wherein Don C. Young of counsel for plaintiffs and Ellis C. Jones of counsel for defendants were appointed commissioners to sell certain personal property. As to the real property belonging to the partnership the judgment provided that "the parties to this action shall have a reasonable time within which to come to an agreement relative to the real estate which is admitted to be assets of the partnership" with further provision that in the event the parties fail to come to an agreement, either party might apply to the court for an order to sell.

Thereafter the defendant T. Plato Young through his counsel submitted in writing a proposal for division of the real property between plaintiffs and defendants, dividing the property into groups 1 and 2, with privilege to the plaintiff T. Ralph Young "to take his choice." By letter Don C. Young as counsel for plaintiffs notified defendants' counsel that plaintiffs accepted the proposal, and chose group 2 as specified.

The defendants later failed to comply with the proposal and declined to execute deeds.

Plaintiffs then filed in the cause a verified petition and affidavit setting out the facts and praying for an order of court directing defendants to carry out the terms of the agreement and to execute deeds for property embraced in group 2 upon plaintiffs' delivering deeds for property embraced in group 1. To this petition and motion defendants filed no answer, reply or affidavit.

Coming on to be heard after notice at the September Term, 1950, Judge Rousseau, then presiding, rendered the following judgment:

"That said action was instituted by the issuance of the summons by the plaintiff, T. Ralph Young, against the defendants on the.....day of April, 1950, and was duly served on each of said defendants on the .....day of ....., 19.....; that thereafter, upon motion of the defendants, the co-plaintiff, Sarah C. Young, was made a party plaintiff; that thereafter the plaintiffs, through their counsel, made a written motion for the appointment of a receiver of said partnership business and assets, and the same coming on to be heard before Hon. J. Will Pless, Jr., Judge then presiding at the June 1950 Term of the Superior Court and pending a hearing thereon said parties and their counsel agreed to a Consent Judgment, which was entered by the Court on the.....day of June 1950, in which one of the attorneys for the defendants, Ellis C. Jones, and one of the attorneys for the plaintiff, Don C. Young, were appointed and designated as Commissioners for certain purposes designated and set out in said Consent Order; that among the various and sundry duties set forth in said Consent Order is what is denominated therein as subsection C as follows: 'The parties to this action shall have a reasonable time within which to come to an agreement relative to the real estate which is admitted to be assets of the partnership'; that in accordance with said provision the defendants, through their said authorized attorney, Ellis C. Jones, their Commissioner designated in said Consent Order, made a written proposition to the plaintiff in which said defendants divided the admitted real estate belonging to said partnership into two groups, and directed that the plaintiffs could accept either one of said groups, and upon the acceptance thereof plaintiffs and defendants would enter into any and all things necessary to carry into effect said division of said real estate agreed upon. That Group One and Group Two contained in said written proposition are as follows:

"GROUP ONE:

Filling Station and Barber Shop
Sewing Room Building (brick)
Banks lot—title in both names
Wheeler lot—title in both names
Stepp House.

"GROUP TWO:

Three buildings adjoining store
Lots in rear of store—in case Ralph Young takes this group, he to convey to Plato Young one lot immediately back of store, twenty-five feet wide for $25.00

Jarvis house
Warlick house
Ox Creek property (sixteen acres)
Vacant lot near Swann's.

"That thereupon plaintiffs, through their counsel and Don C. Young, Commissioner, in writing accepted Group Two, and so informed the attorney and Commissioner for the defendants in writing July 12, 1950; that thereafter, in accordance with said written agreement, pursuant to the written order of the Court and consent by both plaintiffs and defendants, the plaintiffs offered to carry out and fully perform the terms of said offer by the execution and delivery to the defendants of a proper deed of conveyance for all of said real estate contained in Group No. One, and demanded of the defendants that they execute and deliver to the plaintiffs a good and sufficient deed of conveyance for all of the property described in Group No. Two, which offer has been refused by the defendants. And in clarification of said offer and acceptance, it was agreed that the lot which the plaintiff was to convey to defendant, Plato Young, for the sum of $25.00 located back of the storeroom, was of the size and description set forth in the Petition herein, and also as described by metes and bounds in the judgment.

"Thereupon, the plaintiff, T. Ralph Young, for and on behalf of himself and his co-plaintiff, filed a duly verified petition to be used as an affidavit in said entitled cause on the 5th day of August 1950; and at the same time his counsel prepared a notice to the counsel for the defendants, giving notice that said matter would be heard upon said petition before the Judge presiding over the Superior Court of Buncombe County on August 17, 1950, at 9:30 A.M., or as soon thereafter as the Judge could hear the same, and said notice, together with a copy of the petition and affidavit attached, were acknowledged as received by Ellis C. Jones, Attorney for the defendants, on the 7th day of August 1950, and that said defendants have not filed any answer to said petition or any affidavits in said cause; and the Court finds as a fact that each and all of the statements contained in said petition are true. That said matter came on for hearing by agreement of the defendants and plaintiffs, and being the first time that the matter could be heard before the Judge of the Superior Court on the 5th day of September 1950, at 2 o'clock P.M. as aforesaid, that during the hearing thereof and in open court at said time, the said Ellis C. Jones, one of the attorneys for the defendants and commissioner appointed by the court, admitted in open court that the written proposal which he had submitted to Don C. Young, one of the attorneys for plaintiffs and the other commissioner, was authorized and directed by the defendant Plato Young, by the said Plato Young sending to the office of

said commissioner the written memorandum containing the said proposition of the division of said real estate, and that the said Plato Young afterwards in response to a telephone conversation with said Ellis C. Jones, commissioner, ratified and reaffirmed said offer of division so made in writing:

"It is, therefore, ordered, adjudged and decreed:

"1. That the plaintiffs and defendants have agreed upon the division of the real estate admitted by both plaintiffs and defendants to be assets of said partnership, in which division the defendants are to become the owners of and entitled to the immediate possession of the real estate described in Group One, and the plaintiffs are the owners of and entitled to the immediate possession of the real estate described in Group Two of said division.

(Here follows particular description of the property embraced in the two groups.)

"It is further ordered, adjudged and decreed that plaintiffs and defendants shall have thirty (30) days from this date in which to make and execute deeds of conveyances, each to the other, of said described tracts of land designated as Group One and Group Two, in accordance with this judgment, and possession of said pieces or parcels of land respectively awarded under this decree and judgment shall be given to each of said parties as of October 1, 1950.

"5. It is further ordered, adjudged and decreed that if plaintiffs or defendants fail and refuse to execute and deliver good and sufficient conveyances in accordance with this judgment and decree as aforesaid within the time specified, then either of said parties may register or cause to be registered, this judgment and decree in the office of the Register of Deeds for Buncombe County, and thereupon said judgment and decree shall be and constitute a full conveyance of said described properties between said parties in accordance with said division and said judgment."

To this judgment and the findings of fact therein set forth the defendants excepted and appealed.

Don C. Young and Williams & Williams for plaintiffs, appellees.

Ellis C. Jones and Guy Weaver for defendants, appellants.

DEVIN, J. It is apparent that the parties hereto, their counsel and the Judges who successively heard this matter had in mind an amicable adjustment and division of the real property which had belonged to the dissolved partnership. However, the parties are not now in accord, and the question whether the proposal and acceptance appearing in the record constituted a valid and enforceable agreement with respect to described real property is presented to this Court for decision. Upon the record

before us we are of opinion that the question should be answered in the affirmative, and that the judgment of Judge Rousseau should be upheld. *Hall v. Misenheimer,* 137 N.C. 183, 49 S.E. 104.

The judgment appealed from appears to have been based upon the record and the facts set out in plaintiffs' verified petition to which no answer or counter-affidavit was interposed. The facts stated in plaintiffs' petition the court found to be true, and the court also took into consideration admissions made by counsel for defendants in open court at the hearing. *Coker v. Coker,* 224 N.C. 450, 31 S.E. 2d 364; *Gardiner v. May,* 172 N.C. 192, 89 S.E. 955. Hence, the only question posed for us on this record is whether the uncontradicted evidence presented was sufficient to support the judgment. We think it was, and that the judgment should be affirmed. It is so ordered.

Affirmed.

McDOWELL MOTOR COMPANY, INC., v. NEW YORK UNDERWRITERS INSURANCE COMPANY, NEW YORK.

(Filed 28 February, 1951.)

1. Insurance § 13a—

While doubtful language in a policy must be construed in favor of insured and against insurer, and while the courts will adopt that construction favorable to insured when the policy is reasonably susceptible to two constructions, nevertheless the policy is a contract and is subject to the rules of interpretation applicable to written contracts generally, and must be construed to effectuate the intent of the parties as gathered from the language used.

2. Same—

In interpreting the language of an insurance policy to ascertain the intent of the parties, consideration may be given to the character of the business of the insured and the usual hazards involved therein.

3. Same—

Unambiguous terms in an insurance policy will be given their usual, ordinary and commonly accepted meaning.

4. Insurance § 43b—Theft of car by prospective purchaser held within exclusion clause of dealer's theft policy sued on.

The dealer's automobile theft policy in suit excluded liability in case insured voluntarily parted with title to or possession of any automobile covered thereunder, whether induced to do so by fraud, trick, device, false pretense, or otherwise. Insured's sales manager permitted a person representing himself to be a prospective purchaser to take an insured car in compliance with such person's request to be allowed to drive it to a place outside the city limits for his wife's inspection and approval or disapproval.

The manager had authority to permit prospective customers to take out cars for inspection. *Held:* The theft of the car by such person comes within the language of the exclusion clause of the policy, and insurer is not liable. Instances in which only the custodial possession is surrendered for the purpose of having the custodian perform some service to the car for the owner, distinguished.

APPEAL by plaintiff from *Halstead, Special Judge,* October Term, 1950, of PASQUOTANK.

Civil action to recover for the theft of an automobile.

The defendant, for a valuable consideration, issued to the plaintiff, the Ford dealer in Elizabeth City, a dealer's open policy of insurance, insuring automobiles owned by the plaintiff, among other things, against theft. The policy was in full force and effect at the time of the loss complained of, and the stolen car constituted a portion of the insured property with a replacement value of $1,588.63.

On 13 April, 1950, a prospective purchaser unknown to plaintiff, but who gave his name as Roberts, approached plaintiff's sales manager about the purchase of a two door, late model car. The plaintiff having no two door car, the sales manager undertook to interest him in the purchase of a slightly used four door 1949 Ford sedan. Whereupon the stranger expressed a desire to have his wife see the automobile before purchasing it, and stated he would bring her to plaintiff's place of business later that day. However, he did not return until about 10:30 the next morning, stating his wife was ill. He agreed to purchase the car for $1,850.00 if his wife approved. He then requested the sales manager to allow him to drive the car to the Bray Apartments on Weeksville Road, just outside Elizabeth City, for his wife's inspection and approval or disapproval. The prospective purchaser was permitted to drive the car away from plaintiff's premises under these circumstances, and neither he nor the car has been seen or heard from since.

The defendant denies liability for the theft of the automobile because of an exclusion clause contained in the plaintiff's policy, the pertinent part of which reads as follows: "Exclusions. Such policy does not cover: . . . loss suffered by the Insured in case he voluntarily parts with the title to or possession of any automobile at risk hereunder, whether or not induced so to do by any fraudulent scheme, trick, device, or false pretense or otherwise."

At the conclusion of plaintiff's evidence, defendant moved for judgment as of nonsuit. Motion allowed. Plaintiff excepted and appealed to the Supreme Court.

McMullan & Aydlett for plaintiff.

Wilson & Wilson for defendant.

DENNY, J. The question for determination is whether or not the delivery of the automobile by plaintiff's sales manager to the prospective purchaser, under the above circumstances, was a voluntary parting with the possession thereof within the meaning of the exclusion clause contained in the plaintiff's policy of insurance.

This controversy hinges on the proper interpretation of the exclusion clause with respect to what constitutes a voluntary parting of possession as contemplated by the contracting parties.

The appellant argues that the language used in the exclusion clause is not clear since the word "possession" has many different meanings in legal terminology, citing *National Safe Deposit Co. v. Stead,* 232 U.S. 58, 58 L. Ed. 504, where it is said: "Both in common speech and in legal terminology, there is no word more ambiguous in its meaning than possession. It is interchangeably used to describe actual possession and constructive possession which often so shade into one another that it is difficult to say where one ends and the other begins. . . . Custody may be in the servant and possession in the master; or title and right of control may be in one and the property within the protection of the house of another." It is contended, therefore, that under our general rule when the meaning of language used in a policy of insurance is doubtful, it must be construed in favor of the insured and against the insurer. *Williams v. Stone Co.,* 232 N.C. 88, 59 S.E. 2d 193; *Manning v. Insurance Co.,* 227 N.C. 251, 41 S.E. 2d 767; *Roberts v. Insurance Co.,* 212 N.C. 1, 192 S.E. 873, 113 A.L.R. 310; *Mills v. Insurance Co.,* 210 N.C. 439, 187 S.E. 581; *Jolley v. Insurance Co.,* 199 N.C. 269, 154 S.E. 400; *Allgood v. Insurance Co.,* 186 N.C. 415, 119 S.E. 561; *Underwood v. Insurance Co.,* 185 N.C. 538, 117 S.E. 790; *Crowell v. Insurance Co.,* 169 N.C. 35, 85 S.E. 37.

Likewise, where a policy of insurance is reasonably susceptible to two constructions, one favorable to the insured, the other to the insurer, the construction favorable to the insured will be adopted since the insurer chose the language contained in the policy. *Electric Co. v. Insurance Co.,* 229 N.C. 518, 50 S.E. 2d 295; *Insurance Co. v. Harrison-Wright Co.,* 207 N.C. 661, 178 S.E. 235; *Underwood v. Insurance Co., supra.*

We recognize the soundness of these rules, but the rule is equally well settled that an insurance policy is only a contract and subject to the same rules of interpretation applicable to written contracts generally, and the intention of the parties as gathered from the language used in the policy is the polar star that must guide the courts in the interpretation of such instruments. *Kirkley v. Insurance Co.,* 232 N.C. 292, 59 S.E. 2d 629; *Electric Co. v. Insurance Co., supra; Bailey v. Insurance Co.,* 222 N.C. 716, 24 S.E. 2d 614; *Stanback v. Insurance Co.,* 220 N.C. 494, 17 S.E. 2d 666; *McCain v. Insurance Co.,* 190 N.C. 549, 130 S.E. 186. In the case

of *Electric Co. v. Insurance Co., supra, Stacy, C. J.,* in speaking for the Court, on this question, said: "The heart of a contract is the intention of the parties which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." Therefore, in the interpretation of language contained in an insurance policy, the court may take into consideration the character of the business of the insured and the usual hazards involved therein in ascertaining the intent of the parties.

Insurance contracts will be construed according to the meaning of the terms which the parties have used and unless such terms are ambiguous, they will be interpreted according to their usual, ordinary, and commonly accepted meaning. *Bailey v. Insurance Co., supra; Stanback v. Insurance Co., supra; Roberts v. Insurance Co., supra; Gant v. Insurance Co.,* 197 N.C. 122, 147 S.E. 740; *Powers v. Insurance Co.,* 186 N.C. 336, 119 S.E. 481; *Crowell v. Insurance Co., supra; Penn v. Insurance Co.,* 158 N.C. 29, 73 S.E. 99.

It is conceded that plaintiff's sales manager had the authority to deliver the possession of the automobile in question to the prospective customer for the purpose of testing it or showing it to his wife for her approval or disapproval. And while it appears to be a practice with the plaintiff and some other dealers in the Elizabeth City area to permit prospective purchasers to test drive cars unaccompanied by a salesman or other representative of the owner, there is no evidence to support the view that the defendant was apprised of such practice and intended or agreed to insure the plaintiff against loss growing out of such practice. It becomes necessary, therefore, for us to say whether, in our opinion, delivery of the car to the prospective purchaser, a total stranger, for a purpose of his own, was a voluntary parting with possession within the meaning of the exclusion clause contained in the policy.

As a matter of course, the insurer would not be relieved from liability where the possession of a car covered by the policy was obtained from one not authorized to make a delivery thereof or where the car was taken under circumstances not implying consent on the part of the owner. *Botnick Motor Corporation v. Insurance Co.,* 300 N.Y.S. 1220, 253 N.Y. App. Div. 786; *Beene v. Southern Casualty Co.,* 168 La. 307, 121 So. 876; *Bankers and Shippers Insurance Co. v. Motor Co.* (Texas—Civ. App. 1937), 102 S.W. 2d 294; *Pratt v. Insurance Co.,* 50 R.I. 203, 146 A. 763.

And in our opinion the exclusion clause under consideration would not constitute a release of the insurer from liability for loss by theft where only the custodial possession of a car was surrendered for the purpose of having some service performed for the owner by the custodian, such as washing, greasing, storing, repairing, etc. Blashfield's Cyclopedia of

Law and Practice, Vol. VI, sec. 3717; *Bennett Chevrolet Co. v. Insurance Co.*, 58 R.I. 16, 190 A. 863, 109 A.L.R. 1077; *Gibson v. Insurance Co.*, 117 W. Va. 156, 184 S.E. 562; *National Mut. Casualty Co. v. Cypret*, 207 Ark. 11, 179 S.W. 2d 161; *Beene v. Southern Casualty Co., supra; Allen v. Insurance Co.*, 105 Vt. 471, 168 A. 698, 89 A.L.R. 460.

On the other hand, we think the exclusion clause does relieve the insurer from liability for theft where the possession of the car was voluntarily surrendered to another with the right to exercise control thereof for a purpose of his own. *Bennett Chevrolet Co. v. Insurance Co., supra; Boyd v. Insurance Co.*, 147 Neb. 237, 22 N.W. 2d 700; *Stuart Motor Co. v. General Exchange Insurance Corporation* (Texas—Civ. App. 1931), 43 S.W. 2d 647.

A contrary conclusion, however, was reached in passing upon a factual situation similar to that before us and involving the identical exclusion clause, in *McConnell v. Insurance Co.* (USCA 5th Circuit), 178 F. 2d 76, and in *Tripp v. Insurance Co.*, 141 Kan. 897, 44 P. 2d 236.

Even so, in our opinion, the exclusion clause was made a part of the plaintiff's policy for the very purpose of relieving the insurer from liability for theft in those instances where the insured voluntarily parts with the possession of an automobile covered by the policy under such circumstances as those disclosed on this record.

We have carefully considered the facts and circumstances under which the plaintiff parted with the possession of its automobile, and the authorities cited herein, and in our opinion it voluntarily parted with the possession of the insured car within the meaning of the exclusion clause contained in its policy.

The judgment as of nonsuit entered below is

Affirmed.

CHARLES W. GIBSON ET AL. v. PERCY JANE DUDLEY ET AL.

(Filed 28 February, 1951.)

1. Adverse Possession § 3—Plaintiff's evidence held to show that possession was not adverse and nonsuit was proper.

Plaintiff's evidence to the effect that he went into possession of a lot purchased by him, and used a driveway on the side of the lot under the belief that the entire driveway was on his property until defendant bought the adjoining lot, when it was discovered that a part of the driveway was admittedly included in defendant's deed, and that thereupon plaintiff conferred with defendant as to the further use of the driveway and consequently asked his attorney to fix up papers to make it a joint driveway permanently, *is held* insufficient to show possession by plaintiff adverse to defendant prior to the discovery of the inadvertence.

2. Same—

A grantee's occupation of land beyond the boundary called for in his deed under the mistaken belief that it belonged to him is not adverse to the true owner, since it is the intent to claim against the true owner which renders the entry and possession adverse.

3. Same—

Every possession of land is presumed to be under the true title and permissive rather than adverse.

4. Appeal and Error § 38—

The judgment of the lower court is presumed correct and the burden is upon appellant to show error.

APPEAL by plaintiffs from *Clement, J.*, May Term, 1950, of FORSYTH.

Civil action to establish title to part of driveway between plaintiff's and defendant's residential properties.

The plaintiffs and the defendant own adjoining lots on the west side of Buxton Street in the City of Winston-Salem. Each extends 150 feet back to an alley. There is an eight-foot driveway leading from the entrance on Buxton Street to plaintiff's garage about 90 feet from the street. This driveway passes partly over plaintiff's property and partly over defendant's property, according to the calls in their respective deeds. The controversy is over a triangular strip of land in the driveway which is four feet wide on Buxton Street and tapers to a point in the dividing line between the two properties a distance of fifty feet from the street.

There is a house on plaintiff's lot which he purchased in 1924 and went immediately into possession. He did not have the exact boundaries of his lot established at the time, but assumed the driveway was entirely on his premises. He so used it without question until the defendant purchased the adjoining vacant lot in 1948, had it surveyed, and unearthed the iron stakes which were originally put down to mark the dividing line between the two lots.

The plaintiff then conferred with the defendant and they first suggested a joint driveway. Plaintiff went to his lawyer and "asked him to fix up papers to make it a joint driveway permanently." Instead, the lawyer notified the defendant that plaintiff was claiming title to the entire driveway by adverse possession for twenty years.

This suit is to establish the plaintiff's claim to the part of the driveway covered by defendant's deed. From a judgment of nonsuit entered at the close of all the evidence, the plaintiff appeals, assigning errors.

Parker & Lucas and Elledge & Browder for plaintiffs, appellants.

Womble, Carlyle, Martin & Sandridge for defendants, appellees.

STACY, C. J. The question for decision is whether the evidence, taken in its most favorable light for the plaintiff, survives the demurrer and carries the case to the jury. The trial court answered in the negative, and we approve.

The vital question is the character of plaintiff's possession of the triangular strip of the driveway embraced in defendant's deed prior to 1948, whether permissive or adverse. The law presumes it was permissive. He does not say it was adverse.

The plaintiff purchased and went into possession of his lot in 1924. He thought his deed covered the whole of the driveway, including the *locus in quo.* "I thought all the time it was my property." Not until 1948, when the defendant purchased the adjoining lot and had it surveyed, did he learn otherwise. He then had a conversation with the defendant about his encroachment on the defendant's lot. "I asked Mr. Dudley what he was going to do about letting me continue to use the driveway. He told me, we suggested we'd have a joint driveway." The plaintiff then went to his lawyer and asked him "to fix up papers to make it a joint driveway permanently." Instead, a few days later the lawyer notified the defendant by letter that the plaintiff was claiming title to the whole of the driveway. The plaintiff says, "I did not ask Mr. Elledge to write a letter to Mr. Dudley; Mr. Elledge wrote the letter; I never saw the letter."

The plaintiff further testified that the triangular strip in question "is not covered by my deed. I thought all the time it was my property. . . . I am claiming the old established driveway that was there when I bought the property, . . . and I have continued to use it since then. I thought all the time it was mine. . . . I am claiming by adverse possession by use by reason of my driveway. . . . I have used the property for a driveway and also to store my coal in the basement since I bought the property 24 years ago."

Note, the plaintiff says he is *now* claiming the small strip in question by adverse possession, but nowhere does he say his claim prior to 1948 was other than under his deed, which admittedly does not cover the *locus in quo,* while the defendant's deed does. Certainly he was not claiming it as against the true owner when he first discovered the error and went to see the defendant and then his own lawyer about fixing up papers to make it a joint driveway. Prior to this time, "he did not intend to usurp a possession beyond the boundaries to which he had a good title." *Bynum v. Carter,* 26 N.C. 310. When he first went into possession he was claiming, and intended to claim, only that which he had purchased, and there was no occasion for any change in his purpose prior to the discovery that he was encroaching on defendant's lot. No hostile occupancy oc-

curred up to this time as the plaintiff thought his deed covered the entire driveway. His claim then was not one of adverse possession but one of rightful ownership. If his possession were exclusive, open and notorious, as he now contends, no one regarded it as hostile or adverse, not even the plaintiff himself, for he was not conscious of using his neighbor's land. "I thought all the time it was mine." These conclusions are impelled by the plaintiff's own testimony.

The observations of *Ruffin, C. J.,* in *Green v. Harman,* 15 N.C. 158, appear apropos: "If indeed, two persons own adjoining lands, and one runs a fence so near the line as to induce the jury to believe that any slight encroachments were inadvertently made, and that it was the design to run on the line, the possession constituted by the enclosure might be regarded as permissive, and could not be treated as adverse, even for the land within the fence, except as it furnished evidence of the line in a case of disputed boundary." No boundary dispute exists here, since admittedly the defendant's deed covers the *locus in quo,* and the plaintiff's deed does not.

Again in *Vanderbilt v. Chapman,* 175 N.C. 11, 94 S.E. 703, *Allen, J.,* says: ". . . every possession of land is presumed to be under the true title . . . and if the possession is by mistake or is equivocal in character, and not with the intent to claim against the true owner, it is not adverse." Accordant, *King v. Wells,* 94 N.C. 344; *Boyden v. Achenbach,* 79 N.C. 539; *S. c.,* 86 N.C. 397; *Ray v. Lipscomb,* 48 N.C. 186. "It is the occupation with an *intent* to claim, against the true owner, which renders the entry and possession adverse." *Parker v. Banks,* 79 N.C. 480.

Bulge the plaintiff's testimony as we may, it hardly seems capable of being stretched to a claim of adverse possession prior to the letter of plaintiff's counsel in 1948. Even then the plaintiff is cast in a role he did not know he was taking. The law never presumes a wrong; quite the reverse; it does not ascribe one's act to covetousness when all the evidence points only to an inadvertence. Indeed, the plaintiff's daughter says, "We assumed it was ours." It would be strange if one who enters permissively upon the premises of another could camouflage his intention to claim adversely for twenty years, then turn upon the owner and say, "I now have the better title by reason of my possession, and I will disregard your indulgence and assert a right to all you have allowed me to occupy." *Bryson v. Slagle,* 44 N.C. 449. Fortunately, the law is not so written. *Snowden v. Bell,* 159 N.C. 497, 75 S.E. 721; *Mebane v. Patrick,* 46 N.C. 23; *Ingraham v. Hough,* 46 N.C. 39.

On appeal here, the plaintiff, appellant, not only has the laboring oar, but the tide is also against him. *Cole v. R. R.,* 211 N.C. 591, 191 S.E. 353. In the instant case he is faced with two contrary presumptions, the

one that his possession was permissive and not adverse, the other that the judgment of the trial court is correct. The impression prevails that the record as presented fails to surmount these barriers. The following authorities also support the ruling below, some directly, others obliquely. *Darr v. Aluminum Co.*, 215 N.C. 768, 3 S.E. 2d 434; *Weaver v. Pitts*, 191 N.C. 747, 133 S.E. 2; *Dawson v. Abbott*, 184 N.C. 192, 114 S.E. 15; *S. v. Norris*, 174 N.C. 808, 93 S.E. 950; *Waldo v. Wilson*, 173 N.C. 689, 92 S.E. 692; *Land Co. v. Floyd*, 171 N.C. 543, 88 S.E. 862; *King v. Wells*, 94 N.C. 352; *Gilchrist v. McLaughlin*, 29 N.C. 310; Anno. 97 A.L.R. 26; 1 Am. Jur. 916, *et seq.*

The judgment of nonsuit will be upheld.

Affirmed.

VERNIE PEEK v. HORACE SHOOK, EXECUTOR OF THE LAST WILL AND TESTAMENT OF LIZZIE SHOOK, DECEASED.

(Filed 28 February, 1951.)

1. Evidence § 32—Testimony incompetent under G.S. 8-51.

In order for testimony to be incompetent under G.S. 8-51, the witness must be a party to the action or a person interested in the event or a person from, through, or under whom a party or interested person derives his interest or title; the witness must be testifying in his own behalf or in behalf of the party succeeding to his title or interest; the witness must be testifying against the personal representative of a deceased person or the committee of a lunatic or a person deriving his title or interest from, through, or under a deceased person or lunatic; and the testimony must concern a personal transaction or communication between the witness and the deceased person or lunatic.

2. Same—

Testimony otherwise incompetent under G.S. 8-51 is rendered admissible when the personal representative of a deceased person, or the committee of a lunatic, or the person deriving his title or interest from, through, or under the deceased person or lunatic, is examined in his own behalf, or the testimony as to declarations of the deceased person or lunatic is given in evidence concerning the same transaction or communication.

3. Same—

A personal transaction or communication within the purview of G.S. 8-51 is anything done or said between the witness and the deceased person or lunatic tending to establish the claim being asserted against the personal representative of the deceased person, or the committee of the lunatic, or the person deriving his title or interest from, through, or under the deceased person or lunatic.

4. Same—

A person seeking to recover from the estate for personal services rendered a decedent is precluded by G.S. 8-51 from testifying that he expected to receive pay for his services "after she (the decedent) said go ahead" since such testimony tends to prove deceased's agreement to pay for the services.

5. Same—

Since personal services rendered by plaintiff to decedent are of necessity personal transactions between them, plaintiff may not testify directly that he rendered such services nor establish this fact indirectly by testifying that he expected pay for such services or as to their value, or that he had not been paid for them.

APPEAL by defendant from *Bennett, Special Judge,* and a jury, at the October Term, 1950, of MADISON.

Civil action against an estate for the reasonable value of services allegedly rendered by plaintiff to decedent in her lifetime pursuant to an express contract.

The plaintiff offered the testimony of others tending to show that his wife's mother, the decedent, who was aged and ill, moved to his home on 24 November, 1947, and resided there until her death on 29 June, 1948; that during this period of time he boarded, lodged, nursed, and took care of the decedent; and that he did these things for the decedent pursuant to the following conversation which he had with her on the day of her arrival: "She told him she wanted him to take care of her, (and to go ahead) and do all that was needed to be done for her, and she would see he got pay for it, and he told her he would."

The plaintiff testified in person over the objection and exception of the defendant that he "was expecting . . . to receive pay for what was done for" the decedent "after she said go ahead"; that his services to the decedent were "worth $200.00 a month . . . the first three months" and "$400.00 a month . . . the next four months"; and that he had not received any compensation from the decedent for his services except the sum of $133.00, which represented the proceeds of seven checks issued to the decedent by the Welfare Department of Madison County.

There was a verdict and judgment in favor of plaintiff for $1,800.00, and the defendant appealed, assigning errors.

Calvin R. Edney for plaintiff, appellee.

Carl R. Stuart for defendant, appellant.

ERVIN, J. The defendant bases his objection to the admission of the evidence given by the plaintiff in person upon the statute now codified as G.S. 8-51.

This statute does not render the testimony of a witness incompetent in any case unless these four questions require an affirmative answer:

1. Is the witness (a) a party to the action, or (b) a person interested in the event of the action, or (c) a person from, through or under whom such a party or interested person derives his interest or title?

2. Is the witness testifying (a) in his own behalf or interest, or (b) in behalf of the party succeeding to his title or interest?

3. Is the witness testifying against (a) the personal representative of a deceased person, or (b) the committee of a lunatic, or (c) a person deriving his title or interest from, through or under a deceased person or lunatic?

4. Does the testimony of the witness concern a personal transaction or communication between the witness and the deceased person or lunatic?

Even in instances where these four things concur, the testimony of the witness is nevertheless admissible under an exception specified in the statute itself if the personal representative of the deceased person, or the committee of the lunatic, or the person deriving his title or interest from, through, or under the deceased person or lunatic, is examined in his own behalf, or the testimony of the deceased person or lunatic is given in evidence concerning the same transaction or communication.

Somewhat similar analyses of the statute appear in the following authorities: *Bunn v. Todd,* 107 N.C. 266, 11 S.E. 1043; Stansbury on the North Carolina Law of Evidence, section 66.

A personal transaction or communication within the purview of the statute is anything done or said between the witness and the deceased person or lunatic tending to establish the claim being asserted against the personal representative of the deceased person, or the committee of the lunatic, or the person deriving his title or interest from, through or under the deceased person or lunatic. *Davis v. Pearson,* 220 N.C. 163, 16 S.E. 2d 655; *Boyd v. Williams,* 207 N.C. 30, 175 S.E. 832.

When these rules are applied to the case at bar, it is manifest that the receipt of the testimony given by the plaintiff in person contravened the statute. The plaintiff was a party to the action. He was testifying in his own interest against the personal representative of a deceased person. His testimony concerned things done or said between him and the deceased tending to establish his claim against the estate of the deceased. The defendant did not "open the door" for the admission of the plaintiff's evidence by introducing his own testimony or that of the deceased in relation to these things.

This conclusion finds abundant support in many of our decisions. The statement of the plaintiff that he was expecting to receive pay for what was done for the decedent "after she said go ahead" tended to prove a contract with the decedent, and ought to have been rejected under the

decisions holding that a person who is making a contract claim against a decedent's estate is precluded by the statute from testifying as to the agreement between him and the decedent out of which the claim arises. *Hager v. Whitener,* 204 N.C. 747, 169 S.E. 645; *Sherrill v. Wilhelm,* 182 N.C. 673, 110 S.E. 95; *Pope v. Pope,* 176 N.C. 283, 96 S.E. 1034; *Knight v. Everett,* 152 N.C. 118, 67 S.E. 328; *Poston v. Jones,* 122 N.C. 536, 29 S.E. 951; *Barbee v. Barbee,* 108 N.C. 581, 13 S.E. 215; *Armfield v. Colvert,* 103 N.C. 147, 9 S.E. 461.

Moreover, this statement and the other testimony now under scrutiny tend to show by indirection that services of a personal character looking toward the physical comfort of the decedent were rendered by the plaintiff. In the very nature of things, these services had to be performed by the plaintiff in the presence of the decedent or with her knowledge or consent. Hence, they constituted personal transactions between the plaintiff and the decedent, and the plaintiff was barred by the statute from testifying directly as to them. *Price v. Pyatt,* 203 N.C. 799, 167 S.E. 69; *Pulliam v. Hege,* 192 N.C. 459, 135 S.E. 288; *Brown v. Adams,* 174 N.C. 490, 93 S.E. 989, L.R.A. 1918 C, 911; *Davidson v. Bardin,* 139 N.C. 1, 51 S.E. 779; *Kirk v. Barnhart,* 74 N.C. 653. The law will not permit a litigant to beat a legal devil around the stump. As a consequence, a claimant is incompetent under the statute to testify as to the value of personal services rendered by him to the decedent (*Knight v. Everett,* 152 N.C. 118, 67 S.E. 328; *Dunn v. Currie,* 141 N.C. 123, 53 S.E. 533; *Stocks v. Cannon,* 139 N.C. 60, 51 S.E. 802), or to testify that he has not been paid for such services by the decedent. *McGowan v. Davenport,* 134 N.C. 526, 47 S.E. 27; *Benedict v. Jones,* 129 N.C. 475, 40 S.E. 223; *Dunn v. Beaman,* 126 N.C. 766, 36 S.E. 172; *Woodhouse v. Simmons,* 73 N.C. 30. Such testimony necessarily tends to disclose by indirection that the claimant rendered the personal services in question to the decedent.

The erroneous admission of the testimony given by the plaintiff in person entitles the defendant to a

New trial.

JAMES GLADY DUKE v. CHARLES W. CAMPBELL, ADMINISTRATOR OF THE ESTATE OF D. W. HUDSON, DECEASED.

(Filed 28 February, 1951.)

1. Appeal and Error § 6c (2)—

A sole assignment of error to the sustaining of a demurrer filed in the cause presents the question as to whether error of law appears upon the face of the record.

2. Appeal and Error § 37—

Where error is manifest on the face of the record the Supreme Court may correct it *ex mero motu.*

3. Pleadings § 17a—

A demurrer must distinctly specify the grounds of objection, and demurrer to the further defense and answer of defendant on the ground that it does not "constitute a counterclaim in that it does not state a cause of action" is insufficient. G.S. 1-128.

4. Pleadings § 19c—

Where further defense and answer is set up in unity in five paragraphs in the answer, a demurrer directed to a portion of one of such paragraphs for failure to set up a counterclaim is a nullity, since in such instance the demurrer must be to the whole of the further defense and answer.

APPEAL by defendant from *Nettles, J.,* at October Term, 1950, of ROCKINGHAM.

Civil action to recover on implied contract for personal services allegedly rendered by plaintiff to defendant's intestate, D. W. Hudson, heard upon demurrer filed by plaintiff to "new matter contained in Paragraph 1 of the defendant's further answer filed in this cause."

Plaintiff alleges in his complaint, among other things:

"4. That the plaintiff is the son-in-law of defendant's intestate; that the plaintiff and the daughter of the defendant's intestate married on the 24th day of January, 1924; that the plaintiff and his wife made their home in the home of the defendant's intestate from the time they married until the plaintiff's wife died on the 28th day of October, 1949; that the plaintiff continued to make his home in the home of the defendant's intestate until the defendant's intestate died on the 28th day of December, 1949; that during the years from 1924 until 1942, the plaintiff cultivated half the lands belonging to D. W. Hudson, and the said D. W. Hudson tended the other half.

"5. That after the year 1942 the defendant's intestate was not physically able to farm and plaintiff cultivated all the lands," etc., setting out in detail the services performed and the value thereof.

Defendant, answering, denies the material allegations of the complaint of plaintiff, as to indebtedness to him, and sets out "for a further answer and defense" five paragraphs of averments.

The first paragraph contains matter pertaining to the relationship existing through the years between plaintiff and defendant's intestate, and sets up provision in a deed from the intestate to plaintiff and his wife,—conveying 28¼ acres of land, by the terms of which, it is averred, plaintiff is indebted to defendant in the sum of $1,050.00.

In the second paragraph it is averred that plaintiff owes defendant $50.00 for a refrigerator, $10.00 for a hog, and $7.57 for hog feed.

In the third paragraph it is averred that plaintiff and his wife were furnished a home by intestate of defendant, and enjoyed certain other benefits from lands of the intestate, and from the said 28¼ acres of land.

In the fourth paragraph, there is a plea of the statute of limitation, and also answer in detail to plaintiff's allegation as to services rendered.

And in the fifth paragraph, other matters in further defense are set out, and there is the summary that plaintiff is "entitled to nothing on his allegations for services rendered to the estate of the intestate but on the contrary the estate is entitled to recover of the plaintiff the sum of $1,050.00 as alleged in the conveyance to the plaintiff and the sum of $50.00 for the refrigerator, $10.00 for a hog, and $7.57 for hog feed, making a total of $1,117.57."

And defendant prays judgment that plaintiff recover nothing by this action, but that defendant recover of plaintiff $1,117.57 and costs.

Plaintiff demurred "to the new matter contained in Paragraph 1 of the defendant's further answer filed in this cause, and for cause of demurrer says: The said new matter in defendant's answer upon its face does not constitute a counterclaim in that it does not state a cause of action."

The demurrer was sustained,—and defendant excepted and appeals to Supreme Court and assigns error.

Scurry & McMichael for plaintiff, appellee.

Sharp & Sharp, by: Norwood E. Robinson for defendant, appellant.

WINBORNE, J. The sole assignment of error presented for consideration on this appeal is based upon exception to the ruling of the court in sustaining the demurrer filed by plaintiff as shown in the record. This exception 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 *Gibson v. Ins. Co.,* 232 N.C. 712, and cases cited. And where error is manifest on the face of the record, it is the duty of the Court to correct it, and it may do so of its own motion, that is, *ex mero motu.* See *Gibson v. Ins. Co., supra.*

In the case in hand it appears upon the face of the record that error is apparent in two aspects:

First: The demurrer fails to distinctly specify the grounds of objection to the answer of defendant, and may be disregarded, G.S. 1-128. *Love v. Comrs.,* 64 N.C. 706; *Heilig v. Foard,* 64 N.C. 710; *George v. High,* 85 N.C. 99; *Bank v. Bogle,* 85 N.C. 203; *Goss v. Waller,* 90 N.C. 149; *Burbank v. Comrs.,* 92 N.C. 257; *Elam v. Barnes,* 110 N.C. 73, 14 S.E. 621; *Ball v. Paquin,* 140 N.C. 83, 52 S.E. 410; *Seawell v. Cole,*

194 N.C. 546, 140 S.E. 85; *Griffin v. Bank,* 205 N.C. 253, 171 S.E. 71; *Wilson v. Motor Lines,* 207 N.C. 263, 176 S.E. 750.

The statute G.S. 1-128 declares that "The demurrer shall distinctly specify the ground of objection to the complaint, or it may be disregarded."

This statute as so worded is substantially the same as in the several codifications, C.C.P., Sec. 96; The Code, Sec. 240; Rev. 475; and C.S. 512.

In the *Love case* (1870), *supra,* the Court, in opinion by *Pearson, C. J.,* speaking of the provisions of the statute as it then existed, C.C.P., Sec. 96, had this to say: "These are broad words and include demurrers for defects in substance as well as defects of form. So the demurrer in our case ought to have been disregarded, because it does not distinctly specify the ground of objection . . . The rule is positive. It applies to all demurrers, and cannot be modified by implication . . ." To like effect are repeated decisions of this Court. (See cases cited above.)

Second: The demurrer is directed to a portion of one paragraph of the five set up in unity as a "further defense and answer" to the complaint of plaintiff. In such case the demurrer must be to the whole pleading. See G.S. 1-128. *Ransom v. McClees,* 64 N.C. 17; *Sumner v. Young,* 65 N.C. 579; *Speight v. Jenkins,* 99 N.C. 143, 5 S.E. 385; *Cowand v. Meyers,* 99 N.C. 198, 6 S.E. 82; *Conant v. Barnard,* 103 N.C. 315, 9 S.E. 575; *Moore v. Ins. Co.,* 231 N.C. 729, 58 S.E. 2d 756.

In *Sumner v. Young, supra,* the Court said: "When there is but one cause of action, or but one defense, a demurrer must cover the whole ground, or else it will be a nullity." This declaration is approved and applied in the *Moore case, supra.*

In the present case, while matters set up in the "further defense and answer" of defendant might have been the subject of separate alleged causes of action, they were not separated. Therefore, the "further defense and answer" must be treated as a unit, and demurrer directed to a part of it is a nullity. *Sumner v. Young, supra.*

While the parties, in their briefs filed in this Court, debate the merits of the matters set out in Paragraph 1 of the "further defense and answer," decision here does not reach that phase of the matter.

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

Reversed.

R. R. BRYANT, ADMINISTRATOR OF SHELBY JEAN BRYANT, v. LITTLE RIVER ICE COMPANY OF ZEBULON, INC., AND MILTON MAY BRYANT.

(Filed 28 February, 1951.)

1. Pleadings § 19c—

Upon demurrer, the complaint will be liberally construed with a view to substantial justice, G.S. 1-151, and the demurrer will be overruled if in any portion of the complaint facts are alleged sufficient to constitute a cause of action or if facts sufficient for that purpose can be reasonably and fairly gathered from it.

2. Automobiles § 18a—Complaint held not to establish insulated negligence as a matter of law.

Allegations to the effect that plaintiff was a pupil in a school bus and was injured in a collision between the bus and a truck belonging to the corporate defendant and operated by the individual defendant in the course of his employment, and that as the truck driver approached a bridge at a place known to him to be hazardous, he failed and neglected to keep his truck under control and failed to drive the truck to his right so as to leave one-half the width of the bridge for the passage of the school bus, proximately resulting in the collision in suit, *is held* sufficient to state a cause of action and overrule defendants' demurrer notwithstanding other allegations at variance therewith or less favorable to plaintiffs, the facts alleged being insufficient to support the doctrine of insulated negligence as a matter of law.

APPEAL by defendants from *Burgwyn, Special Judge*, September Term, 1950, of NASH.

L. L. Davenport, Yarborough & Yarborough, Bunn & Arendell, and Thomas D. Bunn for plaintiff.

Battle, Winslow, Merrell & Taylor for defendants.

DENNY, J. The plaintiff, R. R. Bryant, administrator of Shelby Jean Bryant, instituted this action to recover damages for the wrongful death of his intestate. And this appeal by the defendants is from a judgment overruling their demurrer interposed upon the ground that plaintiff's complaint does not state facts sufficient to constitute a cause of action.

The complaint, among other things, alleges that on 6 October, 1949, about 7:45 a.m., plaintiff's intestate, Shelby Jean Bryant, 14 years of age, met her death by reason of a collision between a school bus, owned and operated by the Nash County Board of Education, and a truck, owned by the corporate defendant, Little River Ice Company of Zebulon, Inc., and operated by the individual defendant, Milton May Bryant, as an agent of the corporate defendant; that said agent was acting within the scope of his employment at the time of said collision; that plaintiff's

intestate was a student at Ferrell's School in Nash County, and as such student was furnished daily transportation from her home to said school and return each school day on the regular school bus, owned and operated as alleged; that at the time of the aforesaid collision plaintiff's intestate was a student passenger on said bus en route to Ferrell's School, and that said school bus at the time of her fatal injury was being operated in a careful and lawful manner.

The complaint, after also alleging that the collision occurred on a wooden bridge over Turkey Creek on the old "Abby Murray Road," and that the bridge was forty-seven feet and two inches long and seventeen feet and three inches wide and was located at the break of a very sharp curve, and that "on account of the undergrowth, bushes, grass, and other natural obstacles that had been allowed to grow up on the shoulders beside the road and hang over into the road and onto the bridge from both directions approaching the said bridge, the view . . . of the drivers was short, obscure and obstructed," further alleges that the defendants were negligent, *inter alia:*

"(f) That said Milton May Bryant knew of the dangerous and hazardous condition existing at the said bridge and at the time and place where the said collision occurred, and that he wrongfully and negligently failed to keep the said Chevrolet truck under proper control at all times, and failed and neglected to give at least half of the said road and/or bridge to the vehicle which he was meeting, the said school bus, as it was his duty to do, and that he failed and neglected to observe the hazardous conditions then existing and to operate the said ice truck in a careful and cautious manner at the time and place where a special hazard existed, and which was known to him, as it was his duty to do.

"(g) That the said Milton May Bryant carelessly, recklessly and negligently drove said ice truck upon the bridge over Turkey Creek at the time and place of said collision, at an angle and not close up to the right rail of said bridge, well knowing that he was not leaving sufficient room upon said bridge for another motor vehicle to pass, and especially a vehicle of the length and breadth of the school bus.

"10-B. That the driver of the (corporate) defendant's truck . . . after having . . . entered upon the said bridge after he knew, or by the exercise of reasonable care could have known, that the school bus was at or about the same time entering upon said bridge, should have driven his truck close up to the rail of said bridge, to his right-hand side thereof and should have left and/or given to oncoming traffic, especially the said school bus, sufficient room to pass. . . . However, . . . he carelessly, negligently, and recklessly operated said truck along the center of said road and bridge and thereby took up and occupied more than one-half of the same when it was not necessary for him so to do, and at the time of

said collision between the school bus and the said truck he was taking up and occupying more than one-half of the said road and bridge and was operating said truck at an angle so that the front part of said truck extended over and across the middle of the said road and bridge, making it impossible for said school bus to pass without damage to the bus . . ., and as a direct result of said carelessness, negligence and recklessness on the part of Milton May Bryant, said collision and wreck occurred and the plaintiff's intestate thereby lost her life."

A demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action should be overruled if the complaint, when liberally construed in favor of the pleader, alleges facts sufficient to constitute a cause of action. Or, to put it another way, if any portion of a complaint alleges facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be reasonably and fairly gathered from it, the pleading will survive a demurrer. *Mills Co. v. Shaw, Comr. of Revenue,* 233 N.C. 71, 62 S.E. 2d 487; *King v. Motley,* 233 N.C. 42, 62 S.E. 2d 540; *Presnell v. Beshears,* 227 N.C. 279, 41 S.E. 2d 835; *Ferrell v. Worthington,* 226 N.C. 609, 39 S.E. 2d 812; *Sparrow v. Morrell & Co.,* 215 N.C. 452, 2 S.E. 2d 365; *Smith v. Sink,* 210 N.C. 815, 188 S.E. 631; *Fairbanks, Morse & Co. v. Murdock Co.,* 207 N.C. 348, 177 S.E. 122; *Cole v. Wagner,* 197 N.C. 692, 150 S.E. 339; *Meyer v. Fenner,* 196 N.C. 476, 146 S.E. 82; *Hoke v. Glenn,* 167 N.C. 594, 83 S.E. 807.

It is the purpose of our code system of pleadings to have actions tried upon their merits and to this end, pleadings must be liberally construed with a view to substantial justice between the parties. G.S. 1-151. And unless a pleading is fatally defective a demurrer thereto will be overruled, "however inartificially it may have been drawn or however uncertain, defective and redundant may be its statements for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader." *Dixon v. Green,* 178 N.C. 205, 100 S.E. 262. *McCampbell v. Building & Loan Asso.,* 231 N.C. 647, 58 S.E. 2d 617; *Kemp v. Funderburk,* 224 N.C. 353, 30 S.E. 2d 155; *Mallard v. Housing Authority,* 221 N.C. 334, 20 S.E. 2d 281; *Anthony v. Knight,* 211 N.C. 637, 191 S.E. 323; *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761; *Blackmore v. Winders,* 144 N.C. 212, 56 S.E. 874.

Applying the above principles to plaintiff's pleadings, we hold the demurrer was properly overruled.

The plaintiff's complaint contains certain additional allegations which are somewhat difficult to reconcile with those set out herein, and which are less favorable to the plaintiff. Even so, they are not fatal to the plaintiff's cause of action on the demurrer interposed herein. *Lee v. Produce Co.,* 197 N.C. 714, 150 S.E. 363. Nor do we think the facts

alleged are such as to render applicable, as a matter of law, the doctrine of insulated negligence, as contended by the defendants, as set forth and applied in *Hinnant v. R. R.*, 202 N.C. 489, 163 S.E. 555.

The ruling of the court below will be upheld.

Affirmed.

STERN FISH COMPANY v. CHARLIE G. SNOWDEN.

(Filed 28 February, 1951.)

1. Trial § 31b—Charge held for error as being misleading.

Defendant admitted that plaintiff had advanced him $500.00 to be used in the purchase of fish for plaintiff's account, and set up a counterclaim in an amount in excess of $500.00 for fish purchased for plaintiff's account and for loading charges which plaintiff was required to pay under the contract. An instruction to the effect that if the jury should answer the issue as to defendant's indebtedness to plaintiff in any amount that the jury should not answer the issue as to the amount of indebtedness of plaintiff to defendant, *is held* reversible error, the action not being for an account stated, and the instruction being misleading upon the record.

2. Trial § 31a—

The purposes of the court's charge to the jury are the clarification of the issues, elimination of extraneous matters, and declaration and explanation of the law arising on the evidence in the case. G.S. 1-180.

APPEAL by defendant from *Halstead, Special Judge,* October Term, 1950, of PASQUOTANK.

Civil action to recover moneys deposited with defendant by plaintiff to cover price of fish purchased by defendant for plaintiff's account.

The plaintiff, a Philadelphia fish concern, engaged the defendant to purchase live carp for its account during the 1948 fishing season and store them in defendant's pond at Currituck, N. C. From there the plaintiff would send its trucks to pick them up and transport them to Philadelphia for sale.

Plaintiff's president testified: "Under the contract between me and Mr. Snowden we were to send our truck for such fish as he had purchased or caught and placed in the pond for our account at such times as we needed them. . . . Snowden, as our representative, purchased and weighed these fish and put them in the pond, and we owed him under our contract five and one quarter cents a pound for such carp so purchased. Our contract further called for reimbursing Mr. Snowden for the loading charges. I knew that in the ordinary course of events a certain percentage of live carp purchased for us would die before our trucks got there.

. . . I deposited with him a check for $500. This has never been returned."

The defendant admitted receipt of the deposit as alleged, and set up a counterclaim for $810.32 to cover live fish purchased for plaintiff's account and not paid for by plaintiff.

Defendant testified: "Under date of May 4, 1948 Stern Fish Company owed me for 14,768 pounds at a contract price of five and a quarter cents, a total of $775.32. On May 4, 1948, it likewise owed me $35.00 loading charges, making a total of $810.32. Stern Fish Company has never paid me that amount, which represents fish purchased for their account under the contract. I gave them credit for $500.00 as represented by their $500.00 deposit with me. There remained due $310.32. On May 4, 1948 I sent Stern Fish Company a bill for that amount."

Upon denial of liability and assertion of counterclaim, the jury returned the following verdict:

"1. Is the defendant indebted to the plaintiff, as alleged in the complaint, and if so, in what amount? Answer: $500.00.

"2. Is the plaintiff indebted to the defendant, as alleged in the answer, and if so, in what amount? Answer: Nothing."

From judgment on the verdict, the defendant appeals, assigning errors.

Wilson & Wilson for plaintiff, appellee.

McMullan & Aydlett for defendant, appellant.

STACY, C. J. The following excerpt from the charge forms the basis of one of defendant's exceptive assignments of error and appears too wide of the mark to be sustained under any rule of interpretation or construction:

"Gentlemen of the Jury, now each one cannot be indebted to the other, to the extent of your answering both of these issues in some amount for each of these parties. If you answer the first issue, that is: Is the defendant indebted to the plaintiff as alleged in the complaint, and if so, in what amount? Why then, Gentlemen, the second issue, you'd answer that nothing, because if the defendant is indebted to the Fish Company, then the Fish Company certainly is not indebted to the defendant."

Apparently the court had in mind and intended to say, that in arriving at a proper adjustment of the account between the parties, consisting, as it does, of debits on the one side and credits on the other, there could be but one correct balance, either in favor of the plaintiff or the defendant, but not in favor of both. Unfortunately, however, the action is not for an account stated, *Hawkins v. Long,* 74 N.C. 781, but to recover an advanced deposit, with a counterclaim interposed by the defendant on open account, and the court's language is hardly susceptible of this single

interpretation, if really capable of such construction at all. The defendant may have intended to make his counterclaim an account stated in the statement rendered 4 May, 1948, but he omits so to allege or to testify. *Copland v. Telegraph Co.*, 136 N.C. 11, 48 S.E. 501; 1 Am. Jur. 272. The jury is told in so many words that if they answer the first issue in any amount, their answer to the second issue would be nothing, and conversely by inference, if they answer the second issue in any amount, their answer to the first issue would be nothing. This left the jury with very little choice, since the defendant had admitted in his answer that he received the $500 advanced by the plaintiff. Indeed, the only controverted issue in the case was that raised by the defendant's counterclaim. If the defendant recover nothing on his counterclaim, the plaintiff would be entitled to judgment on the pleadings for his advanced deposit of $500. In the light of the transcript, the instruction appears misleading, if not confusing.

The chief purposes to be attained or accomplished by the court in its charge to the jury are clarification of the issues, elimination of extraneous matters, and declaration and explanation of the law arising on the evidence in the case. G.S. 1-180 as rewritten in 1949, S.L. Chap. 107; *Irvin v. R. R.*, 164 N.C. 6, 80 S.E. 78. These are essential in cases requiring the intervention of a jury. As was said by *Merrimon, C. J.*, in *S. v. Wilson*, 104 N.C. 868, 10 S.E. 315, "The jury should see the issues, stripped of all redundant and confusing matters, and in as clear a light as practicable," and by *Barnhill, J.*, in *S. v. Friddle*, 223 N.C. 258, 25 S.E. 2d 751, "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." Accordant: *S. v. Sutton*, 230 N.C. 244, 52 S.E. 2d 921; *S. v. Jackson*, 228 N.C. 656, 46 S.E. 2d 858; *Guyes v. Council*, 213 N.C. 654, 197 S.E. 121; *S. v. Rogers*, 93 N.C. 523; *S. v. Jones*, 87 N.C. 547; *S. v. Matthews*, 78 N.C. 523; *S. v. Dunlop*, 65 N.C. 288; *Bird v. United States*, 180 U.S. 356, 45 L. Ed. 570.

A new trial seems necessary. It is so ordered.

New trial.

MRS. CLATER F. RIVERS v. TOWN OF WILSON.

(Filed 28 February, 1951.)

1. Municipal Corporations § 14a—

Plaintiff's evidence was to the effect that a leaking water-meter box projected about three inches above the ground in the dirt strip between the sidewalk and the curb, and that plaintiff fell over it when, instead of following the available pavement, she elected to cross the dirt strip in going to her parked car. *Held:* Nonsuit was properly entered. Whether G.S. 1-53 is limited to claims founded on contract or applies equally to those sounding in tort, *quære?*

2. Same—

The fact that a water-meter box maintained by a city between the sidewalk and the curb was leaking, without more, indicates no unsafeness in its condition.

3. Same—

A municipality is under duty to keep the grass plot or space between the paved portion of the sidewalk and the curb in a reasonably safe condition for the purposes of its use.

4. Same—

An action against a municipality to recover for a fall on a street or sidewalk is in tort for negligence, and plaintiff must show some breach of legal duty, *res ipsa loquitur* being inapplicable, and proof of the existence of the condition which caused the injury or the happening of the accident, being alone insufficient.

5. Same—

A municipality is not an insurer of the safety of its streets and sidewalks but is under duty to exercise reasonable diligence to keep them in a reasonably safe condition.

APPEAL by plaintiff from *Bone, J.*, October-November Term, 1950, of WILSON.

Civil action to recover damages for personal injuries arising from alleged negligence of the defendant.

On the afternoon of 20 March, 1946, the plaintiff was a visitor at the Woodard-Herring Hospital in the Town of Wilson where her husband was a patient. At about 2:00 p.m. she left the hospital and started to her car which was parked on the opposite side of Green Street. Plaintiff says she was familiar with the sidewalk, the street and the surroundings. "I had been there plenty of times." Instead of following the "unobstructed pavement from the steps out," because of some boards nearby, the plaintiff, according to her testimony, started across the dirt strip between the sidewalk and the curb and tripped on a water-meter box

which stood "about three inches" above the ground and was leaking "so that it was just about the color of the ground. . . . It was right wet all around it." The damp earth did not make it more noticeable, she says. "The water did not put me on notice that it was there. I did not see it until I tripped over it and fell. . . . I was looking for the traffic because that is a very busy street there. . . . I was looking where I was going. . . . It was not raining. I don't remember whether the sun was shining or whether any leaves were on the trees. . . . I stumbled over the water meter. . . . I had never crossed over that particular spot where the water-meter box was at any time in the past. . . . My car was parked right off from the door of the hospital. I was going almost directly across to my car. . . . I filed no claim until this suit was brought on 8 March 1949."

There is evidence that plaintiff's injuries were serious and painful.

The allegation of negligence is that the defendant, in the exercise of due care, failed to keep this particular sidewalk in a reasonably safe condition for travel.

The defendant denied liability and pleaded contributory negligence in bar of plaintiff's right to recover; also that plaintiff failed to present her claim within two years as required by G.S. 1-53.

From judgment of nonsuit entered at the close of plaintiff's evidence, she appeals, assigning error.

Robert A. Farris for plaintiff, appellant.

Lucas & Rand and Connor, Gardner & Connor for defendant, appellee.

STACY, C. J. The question for decision is whether the evidence, taken in its most favorable light for the plaintiff, survives the demurrer and carries the case to the jury. The trial court answered in the negative, and we approve.

The plaintiff cites *Gasque v. Asheville,* 207 N.C. 821, 178 S.E. 848, as direct authority requiring the case to be submitted to the jury, and *Webster v. Charlotte,* 222 N.C. 321, 22 S.E. 2d 900, as also tending to support her position. Conversely, the defendant relies on the case of *Gettys v. Marion,* 218 N.C. 266, 10 S.E. 2d 799, as controlling authority to support the judgment of nonsuit on the facts of the instant record.

The applicable rule is stated by *Hoke, J.,* in *Fitzgerald v. Concord,* 140 N.C. 110, 52 S.E. 309, as follows:

"The town, however, is not held to warrant that the condition of its streets, etc., shall be at all times absolutely safe. It is only responsible for negligent breach of duty, and, to establish such responsibility, it is not sufficient to show that a defect existed and an injury has been caused thereby. It must be further shown that the officers of the town 'knew,

or by ordinary diligence might have discovered, the defect, and the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated.' "

The water-meter box was not in the traveled part of the sidewalk, but in the grass plot between the paved portion and the curb; nor was it hidden, defective or in disrepair. The fact that it was leaking, without more, indicated no unsafeness in its condition; rather that it could be more readily seen. True, this grass plot or tree space between the paved portion of the sidewalk and the curb is required to be kept in a reasonably safe condition for the purposes of its use as a part of the street or highway. 43 C.J. 989. Plaintiff's action is in tort for negligence, which must be established by more than the mere happening of an accident. The existence of a condition which causes injury is not enough. The breach of a legal duty must be made to appear. This is not presumed; *res ipsa loquitur* is inapplicable. The town is not an insurer of the safety of its streets and sidewalks, although they are required to be kept in a reasonably safe condition.

Measured by these standards, we are constrained to hold that plaintiff's evidence brings the case within the purview and scope of the *Gettys* opinion. Further elaboration here would appear repetitious and unnecessary. We are content to rest our decision on this decision.

This obviates the necessity of determining whether G.S. 1-53, like G.S. 153-64, is limited to claims founded on contract or applies equally to those sounding in tort. We do not reach the question.

Affirmed.

STATE v. REGINALD CUTHRELL.

(Filed 28 February, 1951.)

1. Criminal Law § 28—

Defendant's plea of not guilty places the burden upon the State to prove every fact necessary to establish guilt.

2. Arson § 7—

Defendant's plea of not guilty in a prosecution under G.S. 14-62 places the burden upon the State to prove (1) the fire, (2) that it was of incendiary origin, (3) and that defendant was connected with the crime.

3. Arson § 6: Criminal Law § 31a—

In a prosecution under G.S. 14-62 it is reversible error to admit opinion testimony that the fire was of incendiary origin since the facts constituting the basis for such conclusion are so simple and readily understood that it is for the jury to draw the conclusion from testimony as to the facts, and therefore the conclusion is not the subject of opinion testimony.

STATE *v.* CUTHRELL.

APPEAL by defendant from *Halstead, Special Judge,* and a jury, at the August Term, 1950, of CAMDEN.

Criminal prosecution upon a two-count indictment, charging the defendant, Reginald Cuthrell, with aiding, counselling, and procuring Bobby Gene Bowers to burn a building used by R. B. Cuthrell as a restaurant, and with conspiring with Bobby Gene Bowers to burn such building.

The building, which was located at Elizabeth City Beach in Camden County, was totally destroyed by fire on the night of 5 May, 1950.

The defendant entered a general plea of not guilty, and the State undertook to establish its charges against him by the testimony of his alleged accomplice, Bobby Gene Bowers.

Bowers testified, in substance, that he purposely set the building on fire at the instigation of the defendant, who promised to pay him $50.00 for so doing, and who aided him in his incendiary undertaking by motoring him to and from the premises on the night of the fire.

The defendant denied the evidence of Bowers in its entirety. He testified further that he was in another place at the time of the fire, and had no knowledge as to its origin.

The State called as a witness M. O. Stevens, the Sheriff of Camden County, who inspected the scene of the fire after the building had been reduced to ashes. The court permitted Sheriff Stevens to express this opinion over the objection and exception of the accused: "From my observation of the scene of the fire, it looked to be as though it were set afire."

The jury convicted the defendant upon the first count, which charged him with aiding, counselling, and procuring Bobby Gene Bowers to burn the building in question, and acquitted him upon the second count, which charged him with conspiring with Bobby Gene Bowers to burn such building.

The court sentenced the accused to imprisonment for a term of years in the State's Prison, and he appealed, assigning errors.

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

John A. Wilkinson and H. S. Ward for the defendant, appellant.

ERVIN, J. The first count in the indictment is bottomed upon the statute codified as G.S. 14-62.

A plea of not guilty to a criminal charge puts in issue every fact necessary to establish the guilt of the accused. *S. v. Meyers,* 190 N.C. 239, 129 S.E. 600; *S. v. Hardy,* 189 N.C. 799, 128 S.E. 152.

Where such plea is entered in a prosecution for common law arson or for the statutory felony of burning a building contrary to G.S. 14-62, it

is incumbent on the State to prove both the *corpus delicti,* and the connection of the accused with the crime. 6 C.J.S., Arson, section 29. The *corpus delicti* in such prosecution consists of two elements: the fire, and the cause of the fire. Annotation: 13 Ann. Cas. 803-804. The fire must be incendiary in origin. *S. v. Church,* 202 N.C. 692, 163 S.E. 874.

The statement of Sheriff Stevens, who visited the premises subsequent to the fire, that in his opinion the building was "set afire" is clearly incompetent. This is not a case for opinion evidence. The physical facts, which are the subject of the investigation, are so simple that they can be readily understood by the jury when properly described by the witness, and the jury is as well qualified as the witness to draw the appropriate inference from them. Stansbury on North Carolina Evidence, section 124; Wigmore on Evidence (3rd Ed.), section 1926.

The conclusion that the trial judge erred in admitting the statement of Sheriff Stevens has explicit support in well considered cases in other jurisdictions expressly excluding evidence of opinions of witnesses as to the incendiary nature of fires. *S. v. Nolan,* 48 Kan. 723, 29 P. 568, 30 P. 486; *People v. Grutz,* 212 N.Y. 72, 105 N.E. 843, L.R.A. 1915 D, 229, Ann. Cas. 1915 D, 167. See also: *Sawyer v. State,* 100 Fla. 1603, 132 So. 188; Wharton's Criminal Evidence (11th Ed.), section 956. It likewise has implicit support in our own decisions concerning related evidential matters. *Deppe v. R. R.,* 154 N.C. 523, 70 S.E. 622; *Cogdell v. R. R.,* 132 N.C. 852, 44 S.E. 618; *Burwell v. Sneed,* 104 N.C. 118, 10 S.E. 152.

The defendant's plea of not guilty denied the existence of the *corpus delicti,* and thus raised the precise issue whether the defendant's alleged accomplice, Bobby Gene Bowers, wantonly and willfully burned the building in question. The opinion of Sheriff Stevens, the chief law enforcement officer of Camden County, that the fire was of incendiary origin may have tipped the scales in favor of the prosecution, and induced the jury to resolve this crucial issue against the accused. This being so, the receipt of such opinion in evidence constitutes prejudicial error, entitling the defendant to a

New trial.

EUIT CHANDLER v. C. E. MASHBURN, ADMINISTRATOR OF THE ESTATE OF ARSEMUS CHANDLER, DECEASED.

(Filed 28 February, 1951.)

1. Pleadings § 7—

The answer must contain a general or specific denial of each material allegation of the complaint controverted by defendant, and may contain a statement of any new matter constituting a defense or counterclaim. G.S. 1-135.

2. Pleadings § 8—

A denial in the answer of a material fact alleged in the complaint enables defendant to show any facts which go to deny the existence of the controverted fact, and therefore narration of evidence which defendant contends sustains his denial of the controverted fact is irrelevant pleading.

3. Pleadings § 31—

Upon motion of any party aggrieved, aptly made, the court may strike out irrelevant or redundant matter inserted in a pleading. G.S. 1-153.

4. Same—

Where defendant has denied a material allegation of the complaint, narration in his "further answer and defense" of evidential matters tending to sustain defendant's denial of the controverted fact is irrelevant, and should be stricken upon motion aptly made.

APPEAL by plaintiff from *Bennett, Special Judge,* at October Term, 1950, of MADISON.

Civil action instituted 20 July, 1950, to require defendant to account for and pay over to plaintiff, as sole distributee, the personal assets remaining in his hands as administrator of the estate of Arsemus Chandler, deceased, after payment of debts, and costs of administration.

Plaintiff alleges in his complaint substantially these facts: That Arsemus Chandler died on 9 June, 1949, and defendant is the duly appointed administrator of his estate; that Arsemus Chandler and Della Fender Hensley were married on 23 September, 1922, and remained married until the date of her death on 23 March, 1928; that he, the plaintiff, was born of said marriage on 6 June, 1925, and is the only child and heir of Arsemus Chandler, deceased; that defendant has administered the estate, and there remains in his hands for distribution a certain amount of money; and that he, the plaintiff, as the sole distributee of the estate, is entitled to have defendant pay same to him.

Defendant, answering, either admits, or does not deny the material allegations of the complaint except the allegation that plaintiff was born of the marriage between Arsemus Chandler and Della Fender Hensley, and is the only child and heir of Arsemus Chandler,—which are denied.

Defendant, then, sets up a "further answer and defense." In the first three paragraphs thereof it is averred, summarily stated, that Arsemus Chandler died intestate on 9 June, 1949, a resident of Madison County, and that certain named brothers and sisters of him left surviving contend that they are his only heirs at law, "all of whom are entitled to share in the estate . . . and no other person or persons are so entitled." In a portion of paragraph four and in paragraphs five, six, seven and eight of said "further answer and defense," defendant recites evidentiary matter, relating to the averment that plaintiff is not the child of Arsemus Chandler, and in paragraph nine defendant avers that he is now, and has been at all times ready to make distribution of the assets of the estate to the legal and lawful heirs of Arsemus Chandler for the termination of which he prays that an issue be submitted to the jury, etc.

Plaintiff, in apt time, moved to strike from the "further answer and defense" set up by defendant, certain portion of paragraph four, and all of paragraphs five, six, seven and eight for that same are irrelevant, immaterial and improper, and would be prejudicial to plaintiff if allowed to stand as now appear in the "further answer and defense."

Upon hearing thereon, the judge presiding allowed the motion to strike certain clauses in paragraphs five, six and eight, but denied it as to all other parts to which the motion relates.

Plaintiff excepted, and appeals to Supreme Court and assigns error.

J. M. Baley, Jr., for plaintiff, appellant.

Carl R. Stuart for defendant, appellee.

WINBORNE, J. The only assignment of error presented on the appeal is, by the terms of the brief of plaintiff filed in this Court, confined to the refusal of the court to strike out paragraphs five, six, seven and eight of defendant's "further answer and defense."

As so confined, the exception thereto on which the assignment is based is well taken.

The answer of a defendant must contain (1) a general or specific denial of each material allegation of the complaint controverted by the defendant, and (2) a statement of any "new matter constituting a defense or counter-claim." G.S. 1-135, formerly C.S. 519.

The plea of denial controverts and raises an issue of fact between the parties as to each material allegation denied, and forces the plaintiff to prove them. That is all that is required of the defendant to admit of presentation of his defense. McIntosh N. C. P. & P. 461. In such case the defendant may show any facts which go to deny the existence of the controverted facts. *Brown v. Hall,* 226 N.C. 732, 40 S.E. 2d 412. Hence, averments narrating evidence which defendant contends sustains his

denial of the controverted facts are irrelevant as pleading, and have no place in the answer.

And upon motion of any party aggrieved, aptly made, the court may strike out irrelevant or redundant matter inserted in a pleading. G.S. 1-153. *Revis v. Asheville,* 207 N.C. 237, 176 S.E. 738.

Applying these principles to case in hand the answer of defendant, denying the allegation of the complaint that plaintiff was born of the marriage between Arsemus Chandler and Della Fender Hensley, raises an issue of fact, forcing plaintiff to proof of the fact alleged in his complaint. This is all that is required of defendant to admit of presentation of his defense under appropriate rules of evidence. Therefore, the narration of the evidential matters contained in paragraphs five, six, seven and eight of defendant's "further answer and defense" is irrelevant, and, upon motion aptly made should be stricken. This does not render incompetent any competent evidence recited in these paragraphs of the answer, if and when offered by defendant, relevant to issue involved.

For causes stated, the judgment below is

Reversed.

WALTER LEE GIBBS v. STANLEY ARMSTRONG.

(Filed 28 February, 1951.)

1. **Appeal and Error § 39e—**

Exception to the admission of evidence cannot be sustained when it appears that testimony of the same import was thereafter admitted without objection.

2. **Same—**

The exclusion of evidence will not be held for reversible error when it does not appear what the testimony of the witness would have been.

3. **Appeal and Error § 39f—**

Exception to the charge will not be sustained when the charge construed contextually is without substantial error.

APPEAL by defendant from *Godwin, Special Judge,* October Term, 1950, of HYDE. No error.

This was an action to recover possession of a cow alleged to be wrongfully detained by the defendant. There was verdict that plaintiff was the owner and entitled to the possession of the described cow, and from judgment in accord therewith defendant appealed.

Geo. T. Davis for plaintiff, appellee.

LeRoy Scott and O. L. Williams for defendant, appellant.

DEVIN, J. According to plaintiff's testimony the cow now in suit was born in 1945 of a cow belonging to the plaintiff, and at four months was marked with "an over-square both ears and under-bit right ear." This mark or brand had been duly registered under G.S. 80-47. In 1947 the cow now two years old was impounded damage feasant on the premises of Willie J. Spencer, and plaintiff notified. In consequence plaintiff en route to recover the cow discovered that the defendant Armstrong had already taken possession of the cow, claiming it as his own. Plaintiff testified that on examination he recognized the cow as his and found the marks he had originally put on her.

The defendant on the other hand testified the cow was his, that he had raised it from a calf, and that it had disappeared from his premises in October, 1946. He testified the next time he saw the cow it was at Willie J. Spencer's in December, 1947, and that he identified her by a cut place on her leg, a birthmark on her side and on one udder, and by her color. When the cow disappeared in 1946 it was marked on the ear with a "hog ring," and there were then no marks on the upper part of the ear. The defendant identified the cow as his. There was other testimony for plaintiff and defendant tending to support the rival contentions.

It is apparent that a clear cut issue of fact was raised by the testimony as to the ownership of the cow. The jury, after hearing all the evidence, decided in favor of the plaintiff, and we are not disposed to overrule their decision.

The defendant noted exception to the testimony of the plaintiff that Willie J. Spencer had sent him word he had one of his cows. However, it appears that Willie J. Spencer testified without objection that he had sent word to the plaintiff to this effect and to come and get his cow. So it would seem no harmful result to the defendant may be predicated on the court's ruling. *Hobbs v. Coach Co.*, 225 N.C. 323 (331), 34 S.E. 2d 311; *S. v. Oxendine*, 224 N.C. 825 (828), 32 S.E. 2d 648. Other exceptions to the testimony noted by defendant related to unanswered questions (*S. v. Utley*, 223 N.C. 39 (45), 25 S.E. 2d 195), or were immaterial. *Collins v. Lamb*, 215 N.C. 719, 2 S.E. 2d 863.

Defendant also assigns error in the court's charge to the jury for that the court failed to define correctly the term greater weight of the evidence, but, on examination of the charge as a whole and considering it contextually, we discover no substantial error therein in this respect.

In the trial we find

No error.

MRS. KATHERINE DEWEESE v. BELK'S DEPARTMENT STORE.

(Filed 28 February, 1951.)

Appeal and Error § 29b—

Appellant may not complain of alleged error relating to an issue answered in his favor.

APPEAL by plaintiff from *Rousseau, J.*, at Regular December Term, 1950, of BUNCOMBE.

Civil action to recover damages for personal injury allegedly sustained by plaintiff in fall down steps in store of defendant in the city of Asheville, N. C., as result of actionable negligence of defendant.

Defendant, answering, denies the material allegations of the complaint, and for further answer and defense, avers that plaintiff's fall was proximately caused by her own negligence in manner set forth.

On the trial both parties offered evidence and the case was submitted to the jury on issues pertaining to (1) the alleged negligence of defendant, (2) the alleged contributory negligence of plaintiff, and (3) damages. The jury answered each of the first two issues in the affirmative. Thereupon the court entered judgment that plaintiff take nothing by her action, etc.

Plaintiff appeals therefrom to Supreme Court and assigns error.

I. C. Crawford and Don C. Young for plaintiff, appellant.

Smathers & Meekins for defendant, appellee.

PER CURIAM. The assignments of error presented on this appeal relate to matters of evidence bearing on the first issue. Since the jury answered this issue in favor of plaintiff, assignment of error based upon exception by plaintiff to the admission, or to exclusion of evidence bearing thereon, is not tenable. Hence, in the judgment below, there is

No error.

STATE v. CHARLIE GIBBS.

(Filed 28 February, 1951.)

APPEAL by defendant from *Halstead, Special Judge,* September Term, 1950, of BEAUFORT.

Criminal prosecution tried in the Superior Court, on appeal from Recorder's Court, upon warrant charging defendant with aiding and

abetting in the unlawful possession and transportation of intoxicating nontax-paid whiskey.

Verdict: Guilty as charged in the warrant.

Judgment: Pronounced.

Defendant appeals to Supreme Court, assigning errors.

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

LeRoy Scott and H. S. Ward for defendant, appellant.

PER CURIAM. Due consideration has been given to all assignments of error presented by the defendant on this appeal, and cause for disturbing the judgment below is not made to appear. Therefore we find

No error.

HAROLD WATTS, A MINOR, BY HIS NEXT FRIEND, FRANK L. WATTS, v. CHARLES R. CARTEE AND BLUE BIRD TAXI COMPANY OF ASHEVILLE, INC.

(Filed 28 February, 1951.)

APPEAL by defendants from *Patton, Special Judge,* August Term, 1950, of BUNCOMBE. No error.

This was an action to recover damages for a personal injury alleged to have been caused by the negligence of the defendants.

The evidence tended to show that on the night of 11 July, 1949, the plaintiff, then thirteen years of age, was riding a bicycle traveling east on Haywood Road in the City of Asheville when and where he was struck and injured by a taxicab traveling in the opposite direction, the cab belonging to defendant Taxi Company and being driven by defendant Cartee, an employee of his codefendant. There was verdict and judgment for plaintiff, and defendants appealed.

Horton & Horton and Joseph B. Huff for plaintiff, appellee.

Smathers & Meekins for defendants, appellants.

PER CURIAM. The only assignment of error brought forward by the defendants' appeal is the refusal of the court to allow their motion for judgment of nonsuit. An examination of the evidence shown by the record leads us to the conclusion that it was sufficient to withstand a motion for nonsuit, and that the case was properly submitted to the jury.

In the trial we find

No error.

DEWEY DAVIS, ADMINISTRATOR OF THE ESTATE OF A. S. DAVIS, DECEASED, v. J. M. RADFORD, DOING BUSINESS AS RADFORD'S DRUG STORE; DR. T. C. SMITH COMPANY AND FOSTER MILBURN COMPANY.

(Filed 7 March, 1951.)

1. Food § 8—

A retailer who sells an article for use in connection with food for human consumption *is held* in law to have impliedly warranted that it is wholesome and fit for that purpose.

2. Food § 4—

A distributor of an article for use in connection with food for human consumption, which is resold in the original package by the retailer, may be held liable by the consumer for breach of implied warranty that the product is wholesome and fit for human consumption, even though there is no privity of contract between them.

3. Food § 14—

Where a retailer has paid a judgment in favor of the consumer for breach of implied warranty that a product, sold in the original container, is wholesome and fit for human consumption, the retailer may recover his loss against the distributor for breach of this warranty.

4. Food § 17—

A retailer, sued by a customer for breach of implied warranty that the product, sold in the original package, is wholesome and fit for human consumption, is not required to wait until he has suffered loss before having the wholesaler or distributor joined as codefendant upon allegation that the wholesaler or distributor is primarily liable upon the warranty.

5. Pleadings § 10—

Where a retailer of an article, sold in the original package for use in connection with food, is sued for breach of implied warranty that the product is wholesome and fit for human consumption, he may have his distributor joined as a codefendant and file cross-action against the distributor on the ground that the distributor had impliedly warranted to it that the article was fit for human consumption and that the distributor is primarily liable for injury resulting from breach of this warranty, since the cross-action relates to plaintiff's claim and is based upon an adjustment of that claim, and the defendants are entitled to have their ultimate rights as between themselves determined in the one action, G.S. 1-222.

APPEAL by defendant Dr. T. C. Smith Company, from *Rousseau, J.*, December Term, 1950, of BUNCOMBE. Affirmed.

Plaintiff sued defendant Radford, a retail druggist in Asheville, for damages for breach of implied warranty of wholesomeness in the sale to his intestate of an article for human consumption known as "Westsal," which it was alleged contained poisonous ingredients and which caused the injury and death of the intestate.

Defendant Radford filed answer in which he denied the sale of the article complained of to plaintiff's intestate, or that there had been a breach of warranty, or that the death of plaintiff's intestate was due to the use of Westsal. However, in his further answer defendant Radford alleged he had purchased the patented bottled product known as Westsal, a salt substitute, from Dr. T. C. Smith Company, wholesale druggists in Asheville handling this product, with implied warranty that it was suitable for human consumption and manufactured and sold in compliance with the laws of the United States and the State of North Carolina, and that said Smith Company was primarily liable for any damages plaintiff might recover from defendant Radford, and prayed that Dr. T. C. Smith Company be made party to the action. Similar allegations were made as to Foster Milburn Company, a New York corporation, manufacturer of Westsal, but no service was had on that corporation, and on motion it was dismissed.

Defendant Dr. T. C. Smith Company, having been by order duly made party defendant and served with summons, demurred to the answer and cross-complaint of defendant Radford, for that it did not state facts sufficient to constitute a cause of action against the demurring defendant in that it was not alleged that defendant Radford had sustained any loss or damage, nor was it alleged that there was any deleterious substance in the package alleged to have been sold by Dr. T. C. Smith Company to defendant Radford, or that there was any breach of implied warranty on the part of the demurring defendant, and that there was a misjoinder of parties and causes of action.

The demurrer was overruled and defendant Smith Company appealed.

Francis J. Heazel and Harkins, Van Winkle, Walton & Buck for plaintiff, appellee.

Smathers & Meekins for defendant, appellant.

DEVIN, J. The appeal is from a judgment in the court below overruling the demurrer of defendant Dr. T. C. Smith Company to the answer and cross-complaint of defendant Radford. Briefly stated, the pleadings present this picture: Defendant Radford, a retail merchant, having been sued by a customer for breach of the implied warranty of wholesomeness and consequent damage in the sale of an article for human consumption, known as "Westsal," has had Dr. T. C. Smith Company (hereinafter referred to as Smith Company), a wholesale dealer, made party defendant (*Ins. Co. v. Motor Lines*, 225 N.C. 588, 35 S.E. 2d 879), upon allegations in his answer that defendant Smith Company sold him the article complained of in a sealed package or bottle with implied warranty that it was fit for human consumption and that, if it be adjudicated in this action

that defendant Radford is liable to the plaintiff for breach of warranty, defendant Smith Company is primarily liable therefor, and defendant Radford would be entitled to recover over against defendant Smith Company for the loss sustained, and that all matters affecting both defendants growing out of the same transaction should be settled in one action.

The question here presented is whether a retail dealer when sued by a customer for breach of the implied warranty of wholesomeness in an article sold in sealed package, has the right to bring in the wholesale dealer from whom he purchased, on allegation that the wholesaler impliedly warranted to the retailer that the article was fit for human consumption, and was primarily liable for injury resulting.

It may be noted that the only person whom plaintiff has sued is Radford, though he has offered no objection to the order making Smith Company party defendant. Both the plaintiff's complaint and defendant Radford's cross-complaint are bottomed upon allegations of implied warranty. It is not contended that defendants were joint tort-feasors, or that there was a joint obligation on part of defendants. But it is contended by defendant Radford that sufficient facts are alleged in his answer considered in connection with the complaint to sustain the action of the court in bringing in the wholesale dealer from whom he purchased the product complained of as one primarily liable for any injury resulting from its use for human consumption, and sufficient to survive the demurrer. The only objection offered by Smith Company is by way of demurrer questioning the sufficiency of the allegations in Radford's answer to state a cause of action against it.

A person who sells an article for use in connection with food for human consumption is held in law to have impliedly warranted that it is wholesome and fit for that purpose, and for breach of that warranty proximately resulting in injury may be held liable in damages to the purchaser. *Ward v. Seafood Co.*, 171 N.C. 33, 87 S.E. 958; *Rabb v. Covington*, 215 N.C. 572, 2 S.E. 2d 705; *Williams v. Elson*, 218 N.C. 157, 10 S.E. 2d 668. However, in *Thomason v. Ballard*, 208 N.C. 1, 179 S.E. 30, it was held that for an injury from unwholesome food purchased from a retail merchant the manufacturer could not be held liable for breach of implied warranty but only on proof of negligence, for the reason that there was no contractual relation between the manufacturer and the consumer to which implied warranty with respect to food could attach. *Enloe v. Bottling Co.*, 208 N.C. 305, 180 S.E. 582; *Caudle v. Tobacco Co.*, 220 N.C. 105, 16 S.E. 2d 680. But this rule was somewhat modified in *Simpson v. Oil Co.*, 217 N.C. 542, 8 S.E. 2d 813, where it was said that when an article sold in original package carried a label giving assurance it was suitable for the purpose as an insecticide and harmless to human skin, this would constitute a warranty on the part of manufacturer and

distributor "running with the product into the hands of the consumer for whom it was intended." *Potter v. Supply Co.*, 230 N.C. 1 (7), 51 S.E. 2d 908. In case of sale of goods for human consumption the requirement of privity of contract is not always controlling. 55 C.J. 669.

Under the decision in *Simpson v. Oil Co., supra*, it would seem that the plaintiff here could have maintained an action against Smith Company, the distributor, for the cause set out in his complaint, though he has elected to sue only the retail dealer. Furthermore, the principle has also been established by the decisions of this Court that where the wholesaler has sold to a retail dealer for resale personal property with implied warranty of fitness for the use for which it was purchased and sold, and the retail dealer has sold to a customer with same warranty, and for breach of this warranty been by judgment compelled to pay, the retail dealer may thereafter in turn maintain action against the wholesaler for the entire loss sustained. *Aldridge Motors, Inc., v. Alexander*, 217 N.C. 750, 9 S.E. 2d 469; *Ashford v. Shrader*, 167 N.C. 45, 83 S.E. 29. The rule is stated in Williston on Contracts, sec. 1355, as follows: "Where goods are sold with a warranty to a dealer it must be assumed that the dealer may resell them with a similar warranty to a subpurchaser. Accordingly, if this is done, and the subpurchaser recovers damages from the original buyer, the latter has a *prima facie* right to recover these damages against the seller who originally sold him the goods. And even though the original buyer has not yet been held liable to his vendee the amount of his probable liability may be recovered from the original seller."

In *Stokes v. Edwards*, 230 N.C. 306, 52 S.E. 2d 797, the plaintiffs, retail dealers, purchased from wholesale dealers and manufacturers 14 oil burners for curing tobacco with implied warranty of fitness for that purpose. These burners were sold to plaintiffs' customers with same warranty and proved unfit. Plaintiffs refunded to their customers and sued the wholesalers and manufacturers for the full amount. Recovery was sustained, this Court holding that the original sellers having impliedly warranted that the goods were reasonably fit for the contemplated purpose were liable to the buyers for the damages proximately resulting to them from the breach of the warranty, and *Justice Ervin*, speaking for the Court, added: "This is true even though the seller is not the manufacturer or producer of the goods, and even though the buyer is a dealer who purchases the goods for resale to others for the contemplated use."

So, in the case at bar it would seem to follow logically that if defendant Radford had personally suffered by reason of the breach of Smith Company's warranty, he could have recovered the loss from Smith Company, and if he should suffer loss by reason of recovery of damages against

him by one to whom he sold with same warranty he could recover the entire amount sustained from Smith Company. In other words, where the distributor or wholesale dealer sells to the retail dealer articles in original packages for human consumption with warranty of wholesomeness and the retail dealer sells under the same warranty to a customer, for the injury resulting the retail dealer may properly charge the wholesaler with primary liability for the loss sustained. When sued by the customer under these circumstances may the retail dealer join the wholesaler in the suit upon allegations in the answer of primary liability of the wholesaler in the event of recovery by the customer?

We are of opinion that such a plea is sufficient to survive a demurrer.

The right to maintain cross-actions between defendants who have been sued for a joint tort or on a joint obligation to establish primary liability as between themselves in the event of plaintiff's recovery has been generally upheld. The statute G.S. 1-240 authorizes joinder of a third party as a joint tort-feasor for the purpose of enforcing contribution, but before that statute was enacted (1929), it was settled law that a third party could be brought in on allegation of primary liability. *Gregg v. Wilmington,* 155 N.C. 18, 70 S.E. 1070; *Guthrie v. Durham,* 168 N.C. 573, 84 S.E. 859; *Bowman v. Greensboro,* 190 N.C. 611, 130 S.E. 502. "The question of primary and secondary liability is for the offending parties to adjust between themselves." *Dillon v. Raleigh,* 124 N.C. 184 (187), 32 S.E. 548. And the same rule, we think, is applicable where there is allegation in the answer against a codefendant of primary liability for breach of warranty in the sale of products for human consumption.

The right to maintain a cross-action against a codefendant is subject to the rule stated in *Montgomery v. Blades,* 217 N.C. 654, 9 S.E. 2d 397, that the cross-action must be "founded upon and connected with the subject matter in litigation between the plaintiff and the defendant." It must be in reference to the claim made by the plaintiff and based upon an adjustment of that claim. *Schnepp v. Richardson,* 222 N.C. 228, 22 S.E. 2d 555; *Coulter v. Wilson,* 171 N.C. 537, 88 S.E. 857. The policy of determining in one action all matters connected with the subject of the action common to the several parties has been frequently stated, and the statute G.S. 1-222 contains the provision that the judgment "may determine the ultimate rights of the parties on each side as between themselves."

The question here presented is not without difficulty. There are several cases cited by appellant on this point which require consideration.

In *Winders v. Southerland,* 174 N.C. 235, 93 S.E. 726, the plaintiff having been ousted sued his grantor Southerland for breach of warranty of title and seizin, and joined also Smith who had conveyed to Souther-

land with same warranty. Demurrer for misjoinder was overruled, the Court holding defendants were properly joined. It was said, however, that Southerland could not have sued Smith until he had sustained loss. But it may be noted that if Southerland had been sued on his warranty, he could have called on Smith, his grantor, to defend on the latter's warranty to him. We think the decision in this case is not controlling on the facts in the case at bar.

In *Cavarnos-Wright Co. v. Blythe Bros. Co. and others,* 217 N.C. 583, 8 S.E. 2d 924, the City of High Point having been sued by a property owner for damages caused by excavations incident to constructing a railroad underpass, moved that the State Highway & Public Works Commission and the surety on its contractor's bond be made parties. It appeared that the City had employed Blythe Bros. Co. to do the excavating, and the State Highway & Public Works Commission, for other work it had agreed to do, had employed Guion & Co. as its contractor. Both Blythe Bros. Co. and Guion & Co. were original parties defendant. The motion to make the Surety Company party was denied, and affirmed here on authority of *Lumber Co. v. Lawson,* 195 N.C. 840, 143 S.E. 847, in view of the nature of the bond of a contractor employed by the Highway Commission. It was further stated in the opinion that the City had no claim against the Highway Commission's contractor "until and unless liability is established and issue as to primary and secondary liability be answered in favor of the appellant (City)." The question presented for review in that case was the propriety of the ruling that the surety on the bond of the contractor employed by the Highway Commission was not a necessary or proper party to the action. Guion & Co. was already a party and the right of the City to raise and determine the question of primary and secondary liability between it and Guion & Co. was not doubted, but the surety on Guion & Co.'s bond was not a necessary party to the determination of that question.

In *Board of Education v. Deitrick,* 221 N.C. 38, 18 S.E. 2d 704, plaintiff brought suit to recover damages from the contractor whom it had employed to construct a building, on the ground of fraudulent concealment of defective lumber. The defendant denied the fraud and alleged he had purchased the lumber from a dealer who in turn had fraudulently concealed from him the condition of the lumber, and moved that the dealer be made party defendant. The denial of this motion was affirmed on the ground that there was no privity between plaintiff and the dealer, and that the dealer did not participate in the fraud alleged to have been committed by the defendant, and was in no sense a joint tort-feasor.

Walker v. Packing Co., 220 N.C. 158, 16 S.E. 2d 668, was a suit by dealer-consumer to recover damages for unwholesome lard from the manufacturer-vendor on ground both of negligence and breach of implied

warranty. It was held the evidence was insufficient to sustain a cause of action for negligence, and plaintiff's right to maintain action for breach of warranty was upheld.

In *Schnepp v. Richardson,* 222 N.C. 228, 22 S.E. 2d 555, the plaintiff, a subcontractor, employed by Blackwelder, the principal contractor, sued the owners for labor and materials furnished. Defendants alleged Fisher was the contractor and not Blackwelder, and on their motion Fisher was made party. Fisher demurred for misjoinder, and the demurrer was sustained and the ruling affirmed here. It was said in the opinion by *Justice Barnhill,* "The cross-action defendants seek to set up against Fisher is not germane to, founded upon or necessarily connected with the subject of litigation between plaintiff and defendants. . . ."

It will be observed that the distinction between these cases and the case at bar is that here there is allegation by the retail dealer in his answer that he purchased in sealed containers from the wholesale dealer or distributor articles for human consumption under warranty of wholesomeness, and that he sold to the consumer with same warranty, and that the liability of the wholesale dealer for injury resulting from breach of this warranty was primary. And, further, it may be observed that since the retail dealer Radford, if found liable, could recover the loss from the wholesaler Smith Company, it would appear that Smith Company had such an interest in the litigation between plaintiff and defendant Radford that it would gain or lose as result of the judgment in plaintiff's suit against Radford. *Mullen v. Louisburg,* 225 N.C. 53, 33 S.E. 2d 484; *Griffin & Vose, Inc., v. Minerals Corp.,* 225 N.C. 434, 35 S.E. 2d 247.

For the reasons stated the demurrer on the ground of misjoinder of parties and causes of action was properly overruled.

We conclude that the allegations in the defendant Radford's further answer are sufficient to withstand the demurrer, and the judgment below is

Affirmed.

J. D. HODGES v. THE HOME INSURANCE COMPANY OF NEW YORK.

(Filed 7 March, 1951.)

1. Limitation of Actions § 11—

Where action begun prior to the bar of the applicable statute of limitations is dismissed for want of service of process on the defendant, a second action on the same cause of action commenced within twelve months after the dismissal, but after the expiration of the statutory limitation, is barred. G.S. 1-25.

2. Same: Actions § 10—

Where plaintiff, who has commenced his action prior to the bar of the statute of limitations, fails to obtain valid service upon defendant, he is required to sue out *alias* or *pluries* summons if he desires to prevent a discontinuance. G.S. 1-95.

3. Same—

While an action is commenced by the issuance of summons, G.S. 1-88, defendant's rights are unaffected by the pendency of the action *in personam* until he is brought into court by proper service of process or acceptance of service or general appearance.

APPEAL by plaintiff from *Morris, J.*, January Term, 1951, BEAUFORT.

Civil action to recover on a fire insurance policy heard on demurrer to the complaint.

On 21 April 1948 defendant issued and delivered to plaintiff a policy of insurance in the sum of $2,000, insuring plaintiff against loss of or damage to a certain building and fixtures by fire. On 4 June 1948 the insured property was totally destroyed by fire. On 3 May 1949 plaintiff instituted an action on said policy in the Superior Court of Beaufort County. Summons was issued and sent directly to the Commissioner of Insurance who accepted service thereof and forwarded a copy to defendant, a nonresident corporation. On 1 June 1949 defendant made a special appearance and moved to dismiss the action for want of service of the summons. At the February Term 1950, the court, upon hearing the motion, concluded there had been a valid service of process or acceptance thereof and overruled the motion. On appeal to this Court we reversed. *Hodges v. Insurance Co.*, 232 N.C. 475. Opinion therein was certified 11 October 1950.

Thereafter, on 11 November 1950, plaintiff sued out a summons in this cause which was duly served. At the same time he filed his complaint in which all the foregoing material dates were set forth.

Defendant appeared and demurred for that the complaint fails to state facts sufficient to constitute a cause of action in that it affirmatively appears said action was instituted more than twelve months after the inception of the loss and is therefore barred by the provisions of G.S. 58-177, which provision appears in the policy sued upon as one of the conditions of liability. The demurrer was sustained and plaintiff appealed.

D. D. Topping, W. B. Carter, and H. S. Ward for plaintiff appellant.

Rodman & Rodman for defendant appellee.

BARNHILL, J. Where an action is instituted within the time prescribed by the pertinent statute of limitations and is thereafter dismissed for

want of service of the summons therein, may the plaintiff maintain an action on the same cause of action when summons therein was issued after the lapse of the statutory period but within twelve months after the dismissal of the original action for want of jurisdiction of the parties? This is the question posed for decision.

Plaintiff relies on G.S. 1-25 and former decisions of this Court applying the same to fact situations he contends are sufficiently identical to render them controlling here. But the history of this statute is such that former decisions of this Court cannot be properly appraised without reference to the exact content of the statute at the time the decision was rendered.

At common law, suits frequently abated for matter of form. In such cases plaintiff was allowed a reasonable time within which to sue out a new writ. This time was theoretically computed with reference to the number of days which the parties must spend in journeying to the court: hence the name "journey's account." Such renewed suit was but a continuance of that which had abated and of necessity was in the same court, against the same parties, and for the same cause of action. *Bradshaw v. Bank,* 172 N.C. 632, 90 S.E. 789. This in substance is now our discontinuance statute, G.S. 1-95.

Likewise, in the early period of our history, it was thought wise to make provision to protect a litigant who has been diligent to institute his action within the statutory period but whose cause, through no fault of his own, has been terminated after the statutory period has expired for matter of form not involving the merits. The two rules were incorporated in one statute in the Acts of 1715.

Chap. 2 of said Acts prescribes certain limitations of actions. Sec. 6 thereof is in the form of a proviso as follows: "6. *Provided nevertheless, and it is hereby further enacted,* That if on any the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill; or if any of the said actions shall be brought by original writ, and the defendant cannot be attached or legally served with process, that in all such cases, the party plaintiff . . . may commence a new action or suit, from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or till the defendant can be attached or served with process, so as to compel him to appear and answer." See 1 Potter's Laws of North Carolina 1819, p. 98.

This proviso is brought forward in the Revised Statutes of 1836 substantially as originally enacted. However, in the Code of Civil Procedure of 1868 it was divided into two sections. One relates exclusively

to actions in which real property is the subject matter of the suit. C.C.P. s. 21. The other provides: "If an action shall be commenced within the time prescribed therefor, and the plaintiff be nonsuited, or a judgment therein be reversed on appeal, or be arrested, the plaintiff . . . may commence a new action within one year after such nonsuit, reversal, or arrest of judgment." C.C.P. s. 45. These two sections are brought forward in the Code of 1883, ss. 142 and 166. In the Revisal of 1905 the two sections were consolidated so as to apply to all actions, Rev. s. 370, and have been brought forward in subsequent codifications as then written. G.S. 1-25.

It is to be noted, therefore, that the Legislature, in enacting the Code of Civil Procedure of 1868, deleted and declined to re-enact that part of the original statute which permitted a new suit within twelve months if the defendant could not be served with process in the original action.

We have held that the statute applies when the original action is dismissed for want of jurisdiction of the subject matter, *Straus v. Beardsley,* 79 N.C. 59; *Dalton v. Webster,* 82 N.C. 279, or where the complaint in the original action fails to state a cause of action. *Webb v. Hicks,* 123 N.C. 244. But the statute has not been applied when the process in the original action was not served and the action was dismissed for want of jurisdiction of the parties. When the original summons is not served, the plaintiff's remedy rests in the provisions of our discontinuance statute. G.S. 1-95.

The decision in this jurisdiction more nearly in point, rendered since the adoption of the Code of Civil Procedure, is *Etheridge v. Woodley,* 83 N.C. 12. In that case the original summons was not served. Plaintiff, as here, failed to keep his action alive by the issuance of *alias* and *pluries* summonses. A new summons was issued and served after the statutory period had expired. The action was barred unless the limitation statute was suspended by the "new action" statute. The Court held that (1) the failure of the plaintiff to sue out *alias* and *pluries* summonses worked a discontinuance of the original action; (2) the summons actually served after the discontinuance constituted a new action; and (3) the new action having been instituted after the period of limitation had expired, the statutory bar prevailed and defeated the action. See also *Hatch v. R. R.,* 183 N.C. 617, 112 S.E. 529.

But the plaintiff cites and relies on *Harris v. Davenport,* 132 N.C. 697, in which the Court said: "The action was dismissed for want of jurisdiction of the parties, and that has been held as a nonsuit of the plaintiff under section 166 of The Code. *Straus v. Beardsley,* 79 N.C. 59, *Dalton v. Webster,* 82 N.C. 279." They also cited *Blades v. R. R.,* 218 N.C. 702, 12 S.E. 2d 553, in which this statement is quoted.

However, a careful examination of the record in the *Harris case* discloses that the question of the suspension of the statute of limitations by the new action statute, now G.S. 1-25, was not at issue or presented for decision. There an administrator instituted a special proceeding to sell land to make assets to pay claims received and accepted by him. The proceeding was dismissed for want of proper service of process. He instituted a new proceeding within twelve months thereafter. The defendant pleaded the statute of limitations. The Court applied the rule that the filing with and acceptance of a claim by an administrator suspends the running of the statute of limitations. Irrespective of the first action, there was no bar to the right of the administrator to apply for authority to sell land to make assets at any time during the administration and so long as there were unsatisfied claims awaiting settlement. Hence the quoted statement was pure dictum. This is likewise true in the *Blades case.*

Plaintiff likewise cites *Ketterman v. Railroad Co.,* 48 W. Va. 606, and *Meisse v. McCoy's Adm'r.,* 17 Ohio St. Rep. 225. Neither of these cases is in point for the reason that in each the statute under consideration contained a broad catch-all provision not incorporated in our Act. The West Virginia statute, after specifying certain causes of dismissal, adds: "any cause which cannot be plead in bar of the action," and the Ohio statute contains the general provision: "If the plaintiff fail in such action otherwise than upon the merits."

Thus it appears that the Legislature has expressly rejected the dismissal of an action for want of jurisdiction of the parties as a ground for suspending the statute of limitations so as to permit a new action within twelve months after the termination of the original action. The statute as now constituted is specific in its terms. The language "the plaintiff is nonsuited, or a judgment therein reversed on appeal, or is arrested" may not be held to include a dismissal for want of service of process.

An action is commenced by issuing a summons. G.S. 1-88. Even so, in actions *in personam,* jurisdiction of the parties litigant can be acquired only by personal service of summons within the territorial jurisdiction of the court, unless there is an acceptance of service or a general appearance, actual or constructive. Though the action is conceived by the issuance of process, it remains dormant and without vitality until given life by the proper service of process. Until the party defendant is thus brought into court, his rights are unaffected by the pendency of the action. In the absence of a clear declaration of a contrary intent by the Legislature, no other conclusion is permissible.

At the time defendant entered its motion to dismiss the original action, the plaintiff still had more than sixty days in which to sue out an *alias* summons and thus keep his action alive. He elected instead to rest his

case upon the validity of the service had. The unfortunate result is unavoidable.

The judgment below is

Affirmed.

ENO INVESTMENT COMPANY v. PROTECTIVE CHEMICALS LABORATORY, INC.

(Filed 7 March, 1951.)

1. Corporations § 35: Registration § 5c—

The mortgagees in an unregistered mortgage are not entitled to priority as against the assets of the corporate mortgagor in the hands of a receiver. G.S. 47-20.

2. Mortgages § 2c—

Liens of equitable mortgages are ordinarily enforceable only as between the parties and privies.

3. Same: Corporations § 35—

Officers and directors of a corporation who loan it money upon an agreement that the loan should be secured by a mortgage on corporate realty may not assert an equitable lien on the assets of the corporation upon appointment of a receiver before the execution of the mortgage.

4. Appeal and Error § 21—

Where the exceptions and assignments of error are not grouped as required by Rule of Practice in the Supreme Court 19 (3), the appeal may be dismissed.

5. Appeal and Error § 24—

Where there is no exception to an order, and the record does not include a copy of the order, the correctness of the order cannot be reviewed.

6. Appeal and Error § 6b—

Where the court enters an order directing payment by the receiver of a certain item, an exception taken to a subsequent order in the proceedings entered after the claim had been paid under the prior order, is too late to present the correctness of the order of payment.

7. Corporations §§ 7½, 11½—

Where no unfair advantage is taken, stockholders and officers of a corporation may lend it money and take a mortgage on the corporate property as security.

8. Corporations § 35—

Where corporate officers and stockholders have lent the corporation money in good faith, such loans secured by mortgage on the corporate

property are entitled to a preference, and such loans which are not so secured are properly admitted as an unpreferred claim against the receivership estate.

APPEALS by third mortgage claimants J. H. Barnes and others similarly situated from *Harris, J.*, in Chambers, 26 August, 1950; and by claimants Harold T. Sanford and E. C. Bull from *Harris, J.*, in Chambers, 27 March, 1950, and 26 August, 1950. From DURHAM.

Civil action in receivership to liquidate the assets of the defendant corporation for the benefit of creditors.

Much of the original paid-in capital of this corporation was invested in plant and equipment, with a substantial portion being drawn off in salaries and drawing accounts of five executives during the period of ten or eleven months while the plant was being erected, thus resulting in a shortage of working capital when operations were commenced in June, 1948. Within a few months a loan of $35,000 was sought but only $15,000 obtained from a life insurance company on the security of the plant and physical assets of the corporation. Later, and in March, 1949, the business still being hard pressed for funds, a loan of $9,410 was made by a group of individuals, principally stockholders and officers of the corporation. The loan was secured by a second deed of trust on the physical properties of the corporation.

At a joint meeting of the stockholders and directors held on 12 April, 1949, it appeared to be urgently necessary that additional working capital be raised. Accordingly, a resolution was adopted directing that an attempt be made to raise the needed funds, to be "secured by means of a second mortgage . . . to be established by having the noteholders of the present second mortgage surrender their notes to the corporation for cancellation and re-issue of new notes for a new mortgage having an increased principal."

In August, 1949, the committee handling this refinancing program appear to have collected loans of new capital totaling $3,610 from nineteen stockholders. At that time the balance due on the existing second deed of trust was $9,410. A new deed of trust was prepared, dated 17 August, 1949, to Victor S. Bryant, Trustee for the original lenders and also the nineteen stockholders who were putting up the additional money.

Because some of the noteholders under the existing deed of trust refused to surrender their notes and allow the deed of trust to be canceled, the substitute notes and deed of trust could not be used. Thereupon new notes secured by a third deed of trust were prepared for the purpose of securing the stockholders who were making the new loan. These notes and the deed of trust securing them, dated 17 August, 1949, appear to have been only partially executed. They were signed by the secretary but

by no other qualified official of the corporation, and were in that condition, undelivered and unrecorded, when the receiver, J. E. Markham, Esq., was appointed and took possession of the property of the corporation under order of Burney, J., on 3 November, 1949. This group of stockholder-creditors named in the foregoing unrecorded deed of trust are herein referred to as the third mortgage claimants. They filed claim with the receiver asking that their claim be treated as an equitable lien on the real estate and physical properties of the corporation and given priority over the general creditors of the corporation.

Various interlocutory orders were entered under which the real estate, equipment and other property of the corporation were reduced to cash, and on 14 March, 1950, the receiver filed a preliminary report, reciting that pursuant to a former order he had paid the indebtedness secured by the first and second deeds of trust, $14,307.51 and $9,880.50 respectively, and also other costs and charges incident to the management and liquidation of the receivership estate. The receiver in his report also recommended that the $3,610 claim of the third mortgage claimants be denied as a priority but admitted as a common claim against the receivership estate. The third mortgage claimants excepted to the report of the receiver for failure to recognize their claim as an equitable lien upon the real estate and other property of the corporation with priority.

When the receiver's report came on for hearing, Harold T. Sanford and E. C. Bull, former officers and directors of the corporation, each of whom had filed a claim for salary in the amount of $3,400, moved for the appointment of a referee to hear the disputed claims. Judge Harris overruled this motion and by order dated 27 March, 1950, directed that the receiver proceed to hear the disputed claims and submit his findings of fact to the court. The claimants Sanford and Bull excepted to the order.

On 5 May, 1950, the receiver heard evidence on the various contested claims and under date of 30 June, 1950, submitted to the court his report, recommending, among other things, that the claim of the third mortgage claimants totaling $3,610 be denied as a preference but admitted as a common claim. The third mortgage claimants excepted to the report for failure of the receiver to recommend that their claim be treated as a preference; the claimants Sanford and Bull excepted for failure of the receiver to recommend disallowance of the claim of the third mortgage claimants. At this stage the record discloses no dispute as to the validity of the second mortgage claim, which previously had been paid under order of 9 January, 1950, to which no exception appears to have been taken.

By consent and after continuances, the receiver's report was heard before Judge Harris on the foregoing exceptions. Judge Harris found that the partially executed deed of trust dated 17 August, 1949, purport-

ing to secure the claim of the third mortgage claimants amounting to $3,610, "was not and never has been recorded and has no priority over the other general creditors," and that the claim be admitted on a parity with the claims of other general creditors of the corporation.

The third mortgage claimants excepted to the findings of fact and conclusions of law set out in the foregoing order, "for failure of the court to allow their claim as a priority and preference over general creditors." And the claimants Sanford and Bull, asserting that the claim of the third mortgage claimants should have been disallowed as a common claim, excepted to the order for failure to so disallow the claim.

Both groups of claimants, having excepted as herein set out, appealed to this court.

Victor S. Bryant, Robert I. Lipton, and Ralph N. Strayhorn for third mortgage claimants, appellants.

Egbert L. Haywood and John T. Manning for appellants Harold T. Sanford and E. C. Bull.

E. C. Brooks, Jr., for respondent, J. E. Markham, receiver, appellee.

APPEAL OF THIRD MORTGAGE CLAIMANTS.

JOHNSON, J. We find no error in the order of the court below overruling the exception of these claimants to the report of the receiver and adjudging that their claim be accepted and treated as a common, unpreferred claim against the assets of the corporation in the hands of the receiver. If the claim be considered as secured by an unregistered deed of trust, it is entitled to no priority against the receiver. This is so for the reason that by the adjudication of insolvency and the appointment of the receiver, the creditors at large of the corporation, represented by the receiver, became in legal contemplation creditors for a valuable consideration within the meaning of our registration statute, G.S. 47-20, and, therefore, the deed of trust as to the receiver is void. *Observer Co. v. Little,* 175 N.C. 42, 94 S.E. 526; *Manufacturing Co. v. Price,* 195 N.C. 602, 143 S.E. 208; *Acceptance Corporation v. Mayberry,* 195 N.C. 508, p. 512, 142 S.E. 767.

Nor is the position of claimants improved by urging their claim as an equitable lien on the physical properties of the corporation. These liens, frequently resting in parol and usually being based on the doctrine of estoppel and unjust enrichment, while ordinarily enforceable as between parties and privies (*Winborne v. Guy,* 222 N.C. 128, 22 S.E. 2d 220; 53 C.J.S., Liens, section 4, pages 836 and 839), as a general rule are treated as being void as to a receiver representing the general creditors of a receivership estate. *Hood, Comr. of Banks, v. Macclesfield Co.,* 209 N.C. 280, 183 S.E. 404. See also *Finance Corporation v. Hodges,* 230

N.C. 580, 55 S.E. 2d 201; and *Lamb v. Hood, Comr. of Banks,* 205 N.C. 409, 171 S.E. 359. The record here discloses no equities on the side of the third mortgage claimants sufficient to take the case out of the general rule established by the decisions of this Court, which appears to have been correctly applied below by Judge Harris. The appeal of the third mortgage claimants is

Affirmed.

APPEAL BY CLAIMANTS HAROLD T. SANFORD AND E. C. BULL.

JOHNSON, J. The receiver's motion to dismiss the appeal of the claimants Sanford and Bull appears to be well taken. There is no grouping of exceptions or assignments of error as required by Rule 19 (3) of the Rules of Practice in the Supreme Court. *Harrell v. White,* 208 N.C. 409, 181 S.E. 268; *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126. Neither does the record reflect any exception to the order of 9 January, 1950, under which the receiver was directed to pay, and appears to have paid, the second mortgage claims. Nor does the record include a copy of this order. Hence it cannot be reviewed. *Wiley v. Mining Co.,* 117 N.C. 489, 23 S.E. 448. It appears from the record that the payment of the second mortgage claim was first challenged by the exception of claimants Sanford and Bull to the order of 27 March, 1950, which order was entered after the claim had been paid by the receiver as a second mortgage preference under authority of the previous order of 9 January, 1950. Therefore this delayed exception (which was not brought forward and made the basis of an exceptive assignment of error) on procedural grounds is not entitled to consideration. However, the record indicates that this claim, being supported by a duly registered second deed of trust on the physical properties of the corporation, was properly paid as a preference. And while the exception of the claimants Sanford and Bull to the order of 26 August, 1950, for allowance of the claim of the third mortgage claimants, is not assigned as error, nevertheless a study of the record impels the conclusion that the court below properly admitted the claim as a common, unpreferred claim against the receivership estate. Where no unfair advantage is taken—and none is made to appear here as to either the second or third mortgage claims—there is nothing to hinder stockholders or directors from lending money and taking liens on corporate property as security. *Wall v. Rothrock,* 171 N.C. 388, 88 S.E. 633. On the appeal of claimants Sanford and Bull,

Appeal dismissed.

S. W. ANDERSON AND BRYCE LITTLE, TRUSTEE, v. THOMAS P. MOORE AND WIFE, MARY ANNA MOORE.

(Filed 7 March, 1951.)

1. Mortgages § 17c—

Ordinarily a mortgagee in possession is required to account for the rents and profits he receives from the premises.

2. Mortgages § 16b—

Where the mortgagee is permitted to remain in actual possession as mortgagee for a period of ten years, and no action to foreclose or redeem has been instituted, the right to redeem is barred. G.S. 1-47 (4).

3. Mortgages § 17c—

Where the right to redeem is barred the right to enforce an accounting is likewise barred. G.S. 1-47 (4).

4. Same—

The right of the mortgagor to an accounting of rents and profits by the mortgagee in possession is exclusively equitable, and may be asserted only in a suit to foreclose or to redeem, or in connection with voluntary payment.

5. Same—

The institution of suit to foreclose by the mortgagee in possession tolls G.S. 1-47 (4), and the right of the mortgagor to demand an accounting for the rents and profits is not barred during the pendency of the foreclosure suit.

6. Mortgages § 31g—

Where a decree of foreclosure is entered directing the commissioner appointed to sell the lands, but no further proceedings are had in the matter and no sale held, the foreclosure suit remains pending for the purposes of motions in the cause.

7. Mortgages § 17c: Equity § 3—

Laches will not preclude a mortgagor from demanding an accounting from the mortgagee in possession regardless of the length of time after the entry of decree of foreclosure so long as the foreclosure suit remains pending.

8. Actions § 10—

Rendition of judgment does not terminate an action but the action remains pending until judgment is satisfied, and is open to motion for execution, for recall of execution, to determine proper credits and for other matters relating to the existence of the judgment or the amount due thereon.

9. Mortgages § 17c: Equity § 3—

Where the mortgagee permits decree of foreclosure to remain unexecuted and subject to further orders of the court, his delay precludes him from asserting that the mortgagor is barred by laches from moving for an accounting.

APPEAL by defendants from *Bone, J.*, October-November Term, 1950, of WILSON.

This is an action to foreclose a deed of trust.

The facts pertinent to the appeal are as follows:

1. On 5 June, 1928, the plaintiff S. W. Anderson entered into a written agreement with the defendant Thomas P. Moore for the sale and purchase by the respective parties of the plaintiff's home at No. 1000 West Lee Street, in the Town of Wilson, N. C., for the sum of $7,500.00. It was stipulated in the agreement that the seller, S. W. Anderson, was to mortgage the property to the Carolina Mortgage Company and credit the proceeds on the purchase price. The property was then to be conveyed to the purchaser, Moore, who would execute a second deed of trust, securing the balance of the purchase price to the seller. This contract was carried out in 1928, and the purchaser went into possession.

2. In 1931, the purchaser Moore defaulted in the payments due on the notes secured by both mortgages, whereupon the plaintiff Anderson reentered the premises and has been in possession thereof ever since. The plaintiff Anderson paid off the first mortgage to Carolina Mortgage Company according to its terms.

3. In 1932 the present action was instituted to foreclose the second deed of trust upon the property. Personal service was had upon the defendants as mortgagors. No answer was filed by them and judgment by default final in the sum of $2,350.00 with interest from 24 July, 1931, until paid, was entered by the Clerk of the Superior Court, who also ordered the defendants foreclosed of their equity of redemption in the land if they failed to pay the judgment in thirty days, and appointed a commissioner to sell the mortgaged premises upon such failure and to apply the proceeds to the debt. The cause was retained for other and further orders. Shortly thereafter the commissioner was taken seriously ill. No further proceedings were had in the matter and no sale has been held.

4. The defendants have made no payments upon their indebtedness to the plaintiff Anderson since their default in 1931.

In 1950, however, the defendants filed a motion in the cause for an accounting. The motion was denied. Defendants excepted and appealed to the Supreme Court, assigning error.

F. L. Carr for plaintiff, appellee.

G. L. Parker and R. F. Mintz for defendants, appellants.

DENNY, J. Ordinarily a mortgagee in possession is required to account for the rents and profits he receives from the premises. *Brown v. Daniel*, 219 N.C. 349, 13 S.E. 2d 623; *Mills v. Loan Asso.*, 216 N.C. 664, 6 S.E.

2d 549; *Fleming v. Land Bank,* 215 N.C. 414, 2 S.E. 2d 3; *Kistler v. Development Co.,* 214 N.C. 630, 200 S.E. 400; *Crews v. Crews,* 192 N.C. 679, 135 S.E. 784; *Weathersbee v. Goodwin,* 175 N.C. 234, 95 S.E. 491; *Green v. Rodman,* 150 N.C. 176, 63 S.E. 732; Glenn on Mortgages, Vol. II, Sec. 206, p. 1033; Jones on Mortgages (8th Ed.), Vol. II, Sec. 1425, 59 C.J.S., Mortgages, Sec. 856 (a), p. 1657, and Sec. 857 (b), p. 1664; 36 Am. Jur., Mortgages, Sec. 306, p. 843. If, however, he is permitted to remain in actual possession of such premises, as mortgagee, for a period of ten years and the mortgage debt has not been paid and no action to foreclose or redeem has been instituted in the meantime, title to the premises will be deemed to be in him, and the ten-year statute of limitations, G.S. 1-47 (4), if properly pleaded and relied upon, will be a complete defense to an action to redeem. *Hughes v. Oliver* and *Oliver v. Hughes,* 228 N.C. 680, 47 S.E. 2d 6; *Crews v. Crews, supra; Bernhardt v. Hagamon,* 144 N.C. 526, 57 S.E. 222; *Frederick v. Williams,* 103 N.C. 189, 9 S.E. 298. And when the right to redeem is barred by the statute of limitations, G.S. 1-47 (4), the right to enforce an accounting is likewise barred.

Moreover, the right of the mortgagor to "an account of the rents and profits of the land received by the mortgagee is purely and exclusively of equitable cognizance. At law he cannot be made to account. The mortgagor has a right of redemption only in equity, and the right to account is only an incident to this." Jones on Mortgages (8th Ed.), Vol. II, Sec. 1426, p. 913.

"The rule, then, is that the mortgagee's accountability must be adjudged in a suit to foreclose or a suit to redeem, or in connection with voluntary payment." Glenn on Mortgages, Vol. II, Sec. 206, p. 1035.

The plaintiff Anderson had been in possession of the premises involved herein, as mortgagee, for more than nineteen years, when defendants moved for an accounting. Consequently, any right the defendants may have for an accounting depends on whether the institution of the foreclosure suit by the plaintiffs in 1932, which is still pending, tolled the statute of limitations, G.S. 1-47 (4). That question appears to have been settled adversely to the plaintiff Anderson's position. *Barnhill, J.,* in speaking for the Court in *Insurance Co. v. Knox,* 220 N.C. 725, 18 S.E. 2d 436, with respect to the effect the institution of a foreclosure suit would have on the running of the statute of limitations, said: "The action, once instituted within the 10-year period against all parties having any record interest in the land, suspends the running of the statute of limitations. Neither the parties to the action nor anyone claiming under them can thereafter successfully plead such statute in bar of plaintiff's right to foreclose." And since a mortgagor has the right to redeem, at any time before the sale of the property pledged to secure his debt by paying such

indebtedness, he has a right to an accounting to determine whether or not there is anything due the mortgagee. 36 Am. Jur., Mortgages, Sec. 301, p. 841; Glenn on Mortgages, Vol. II, Sec. 210, p. 1043. If the mortgagee in possession has received sufficient rents and profits to liquidate the indebtedness secured by his mortgage, the mortgagor is entitled to have an entry of satisfaction entered on the judgment of foreclosure, the mortgage or deed of trust canceled, and the premises surrendered to him free and clear of the indebtedness secured thereby.

The appellee Anderson contends, however, that since eighteen years have elapsed since the entry of the judgment of foreclosure, the defendants have been guilty of laches and should not be permitted at this late date to assert a right of redemption by a motion in the cause. This contention is untenable. In the case of *Finance Co. v. Trust Co.*, 213 N.C. 369, 196 S.E. 340, this Court said: "An action in court is not ended by the rendition of a judgment, but in certain respects it is still pending until judgment is satisfied. It is open to motion for execution, for recall of an execution, to determine proper credits and for other matters affecting the existence of the judgment or the amount due thereon." *Land Bank v. Davis*, 215 N.C. 100, 1 S.E. 2d 350; McIntosh, Prac. and Proc., Sec. 991, and cited cases.

Furthermore, the plaintiff Anderson is in no position to raise the question of laches on the part of the defendants. He has been in a position to consummate this foreclosure proceeding at any time after the expiration of thirty days from the entry of the judgment of foreclosure on 19 September, 1932, but has failed and neglected to do so. On the contrary, he has permitted the judgment of foreclosure to remain unexecuted, subject to the further orders of the court, and by reason of his delay he has made the present situation possible. Undoubtedly this delay may well have enhanced the value of the defendants' equity of redemption. However this may be, it has no bearing one way or the other on his duty as mortgagee in possession to account for the rents and profits received by him while he is in possession in such capacity, nor upon the right of the mortgagors to demand an accounting of him.

In view of the conclusion reached herein, we deem it advisable to call attention to the following statement which appears in the opinion in the case of *Oliver v. Hughes, supra:* "The defendants . . . contend that if the plaintiff is entitled to foreclose his deed of trust, as provided in the judgment entered below, he must account for rents and profits while he was in possession of the respective tracts of land. This contention cannot be sustained on this record, for the reason no such relief is sought by them in their pleadings. It will also be noted that these defendants made no tender, nor do they allege a willingness or desire to exercise their right to redeem the lands conveyed in said deed of trust."

Perhaps it should have been pointed out in that opinion that the plaintiff nor his successor in title, who entered into possession of the premises subject to the superior lien, entered into possession thereof as mortgagee under the superior lien which plaintiff was seeking to foreclose, 59 C.J.S., Mortgages, Sec. 856, p. 1659, but entered under the conditions and circumstances as set out in the companion case of *Hughes v. Oliver, supra,* consolidated and tried with the case of *Oliver v. Hughes.* Moreover, the question of rents was litigated in the case of *Hughes v. Oliver* and a judgment therefor obtained pursuant to the provisions of G.S. 1-341. However, reference to the case of *Oliver v. Hughes* is made for the purpose of saying that anything in the opinion therein which might be construed as being in conflict with the general rule with respect to the right of a mortgagor to an accounting by a mortgagee in possession is modified to that extent.

We think on the facts disclosed on the present record, the defendants are entitled to an accounting, and the ruling of the court below to the contrary is

Reversed.

W. R. AIKEN ET AL. v. R. C. ANDREWS ET AL.

(Filed 7 March, 1951.)

1. Vendor and Purchaser § 19b—

Where the vendor makes a deposit on the purchase price under agreement that the balance should be paid upon tender of deed upon completion of the house by a stipulated time, evidence that the vendor complied with his contract and tendered deed on the day specified and demanded payment of the balance of the purchase price, and that such tender was refused, is sufficient to take the case to the jury on vendor's counterclaim for damages resulting from breach of the contract by the purchaser set up in the purchaser's action to recover the advance deposit.

2. Same—

Where deed is to be delivered upon payment of the balance of the purchase price, actual and timely tender of deed by the vendor and demand by him for the balance of the purchase price is necessary to cut off the purchaser's right to treat the contract as still subsisting and entitle the vendor, in event of the purchaser's refusal, to recover the damages suffered by reason of the purchaser's breach.

APPEAL by defendants from *Patton, Special Judge,* August Term, 1950, of BUNCOMBE.

Civil action to recover payment on contract to buy and sell a tract of land or house and lot.

On 8 April, 1949, the defendant, Roy C. Andrews, agreed to sell, and the plaintiff, W. R. Aiken, agreed to buy, a house and lot located on School Road in West Asheville, at and for the price of $17,500, of which $1,000 was paid at the time, and it was stipulated in the agreement that the transaction should be completed on or before 8 May, 1949. The balance of $16,500 was to be paid in cash "at the close of the deal"; and "upon failure (of execution) by the seller within thirty days, the deposit shall be returned to the purchaser." It was further provided that the house should be complete "with screens and storm sash for all windows, screen doors, window shades," etc., so as to close the deal within the stipulated time.

On Monday, 9 May, 1949 (the 8th day being Sunday), the defendants tendered the purchaser warranty deed to the property, duly executed, and demanded payment of balance of purchase price. This was declined, without reason assigned therefor, the plaintiff simply saying, "I won't accept it." The next day, defendant's lawyer called Dr. Aiken on the telephone and asked him if he were going through with the deal. His reply was, "see Mr. Loftin, talk to him." He says, "I immediately called Mr. Loftin, and he told me that Dr. Aiken was not going through with it."

The defendant then put the property in the hands of a real estate agent for sale. For convenience, he conveyed it to Irwin Monk on 13 June, 1949, and on 24 June, 1949, Irwin Monk and wife conveyed the property to Vernon R. Cheek and wife. The defendant received from the Cheeks $17,000, less real estate commissions of $850.00.

The plaintiff sues to recover the advanced payment of $1,000.00. The defendant filed counterclaim of $1,350.00, alleged loss on the transaction—$500.00 on purchase price and $850.00 paid as commissions to broker.

On the hearing, "it was stipulated in open court that the plaintiffs were entitled to recover $1,000.00 of the defendants unless the defendants showed a breach and prevailed on this counterclaim." Whereupon the court ruled that the burden of proof was on the defendants to make good their counterclaim.

At the close of defendants' evidence judgment of nonsuit was entered on the counterclaim. The court thereupon entered judgment in favor of the plaintiffs for $1,000.00.

The defendants appeal, assigning errors.

E. L. Loftin for plaintiffs, appellees.

Don C. Young and Irwin Monk for defendants, appellants.

STACY, C. J. The question for decision is whether the evidence, taken in its most favorable light for the defendants, suffices to overcome the

demurrer and to carry the case to the jury on the counterclaim. The trial court answered in the negative. We are inclined to a different view.

Defendant's testimony is to the effect that he complied with the terms of the written contract in every respect, that is, he completed the house as agreed, duly executed and tendered deed within the time stipulated, and plaintiff declined to accept it or to go through with the deal. This is evidence from which the jury may infer that the plaintiff breached the contract of sale, thus entitling the defendant to treat it at an end and to sue for damages. *Pope v. McPhail,* 173 N.C. 238, 91 S.E. 947. This, the defendant has done, and to minimize his loss he immediately put the property back on the market for sale. Such is his evidence.

It seems the defendant was well advised in timely tendering deed and demanding balance of purchase price, albeit the contract is one of sale and not an option. *Winders v. Kenan,* 161 N.C. 628, 77 S.E. 687. Speaking of its purpose and effect in *Bateman v. Hopkins,* 157 N.C. 470, 73 S.E. 133, *Walker, J.,* with his usual thoroughness, analyzed the authorities and drew from them the following epitome: "Where the stipulations are mutual and dependent—that is, where the deed is to be delivered upon the payment of the price—an actual tender and demand by one party is necessary to put the other in default, and to cut off *his* right to treat the contract as still subsisting." Hence, the effect of the tender and demand was "to cut off the plaintiff's right to treat the contract as still subsisting," or further to insist upon its performance. *Bateman v. Hopkins, supra,* 49 Am. Jur.—Specific Performance 40. This, of course, required the return of the money advanced on the purchase price. However, if the defendant suffered loss by reason of the plaintiff's breach of the contract, he has his action for such loss—here asserted by way of counterclaim, the plaintiff having sued to recover the advanced deposit. 4 Pomeroy's Eq. Jur. (5 Ed.), Sec. 1407a, *loc. cit.* 1052.

The plaintiff may have a different story to tell. There is no debate over the right of plaintiff to recover the advanced payment, if the contract were breached or abandoned by the defendant or mutually rescinded. *Adams v. Beasley,* 174 N.C. 118, 93 S.E. 454. And here, by agreement in open court, "unless the defendants showed a breach and prevailed on this counterclaim."

We refrain from further animadversion, preferring to await the plaintiff's version of the matter.

The counterclaim would seem to be for the jury.

Reversed.

SOPHIE MASON BURCHETT ET AL. v. SIMON MASON ET AL.

(Filed 7 March, 1951.)

1. Wills § 20—

A will is not subject to caveat or collateral attack 27 years after it has been probated in common form, G.S. 31-32; but if the will is void for vagueness and uncertainty it is a nullity and may be attacked directly or collaterally or treated as ineffective, anywhere at any time.

2. Judgments § 27b—

A nullity may be upset by direct or collateral attack, ignored, disregarded or treated as ineffectual anywhere at any time. *Ex nihilo nihil fit.*

3. Estoppel § 3—

By participating in proceedings to sell timber from the lands devised in accordance with the will, the parties are thereafter estopped from attacking the validity of the will.

4. Partition § 4a—

Where, in partition proceedings the respondents plead testacy on the part of their common ancestor, the proceeding will be dismissed when it appears that the will is not a nullity, since petitioners *qua heirs* have no interest in the matter. The will is not before the court for construction in the proceeding, and it is error for the court to remand it to the clerk for partition in accordance with the will.

5. Wills § 3½—

Testator owned but one tract of land and directed that it be divided among the beneficiaries in a stipulated manner. *Held:* The fact that the total acreage owned by testator is a few acres short of the acreage necessary for the division as stipulated, requiring some adjustment in the acreage to be apportioned each of the beneficiaries, does not render the will void.

APPEAL by petitioners from *Parker, J.*, October Term, 1950, of VANCE.

Petition for partition.

Three daughters of Spottswood Mason, late of Vance County, bring this special proceeding to have the land of which their father died seized and possessed, sold and divided among his heirs at law, parties hereto, according to their respective interests.

The respondents plead testacy on the part of their common ancestor, Spottswood Mason, and refer to the paper writing duly probated as his will in 1922, shortly after his death, and in which he devised to his wife "everything I have" for and during her natural life, remainder for life only in specific designated acreages to his seven living children, naming them, and one grandchild, only child of a deceased daughter—two 20½ acres each, five 28 acres each and the grandchild 10 acres—pointing out that it was his desire "that my children shall select three disinterested

free holders, at least one of whom shall be a white man (should they not agree, they to be appointed by the Clerk of the Superior Court of Vance County), who shall lay off with proper metes and bounds as indicated hereinbefore, my tract of land to the several children. . . . and at the death of any one of them the share so set aside to that one shall then go to their living children and should any one of them die without leaving children, the share assigned to that one shall be divided equally between my other children who may then be living."

By a codicil the testator further directed that the 28 acres assigned to William Henry Mason "shall be cut off, run and assigned as to include my dwelling house where I now reside."

The total acreage set out in the paper writing to the eight named persons amounted to 191 acres, whereas the total acreage of which the testator died seized amounted to only 180½ acres, 63 acres of which was sold by the executor to make assets, leaving 117.5 acres for division—the amount now sought to be sold and divided among the petitioners and the respondents as heirs at law of the deceased.

The testator's widow died in 1948. This proceeding was instituted 16 December, 1949.

The respondent, Simon Mason, pleaded sole seizin to the 28 acres assigned to him in the will—he having been given possession of same during his father's lifetime.

The respondents also pleaded estoppel against the petitioners by virtue of a special proceeding instituted in 1949 for the sale of the timber on the lands of the deceased, the proceeds to be distributed to the petitioners and others according to their respective interests under the provisions of their father's will.

Issues were submitted to the jury and answered by them in favor of Simon Mason on his plea of sole seizin; and in favor of the respondents on their plea of estoppel as against the petitioners. The court thereupon remanded the cause to the Clerk of the Superior Court for partition and division of the land according to the provisions of the will of Spottswood Mason.

The petitioners appeal, assigning errors.

Banzet & Banzet, J. C. Cooper, Jr., and William W. Taylor, Jr., for petitioners, appellants.

Perry & Kittrell, Blackburn & Blackburn, and A. A. Bunn for respondents, appellees.

STACY, C. J. The present proceeding can be sustained only upon the holding that the will of Spottswood Mason is void for vagueness and uncertainty in the description of the different properties therein attempted

to be devised. *Hodges v. Stewart,* 218 N.C. 290, 10 S.E. 2d 723, and cases cited. Of course, a nullity may be upset by direct or collateral attack, ignored, disregarded, or treated as ineffectual, anywhere at any time. *Ex nihilo nihil fit* is one maxim that admits of no exceptions. *Harrell v. Welstead,* 206 N.C. 817, 175 S.E. 283.

The paper writing in question was probated in common form as the will of the deceased soon after his death in 1922. It is not now, after the lapse of 27 years, subject to caveat or collateral attack. G.S. 31-32; *In re Will of Rowland,* 202 N.C. 373, 162 S.E. 897. If it fall, it must fall of its own infirmity.

The trial court was correct in holding that the will as probated is controlled by the principles announced in *Caudle v. Caudle,* 159 N.C. 53, 74 S.E. 631; also in *Hodges v. Stewart, supra;* and that the petitioners are estopped to question its validity by reason of their participation in the proceeding to sell the timber in 1949. *In re Will of Averett,* 206 N.C. 234, 173 S.E. 621; *In re Will of Lloyd,* 161 N.C. 557, 77 S.E. 955; *Rand v. Gillette,* 199 N.C. 462, 154 S.E. 746; *Distributing Co. v. Carraway,* 196 N.C. 58, 144 S.E. 535. Having so held, however, the proceeding should have been dismissed rather than remanded to the Clerk, who has no authority to construe the will. *Brissie v. Craig,* 232 N.C. 701, 62 S.E. 2d 330. Nor is the will presently before us for construction. It will be time enough for us to speak, if need be, after the trial court has expressed its opinion. *Fuquay v. Fuquay,* 232 N.C. 692. 62 S.E. 2d 83. The petitioners *qua heirs* have no interest in the matter. Only as devisees are they entitled to be heard.

The will itself provides the *modus operandi* for division of the property among the respective devisees. The dominant intent of the testator was to leave his real estate—"my tract of land" as he described it and he had only one tract—to the objects of his bounty for the periods specified and in the respective amounts designated. The fact that some adjustment is required in the exact acreage to be apportioned to each of the first remaindermen presents no insuperable barrier such as to render the devise inoperative and void. *Freeman v. Ramsey,* 189 N.C. 790, 128 S.E. 404; *Blanton v. Boney,* 175 N.C. 211, 95 S.E. 361; *Wright v. Harris,* 116 N.C. 462, 21 S.E. 914; *Harvey v. Harvey,* 72 N.C. 570; *Grubb v. Foust,* 99 N.C. 286, 6 S.E. 103; *Jones v. Robinson,* 78 N.C. 396; Anno. 157 A.L.R. 1129, *loc. cit.* 1135. There is no question of the validity of the devise to the first taker.

Proceeding dismissed.

FELIX WILLIAMS (SINCE DECEASED), W. T. ALSTON AND RALPH ALSTON, ADMINISTRATOR OF FELIX WILLIAMS, v. ANGIE H. ROBERTSON, A. J. ELLINGTON AND WIFE, UNDINE D. ELLINGTON.

(Filed 7 March, 1951.)

1. Reference § 4—

Where defendant pleads a statute of limitations, it is error for the court to order a compulsory reference without first disposing of the plea in bar.

2. Reference § 3—

An action in ejectment in which defendants plead the twenty (G.S. 1-39, G.S. 1-40) and the seven (G.S. 1-38) year statutes of limitation is not subject to compulsory reference. G.S. 1-189.

APPEAL by defendants from *Nimocks, J.*, September Term, 1950, of WARREN.

Felix Williams, the original plaintiff, instituted this action in ejectment against the defendants, alleging he was the owner of a tract of land in the possession of defendants. Defendants' answer denied the allegations of the complaint, and pleaded the twenty-year statutes of limitations, G.S. 1-39 and 1-40, as a bar to the plaintiff's claim.

Thereafter Felix Williams died and W. T. Alston purchased his alleged title from his heirs, filing an amended complaint alleging title in himself. The defendants filed answer denying his title and again pleading the above statutes of limitations. By leave of court they later pleaded the seven-year statute, G.S. 1-38.

The case came on for trial and after hearing the testimony of one witness, the court ordered a compulsory reference. The plaintiffs and the defendants excepted. Defendants appealed to the Supreme Court, assigning error.

Kerr & Kerr and James D. Gilliland for plaintiffs, appellees.

Banzet & Banzet for defendants, appellants.

DENNY, J. It appears on the face of the record that a compulsory reference was ordered without first disposing of the pleas in bar. This was error and the appellees so concede. *Grady v. Parker,* 230 N.C. 166, 52 S.E. 2d 273; *Ward v. Sewell,* 214 N.C. 279, 199 S.E. 28; *Graves v. Pritchett,* 207 N.C. 518, 177 S.E. 641; McIntosh N. C. Prac. and Proc., section 523, p. 564.

Furthermore, the issues involved and the relief sought in this action, do not appear to be such as to justify or support an order of reference pursuant to the provisions of the statute, G.S. 1-189.

The order of reference will be vacated and the cause remanded for further proceedings in accord with the rights of the respective parties.

Error and remanded.

STATE v. JAMES RICHARD HALL.

(Filed 7 March, 1951.)

Criminal Law § 80b (4)—

Where defendant gives notice of appeal in open court, but does nothing to perfect the appeal, the motion of the Attorney-General to docket and dismiss will be allowed, but where defendant has been convicted of a capital felony this will be done only after an inspection of the record proper fails to disclose error.

MOTION by State to docket and dismiss appeal and affirm judgment in a capital case.

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

ERVIN, J. The prisoner was tried before Judge J. Will Pless, Jr., and a jury, at the October Term, 1950, of the Superior Court of Jackson County upon an indictment charging him with the murder of one Laura Ellen Taylor. The jury returned a verdict finding the prisoner guilty of murder in the first degree, but did not recommend that his punishment should be imprisonment for life in the State's prison. G.S. 14-17 as rewritten by Section 1 of Chapter 299 of the 1949 Session Laws of North Carolina. Judgment was entered upon the verdict that the prisoner suffer death by the administration of lethal gas. G.S. 15-187. The prisoner excepted to this judgment, and gave notice in open court of an appeal to the Supreme Court. The judge trying the case granted the prisoner sixty days as time in which to serve statement of case on appeal, and gave the Solicitor thirty days after such service as time in which to serve exceptions or countercase.

The Clerk of the Superior Court of Jackson County certifies in substance that the prisoner has not served any statement of case on appeal; that the time granted to him by the trial judge for so doing has expired; and that counsel for the prisoner have informed him, *i.e.*, the Clerk, "that they do not intend to perfect the appeal." Furthermore, the prisoner has failed to docket his appeal within the time prescribed by Rule 5 of the Rules of Practice in the Supreme Court. The Attorney-General

presents to this Court the requisite certificate of the Clerk of the Superior Court of Jackson County, and moves that the case be docketed, that the appeal be dismissed, and that the judgment of the Superior Court be affirmed under Rule 17 of the Rules of Practice in the Supreme Court.

In accordance with the custom which obtains in this Court in convictions for capital felonies, we have examined the record proper, which has been certified to us by the Clerk of the Superior Court of Jackson County. Such record fails to disclose any error in the indictment, trial, conviction, and sentence of the prisoner. Consequently, the motion of the Attorney-General must be allowed. *S. v. Morrow,* 220 N.C. 441, 17 S.E. 2d 507; *S. v. Watson,* 208 N.C. 70, 179 S.E. 455. It is so ordered.

Judgment affirmed. Appeal dismissed.

STATE v. CURTIS SHEDD.

(Filed 7 March, 1951.)

Criminal Law § 80b (4)—

Where defendant gives notice of appeal in open court, but does nothing to perfect the appeal, the motion of the Attorney-General to docket and dismiss will be allowed, but where defendant has been convicted of a capital felony this will be done only after an inspection of the record proper fails to disclose error.

APPEAL by defendant from *Pless, J.,* at December Term, 1950, of MACON.

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

No counsel contra.

PER CURIAM. The defendant, being charged in separate bills of indictment with the murder of Jo Ann Boyter and Johnnie Mae Boyter, was convicted of murder in the first degree in each of the two cases, which by consent were consolidated for trial. Sentence of death by asphyxiation was duly imposed in each case. The defendant gave notice of appeal. No case on appeal was served within the time allowed by the court below, and counsel for defendant in the trial below have notified the Clerk of the Superior Court of Macon County that they do not intend to perfect the appeal.

The Attorney-General moves to docket and dismiss the appeal. The motion must be allowed, but, according to the usual rule of the Court in

capital cases, we have examined the record to see if any error appears. We find none therein. *S. v. Watson*, 208 N.C. 70, 179 S.E. 455. Hence,

Judgment affirmed.

Appeal dismissed.

W. D. SPRINKLE v. PEARL BLACK PONDER.

(Filed 21 March, 1951.)

1. Evidence § 32—

G.S. 8-51 does not render incompetent testimony from an interested witness as to transactions with a decedent when such testimony is for and not against the person deriving title or interest from, through or under the deceased person, and therefore it is competent for a defendant to testify to the effect that deceased grantee, under whom she claims, performed certain acts as consideration for the deed.

2. Frauds, Statute of, § 9—

Testimony to the effect that grantee in an executed deed gave valuable consideration therefor, offered for the purpose of showing that it was not a deed of gift, is not incompetent under the statute of frauds, since the statute applies to executory and not executed contracts. G.S. 22-2.

3. Husband and Wife § 4a—

Where there is no evidence that the husband acted unreasonably in choosing the domicile or that the home chosen was inimical to the wife's health, welfare and safety, her consent to go and live with him at the domicile cannot constitute consideration moving from her to him, since in such instance it is the wife's marital duty to go with him to the home of his choice, and as a matter of sound public policy the law will not permit it to be made the subject of contract.

4. Husband and Wife § 12c: Deeds § 6—

Ordinarily the performance by a married woman of her agreement to help her husband build the home and other buildings and contribute from her separate estate for the cost of erection, is a valuable consideration which supports his deed to her for one-half interest in the land, but where the evidence tends to show only her executory contract to do so, without any evidence tending to show performance by her, it is without probative force upon the question of consideration.

5. Husband and Wife § 12b—

Performance by the wife of work and labor beyond the scope of her usual household and marital duties, such as working in the fields, making rugs, etc., may entitle her in proper cases to compensation therefor provided there is a special contract to that effect between them; but in the absence of a special contract such services are presumed to have been gratuitous.

6. Same: Deeds § 6—

An instruction to the effect that the wife's performance of work and labor outside the scope of her usual household and marital duties would constitute a valuable consideration for the husband's deed to her of one-half interest in the property, must be held for prejudicial error where there is neither allegation nor proof of any special agreement between them designating for compensation such extra services rendered by the wife.

7. Contracts § 4—

To constitute a valid contract, the parties must assent to the same thing in the same sense.

8. Deeds § 6: Evidence § 25—

In the husband's action to declare a deed to his wife void on the ground that it was a deed of gift not registered within two years after its execution, G.S. 47-26, evidence that defendant, who was plaintiff's step-daughter claiming as heir of her mother, performed work and labor in plaintiff's home and on his farm while a member of his household, *held* improperly admitted in evidence, since it is not relevant or material to the issue as to whether the deed to the wife was supported by valuable consideration moving from her to the plaintiff, there being no evidence that the mother contributed the child's services as part of the consideration for the deed.

9. Same—Evidence which does not tend to establish the primary fact in issue by any logical inference is irrelevant and incompetent.

In plaintiff's action to have declared void his deed to his wife on the ground that it was a deed of gift not registered within two years of its execution, instituted against one of his two step-daughters claiming as heir of plaintiff's wife, defendant introduced evidence that plaintiff had paid his other step-daughter between $300 and $400 for her interest in the land. The evidence showed the land was worth from $7,000 to $18,000. *Held:* The payment of the nominal sum was a collateral transaction *inter alios acta* and is irrelevant to the issue as to whether the wife furnished valuable consideration for the deed, since it does not tend to establish this primary fact by any logical inference, and its admission must be held prejudicial when the charge states defendant's contention that the transaction showed that the plaintiff thereby recognized as valid his deed to his wife and tended to show that it was supported by a valid consideration.

10. Appeal and Error § 40f—

Where the refusal of a motion to strike certain allegations from the adverse party's pleading is not appealable, movant may preserve his exception and on his appeal from final judgment the exception will be sustained when the matter sought to be stricken is irrelevant to the issue involved in the case. G.S. 1-153.

APPEAL by plaintiff from *Rousseau, J.*, and a jury, at the Regular December Civil Term, 1950, of BUNCOMBE.

Civil action to remove an alleged cloud from the title to land by having a deed made by the plaintiff to his wife, Macie Black Sprinkle, now deceased, declared void as a deed of gift not registered within two years

after its date of execution as required by G.S. 47-26. The following issue was submitted to and answered by the jury as indicated:

"Was the deed executed by W. D. Sprinkle on October 24, 1945, to his wife, Macie Sprinkle, a deed of gift?" Ans.: "No."

From judgment on the verdict, the plaintiff appealed, assigning errors.

Carl R. Stuart and Smathers & Meekins for plaintiff, appellant.

Don C. Young for defendant, appellee.

JOHNSON, J. At the time of the marriage between the plaintiff and Macie Black Sprinkle in 1927, she was living with her two daughters, Pearl (who is the defendant, Pearl Black Ponder) and Alice (now Alice Bradley) in the home of her aunt Nan Black, referred to throughout the trial as Aunt Nan, on the aunt's farm located on the New Stock Road near Weaverville in Buncombe County. The plaintiff, W. D. Sprinkle, "was batching" on his 75-acre farm across the road from Aunt Nan's place. After the marriage, he moved in with the family at Aunt Nan's home, and stayed there two or three years. During this period he sold his farm across the road and, with a view of moving his residence, erected a dwelling and made other improvements on another place owned by him on Flat Creek about three miles from Aunt Nan's place.

In 1929 the daughter Alice married Alfred Bradley, and soon thereafter the plaintiff and his wife left Aunt Nan's place and moved to the new house which had been erected by the plaintiff on his Flat Creek farm. Along with them went Mrs. Sprinkle's daughter Pearl. Aunt Nan died in 1935, leaving her place to plaintiff's wife. On 24 October, 1945, the plaintiff executed and delivered to his wife a deed for a one-half undivided interest in his Flat Creek place, and thereafter she retained possession of the deed at all times until her death on 9 May, 1948. However, the deed was not registered until 22 June, 1949. No child was born of the marriage between the plaintiff and Macie Black Sprinkle. She died intestate, being survived by her two children, Pearl and Alice, her only heirs-at-law.

Plaintiff alleges in his complaint that the original deed to his wife for a one-half undivided interest in the Flat Creek farm was "a deed of gift, without consideration, moving from the grantee to the grantor," and not having been registered within two years after "the making thereof" is void under the statute, G.S. 47-26, and that the defendant's claim to a one-fourth interest in the land is a cloud on his title and should be removed.

The defendant filed answer denying that the deed was a deed of gift. She affirmatively alleges by way of further defense that her mother assisted plaintiff in the construction of the home and other buildings on

the Flat Creek place; that she helped him work on the buildings and also put therein "all of the income received from her individual property" . . . under a special contract that the plaintiff would recompense her by conveying to her a one-half interest in the Flat Creek farm.

The plaintiff rested his case after offering testimony tending to show admissions made by Mrs. Sprinkle to the effect that the deed to her was a deed of gift without valuable consideration. The defendant did not move for nonsuit, but assumed the burden of going forward with her affirmative defense that the deed was made to her mother in fulfillment of a special contract as alleged.

The defendant offered in evidence, over objections of the plaintiff, the following testimony of her sister, Alice Bradley, concerning a conversation which the witness said she heard between the plaintiff and her mother before they moved to Flat Creek:

"Q. What was the conversation between them?

"Objection—overruled—exception.

"A. All I heard she didn't want much to go over to Flat Creek.

"Q. Who didn't?

"A. Mama didn't want to go over to Flat Creek and move there and so she said she would go if he would fix the deed that she would have her share.

"Motion to strike out the answer.

"Q. I will ask you what did Mr. Sprinkle say if she would do that he would do? What did he ask your mother to do and what did she tell him that she would do if he would do certain things?

"Objection—overruled—exception.

"A. He told her that if she would come over there he would invey her an interest.

"Q. You mean convey?

"A. Yes.

"Q. What interest, how much of the land?

"Objection by plaintiff to this testimony.

"Overruled. Exception.

"A. One-half.

"Q. What did he ask your mother to do?

"Objection—overruled—exception.

"A. He asked her to go along and help him work and build a home and all and he would fix it so she could have half of it.

"Objection—overruled—exception.

"Q. When he told her that if she would move over there and help him build a home and live there, did she agree to do that?

"Objection—overruled—exception.

"A. Yes. She agreed to go and went.

"Q. What did your mother say as to whether or not she wanted to move there?

"Objection—overruled—exception.

"A. She didn't want to move and work and build barns and houses and things on the place and help keep the place up and not get any of it and unless he would convey her half of it.

"Motion to strike; denied; exception."

The plaintiff does not challenge the form of the foregoing testimony. Hence we pass the question of whether some of the answers amount to conclusions of the witness tending to invade the province of the jury. First, the plaintiff contends that the testimony should have been excluded as coming from "an interested witness" under the "dead man" statute, G.S. 8-51. This contention, however, cannot be sustained. Here, the defendant's witness was testifying for, rather than against, the "person deriving . . . title or interest from, through or under a deceased person." Such testimony does not come within the inhibitions of the statute. *Bonner v. Stotesbury,* 139 N.C. 3, 51 S.E. 781. Evidence of this kind simply "opens the door" and permits the other party,—the living party to the transaction or communication,—to go upon the stand, if he so desires, and give his version of what transpired. *Batten v. Aycock,* 224 N.C. 225, 29 S.E. 2d 739; *Lewis v. Mitchell,* 200 N.C. 652, 158 S.E. 183; *Herring v. Ipock,* 187 N.C. 459, 121 S.E. 758; *Sumner v. Candler,* 92 N.C. 634. The plaintiff also contends that the foregoing testimony of Alice Bradley, tending to set up a parol contract to convey land, should have been excluded under the statute of frauds, G.S. 22-2, raised by the plaintiff's general denial of the contract (*Henry v. Hilliard,* 155 N.C., 372, 71 S.E. 439). This contention, likewise, is untenable for the reason that here the contract, if such there was, had been executed, and the statute of frauds does not apply to executed contracts; it can be invoked only to prevent the enforcement of executory contracts. *McManus v. Tarleton,* 126 N.C. 790, 36 S.E. 338; *Hall v. Fisher,* 126 N.C. 205, 35 S.E. 425; *Keith v. Kennedy,* 194 N.C. 784, 140 S.E. 721; *Davis v. Harris,* 178 N.C. 24, 100 S.E. 111.

However, further analysis of the testimony of Alice Bradley indicates that it tends to establish between plaintiff and his wife two separate contractual obligations to be performed by the wife as the consideration supporting the deed later made to her, namely: (1) that she forego her desire to remain in the home of her Aunt Nan Black and go live with her husband at his new home on Flat Creek, and (2) that she help him work on and build the house and barns and other buildings on the Flat Creek place and contribute to the costs thereof from her separate estate.

As to the first contractual provision,—the one under which the wife promised to go live with the husband at his new home,—it is fixed law

that any such contract, attempting to make an ordinary marital duty the subject of commerce, is void as against public policy. The "authority of the husband as the head of the family gives him the right, acting reasonably, to . . . determine where . . . the home of the family shall be, and thus to establish the matrimonial and family domicile." 26 Am. Jur., Husband and Wife, sec. 10, p. 638, *et seq.* As long as the husband exercises this choice in a reasonable manner, consistent with the comfort, welfare and safety of his wife, it would seem to be the wife's marital duty to go with the husband to the home of his choice (41 C.J.S., Husband and Wife, sec. 10, p. 399), and this being so, the law will not permit, as a matter of sound public policy, any such marital duty to be made the subject of "barter and sale," and a contract based thereon is a nullity, without consideration. See *Ritchie v. White,* 225 N.C. 450, 35 S.E. 2d 414, 26 Am. Jur., Husband and Wife, sec. 326, p. 923, *et seq.* In the trial below, there was no evidence tending to show that the plaintiff acted unreasonably in choosing the Flat Creek farm as a family home, nor does it appear that the home there provided for the family was inimical to the health, welfare and safety of the wife. Therefore, any agreement of the wife to accompany the plaintiff to the Flat Creek place, and her act in doing so, furnished no supporting consideration for the deed he made to her fourteen or fifteen years later. It follows that the evidence in respect to such contract, admitted over plaintiff's objection, should have been excluded.

As to the second contractual provision set up by the testimony of Alice Bradley,—the provision under which the plaintiff's wife is alleged to have obligated to help him work on and build the home and other buildings and contribute from her separate estate to the costs of erection,—it is enough to say that ordinarily the performance by a married woman of any such contract, calling for contributions from her separate estate and requiring the performance of work above and beyond the pale of her ordinary household and domestic duties, is deemed to be supported by a valuable consideration and is valid and enforceable. *Ritchie v. White, supra* (225 N.C. 450, p. 455, 35 S.E. 2d 414); *Dorsett v. Dorsett,* 183 N.C. 354, 111 S.E. 541. However, in the instant case an analysis of the record discloses no testimony tending to show performance of this provision of the alleged contract. There is no evidence that the plaintiff's wife performed labor of any kind in connection with the erection of the buildings, or that she contributed any money or anything of value from her separate estate toward the costs of erecting the buildings. It also appears that the plaintiff's wife had no separate estate of substance until her Aunt Nan died leaving her the old home place on the New Stock Road. This was several years after all of the buildings, except perhaps a burley barn, had been erected on the Flat Creek farm. Accordingly,

the record discloses that at this stage of the trial below there was testimony tending to establish a valid executory contract by which the wife was to work and assist in the erection of the buildings, the performance of which by the wife would have furnished evidence of a valuable consideration in support of the deed later made to her by the plaintiff; but the record discloses no evidence tending to show performance by the wife. Therefore the alleged contract falls by its own weight and furnishes no consideration tending to support the deed to the wife. This being so, the mere admission in evidence of the testimony of the witness Alice Bradley in respect to the executory contract, which on this record never became executed by the wife's performance, standing alone, was not error. The harm that came to the plaintiff was in the manner in which the jury were instructed to consider other phases of the evidence showing that the wife performed extra work and labor in the home and on the farm, perhaps above and beyond the scope of her usual domestic and marital duties, and which might have been, but were not in the instant case, the subject of a special contract for payment.

Falling in this category was evidence that in addition to the performance of her usual household duties, the wife "worked tobacco, cut tobacco and helped make it, and made rugs, and milked cows and sold milk," and did "work in the corn fields and cut tops and everything; and helped make molasses."

The performance of such outside work by a married woman may in proper cases entitle her to compensation therefor, but only when there is a special contract to that effect between the husband and the wife. In the absence of a special contract, such services are presumed to have been gratuitously performed. *Dorsett v. Dorsett, supra* (183 N.C. 354, 111 S.E. 541). Nevertheless, the court instructed the jury, among other things, as follows:

"If you find that she rendered services under and by virtue of a contract, that is a meeting of the plaintiff's mind and his wife's mind, whereby the plaintiff agreed and the wife agreed, based upon the consideration that she leave her home and go to his home and help him build a home, build buildings, cultivate the land, work in the fields and help him, and if you find those facts, and if she did enough to make a valuable, fair, reasonable price for this one-fourth interest in this land or this one-half interest in this land—she got one-half—then that would be a valuable consideration."

The foregoing instruction necessarily must have led the jury to the erroneous belief that the contract between the plaintiff and his wife, as related by the witness Alice Bradley, was valid in its entirety, including the stipulation under which the wife allegedly yielded her desire to remain at her old home and went with her husband to his new home on Flat

Creek. This instruction also was calculated to lead the jury to believe that the outside work performed by the wife in the fields was included in the contract; whereas, there is neither allegation nor proof of any special contractual provision singling out and designating for compensation these extra services rendered by the wife in the fields. As to this, the testimony below discloses no meeting of the minds of the parties. To constitute a valid contract the parties must assent to the same thing in the same sense. *Elks v. Insurance Co.*, 159 N.C. 619, 75 S.E. 808; *Dodds v. Trust Co.*, 205 N.C. 153, 170 S.E. 652. Where there is such uncertainty that it cannot be known what is contracted for, the contract is unenforceable. *Thomas v. Shooting Club*, 123 N.C. 285, 31 S.E. 654; *Holder v. Mortgage Co.*, 214 N.C. 128, 198 S.E. 589; *Williamson v. Miller*, 231 N.C. 722, 58 S.E. 2d 743.

Another assignment of error urged by the plaintiff is based on his exception to the admission of evidence as to work and labor performed by the defendant in plaintiff's home and on his farm while she was a member of his household. The defendant's sister, Alice Bradley, was permitted to testify as follows:

"Q. What work, if any, did you see her doing on the place?

"Objection—overruled—exception.

"A. She worked in the field . . .

"THE COURT: (interrupting): You put up a witness to show what the plaintiff did.

"Objection—overruled—exception.

"A. Pearl worked on the farm until she went and worked at the market. She helped make rugs and helped in the tobacco fields and helped to raise tobacco and worked in the fields and helped Mama milk and mind the cows.

"Motion to strike; denied; exception."

This evidence was not relevant or material to the issue in the case. Here, the single question involved is whether the deed to Macie Sprinkle is supported by a valuable consideration, moving from her to the plaintiff, and the theory of the case excludes any suggestion that the mother contributed the child's services to the plaintiff as part of the consideration for the deed. The inadvertence of the court below in admitting this extraneous evidence must be held as error (*Pettiford v. Mayo*, 117 N.C. 27, 23 S.E. 252; *Cuthrell v. Greene*, 229 N.C. 475, 50 S.E. 2d 525), especially so in view of the interposed comment of the court which likely gave emphasis to its importance. See *Harris v. Draper, ante*, 221.

Since the case goes back for a new trial, we deem it advisable to discuss another group of exceptive assignments of error,—the exceptions dealing with the defendant's evidence tending to show that a short time before the commencemnt of this action the plaintiff purchased from the defendant's

sister, Alice Bradley, the one-fourth interest she claimed in the lands in controversy. This evidence apparently was admitted on the theory that the action of the plaintiff in procuring the deed from Alice Bradley and paying her a valuable consideration therefor was a circumstance tending to show that the plaintiff's original deed to his wife was supported by a valuable consideration. However, we are constrained to the view that no such conclusion may be logically deduced from this transaction. Three witnesses testified as to the value of the tract of land in controversy in 1945. Their opinions ranged as follows: $7,000 or $8,000; $12,000; and $18,000. The challenged evidence indicates that the plaintiff, twenty days before the commencement of this action in 1949, accepted and put to record a deed from Alice Bradley for the one-fourth interest she claimed in the lands, and paid her therefor only the sum of $200, plus the release of a debt of $130 owed him by her. Tested by the fundamental principles of relevancy and natural logic which govern the admissibility of evidence, it would seem that the most logical conclusion to be drawn from the plaintiff's transaction with Alice Bradley is that he was only "buying his peace." At most, it was a collateral transaction with a third party involving a compromise settlement for a sum scarcely more than it would have cost to litigate the claim. In 20 Am. Jur., Evidence, sec. 248, p. 242, we find this concise statement of the rules governing the test of relevancy and materiality in the admission of evidence: "It is fundamental that evidence to be admissible must relate and be confined to the matter or matters in issue in the case at bar and must tend to prove or disprove these matters or be pertinent thereto, or, to put it another way, the proof must correspond to the issues raised by the pleadings. This rule excludes evidence of collateral facts or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute—those which are remote, collateral, and irrelevant." See also *Shepherd v. Lumber Co.*, 166 N.C. 130, 81 S.E. 1064. Tested by the foregoing rules, the evidence that the plaintiff, four years after his wife's death, settled the other daughter's similar claim for a nominal sum would seem to be entirely irrelevant to the issue sought to be proved by the transaction and *res inter alios acta*. 1 Taylor on Evidence, secs. 317 and 318, p. 229 *et seq.* and notes p. 257[1]. Nothing else appearing, we might treat the evidence of this transaction as inconsequential, and perhaps as having been more helpful than hurtful to the plaintiff's cause, as tending to show an admitted weakness on the defendant side in settling a similar claim for such trivial sum. But not so in the light of the following instructions given the jury.

"The defendant argues that when the mother of this defendant died leaving this defendant and Alice Bradley then there were only two heirs to Macey Black Sprinkle, that that was this defendant and Alice Bradley

and that then they inherited this particular tract of land as tenants in common and that this plaintiff himself recognized that that deed was good, that he had made to his wife because he purchased from Alice Bradley, the sister of this defendant and daughter of his wife her one-fourth interest; that he paid her $200.00 cash and paid off a debt of $130; that he recognized then and there that the deed he had made his wife was good because he purchased from this one sister" . . .

"Defendant argues that this evidence that he bought from Alice Bradley is some evidence of valuable consideration that the wife paid to him and the court charges you that you may consider that testimony of this deed made by Alice Bradley to this plaintiff as some evidence of a valuable consideration, that he recognized that there was some valuable consideration. These are all matters for you."

It would seem that the above instructions must have weighed too heavily against the plaintiff. His exceptions to these instructions must be sustained.

It also appears that when the case was called for trial the plaintiff moved to strike from the defendant's further defense the allegations in respect to the deed from Alice Bradley to the plaintiff. The motion was overruled. The plaintiff's exception then noted, while not appealable at that time (*Parrish v. R. R.*, 221 N.C. 292, bot. p. 292 and top p. 293, 20 S.E. 2d 299), has been properly preserved and brought forward for review, as is the plaintiff's right. *Fayetteville v. Distributing Co.*, 216 N.C. 596, 5 S.E. 2d 838. The exception is sustained as to paragraph six of the defendant's further defense, which will be stricken, as being irrelevant to the issue involved in the case. G.S. 1-153. *Patterson v. R. R.*, 214 N.C. 38, 198 S.E. 364.

Since the case goes back for a new trial, we deem it unnecessary to review the rest of the plaintiff's assignments of error. For the reasons stated, the plaintiff is entitled to another hearing, and it is so ordered.

New trial.

J. T. GREEN AND JACK GOSNELL v. FIDELITY-PHENIX FIRE INSURANCE COMPANY.

(Filed 21 March, 1951.)

1. Pleadings § 28—

Upon defendant's motion for judgment on the pleadings, the allegations of the complaint must be taken as true.

2. Arbitration and Award § 13: Insurance § 24b (2)—

Where arbitration proceedings are had in accordance with the policy agreement, the insured mortgagor participating in the proceedings is ordi-

narily bound by the award, and he may not attack it on the ground that the proceedings were had without the knowledge or consent of the mortgagee.

3. Insurance § 21—

The standard or union mortgage clause, which provides that the interest of the mortgagee in the proceeds of the policy shall not be invalidated by any act or neglect of the mortgagor, constitutes an independent contract between the insurer and the mortgagee effecting a separate insurance of the mortgage interest, and under such clause the mortgagee is not bound by any adjustment of the loss between insurer and the mortgagor had without his knowledge or consent.

4. Same: Chattel Mortgages and Conditional Sales § 6½—

An open or simple loss payable clause in favor of the mortgagee does not create an original contract between the insurer and the mortgagee but merely makes the mortgagee an appointee of the insurance fund to the extent of his interest in derivation of the rights of the insured mortgagor, and therefore a mortgagee under such clause can have no greater right than the mortgagor and is bound by an appraisal or arbitration had in good faith between the mortgagor and the insured, even though he is not a party and has no notice of the proceeding.

5. Same: Insurance § 24b (2)—

Where the policy contract specifically provides that the amount of loss should be determined by appraisers appointed by insured and insurer, without provision in any portion of the policy that the mortgagee named in the open or simple loss payable clause in the policy should be notified, the mortgagee is bound as to his rights against insurer by an arbitration had in accordance with the terms of the policy even though it was made without notice to him.

6. Contracts § 8—

The courts must construe a contract in accordance with the language of the agreement, and cannot create contractual rights for the protection of those who have failed to protect themselves.

7. Appeal and Error § 14: Judgments § 20a—

After appeal from final judgment the trial court is without authority to hear a motion in the cause, even during the term.

8. Trial § 47—

The trial court has no authority to hear a motion for a new trial for newly discovered evidence after the expiration of the term.

9. Courts § 6—

A term of court ends when the trial judge finally leaves the bench, even though he does so before the expiration of the statutory term without formally adjourning the term.

10. Trial § 47—

A new trial for newly discovered evidence cannot be granted for evidence which is not competent, material or relevant under the pleadings.

GREEN *v.* INSURANCE CO.

FIRST APPEAL by plaintiffs from *Rudisill, J.*, at August Term, 1950, of the Superior Court of POLK County, and second appeal by plaintiffs from *Rudisill, J.*, at Chambers in Rutherfordton, North Carolina, on 27 September, 1950.

Civil action by the mortgagor and mortgagee of an automobile against an insurance company to recover upon a policy of fire insurance covering the automobile and containing a mortgage clause making the proceeds of the policy payable to the mortgagee as his interest might appear.

The matters set out in the next three paragraphs are not in dispute.

The defendant, Fidelity-Phenix Fire Insurance Company, issued a policy of insurance to protect the plaintiff Jack Gosnell against the loss of his automobile by fire. Gosnell had mortgaged the automobile to the plaintiff J. T. Green to secure an indebtedness of $650.00, and a mortgage clause was incorporated in the policy making any loss covered by it payable to Gosnell, the insured, and Green, the mortgagee, as their interest might appear.

The policy limited the insurance company's liability for the total loss of the automobile to its actual cash value at the time of the loss less the sum of $50.00, and provided that the amount of the loss should be determined by the insured and the insurance company in case they could agree as to it. The policy contained the following appraisal or arbitration clause: "If the insured and the company fail to agree as to the amount of loss, each shall, on the written demand of either, made within sixty days after receipt of proof of loss by the company, select a competent and disinterested appraiser, and the appraisal shall be made at a reasonable time and place. The appraisers shall first select a competent and disinterested umpire, and failing for fifteen days to agree upon such umpire, then, on the request of the insured or the company, such umpire shall be selected by a judge of a court of record in the county and state in which such appraisal is pending. The appraisers shall then appraise the loss, stating separately the actual cash value at the time of loss, and the amount of loss, and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss."

The automobile was wholly destroyed by fire during the life of the policy. The insurance company conceded its liability in the premises, but a dispute arose between it and Gosnell, the insured, as to the amount of the loss sustained. As a consequence, an appraisal of the amount of the loss was made in writing by two appraisers appointed by Gosnell and the insurance company, and an umpire chosen by the two appraisers. Their written award stated that the automobile had an actual value of $365.00 at the time of its destruction, and fixed the amount of the loss at $315.00. The insurance company admitted liability for the last men-

tioned sum, and offered to pay the same to Gosnell and Green jointly. They refused the tender, and brought this action.

When properly construed, their joint complaint discloses the uncontroverted matters set out above. It alleges additionally that the loss sustained by plaintiffs on account of the burning of the insured automobile amounted to $850.00, and prays judgment against the defendant for that sum. The complaint expressly avers that plaintiffs are not bound by the award of the appraisers because it was made without the knowledge or consent of the plaintiff Green, whose mortgage debt is still unpaid. The complaint does not contain sufficient allegations to impeach the award for fraud or collusion, or for disqualification of the appraisers.

The answer asserts that the appraisal is binding on both plaintiffs, and tenders judgment to the plaintiffs accordingly.

The defendant moved at the trial for judgment on the pleadings conforming to its tender. The court concluded that the award of the appraisers bound both plaintiffs, sustained the motion of the defendant, and entered a final judgment on the pleadings limiting the recovery of the plaintiffs upon the policy to the amount of the award, *i.e.*, $315.00.

The plaintiffs excepted to the judgment and appealed from it in open court to the Supreme Court. Judge Rudisill thereupon signed an order settling "the pleadings and judgment . . . as the case on appeal," and took his final departure from the county without formally adjourning the term.

Thereafter, to wit, on the last day of the term as fixed by statute, the plaintiffs filed a verified motion in the cause without withdrawing their prior appeal from the judgment on the pleadings. They alleged in their motion that subsequent to the rendition of the judgment they discovered that the appraisers had made the award without giving them notice and an opportunity to be heard as to the matter submitted, and moved for vacation of the judgment and a new trial on that ground. Judge Rudisill heard this motion out of the county and out of the term, and signed an order denying it. The plaintiffs noted a second appeal to the Supreme Court from this order.

W. Y. Wilkins, Jr., for plaintiffs, appellants.

M. R. McCown and J. Lee Lavender for defendant, appellee.

ERVIN, J. The first appeal raises these questions:

1. Is the plaintiff Gosnell, the insured and mortgagor, bound by the award of the appraisers?

2. Is the plaintiff Green, the mortgagee, bound by it?

In deciding these questions, we must assume that the allegations of fact in the complaint are true. This is so because the judgment was

entered on the pleadings pursuant to the motion of the defendant. *Raleigh v. Fisher,* 232 N.C. 629, 61 S.E. 2d 897.

The complaint alleges these things concerning the award: That Gosnell, the insured and mortgagor, and the insurance company were not able to agree upon the amount of the loss; that they submitted their differences in this respect to appraisal or arbitration; that an appraisal or arbitration proceeding was had; that the appraisers made an award in writing fixing the amount of the loss; and that the appraisal or arbitration proceeding was had without the knowledge or consent of Green, the mortgagee. There is no allegation of any fraud or collusion.

Inasmuch as the complaint confesses that the plaintiff Gosnell was a party to the appraisal or arbitration proceeding, the award of the appraisers is presumed to be valid as to him, and the judgment on the pleadings must be upheld as to him unless it can be said that the complaint discloses circumstances entitling him to have the award set aside. *Young v. Insurance Co.,* 207 N.C. 188, 176 S.E. 271; *Farmer v. Wilson,* 202 N.C. 775, 164 S.E. 356; *Hemphill v. Gaither,* 180 N.C. 604, 105 S.E. 183.

The only circumstance urged by the complaint for the impeachment of the award is that it was made in an appraisal or arbitration proceeding had between Gosnell and the insurance company without the knowledge or consent of Green. Gosnell cannot attack the award on this ground. His attempt to do so offends the plain principle of justice embodied in the ancient maxim *nemo contra factum suum venire potest,* meaning nobody can come in against his own deed.

This brings us to the question whether Green, the mortgagee, is bound by the appraisal or arbitration proceeding had between Gosnell, the mortgagor, and the insurance company without his knowledge or consent. The answer to this question is to be found in the language employed by the parties to express their agreement.

Clauses are frequently inserted in property insurance policies to protect a mortgagee's interest against loss from the causes insured against. These clauses are mainly of two kinds, to wit: (1) The standard or union mortgage clause, which stipulates, in substance, that the interest of the mortgagee in the proceeds of the policy shall not be invalidated by any act or neglect of the mortgagor; and (2) the open or simple loss-payable clause, which merely provides that the loss, if any, shall be payable to the mortgagee, as his interest may appear. 29 Am. Jur., Insurance, sections 552, 553.

It is the accepted position in North Carolina and most other states that when the standard or union mortgage clause is attached to or inserted in a policy insuring property against loss, it operates as a distinct and independent contract between the insurance company and the mortgagee,

effecting a separate insurance of the mortgage interest. *Stockton v. Insurance Co.*, 207 N.C. 43, 175 S.E. 695; *Mahler v. Insurance Co.*, 205 N.C. 692, 172 S.E. 204; *Bennett v. Insurance Co.*, 198 N.C. 174, 151 S.E. 98, 72 A.L.R. 275; *Bank v. Bank*, 197 N.C. 68, 147 S.E. 691; *Bank v. Assurance Co.*, 188 N.C. 747, 125 S.E. 631; *Bank v. Ins. Co.*, 187 N.C. 97, 121 S.E. 37; Annotation: 124 A.L.R. 1034. Under this interpretation, a mortgagee entitled to share in the proceeds of an insurance policy under a standard or union mortgage clause is not bound by an adjustment of the loss, whether by arbitration or agreement, made by the insurance company and the mortgagor without his knowledge or consent. *Reeder v. Twin City F. Ins. Co.*, 5 F. Supp. 805; *Scottish Union & Nat. Ins. Co. v. Field*, 18 Colo. App. 68, 70 P. 149; *Collinsville Sav. Soc. v. Boston Ins. Co.*, 77 Conn. 676, 60 A. 647, 69 L.R.A. 924; *Hartford F. Ins. Co. v. Olcott*, 97 Ill. 459; *McDowell v. St. Paul F. & M. Ins. Co.*, 207 N.Y. 482, 101 N.E. 457; *Beaver Falls Bldg. & L. Asso. v. Allemania F. Ins. Co.*, 305 Pa. 290, 157 A. 616; *Superior F. Ins. Co. v. Leal* (Tex. Civ. App.), 73 S.W. 2d 584.

These authorities are not decisive of the present controversy, however, for the plaintiff Green claims under an open or simple loss-payable clause. Diligent research fails to reveal any North Carolina case passing upon the precise question whether a mortgagee protected by such clause is bound by an appraisal or arbitration proceeding between the mortgagor and the insurance company, where he is afforded no opportunity to participate in the proceeding. The decisions in other states are in irreconcilable conflict. Annotations: 111 A.L.R. 697; 38 A.L.R. 383; 25 L.R.A. (N.S.) 741; 19 L.R.A. 321; 18 Ann. Cas. 271.

Nevertheless, the cases in this State and the better considered cases elsewhere construing the open or simple loss-payable clause point unerringly to the conclusion which must be reached if due heed is accorded to the language employed by the parties to express their agreement. These cases hold that when an open or simple loss-payable clause is attached to or inserted in a policy insuring property against loss, it does not create a new or original contract between the insurance company and the mortgagee effecting a separate insurance of the mortgage interest, or abrogate the provisions of the policy placing the insurance on the property of the mortgagor as owner. Such clause merely makes the mortgagee an appointee of the insurance fund, entitling him to receive so much of any sum that may become due to the mortgagor under the policy as does not exceed his interest as mortgagee, and nothing more. The rights of the mortgagee under the clause are wholly derivative, and cannot exceed those of the mortgagor. *Welch v. Insurance Co.*, 196 N.C. 546, 146 S.E. 216; *Roper v. Insurance Cos.*, 161 N.C. 151, 76 S.E. 869; Annotation: 124 A.L.R. 1034.

Since the rights of the mortgagee under the open or simple loss-payable clause are dependent entirely upon those of the mortgagor, it necessarily follows that a mortgagee claiming under such clause is bound by an appraisal or arbitration had in good faith between the mortgagor and the insurance company, even though he was not a party to and had no notice of the proceeding. This conclusion finds implicit support in *Everhart v. Insurance Co.*, 194 N.C. 494, 140 S.E. 78, where it is expressly held that a mortgagee claiming under an open or simple loss-payable clause is bound by an agreement between the mortgagor and the insurance company fixing the amount of the loss, even though he was not a party to the agreement. Moreover, our conclusion has explicit support in well considered cases in other jurisdictions. See *Collinsville Sav. Soc. v. Boston Ins. Co., supra,* and *Chandos v. American F. Ins. Co.*, 84 Wis. 184, 54 N.W. 390, 19 L.R.A. 321.

We are not compelled, however, to rest our decision solely upon this line of reasoning or upon these authorities. The policy named Gosnell, the mortgagor, as the insured, and provided in specific terms that the amount of any loss should be determined by appraisers appointed by the insured and the insurance company in the event they should fail to agree upon the amount of the loss. The complaint shows that the amount of the loss has been established by an award of appraisers selected by the very persons designated for that purpose by the policy itself. As there was no suggestion in any portion of the policy that any mortgagee was to be notified of any appraisal or arbitration proceeding, the award of the appraisers is necessarily binding upon Green, although it was made without notice to him. *Deruy Motor Co. v. Insurance Co. of N. A.*, 146 Kan. 233, 69 P. 2d 677, 111 A.L.R. 692; *Officer v. American Eagle Fire Ins. Co.*, 175 La. 581, 143 So. 500; *Dragon v. Automobile Ins. Co.*, 265 Mass. 440, 164 N.E. 383; *Orenstein v. New Jersey Ins. Co.*, 131 S.C. 500, 127 S.E. 570.

The plaintiff Green argues with much eloquence that he ought to have the right to participate in the adjustment of the loss for his own protection. The answer to this argument is simply this: It is otherwise "nominated in the bond." The law cannot create contract rights and relations for the protection of men who have failed to protect themselves.

In considering the second appeal, we by-pass without discussion or decision the intriguing, but somewhat disconcerting, problem of whether a motion for vacation of a judgment and a new trial for newly discovered evidence will lie at all in a case where the judgment was rendered upon the pleadings and no evidence whatever was introduced. Be that as it may, the plaintiffs cannot be heard to complain of the refusal of Judge Rudisill to grant their motion. If he had ruled thereon in their favor, his ruling would have been without legal force, for their prior appeal

from the judgment on the pleadings had taken the case out of the jurisdiction of the Superior Court. *Bailey v. McPherson, ante,* 231; *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377; *Lawrence v. Lawrence,* 226 N.C. 221, 37 S.E. 2d 496. Even apart from these considerations, Judge Rudisill had no power on the present record to grant the motion of the plaintiffs to vacate the judgment for newly discovered evidence after the expiration of the term in which the judgment was rendered. *Crow v. McCullen,* 220 N.C. 306, 17 S.E. 2d 107. That term ended when Judge Rudisill finally left the bench. McIntosh: North Carolina Practice and Procedure in Civil Cases, section 42. Moreover, Judge Rudisill could not have sustained the plaintiffs' motion even if he had had jurisdiction to entertain it. The plaintiffs did not bring themselves within the rules permitting courts to vacate judgments and grant new trials for newly discovered evidence. *Ibid.,* section 611. The alleged newly discovered evidence was not competent, material, or relevant under the pleadings. Indeed, it was not even newly discovered, for it was necessarily known to the plaintiffs when the action was brought and the judgment rendered. 49 C.J.S., Judgments, section 273.

For the reasons given, the judgment on the pleadings is

Affirmed.

A. R. KEITH v. D. S. SILVIA.

(Filed 21 March, 1951.)

1. Trial § 5—

In civil cases the parties have the right to select the manner of trial, and may waive trial by jury and submit the controversy to the judge presiding, or they may agree to submit the cause to a referee.

2. Reference § 2—

The consent of the parties to a reference continues until the order of reference is complied with by a full report, and prior thereto neither party may revoke the order of reference nor change the identity of the referee without the consent of the other.

3. Reference §§ 5c, 8—

Where a party, after the expiration of the date fixed by the order of consent reference for the filing of the referee's report, enters into stipulations in respect thereto and continues with the reference until the report is prepared and copies thereof are furnished counsel before objecting, he waives his right to complain that the report was not filed by the date specified and may not urge the delay as cause for removing the referee.

4. Reference §§ 5c, 16—

Where the parties waive their right to object to the failure of the referee to file his report by the date specified in the order of consent

reference, and there is no evidence that the referee willfully refused or intentionally failed to file his report as promptly as conditions would permit, the record fails to show dereliction of duty on the part of the referee, and the order of the trial court removing him on this ground and directing him to refund the amount paid him under the terms of the consent reference, is error.

5. Reference § 11—

Where the referee finds all the essential facts at issue, which facts are supported by evidence and are sufficient to support his conclusions of law, the mere failure of the referee to divide his report into the subtitles of "findings of fact" and "conclusions of law" does not justify the court in rejecting the report as being unacceptable.

6. Same—

The broad supervisory power of the trial court to affirm, amend, modify, set aside, confirm in whole or in part, disaffirm the report, or make additional findings, must be exercised in an orderly manner in accord with recognized procedure upon exceptions duly entered or motion directly attacking the validity of the report, and the trial court may not vacate *ex mero motu* a report upon which no attack has been made by any of the parties. G.S. 1-194, G.S. 1-195.

7. Same—

Motion for an order directing the referee to show cause why he should not be removed cannot constitute an attack upon the report of the referee thereafter filed, and therefore the report is not before the trial court and he may not vacate the report upon the hearing of such motion.

8. Same—

Where there are no exceptions to the findings of fact made by the referee in a consent reference they are binding upon the Superior Court and become in effect facts agreed, and if no exceptions are filed the report should be affirmed and judgment entered in accord therewith.

APPEAL by defendant from *Rudisill, J.*, October Term, 1950, HENDERSON.

Civil action to recover rent due under a lease contract.

Plaintiff leased to defendant a garage building in the City of Wilmington for a term of one year. The contract provides that the term should be extended automatically for a further term of three years "unless written notice is given by Lessee sixty days prior to the expiration of the original lease of their intention to cancel."

The plaintiff, contending that the term was extended for want of notice of cancellation, sues for rent accruing during the extended period. Defendant denies liability on the grounds he gave due notice and plaintiff accepted the tenant to whom he, the defendant, had sublet the premises.

The defendant moved the court that the cause be removed to New Hanover County for the convenience of witnesses, etc. The motion came

on for hearing at the January Term 1950. Pending the hearing, the parties agreed to a reference, the hearing to be held in Wilmington, N. C. The court, pursuant to the agreement, entered its order referring the cause to the Honorable D. H. Bland who was directed to file his report on or before April 10, 1950.

Hearings were had before the referee and he, on 19 August 1950, furnished counsel for plaintiff and defendant with copies of his report which was filed with the clerk of the Superior Court of Henderson County on 15 September 1950. On 13 September 1950 counsel representing plaintiff and defendant entered into a written stipulation, "for the convenience of attorneys," that "on or before October 14, 1950, either plaintiff or defendant may file Exceptions to the Referee's Report filed in this cause with the Court on August ....., 1950; may file Motion to confirm said report, or may file Motion to re-refer or submit Issues to the Court."

On or about 12 September 1950 counsel for plaintiff residing in Henderson County filed a written motion for an order directing the referee "to show cause why he should not be removed as Referee and be ordered to return all monies paid to him for his services, which he has not performed in accordance with the order of the Court." The motion was based on the allegations that the referee "has not filed any report despite the fact that several terms of Superior Court have been held in Henderson County, and he has been urged and requested to make the report," and the delay has "caused the plaintiff to bring another suit to recover possession of the building and caused him to lose some $500.00 in rents unless he shall prevail in this cause." On 12 September 1950 the Honorable Luther Hamilton, purporting to act as a special judge, issued a rule directed to the referee and requiring him to appear on 9 October 1950 and "show cause why he should not be removed as Referee and why he should not be ordered to return all monies paid to him on account thereof."

At the October Term, which convened 9 October 1950, Rudisill, J., found certain facts and upon the facts found ordered that (1) the referee be removed effective 12 September 1950, (2) the report filed be rejected as being unacceptable, and (3) the referee refund the amounts paid to him under the consent order. The order was signed out of term by consent 21 October 1950.

To the order entered the defendant excepted and appealed.

L. B. Prince for plaintiff appellee.

J. E. Shipman and Kellum & Humphrey for defendant appellant.

BARNHILL, J. The order of the court below discharging the referee must be held for error. In civil cases the parties have the right to select the manner of trial of their cause. They may waive trial by jury and

submit the controversy to the judge presiding, or they may agree to submit the cause to a referee. When, as here, the parties agree upon a reference, the consent of the parties continues until the order of reference is complied with by a full report. The order cannot be revoked at the election of one of the parties without the consent of the other. *Flemming v. Roberts,* 77 N.C. 415; *Trust Co. v. Jenkins,* 196 N.C. 428, 146 S.E. 68; *Mills v. Realty Co.,* 196 N.C. 223, 145 S.E. 26; *Smith v. Hicks,* 108 N.C. 249.

The consent extends not only to the terms of the reference but also to the person of the referee. The referee selected by the parties, or by their consent, must continue as such until the order has been fully executed and the final report made, unless by like consent another is substituted in his stead. *Flemming v. Roberts, supra.*

We do not mean to say that the court may not discharge a referee for willful failure to discharge his duties or for intentional disregard of the order of reference, *Trust Co. v. Jenkins, supra.* But no such cause is here made to appear.

It is true the court concluded "That the Referee has not performed his duties and has indicated a lack of responsibility to his duties as Referee," but this conclusion is bottomed on two specific findings of fact: (1) The referee was directed to file his report on or before 10 April 1950, and (2) the referee "failed and refused" to file his report until the order signed by the Honorable Luther Hamilton was served on him.

The report was not filed by 10 April 1950 as in said order directed. Even so, plaintiff is in no position to assert that fact as cause for removing the referee. The parties continued with the reference without objection until the report was prepared and copies thereof were furnished to counsel, actually entering into stipulations in respect thereto as late as 13 September, after the motion herein was filed in court. Any cause for objection that the referee failed to file the report as in said order directed was waived. A party to a reference will not be permitted to proceed with the reference after the day fixed for the final report, without objection, thereby taking his chances of a decision in his favor, and then at a later stage, after a decision has been or seems likely to be rendered against him, for the first time, urge the delay as cause for removing the referee. *Andrews v. Jordan,* 205 N.C. 618.

The able and conscientious attorney to whom this cause was referred encountered those conditions so often arising in reference matters which serve to delay a prompt report. As disclosed by the report filed, this delay was caused in large part by counsel for the parties. Counsel who actually appeared at the hearings before the referee have not seen fit to challenge or contradict these statements. The record remains devoid of any substantial grounds for a conclusion that the referee willfully refused

or intentionally failed to file his report as promptly as conditions would permit.

The amounts paid the referee were paid by the parties under the terms of the consent reference. The court was without authority to require the referee to refund the same.

Likewise, that part of the order which rejects the report of the referee "as being unacceptable" must be held for error. This for two reasons: (1) It is based on specific findings of fact which are unsupported by the record, and (2) the report was not before the judge for consideration.

The judge found that the referee in his report does not set out his findings of fact and conclusions of law, and he failed to file his report in the time allowed by the order. While the referee does not divide his report into subtitles, "findings of fact" and "conclusions of law," as is sometimes done, he found all the essential facts at issue. The facts found are supported by evidence and are sufficient to support his conclusions of law. On this record the delay in filing the report is no cause for rejecting the same.

The judge of the Superior Court, in the exercise of his supervisory power and under the statute, G.S. 1-194, may affirm, amend, modify, set aside, confirm in whole or in part, or disaffirm the report of a referee, or he may make additional findings of fact and enter judgment on the report as thus amended. *Anderson v. McRae,* 211 N.C. 197, 189 S.E. 639, and cases cited. But this does not mean that the judge may, *ex mero motu,* vacate a report upon which no attack has been made by any of the parties. The authority must be exercised, if at all, in an orderly manner in accord with recognized rules of procedure. "Either party . . . may move the judge to review the report, and set aside, modify or confirm it in whole or in part . . . ," G.S. 1-194, and the report "may be excepted to by either party . . . and reviewed in like manner and with like effect in all respects as in cases on appeal . . ." G.S. 1-195.

The broad supervisory power of the judge is to be exercised in ruling upon exceptions duly entered, or some motion directly attacking the validity of the report. *Contracting Co. v. Power Co.,* 195 N.C. 649, 143 S.E. 241; *Wallace v. Benner,* 200 N.C. 124, 156 S.E. 795; *Thigpen v. Trust Co.,* 203 N.C. 291, 165 S.E. 720; *Holder v. Mortgage Co.,* 214 N.C. 128, 198 S.E. 589.

Speaking to the subject in *Anderson v. McRae, supra, Stacy, C. J.,* says: "This he may do, however, only in passing upon the exceptions, for in the absence of exceptions to the factual findings of a referee, such findings are conclusive . . . and where no exceptions are filed, the case is to be determined upon the facts as found by the referee." McIntosh P. & P. 577.

Plaintiff's motion does not assail the report of the referee. Indeed, at the time the motion was entered, the report had not been filed. No exceptions have been entered. The cause, by the stipulations of the parties, had in effect been continued until 14 October. The report was not before the judge for consideration. The order rejecting the same must be vacated.

In this connection it is interesting to note that the record presents a somewhat novel situation. While the order was signed out of term 21 October, it is made retroactive and effective as of 12 September. Thus the order rejects as being unacceptable a report which was not on file on the effective date of the order.

On a consent reference, findings of fact made by a referee, in the absence of exceptions thereto, are conclusive on the hearings in the Superior Court as they are on appeal to this Court. The findings to which no exceptions are entered become in effect facts agreed. *Bank v. Graham,* 198 N.C. 530, 152 S.E. 493; *Salisbury v. Lyerly,* 208 N.C. 386, 180 S.E. 701.

Therefore, for the reasons stated, the report filed by the referee must be restored to its rightful place on the civil issue docket. In the absence of exceptions thereto, it should be affirmed and judgment entered in accord therewith.

Error and remanded.

OSSIE BISHOP, TRADING AND DOING BUSINESS AS BISHOP CONSTRUCTION COMPANY, v. D. H. BLACK AND E. L. HAZEN, TRADING AS MOUNTAIN CREST FARMS, AND VINNIE BLACK.

(Filed 21 March, 1951.)

1. Appeal and Error § 10a—

An exception to the order for the disbursement of the funds remaining in the hands of the receiver in accordance with the receiver's report theretofore filed, to which no exception was taken, presents the correctness of the judgment for review, and the alleged error being presented by the record proper, no case on appeal is required.

2. Receivers § 12d—

Where there are no exceptions to the receiver's report, an exception to the order of the court directing the disbursement of the funds remaining in the receiver's hands presents the question of whether the priority of payment directed is correct upon the findings of the receiver.

3. Receivers § 12c—

Under the provisions of R.S. 3466, 31 U.S.C.A. 191, the United States is entitled to priority upon its claim for taxes immediately upon the appointment of a receiver provided the debtor is insolvent at the time of the appointment, irrespective of the time its claim for taxes is docketed in the district.

4. Same—

While the right of the United States to priority on its claim for taxes against an insolvent is not enforceable "against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector," 26 U.S.C.A. 3672, creditors who have attached property of the debtor prior to the appointment of the receiver but who have not reduced their claims to judgment at the time the right of the United States to priority of payment arises, do not come within this category and they are not entitled to priority over the claim for taxes.

5. Same—

Where all claims filed with the receiver which were secured and superior to the claim of the United States for taxes have been paid in full, the claim of the United States for income taxes due from the debtor, filed with, approved and reported by the receiver, is entitled to full satisfaction out of the assets of the insolvent before any other claim or charges of other creditors can be paid from the assets.

APPEAL by the United States from *Rudisill, J.*, December Term, 1950, of HENDERSON.

This is an action instituted 11 October, 1949, in which the plaintiff alleged the defendants D. H. Black and C. L. Hazen, trading as Mountain Crest Farms, were nonresidents of North Carolina; that they were indebted to him in the sum of $1,705.88, and in which a warrant of attachment was issued and levied on certain personal property belonging to the defendants.

The plaintiff further alleged other creditors had filed suits and attached property of the defendants; that the debts of the defendants amounted to approximately $100,000, and that a large number of additional creditors were preparing to file suits and attach their property. Wherefore, the plaintiff prayed the court to appoint a receiver to take over the assets of the defendants and to restrain the creditors from instituting further suits and to require all the defendants' creditors to file their claims with the receiver in order that such claims might be adjudicated in said receivership. Accordingly, a temporary receiver was appointed and the appointment was made permanent on 7 November, 1949. Thereafter, on 6 March, 1950, the Receiver made his report to the March Term of the Superior Court of Henderson County, the pertinent parts of which are as follows:

"The undersigned duly appointed receiver in the above entitled action respectfully reports to the court . . . a list of the names of all creditors

who have filed claims with him, as receiver, with the finding by the receiver as to the priority of each claim as provided by statute:

"1. The cost of this action to be taxed by the court.

"2. State Trust Company mortgage on real estate together with collateral note secured on bean seed, $23,052.22. This the receiver finds to be a first lien and prior claim on the money derived from the sale of the real estate and equipment of the defendants.

"3. State Trust Company, $7,158.83. Secured by chattel mortgage on farm equipment which has already been paid under former order of the court.

"4. To the U. S. Government for income tax liens filed: amount at this time not absolutely determined, but approximately, $2,691.39.

"5. Any other taxes that may be due the Government of the U. S., or the State of North Carolina, that have not been filed with the Receiver.

"6. Ossie Bishop, the sum of $715.00 by reason of sale of Buick automobile to W. R. Johnson for the sum of $730.00, which automobile had been attached by said Ossie Bishop prior to the appointment of your Receiver, your Receiver finding as a fact that such attachment constitutes a prior lien on funds derived from said sale.

"7. To Ben Israel the sum of $632.14, by reason of said Ben Israel having attached one Ford Truck which was sold to W. R. Johnson for the sum of $1,000 prior to the appointment of the Receiver in this cause, which the Receiver finds is a prior lien on the funds derived from the sale of said truck."

The report then deals with additional preferred claims, not pertinent to this appeal, and lists the common creditors who are entitled to share ratably in any assets remaining after payment of the preferred claims.

No exceptions were filed to the report of the Receiver.

After the payment of items two and three, as shown in the report of the Receiver, the only assets remaining in the hands of the Receiver, is a sum slightly in excess of $1,000.

At the December Term, 1950, of the Superior Court of Transylvania County, the court entered an order purporting to determine the parties entitled to receive the funds then in the hands of the Receiver.

The court held that since the Receiver was appointed on 12 October, 1949, and "the Collector of Internal Revenue did not transfer and have docketed its claim from the State of Florida to the Collector of Internal Revenue, in Greensboro, against the defendants until several months thereafter," the United States is not entitled to recover on its claim. The order then states that the remaining parties having entered into an agreement prorating their claims which were approved by the Receiver as a preference, or preferred claim, the court ordered the Receiver to pay to Ben Israel the sum of $250.00, to Ossie Bishop $550.00, and to the

State Trust Company the sum of $200.00, and to file his report and be discharged.

This judgment was entered by consent of the attorney of record who represents the plaintiff Ossie Bishop, and who also represented the Receiver at the hearing below, and by the respective attorneys representing State Trust Company and Ben Israel.

Upon being apprised of the entry of this judgment, the United States excepted thereto and gave notice of appeal to the Supreme Court.

A. J. Redden for Ossie Bishop.

O. B. Crowell for State Trust Company.

Paul K. Barnwell for Ben Israel, appellees.

Thomas A. Uzzell, Jr., United States Attorney, and James B. Craven, Jr., Asst. United States Attorney, for appellant.

DENNY, J. The appellees move to dismiss the appeal for that the appellant failed to serve a statement of case on appeal pursuant to the order entered by his Honor on 13 December, 1950, and for the further reason that no notice was given the appellees or their attorneys of the hearing when the court adjudged that the record proper should constitute the case on appeal.

The correctness of the judgment entered below is the only question posed for decision, and that is presented by the exception noted.

When an error relied on by the appellant is presented by the record proper, no case on appeal is required. *Russos v. Bailey,* 228 N.C. 783, 47 S.E. 2d 22. This cause was heard below on the report of the Receiver, therefore it was unnecessary to serve a case on appeal. *Reece v. Reece,* 231 N.C. 321, 56 S.E. 2d 641; *Privette v. Allen,* 227 N.C. 164, 41 S.E. 2d 364; *Bessemer Co. v. Hardware Co.,* 171 N.C. 728, 88 S.E. 867; *Commissioners v. Scales,* 171 N.C. 523, 88 S.E. 868. The motion to dismiss is denied.

The appellant excepts and assigns as error the signing of the judgment entered below in that it directs the disbursement of the remaining assets in the hands of the Receiver in a manner contrary to the law governing priority of payments among creditors, and for the further reason that his Honor had no jurisdiction to reverse the findings of the Receiver in the absence of appropriate exceptions to his report.

In the case of *Surety Corp. v. Sharpe,* 232 N.C. 98, 59 S.E. 2d 593, *Ervin, J.,* speaking for the Court, sets out in a very comprehensive manner the duties of a receiver. It is pointed out that "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 claimants of his determination. . . . G.S. 55-152. . . . When this is done 'any inter-

ested 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 court provided he files his exceptions in apt time. . . . G.S. 55-152."

No exception having been taken to the report of the Receiver, this appeal turns upon whether the United States is entitled to priority of payment on the findings of the Receiver.

The Congress of the United States in 1797 enacted a statute conferring upon the government a right of priority in payment out of the assets of an insolvent debtor of all claims due the United States. There has been no substantial change in this statute in the meantime, which is now R.S. 3466, 31 U.S.C.A. 191, the pertinent part of which reads as follows: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied."

"It is well settled that the priority statute does not create a lien upon the debtor's property in favor of the United States, but merely confers upon the government a right of priority in payment out of that property in the hands of the debtor's assignees or other representatives, under the conditions specified in the statute." 28 Am. Jur., Insolvency, section 73, p. 819. *Bramwell v. United States Fidelity & G. Co.,* 269 U.S. 483, 70 L. Ed. 368; *United States v. Emory,* 314 U.S. 432, 86 L. Ed. 314; 44 C.J.S., Insolvency, section 14 (b), p. 374.

The priority of the United States, under the provisions of the above statute, attaches upon the appointment of a voluntary or involuntary receiver, *Gordon v. Campbell,* 329 U.S. 362, 91 L. Ed. 348, or upon the date of debtor's assignment for the benefit of creditors, *United States v. Waddill, Holland & Flinn,* 323 U.S. 353, 89 L. Ed. 294; *United States v. Texas,* 314 U.S. 480, 86 L. Ed. 356; *Price v. United States,* 269 U.S. 492, 70 L. Ed. 373; *In re Mitchell's Restaurant,* ..... Del. ....., 67 A. 2d 64; *Spokane Merchants' Asso. v. State,* 15 Wash. 2d 186, 130 P. 2d 373.

However, the right to priority of payment under the above statute does not give the government any lien or right that may be enforced "against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector" in accordance with the provisions of 26 U.S.C.A. 3672.

The appellees, Ossie Bishop and Ben Israel, are creditors who attached property of the debtors prior to the appointment of the Receiver. Even so, they had not reduced their claims to judgment at the time the right of priority of payment in favor of the government arose. Hence, they cannot claim priority under the above statute. They were not mortgagees, pledgees, purchasers or judgment creditors at the time the right

to priority of payment arose in favor of the United States. *United States v. Texas, supra; MacKenzie v. United States* (C.C.A. 9th Cir.), 109 F. 2d 540.

Moreover, prior to the adoption of 26 U.S.C.A. 3670, 3671 and 3672, not even innocent purchasers for value, holders of recorded mortgages, or of unsatisfied judgments of record were protected from an unrecorded tax lien. *United States v. Snyder,* 149 U.S. 210, 37 L. Ed. 705; *MacKenzie v. United States, supra.*

It is well, however, to keep in mind that priority of payment in favor of the government within the meaning of R.S. 3466, 31 U.S.C.A. 191, does not arise unless the debtor is insolvent. *Louisiana State University v. Hart,* 210 La. 78, 26 So. 2d 361, 174 A.L. R. 1366; *United States v. Oklahoma,* 261 U.S. 253, 67 L. Ed. 638. But where a receiver is appointed the insolvency of the debtor, at the time of the appointment, is clearly demonstrated when it appears his assets when liquidated are insufficient to satisfy the claims of contesting creditors. *Gordon v. Campbell, supra.*

Now, as to the appellee, State Trust Company, it is difficult to understand why the court below approved the payment of any portion of the funds remaining in the hands of the Receiver to this claimant. It appears from the record that the State Trust Company filed only two claims with the Receiver and that both of them were paid in full. Furthermore, the only reference to an additional claim by this concern is found in an order signed by his Honor 10 October, 1950, which contains the following statement: "The court further finds that the State Trust Company has a claim in the amount of $1,020.00, which it claims to be a first claim prior to the three creditors set up in said report." How this claim arose, why it was not filed with the Receiver, and why it should be allowed as either a preferred or common claim is not disclosed by the record.

Since it appears that all claims filed with the Receiver, which were secured and superior to the claims of the United States under the provisions of 26 U.S.C.A. 3670, 3671 and 3672, have been paid in full, it is our opinion, and we so hold, that the claim of the United States for income taxes due from the debtors, claim for which was filed with, approved and reported by the Receiver, is entitled to full satisfaction out of the assets of the insolvent debtors before any additional claim or charge is paid except the costs incident to the receivership.

The judgment entered below is vacated and this cause is remanded for judgment in accord with this opinion.

Error and remanded.

J. W. HALL, ADMINISTRATOR OF THE ESTATE OF BETTY SUE HALL, v. HARLEYSVILLE MUTUAL CASUALTY COMPANY AND THE MUTUAL AUTO FIRE INSURANCE COMPANY.

(Filed 21 March, 1951.)

1. Pleadings § 17—

A demurrer should point out the particular facts which should have been, but are not alleged.

2. Insurance § 48—

Where a policy insures against liability as distinguished from mere indemnity, coverage attaches when liability attaches regardless of actual loss by insured at the time, which coverage inures to the benefit of an injured third person who may sue the insurer as soon as the liability of the insured has been established by judgment, *a fortiori* where the policy itself provides that such injured person who has secured judgment against insured is entitled to recover under the policy.

3. Same—

Complaint in an action by the injured third person against insurer in a liability policy will not be held demurrable for failure to identify the particular vehicle insured when the policy provides coverage as to any other automobile driven by insured, and the complaint identifies insured as the driver of the vehicle causing the injury.

4. Insurance § 44d—

Complaint in an action by the injured third person against insurer in a liability policy alleging notice to insurer of plaintiff's claim and insurer's refusal to appear and defend the action against insured, and the obtaining of judgment against insured, *is held* not demurrable for failure to allege compliance by insured with the conditions and terms of said policy, since conditions as to the conduct of insured subsequent to the accident relate to affirmative defenses notwithstanding they may be designated as conditions precedent, and plaintiff is not required to negative the existence of an affirmative defense.

APPEAL by defendant from *Armstrong, J.*, October Term, 1950, WILKES.

Civil action by third party beneficiary to recover on automobile liability insurance policy, heard on demurrer.

The plaintiff alleges the death of his intestate as the proximate result of the negligent operation of a motor vehicle by one Ernest Cleary, the recovery of judgment against Cleary for said wrongful death, the return of execution *nulla bona*, the issuance by defendant of its automobile liability insurance policy insuring Cleary against liability for damages because of bodily injury or death sustained by any person as a result of Cleary's operation of a motor vehicle, notice to defendant of the original action against Cleary, and that the policy was in full force and effect at the time of the injury to and death of his intestate.

Defendant demurred for that "the complaint fails to state a cause of action against these defendants for that" (1) "it alleges or attempts to allege an obligation between the plaintiff and these defendants when, in fact, no such obligation exists;" (2) "there are no allegations in said complaint which create in the plaintiff any right to be a proper party plaintiff in an action against these defendants;" (3) "the complaint does not allege that either a contract or a breach thereof exists that would give rise to a cause of action between plaintiff and these defendants."

The demurrer was overruled and defendant appealed.

W. H. McElwee, Jr., and R. F. Crouse for plaintiff appellee.

Broughton, Teague & Johnson and Larry S. Moore for defendant appellants.

BARNHILL, J. It is to be noted in the beginning that the demurrer is in general terms. It does not point out any particular fact which should be but is not alleged. It seems to be directed solely to the contention that plaintiff as a third party beneficiary has no right to maintain an action on the policy. Even so, we take note of certain contentions advanced by defendant in its brief as to why the complaint fails to state a cause of action.

It is settled law with us that where the policy of insurance is against liability and not of indemnity and the liability of the insured has been established by judgment, the injured person may maintain an action on the policy of insurance, that is, coverage attaches when liability attaches, regardless of actual loss by the insured at the time, and the coverage inures to the benefit of the party injured. *Distributing Co. v. Insurance Co.*, 214 N.C. 596, 200 S.E. 411; 6 Blashfield, Part 2, 104.

But here plaintiff is not required to look to, and we need not cite, former decisions of this Court. The right of action by a third party beneficiary is stipulated in the policy.

"Any person or organization or the legal representative thereof who has secured such judgment (against the insured) or written agreement (agreement signed by the insured, the claimant, and the company) shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy."

The policy of insurance which is made a part of the complaint insures, primarily, against liability arising out of the operation of the particular motor vehicle described in the policy. Defendant in its brief contends that as it is not alleged the death of plaintiff's intestate arose out of the negligent operation of this particular vehicle, the complaint fails to state a cause of action against defendant. But, on this record, such is not the case. The rider attached to the policy provides that "If the

named insured is an individual who owns the automobile classified as 'pleasure and business' or husband and wife either or both of whom own said automobile, such insurance as is afforded by this policy for bodily injury liability . . . with respect to said automobile applies with respect to any other automobile, subject to the following provisions . . ." And the provisions attached do not necessarily exclude the automobile involved in the collision which caused the death of plaintiff's intestate. That remains a matter of proof at the hearing. The allegation in this respect is sufficient to repel the demurrer.

The plaintiff alleges notice to defendant of plaintiff's claim and defendant's refusal to appear and defend the original action against the insured. While the defendant now directs attention to the failure of plaintiff to allege that the insured complied with the conditions and terms of said policy, it cites no decision from this or any jurisdiction in which it is held that such allegation is essential to the statement of a cause of action upon a liability insurance policy.

"The designation of the condition as a condition precedent does not necessarily vary the court procedure or the rules of evidence which places the burden of proving an affirmative defense upon the party making it, especially where the condition relates to the conduct of the insured subsequent to the accident maturing the liability." *MacClure v. Casualty Co.*, 229 N.C. 305. Plaintiff is not required to negative the existence of an affirmative defense.

Whether plaintiff may offer evidence sufficient to bring his cause within the rule which renders defendant liable under its policy to the party injured by the negligent operation, by the insured, of an automobile covered by the policy is a question which must await the day of trial. The allegations contained in his complaint are sufficient to entitle him to the right to attempt to do so. This is all we are now required to decide.

The judgment overruling the demurrer is

Affirmed.

STATE v. CHARLIE ALSTON AND JESSE ALSTON.

(Filed 21 March, 1951.)

1. Criminal Law § 52a (3)—

Circumstantial evidence is a recognized and accepted instrumentality in the ascertainment of truth, and in many cases is sufficient to overrule defendant's motion to nonsuit even though the individual facts may be weak in themselves when they present a strong case considered together.

2. Criminal Law § 52a (1)—

Upon motion to nonsuit the court is required to ascertain merely whether there is evidence to sustain the allegations of the indictment, and not whether it be true or the jury should believe it.

3. Larceny § 7—Circumstantial evidence of guilt of larceny held sufficient.

Evidence tending to show that on the morning following the night the tobacco of the prosecuting witness was stolen, defendants were seen in the truck owned by one of them when it became stuck on the side of the road, that the truck was then loaded with tobacco, but that later when the truck was pushed out of the ditch there was no tobacco in it, and that the tobacco belonging to the prosecuting witness was thereafter found in the woods opposite the place where the truck had been stuck, *is held* sufficient, with the other circumstantial evidence in the case, to overrule defendant's motions to nonsuit in this prosecution for housebreaking and larceny.

APPEAL by defendants, Charlie Alston and Jesse Alston, from *Parker, J.*, and a jury, at January Criminal Term, 1951, of WARREN.

Criminal prosecution tried upon a two-count bill of indictment charging both defendants with the perpetration of the following offenses on 12 October, 1950: (1) breaking and entering a building wherein leaf tobacco belonging to Willis Pritchard was stored and kept, with intent to commit larceny therein contrary to G.S. 14-54; and (2) larceny of leaf tobacco of the value of one thousand dollars, the property of Willis Pritchard.

The State's evidence tends to show that Willis Pritchard had stored about fifteen hundred pounds of leaf tobacco, of the value of approximately one thousand dollars, in a dwelling-packhouse near his home. He last saw the tobacco on 10 October, 1950. When he returned to the packhouse on the morning of 12 October, 1950, the locks had been broken and pulled off and all of the tobacco was gone. Early that night Sheriff Roy Shearin and others, including Willis Pritchard, while out searching for clues, saw signs on the shoulder and side of the Lickskillet-Inez dirt road, at Walker's Hill about ten miles from the Pritchard place, indicating that a motor vehicle had been stuck in the side ditch, next to a thick wooded area, with dense undergrowth extending up to the road. They saw a leaf of tobacco on a bush side of the road. Out in the thicket, from thirty feet to a hundred yards from the side of the road, they found about eleven hundred pounds of leaf tobacco hidden in stump holes, behind bushes, and in low places. Willis Pritchard testified that the tobacco was his and he identified it from the way it was tied; he said it had been tied by his mother who is left-handed, by his tenant, his tenant's wife, and by himself; that his mother, because of arthritis in her hands, tied loose left-hand ties and capped it; that he, Willis Pritchard, made a tie with a big, long head without cap; that his tenant's wife made a "near"

medium-size head with cap; that his tenant tied a head about the same as his but with not quite as many leaves in a bundle. About fifty or sixty tobacco sticks were found in the woods with the tobacco and also a tobacco rack, which Willis Pritchard identified as his. He said he made the rack out of "one by fours" and knew it, and that the sticks were made by his father out of cut oak and that he knew them.

The same night the tobacco was found, and only a short while thereafter, Sheriff Shearin saw both defendants at a nearby store. Charlie Alston's truck was there, in a muddy condition, and the Sheriff asked him if he had been stuck and Charlie replied: "Yes, that it had been stuck on Walker's Hill."

The witness Arthur Robinson testified in substance that he remembered when the tobacco was stolen; that he met Charlie Alston that morning just before sunrise on the Lickskillet road; that when they met, Charlie pulled his truck too far to the side and hit the soft shoulder and ran into the ditch; that, after passing, he looked back and saw the truck standing in the ditch, and that the truck had tobacco on it,—he estimated about twelve hundred pounds.

Luther Palmer testified that he was in the car with Arthur Robinson and recognized both defendants on the truck and saw tobacco on it. He said he later showed the Sheriff where they met the truck and saw it get stuck.

Rufus Dent testified that about 5:00 or 5:30 o'clock a.m. of the "day when Sheriff Shearin came there that night when they said Mr. Pritchard's tobacco was stolen," he met Charlie Alston walking up the Lickskillet road about half a mile from where the truck was stuck and went back to help him push it out. Jesse Alston was at the truck when he arrived; that he, with the help of some others, pushed the truck out of the ditch. He said he did not see any tobacco on the truck at that time.

G. H. Rooker, Deputy Sheriff, testified that Arthur Robinson pointed out to him the place where he said the truck was stuck, and that it was opposite where the tobacco was found.

There was other evidence corroborative of and cumulative to the foregoing evidence tending to show that the defendants' truck was seen with tobacco on it before it reached the place where it was stuck, and that none was on it when seen thereafter.

The defendants went upon the witness stand and admitted being on the Lickskillet road in the early morning of 12 October, 1950. They further admitted that the truck they were operating got stuck at Walker's Hill that morning and had to be pushed out. However, they testified that no tobacco was on the truck at any time that morning, and in this they were supported and corroborated by the testimony of members of their family and other witnesses. They offered evidence tending to show that

they lived that year on nearby rented lands and had interests in about sixteen acres of tobacco; that they used the Lickskillet road in hauling their tobacco to market and made frequent trips over the road during the Fall of 1950; that on the early morning of the day before the plaintiff's tobacco is alleged to have been stolen, they carried a load of tobacco to market over this road. They said, however, that on the morning in question they were on another mission; namely, trying to locate Thomas Kearney for the purpose of surrendering him in court that day in order to prevent forfeiture of a fifty dollar cash appearance bond posted for Kearney by Charlie Alston. The defendants' theory of the case is that the State's witnesses are in error as to the time and place when they claim to have seen tobacco on the defendant's truck.

The jury returned a general verdict of guilty as charged on both counts in the bill of indictment as to each defendant. From judgment pronounced on the verdicts, each defendant appealed, assigning errors.

Leon T. Vaughan and James D. Gilliland for defendants, appellants.

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

JOHNSON, J. The defendants lay stress on their exception to the refusal of the court below to allow their motion for judgment of nonsuit made when the State rested its case and renewed at the close of the evidence.

True, the verdicts here rest entirely upon circumstantial evidence, "but circumstantial evidence is not only a recognized and accepted instrumentality in the ascertainment of truth, but it is essential, and, when properly understood and applied, highly satisfactory in matters of the gravest moment." *S. v. Brackville,* 106 N.C. 701, 11 S.E. 284; *S. v. Cash,* 219 N.C. 818, 15 S.E. 2d 277. "In some classes of cases the chain of evidence is said to be no stronger than the weakest link, but this is not always true, for sometimes facts, which seem weak by themselves, may be woven together like twigs in a bundle, or wires in a cable, and so a strong case may be constructed of facts which would be weak by themselves." Lockhart, North Carolina Handbook of Evidence, 2d Ed., Sec. 266, p. 316.

The motion to nonsuit under G.S. 15-173 "requires that the court ascertain merely whether there is any evidence to sustain the allegations of the indictment, and not whether it be true or the jury should believe it." *S. v. McLeod,* 196 N.C. 542, 146 S.E. 409.

Here, the series of incriminating circumstances, taken in its entirety, was sufficient to be submitted to the jury.

We have examined the other exceptions brought forward in defendants' brief and find in them no cause to disturb the results below. The defendants have had a fair trial under application of the correct principles of law.

No error.

STATE v. JOHN HENRY THOMPSON.

(Filed 21 March, 1951.)

1. Indictment and Warrant § 15—

While the trial court has broad power to allow amendments to warrants, both as to form and substance, nevertheless amendments must relate to the charge and the facts supporting it as they exist at the time it was formally laid, and may not be allowed to change the nature of the offense intended to be charged in the original warrant. G.S. 7-149 (12).

2. Same: Bastards § 4—

An indictment charging defendant with being the father of prosecutrix' unborn illegitimate child may not be amended so as to charge, after the birth of the child, defendant's willful failure and refusal to support the child.

3. Bastards § 1—

The offense of nonsupport of an illegitimate child is the willful and intentional failure to support the child without justification after notice and request, and since the begetting of an illegitimate child is not denominated a crime, paternity being merely incidental to the issue of nonsupport, a man cannot be held criminally liable for the willful failure to support an unborn illegitimate child.

APPEAL by defendant from *Carr, J.*, October Term, 1950, of CHATHAM.

The defendant was tried and found guilty in the General County Criminal Court of Chatham, 10 July, 1950, on the following warrant, issued on 3 January, 1950, by a justice of the peace:

"Mary Bivens, being duly sworn, complains and says that at and in the said County Of Chatham, Bear Creek Township, on or about the 3 day of December, 1950 (1949), John Henry Thompson did unlawfully, wilfully and feloniously be the father of her unborn illegitimate child and does refuse to furnish adequate support, contrary to the form of the statute and against the peace and dignity of the State."

Judgment was rendered sentencing the defendant to six months in jail, assigning him to work upon the roads, to be suspended on payment of $15.00 for the support of the child and a like sum on the first day of each month thereafter until further orders of the court.

On appeal to the Superior Court, upon motion of the Solicitor for the State, the warrant was amended so as to allege "that on or about the 24th day of May, 1950, the child referred to in this warrant, to wit, Wilmia Jean Bivens, was born, and that subsequent to her birth, and between that time and the time this action was tried in the Recorder's Court of Chatham County, to wit, on the 10th day of July, 1950, the defendant did wilfully and unlawfully fail and refuse to support and maintain said child, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State." The defendant excepted to the allowance of this amendment.

Upon the trial, the prosecutrix testified that she had had sexual intercourse with the defendant on many occasions, and that he was the father of her child; that she had some conversation with him about the support of the child before the warrant was issued; that he paid the hospital bill a few days after the child was born, and told her he was going to support it until it was of age, although she had not said anything to him about support for the child and did not do so until 25 August, 1950. She further testified that after her conversation with the defendant in the hospital after her child was born, she never had another conversation with him until 25 August, 1950.

From an adverse verdict and the judgment entered pursuant thereto, the defendant excepted and appealed to this Court, assigning error.

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

Barber & Thompson for defendant.

DENNY, J. When the appeal was called for hearing in this Court, counsel for defendant moved that the judgment entered below be arrested, for that the warrant was issued on 3 January, 1950, prior to the birth of the illegitimate child on 24 May, 1950, and the amendment permitted in the court below resulted in the trial and conviction of the defendant upon an offense entirely different from that charged (if an offense was charged) in the original warrant.

It is well settled by this Court that the power of the Superior Court to allow amendments to warrants is very comprehensive. *S. v. Stone*, 231 N.C. 324, 56 S.E. 2d 675; *S. v. Carpenter*, 231 N.C. 229, 56 S.E. 2d 713; *S. v. Bowser*, 230 N.C. 330, 53 S.E. 2d 282; *S. v. Wilson*, 227 N.C. 43, 40 S.E. 2d 449; *S. v. Brown*, 225 N.C. 22, 33 S.E. 2d 121; *S. v. Holt*, 195 N.C. 240, 135 S.E. 324; *S. v. Mills*, 181 N.C. 530, 106 S.E. 677. A warrant, however, cannot be amended so as to charge a different offense. *S. v. Clegg*, 214 N.C. 675, 200 S.E. 371; *S. v. Goff*, 205 N.C. 545, 172 S.E. 407. But ordinarily, under our statute, G.S. 7-149, Rule 12, the

trial judge may allow, in his discretion, an amendment to a warrant both as to form and substance before or after verdict, provided the amended warrant does not change the nature of the offense intended to be charged in the original warrant. *S. v. Mills, supra; S. v. Poythress,* 174 N.C. 809, 93 S.E. 919; *S. v. Telfair,* 130 N.C. 645, 40 S.E. 976.

Notwithstanding these broad powers with respect to amendments, a warrant as well as the amendments thereto must relate to the charge and the facts supporting it as they existed at the time it was formally laid in the court. *S. v. Summerlin,* 224 N.C. 178, 29 S.E. 2d 462.

Therefore, a conviction upon an amended warrant, unsupported by the facts as they existed at the time the warrant was issued, will not be upheld. Neither will a conviction for the willful failure to support an illegitimate child be upheld on such warrant, where the State, in order to sustain the conviction, must rely altogether on evidence of willful failure to support the child subsequent to the time the charge was laid in court. *S. v. Summerlin, supra.*

The mere begetting of an illegitimate child is not denominated a crime. *S. v. Stiles,* 228 N.C. 137, 44 S.E. 2d 728; *S. v. Dill,* 224 N.C. 57, 29 S.E. 2d 145. Likewise, the failure of a father to pay the expenses of the mother incident to the birth of his illegitimate child, is not a criminal offense. But upon conviction the court may require the payment of such expenses. And the issue or question of paternity is incidental to the prosecution for the crime of nonsupport. *S. v. Bowser, supra; S. v. Stiles, supra; S. v. Summerlin, supra.*

In order to convict a defendant for the nonsupport of an illegitimate child, the burden is on the State to show beyond a reasonable doubt, that he is the father of the child and that he had refused or neglected to support and maintain it, and that such refusal or neglect was willful, that is, intentionally done, "without just cause or justification," after notice and request for support. *S. v. Hayden,* 224 N.C. 779, 32 S.E. 2d 333; *S. v. Ellison,* 230 N.C. 59, 52 S.E. 2d 9; *S. v. Stiles, supra.*

The motion in arrest of judgment will be allowed for the reason that a man cannot be held criminally liable for the willful failure to support an unborn illegitimate child. Moreover, a warrant may not be amended so as to charge the defendant with an offense which was committed, if committed at all, after the warrant was issued.

The defendant's objection to the allowance of the amendment to the warrant should have been sustained. Consequently, it is unnecessary to discuss the assignments of error appearing in the case on appeal.

Judgment arrested.

STATE v. AARON ARTIS.

(Filed 21 March, 1951.)

1. Homicide § 25—

Evidence tending to show that after an altercation between landlord and tenant as to whether the landlord should keep his dog in the tobacco barn near the tenant's house, both the parties armed themselves, and that as the landlord was passing through defendant tenant's yard, presumably on the way to the tobacco barn with the dog, defendant fired from the house inflicting mortal injury, *is held* to require the overruling of defendant's demurrer to the evidence, notwithstanding that defendant's evidence, if believed, would justify a self-defense acquittal.

2. Criminal Law § 81c (5)—

Where defendant is convicted of manslaughter upon evidence fully justifying the verdict, alleged error relating to the charge of murder in the second degree cannot be prejudicial.

APPEAL by defendant from *Carr, J.*, November Term, 1950, of WAYNE.

Criminal prosecution on indictment charging the defendant with the murder of Jim Henry Gardner.

In apt time, the solicitor announced that he would not put the defendant on trial for murder in the first degree, but would ask for a verdict of guilty of murder in the second degree or manslaughter as the evidence might disclose. *S. v. Wall*, 205 N.C. 659, 172 S.E. 216.

The relation of the deceased and the defendant was that of landlord and tenant. The two lived about 100 yards apart. There were two barns on the premises leased by the defendant, a corn barn or feed barn and a tobacco barn. The corn barn or feed barn was used jointly by the two, the landlord using the left side for his farming tools, hay and feed, and the defendant using the right side for his corn, feed and livestock. The landlord also kept some of his farming utensils under the shelter of the tobacco barn.

During the latter part of September, 1950, the landlord housed his oldest son's dog in the feed barn, which was near the defendant's house; in fact, in the edge of the back yard only a short distance of the defendant's living quarters. The dog kept so much noise at night, constantly barking, that the defendant threatened to kill the dog to get rid of it. On Sunday morning, 1 October, 1950, the landlord, together with his son Jimmie and grandson, Antoni Anderson, went over to the defendant's place to feed the hogs. The landlord went into the field to get some corn for the pigs, while the boys gave them the slops. The boys then took the dog and put it in the landlord's chicken house, returning to the defendant's home about the time the landlord came from the field with the corn for the pigs.

The evidence is in conflict as to what transpired thereafter. It seems the defendant did not object to having the dog put into the tobacco barn which was some distance from his house, but insisted that the dog could not be kept in the corn barn because it worried him. Then according to the State's evidence, "he got mad and went into the house and got his rifle; said the dog could not be put in the feed barn, and if it were he would kill him."

Words were exchanged between the defendant and his landlord, the latter leaving to get the dog to "put him in the tobacco barn," according to the State's evidence, and according to the defendant's evidence, "Mr. Gardner says, 'You stay here until I come back and when I come back me or you one is going to die.'" And further: "Mr. Gardner said, 'Aaron, I am going to get that dog and put him back in that barn. It is my dog and my barn, and I am going to put him there.'"

At any rate, the landlord did go to his house, got his gun and loaded it, and returned with the dog, leading him by a rope and chain. In going to the tobacco barn, if that were his destination, he would needs pass through the defendant's front yard. The witnesses on both sides were fearful of what a meeting of the two might portend.

When the landlord reached the defendant's front yard and had entered only a short distance, the defendant fired his rifle, shot him over the heart and killed him instantly.

The State's evidence is to the effect that the deceased was carrying his gun on his shoulder when he entered the yard, while the defendant says he had it in firing position "something like this" (indicating), and he warned the deceased not to approach nearer in his menacing attitude, but he paid no heed.

The defendant contended that he shot only in self-defense, and his witnesses were positive in their testimony in his behalf.

The State's witnesses were equally certain of their testimony. The deceased was hard of hearing and poor of vision. "My father could not hear but very little. . . . He was almost blind." The defendant immediately fled and was sought by the officers all day, finally being arrested about 9:00 p.m. that night.

Verdict: Guilty of manslaughter.

Judgment: Imprisonment in the State's Prison for a term of not less than 7 nor more than 10 years.

The defendant appeals, assigning errors.

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

Herbert B. Hulse and Scott B. Berkeley for defendant.

STACY, C. J. The appeal challenges, first, the sufficiency of the evidence to overcome the demurrer, second, the submission of the charge of murder in the second degree, and, third, the correctness of the instructions to the jury.

The State's evidence readily supports the verdict. The defendant's evidence, if believed, would have justified a self-defense acquittal. And even if the weight of the evidence seem to bear in favor of the defendant, we cannot say there was error in submitting the case to the jury. They are the triers of the facts. The credibility of the evidence is for them. The court ruled properly in denying the motion for judgment as in case of nonsuit. Indeed, the presumptions arising from an intentional killing with a deadly weapon, to wit, unlawfulness and malice, required a jury verdict. *S. v. Chavis,* 231 N.C. 307, 56 S.E. 2d 678; *S. v. Childress,* 228 N.C. 208, 45 S.E. 2d 42; *S. v. Brooks,* 228 N.C. 68, 44 S.E. 2d 482; *S. v. DeMai,* 227 N.C. 657, 44 S.E. 2d 218; *S. v. Staton,* 227 N.C. 409, 42 S.E. 2d 401; *S. v. Vaden,* 226 N.C. 138, 36 S.E. 2d 913; *S. v. Robinson,* 226 N.C. 95, 36 S.E. 2d 655; *S. v. Rivers,* 224 N.C. 419, 30 S.E. 2d 322; *S. v. Todd,* 224 N.C. 358, 30 S.E. 2d 157; *S. v. Burrage,* 223 N.C. 129, 25 S.E. 2d 393; *S. v. Keaton,* 206 N.C. 682, 175 S.E. 296; *S. v. Gregory,* 203 N.C. 528, 166 S.E. 387.

The defendant complains that the charge of murder in the second degree should not have been submitted to the jury, and that otherwise error was committed in the trial of this charge. Even so—though no error in this respect appears on the record—the defendant is in no position to take advantage of it, since he was convicted of the lesser offense of manslaughter and the evidence fully justifies the conviction. *S. v. Beachum,* 220 N.C. 531, 17 S.E. 2d 674; *S. v. Blackwell,* 162 N.C. 672, 78 S.E. 316.

The occurrence here was quite a needless tragedy. Both of the principals were a little too insistent upon their rights. Each made the mistake of arming himself. In this respect the defendant seems to have been the first offender. But, then, we are looking at the events of the day in retrospect. If the parties themselves had it to go over, they too might, and doubtless would speak and act differently. It is easy to be wise in the aftertime. Many there are who will learn only in the school of experience—that school exclusively reserved for those who will learn in no other. Its lessons are hard and it is usually thorough in its teachings, as all who are connected with this case will now quite readily agree.

No error appears in the charge as given or in the refusal to charge as requested. The whole case was largely one of fact determinable alone by the jury. We find no error in the trial. The verdict and judgment will be upheld.

No error.

D. WEBSTER DAVIS v. NICHOLAS MARTINI, THOMAS R. BURT, JAMES EVERITT MORLEY, AND JAMES EVERITT MORLEY, TRADING AS MORLEY'S TRANSIT.

(Filed 21 March, 1951.)

1. Process § 10—

G.S. 1-105, which authorizes service of process on the Commissioner of Motor Vehicles as agent of a nonresident defendant in an action arising out of his operation of a motor vehicle on the public highways of this State, is constitutional.

2. Same—

G.S. 1-105 authorizes service of process thereunder (1) upon a nonresident personally operating a vehicle on a public highway of this State and (2) upon a nonresident when the operation of the vehicle is under his control or direction, express or implied.

3. Appeal and Error § 40d—

The findings of fact of the trial court are conclusive on appeal when they are supported by competent evidence notwithstanding there may be evidence to the contrary also, it being the function of the trial court to weigh the contradictory affidavits and to determine for itself the crucial issues of fact involved.

4. Appeal and Error § 6c (3)—

Exceptions to the findings of fact and to the denial of requests for special findings, challenge the sufficiency of the evidence to support the findings attacked.

5. Process § 10—Evidence held sufficient to support finding that truck was under control of nonresident within purview of G.S. 1-105.

Evidence tending to show that a nonresident issued bill of lading in the name of his transit company, agreed to transport the cargo between the designated points, that the cargo was transported in a truck bearing his firm name, that he gave directions as to who should drive the truck, the time of departure and arrival, and that the collision occurred while the cargo specified was being transported in the truck driven by the designated driver on a public highway in this State, *is held* sufficient to support the trial court's finding that the truck was under the control of the nonresident within the purview of G.S. 1-105, notwithstanding his conflicting affidavits that he was a mere freight forwarder without control of the truck, and that the truck was owned and operated by an independent contractor.

APPEAL by defendant, James Everitt Morley, trading as Morley's Transit, from *Bone, J.*, in chambers at Nashville, North Carolina, 19 December, 1950, in action in the Superior Court of NASH County.

Special appearance challenging the validity of service of process upon the Commissioner of Motor Vehicles as agent for a nonresident defendant under G.S. 1-105.

This civil action grows out of a collision between a truck owned by the plaintiff, D. Webster Davis, a resident of North Carolina, and a tractor-trailer combination driven by the defendant, Thomas R. Burt, a resident of Florida, which occurred upon a public highway in Sharpsburg, North Carolina, on 4 January, 1950. The tractor-trailer combination was owned by the defendant, Nicholas Martini, a resident of New Jersey. The plaintiff sued Burt, Martini, and the defendant, James Everitt Morley, a resident of New York, for damages for injury inflicted on his truck in the collision. He filed a complaint alleging in specific detail that the collision was caused by the actionable negligence of Burt in the operation of the tractor-trailer combination; that Burt was jointly employed by Martini and Morley to drive the tractor-trailer from Lake Alfred, Florida, to Philadelphia, Pennsylvania; and that Burt was acting within the scope of such employment and in behalf of both Martini and Morley at the time of the collision.

Service of summons and complaint was had upon the Commissioner of Motor Vehicles as process agent for each of the nonresident defendants, Burt, Martini, and Morley, in the manner prescribed by G.S. 1-105.

The defendant Morley appeared specially, and moved to vacate the attempted service of process on him and to dismiss the action as to him for want of jurisdiction over his person.

In deciding the issue arising on the special appearance, Judge Bone considered affidavits offered by the plaintiff and counter affidavits submitted by Morley, and found "that the motor vehicle described in the complaint, although owned by the defendant, Nicholas Martini, was being operated by the defendant Thomas R. Burt upon a public highway of the State of North Carolina on the occasion referred to in the complaint for the joint benefit of his co-defendants Nicholas Martini and James Everitt Morley, both nonresidents of the State, and under their joint control and direction within the meaning of G.S. 1-105." Judge Bone concluded that the court had jurisdiction over the person of Morley, and denied the motion lodged by him on his special appearance. The defendant Morley appealed, assigning errors.

Itimous T. Valentine for plaintiff, appellee.

Battle, Winslow, Merrell & Taylor for defendant, James Everitt Morley, appellant.

ERVIN, J. The Legislature acted within the limits of its constitutional authority in enacting the statute now embodied in G.S. 1-105, which authorizes service of process on the Commissioner of Motor Vehicles as the agent of a nonresident defendant in an action arising out of his operation of a motor vehicle on a public highway of this State. *Wynn*

v. Robinson, 216 N.C. 347, 4 S.E. 2d 884; *Bigham v. Foor,* 201 N.C. 14, 158 S.E. 548; *Ashley v. Brown,* 198 N.C. 369, 151 S.E. 725.

Under this statute, the ownership or lack of ownership by the nonresident defendant of the motor vehicle involved in the accident is of no legal consequence in so far as his amenability to constructive service of process is concerned. *Coach Co. v. Medicine Co.,* 220 N.C. 442, 17 S.E. 2d 478; *Wynn v. Robinson, supra.* It provides for constructive service of process upon a nonresident defendant in either of the following situations:

1. Where the nonresident was personally operating the vehicle.

2. Where the vehicle was being operated for the nonresident, or under his control or direction, express or implied.

The facts found by the trial court sustain the ruling on the special appearance, and are binding on the parties to the appeal if they are supported by competent evidence. *Bigham v. Foor, supra.*

The defendant Morley has reserved exceptions to the findings and to the denial of his requests for special findings, and has thereby challenged the sufficiency of the evidence to support the crucial finding that Burt was operating the tractor-trailer combination for him, or under his control or direction at the time of the collision between it and the truck owned by the plaintiff.

The affidavits offered by plaintiff at the hearing on the special appearance contained competent evidence revealing the facts and warranting the inferences set forth in the next five paragraphs.

1. The defendant Morley, who did business under the style "Morley's Transit," had offices at Middletown and New York City in New York, and at Lake Wales in Florida.

2. On 2 January, 1950, the defendant Morley, acting through his office at Lake Wales, Florida, issued a straight bill of lading in the name of "Morley's Transit, Brokerage Division, Insulated Refrigerated Tractor-Trailer Service, 204 Franklin Street, New York 13, New York," acknowledging receipt of 350 packages of oranges from the shipper, the Star Fruit Company, at Lake Alfred, Florida, and agreeing to carry them from that place to the consignee, the Atlantic and Pacific Tea Company, at Philadelphia, Pennsylvania. Under the bill, all carriage charges were payable directly to "Morley's Transit."

3. The defendant Morley, acting through his office at Lake Wales, Florida, gave these specific directions: That the oranges should be transported from the place of shipment to the place of destination in the tractor-trailer combination described in the complaint; that Burt should drive such combination; and that Burt should leave Lake Alfred, Florida, at 5:00 p.m. on 2 January, 1950, and arrive at Philadelphia, Pennsylvania, not later than 6:00 p.m. on 4 January, 1950.

4. Although the tractor-trailer combination was registered in the name of the defendant Martini in the State of New Jersey, the tractor bore the name "Morley" in letters approximately 14 inches high on its front, and the trailer carried this inscription in large words and figures on each side: "Hauling for Morley's Transit, Brokerage Div., Middletown, N. Y., Phone 3518, New York City, Phone CA 6-1403."

5. The collision giving rise to this action occurred on a public highway of North Carolina while the tractor-trailer combination driven by Burt was carrying the oranges from Lake Alfred, Florida, to Philadelphia, Pennsylvania.

These facts and inferences support the finding that Burt was operating the tractor-trailer combination for Morley, or under Morley's control or direction at the time of the accident resulting in this litigation.

To be sure, the defendant Morley offered counter affidavits stating in specific detail that Morley was a mere freight forwarder, having no control over the tractor-trailer combination or its driver, Burt; that Morley simply engaged Martini, an independent contractor, to transport the oranges from Florida to Pennsylvania; and that the collision occurred while Martini was carrying out his undertaking by means of his own tractor-trailer combination operated by his own driver, Burt.

The trial court was necessarily called on to weigh the contradictory affidavits, and to determine for itself the crucial issue of fact arising on the special appearance. Since its decision thereon is supported by competent evidence, the resultant ruling must be

Affirmed.

BARBARA JEANE EDWARDS, BY HER NEXT FRIEND, W. DORTCH LANGSTON, v. I. G. CROSS.

(Filed 21 March, 1951.)

1. Automobiles § 18h (2)—Evidence of frontal collision with child where vision was unobstructed held for jury on issue of negligence.

Evidence tending to show that a six-year-old child was struck by the front of a car owned and operated by defendant as the child was crossing the highway along an intersecting farm road plainly visible to a motorist on the highway, that the highway was straight for a quarter of a mile with nothing to obstruct the view of a motorist, and that the driver did not slacken speed or sound his horn before the collision and failed to stop afterwards, although he slackened speed after traveling a short distance after the impact, and was nervous when later apprehended and questioned about the occurrence, *is held* sufficient to be submitted to the jury upon the issue of defendant's negligence.

2. Automobiles § 18g (6)—

Defendant's failure to stop after hitting a pedestrian, G.S. 20-166, and his nervousness upon being later apprehended and questioned about the accident, permits the inference of conscious wrong or dereliction on his part, and is some evidence that he was guilty of negligence in the operation of the vehicle.

3. Negligence § 19b (1)—

While no inference of negligence arises from the mere fact of an accident or injury, where the thing causing injury is shown to be under the control and operation of defendant and the accident is one which does not occur in the ordinary course of things if due care is exercised, the accident itself, in the absence of some explanation by defendant, affords some evidence of negligence.

APPEAL by plaintiff from *Carr, J.*, August-September Term, 1950, of WAYNE.

Civil action to recover damages for an alleged negligent injury.

The record discloses that on the afternoon of 7 October, 1947, Barbara Jeane Edwards, an infant six years of age, left her mother at a tobacco barn, after returning from school, and started to their home across the highway approximately 120 yards away. A well-beaten path, or farm road, plainly visible to a motorist on the highway, ran from the house to the barn. The plaintiff was struck by an automobile and seriously injured while attempting to cross the highway. Her back and left leg were broken; she was knocked unconscious and remained so for twenty-four hours. "It was two or three days before she knew anything like she did before." There is evidence permitting the inference that the defendant, driving his black, two-door Chevrolet Sedan, was the motorist who struck the plaintiff. He was traveling in the direction of Goldsboro. While the record is silent as to the speed of the car or just how the injury occurred, it is in evidence that the motorist did not slacken his speed or sound his horn before striking the plaintiff; nor did he stop to identify himself or to render any assistance after the injury, albeit a short distance up the road, while still in sight, he reduced his speed and it appeared that he was preparing to stop, but he never did. The plaintiff was found "lying right middle way of the road."

The sound of the impact when the car struck the plaintiff was loud enough to attract the attention of plaintiff's mother, some fifty yards away. The road was straight at this point for a quarter of a mile with nothing to obstruct the view of a motorist. It was "drizzly rain, misty-like," at the time. No other traffic was on the road, except a truck following the Chevrolet Sedan some distance away, or "a few minutes" behind, which stopped but would not carry the plaintiff to the hospital. The defendant was quite nervous and ill at ease when later apprehended and questioned about the occurrence.

From judgment of nonsuit entered at the close of plaintiff's evidence, she appeals, assigning errors.

Scott B. Berkeley and Hugh Dortch for plaintiff, appellant.
J. Faison Thomson for defendant, appellee.

STACY, C. J. The question for decision is whether the evidence, taken as true and in its most favorable light for the plaintiff, together with the reasonable intendments and legitimate inferences fairly deducible therefrom, suffice to overcome the demurrer and to carry the case to the jury on the issue of defendant's negligence. The trial court answered in the negative. We are inclined to a different view.

The evidence clearly permits the inference that the defendant was the motorist who struck the plaintiff; that the extent and character of the injuries inflicted appear to indicate a frontal contact or collision, rather than a side-swiping occurrence; that the automobile he was driving was his and under his control and operation; that he had a clear vision of the beaten path or farm road crossing the highway; that nothing interfered with his seeing the plaintiff, if he were looking or keeping a proper lookout; that his failure to sound his horn or to slacken his speed permits the inference that his attention was diverted from the road ahead and the plaintiff's presence thereon; and that his failure to stop as required by statute, G.S. 20-166, or immediate flight from the scene of the injury, affords sufficient evidence of conscious wrong, or dereliction on his part, to warrant the jury in so concluding. *S. v. Foster,* 130 N.C. 666, 41 S.E. 284; *Etheridge v. Etheridge,* 222 N.C. 616, 24 S.E. 2d 477. His better judgment almost persuaded him to stop a short distance up the road, but the impulse was not quite strong enough. Doubtless he could see, and did see through his rear-view mirror, the plaintiff's body lying motionless in the middle of the road and her mother frantically calling for assistance and trying to help her. This could have added to his nervousness when later apprehended and charged with the offense. The jury may ascribe such uneasiness to his appreciation and knowledge of guilt. Actions are sometimes just as vocative as words and often more reliable or trustworthy. Language can be used to conceal thought as well as to express it.—Voltaire

By rendering the plaintiff unconscious and running away the motorist has forced her to rely on circumstantial evidence. The battle may be an unequal one, but the plaintiff says it is not yet hopeless. She is still pressing her claim.

The applicable rule is stated by *Barnhill, J.,* in the last cited case, *Etheridge v. Etheridge,* as follows: "When a thing which caused an injury is shown to be under the control and operation of the party

charged with negligence and the accident is one which, in the ordinary course of things, will not happen if those who have such control and operation use proper care, the accident itself, in the absence of an explanation by the party charged, affords some evidence that it arose from want of proper care."

This was followed in *Boone v. Matheny,* 224 N.C. 250, 29 S.E. 2d 687, and *Wyrick v. Ballard Co.,* 224 N.C. 301, 29 S.E. 2d 900.

The case of *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661, is not at variance with our present position. There, a child not quite nineteen months of age, was struck by a passing Chevrolet truck and killed. The scene of the injury was in the road immediately adjacent to the home of the child's parents. No one saw the child in the road prior to the injury. The driver of the truck was not aware of the child's presence. The more likely occurrence was that the child ran under the truck behind the cab, or after the driver's vision was cut off. We think the case of *Yokeley v. Kearns,* 223 N.C. 196, 25 S.E. 2d 602, is more nearly in point in factual situation than the *Mills Case.*

It is true no inference of negligence arises from the mere fact of an accident or injury. *Mills v. Moore, supra; Lamb v. Boyles,* 192 N.C. 542, 135 S.E. 464; *Isley v. Bridge Co.,* 141 N.C. 220, 53 S.E. 841. Here, however, we have something more than the plaintiff's injury. *Etheridge v. Etheridge, supra.* We think the circumstances are such as to warrant the submission of the issues to the jury; the facts shown seem to make out a *prima facie* case. The twelve will say how it is.

Reversed.

RUBY H. BATEMAN v. THOMAS E. BATEMAN.

(Filed 21 March, 1951.)

1. Divorce and Alimony § 14—

G.S. 50-16 provides two separate remedies: (1) alimony without divorce, and (2) subsistence and counsel fees *pendente lite.*

2. Same—

An affirmative finding upon the issue as to whether defendant had offered such indignities to plaintiff's person as to render her condition intolerable and life burdensome will support judgment for alimony without divorce notwithstanding the negative findings of the jury upon the issues as to whether defendant had separated himself from plaintiff and failed to provide her subsistence, and had wrongfully abandoned her, and by cruel and barbarous treatment had endangered her life.

3. Divorce and Alimony § 5d—

In an action for alimony with divorce under G.S. 50-16 it is incumbent upon plaintiff to allege and prove that the acts of misconduct complained of were without adequate provocation on her part, but allegations that plaintiff had been a dutiful wife and had tried to make a home for defendant and live with him in peace, with her testimony on the trial that she had done nothing to provoke defendant's mistreatment of her, *is held* sufficient for this purpose.

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

PETITION by plaintiff to rehear the case reported in 232 N.C. 659, 61 S.E. 2d 909, where the facts are stated.

Simms & Simms and John M. Simms for plaintiff, petitioner.
Bickett & Banks for defendant.

DEVIN, J. The plaintiff's suit was under G.S. 50-16 and her prayer for relief was for reimbursement for necessary expenses incurred while she was living with the defendant as his wife, and for present subsistence and counsel fees. The statute provides two separate remedies, one for alimony without divorce, and second for subsistence and counsel fees. *Oldham v. Oldham,* 225 N.C. 476, 35 S.E. 2d 332; *McFetters v. McFetters,* 219 N.C. 731, 14 S.E. 2d 833. As grounds for relief under this statute the wife must allege and prove that the husband has been guilty of misconduct or acts that would constitute cause for divorce. The causes for divorce from bed and board are enumerated in G.S. 50-7, and among these, under section 4, the statute declares it a cause for divorce if either party "offers such indignities to the person of the other as to render his or her condition intolerable and life burdensome."

In the case at bar the plaintiff, in addition to other matters pleaded not now pertinent, has alleged, in substance, that because of the continuous mistreatment, physical violence and abuse of her by the defendant she has suffered many "indignities to her person," which she sets out in detail, and that such mistreatment and abuse has rendered her condition intolerable; and that defendant has offered such indignities to her person as to "render the plaintiff's condition intolerable and her life burdensome." On the trial the plaintiff offered evidence tending to support this allegation.

In the former opinion it was thought the issues as answered by the jury would not support the judgment. It appears from the record that issues were submitted to the jury (1) as to marriage, (2) as to whether the defendant had separated himself from the plaintiff and failed to provide subsistence, (3) was a drunkard, (4) had wrongfully abandoned the plaintiff, (5) had by cruel and barbarous treatment endangered her

life, and (6) "did the defendant offer such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome."

The jury answered the first issue yes, and the 2nd, 3rd, 4th and 5th issues no, but answered the 6th issue yes. This finding alone, we think, was sufficient to support the judgment in favor of the plaintiff.

In addition to plaintiff's allegations of mistreatment and abuse to which the 6th issue was addressed, it was also incumbent upon the plaintiff to allege and to prove that the acts of misconduct complained of were without adequate provocation on her part. *Barker v. Barker,* 232 N.C. 495, 61 S.E. 2d 360; *Carnes v. Carnes,* 204 N.C. 636, 169 S.E. 222. Here, the plaintiff alleged that she had at all times been a dutiful wife to the defendant and had tried to make a home for him and to live with him in peace, and she testified in her examination on the trial that she had done nothing to provoke the treatment complained of. With reference to the 4th, 5th, 6th and 7th issues the court charged the jury that the burden was upon the plaintiff to show she was "free from fault, free from blame on these four issues." (The seventh issue was whether the defendant was an habitual drunkard).

Under these circumstances we do not think the jury's finding on the 6th issue, in view of the pleadings, evidence and charge of the court, was rendered ineffectual by the findings on the other issues.

For the reasons stated we reach the conclusion that the petition to rehear should be allowed and the judgment appealed from affirmed. It is so ordered.

Petition allowed.

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

STATE v. BLAIR HOVIS.

(Filed 28 March, 1951.)

1. Criminal Law §§ 52a (2), 52b—

On demurrer to the evidence or motion for a directed verdict of not guilty, neither the weight nor the reconciliation of the evidence nor the credibility of the witnesses is for the court, but the court is required to determine only whether there is sufficient evidence, considered in the light most favorable to the State, to support a verdict for the prosecution.

2. Criminal Law § 52a (4)—

Contradictions and discrepancies in the State's evidence, even though some of them relate to testimony of exculpatory statements made by defendant, do not justify nonsuit when other evidence of the State, includ-

ing inculpatory statements made by defendant, tend to establish the State's case, the reconciliation of the evidence being the function of the jury alone.

3. Criminal Law § 81b—

Where the charge is not in the record it will be assumed that the court correctly charged the jury.

4. Homicide § 25—Evidence held sufficient to support verdict of guilty of involuntary manslaughter.

Deceased was fatally shot while in a room alone with defendant. The State offered evidence of threats made by defendant against deceased a short time before the fatal shooting. The State also offered in evidence testimony of statements made by defendant to the effect that he and deceased were "fooling" with defendant's pistol, when it went off inflicting the fatal injury, and of later statements made by defendant to the effect that deceased had threatened to kill herself if defendant would not give her more beer, and that at the critical moment had the gun to her chest when defendant attempted to stop her, and the gun went off. *Held:* Conceding that defendant's statements may be reconciled, they are nevertheless susceptible to inferences some of which are inculpatory and some exculpatory, and the inculpatory statements together with the other evidence for the prosecution is sufficient to sustain the jury's verdict of guilty of involuntary manslaughter and overrule defendant's demurrer to the evidence and motion for a directed verdict, the reconciliation and credibility of the testimony being the province of the jury.

5. Homicide § 8a—

Where one engages in an unlawful and dangerous act, such as handling a loaded pistol in a careless and reckless manner, or pointing it at another, and kills the other by accident, he is guilty of involuntary manslaughter, and no presumption is required to support a verdict of guilty of this offense. G.S. 14-34.

6. Same—

Where the unintentional killing of a human being results from an unlawful act not amounting to a felony or from a lawful act negligently done, the offense is involuntary manslaughter.

APPEAL by defendant from *Sharp, Special Judge*, January Term, 1951, of LINCOLN.

Criminal prosecution on indictment charging the defendant with the murder of Mrs. Ruby Bondurant Colbert.

Upon the call of the case for trial, the solicitor announced that he would not prosecute the defendant for murder in the first degree, but would ask for a verdict of murder in the second degree or manslaughter as the evidence might disclose. *S. v. Wall*, 205 N.C. 659, 172 S.E. 216.

It is revealed by the record that on Sunday afternoon, 17 September, 1950, about 4:30 p.m., the deceased was shot in the chest with the defendant's .38 Smith & Wesson pistol and died shortly thereafter. She was

on a couch in the sleeping room of the defendant's "Moonlight Grill" about four miles from Lincolnton on the Maiden Highway when she was shot, with the defendant the only other person in the room at the time.

The defendant came immediately from the bedroom into the main room of the grill, called Amzi Linn, who went back into the bedroom with him. Linn came back out and called Henry Grayson, who returned with him to the bedroom. Grayson says: "When I walked in there this woman was on the bed a-bleeding. She was lying with her head up in the northwest corner of the bed." He further testified that the defendant was running around and around saying, "Get an ambulance, get a doctor, do something. . . . Get an ambulance and the sheriff. . . . He was not drunk or anything like that but he looked like he was scared. . . . He acted like he was scared awfully bad. . . . When I first went into the room, I said, 'What is going on in here?' He (defendant) said they were fooling with an old gun and it went off.

"The Court: Who was fooling with an old gun?

"Witness: Well, I can't say whether he was fooling with it or she was fooling with it. He said they were fooling with an old gun and it went off."

The sheriff testified that Henry Grayson told him on the following Monday that the defendant said, "he was fooling with an old gun and it went off."

On being recalled, the witness Grayson again stated that when he first went into the bedroom, the defendant said: "We was fooling with an old gun and it went off."

The sheriff testified that he found the "pistol with five loaded cartridges and one empty shell . . . near the southeast corner of the bed, about fifteen inches from the foot of the bed. I asked him (defendant) whose gun it was and he said it was his."

Mrs. Nellie Pope, a patron in the grill, said she heard "feet scuffling or something. . . . Then I heard a man's voice cursing and talking loud. He said, 'Damn you' and 'G—— damn you' two or three times, . . . and in two or three minutes I heard something fall. It was just like something heavy fell. It jarred the floor. It was not but just a few minutes until I heard a shot or something that sounded like a shot."

Dr. W. G. Page performed an autopsy on the body of the deceased and testified that in his opinion her death was caused from a bullet passing through her chest; that there were abrasions or ruptures of the skin about the face which "appeared to have been made right at the time of death or shortly thereafter"; that he found a quantity of food and blood in the stomach "which had a marked alcoholic odor"; that in his opinion "the gun was six inches or more from the body when it was fired. . . . I found no smudging either on the clothing of the deceased or on the body

under the clothing. . . . The bullet entered the body about the center of the chest and ranged downward and came out about two inches below the point of entrance and slightly towards the heart side"; that the abrasions on the skin "could have been caused by striking the head against the edge or corner of a door. . . . They could very easily have been inflicted after her death, as much as thirty minutes after death." The indications were that "the wounds were received subsequent to death or at the time of death."

While in jail, the defendant was interviewed by R. W. Turkelson, Special Agent of the State Bureau of Investigation, to whom he stated that the deceased, a divorcee with three children, "had been staying out there and living with him on week-ends," off and on for about three years, and for some time she had appeared rather blue or morose; that she had received a call from her former husband in Florida which had upset her; that on the day in question she had been drinking and came to the kitchen where he was and wanted some more beer; that he told her she had had enough, to which she replied, "all right I will kill myself then"; that as soon as he finished making a sandwich he came to the door of the bedroom and "saw her with the gun up to her chest" and that she again threatened to kill herself; that he called to her, "Ruby don't do that," and reached for the gun; that "as he got his hand over her hand and partly on the gun it went off"; that this excited him and he tried to get her to the hospital and that "he slipped and fell down as he was carrying her out the back door."

The sheriff, on being recalled, quoted the defendant as saying to him on Sunday night, "that Mrs. Colbert had wanted more beer but he would not give it to her and that she got mad and shot herself."

There is further evidence that in December, 1949, the deceased and the defendant were heard fussing at the Moonlight Grill and the defendant threatened to "blow her brains out" if she went away that night.

At the close of the State's evidence, the defendant demurred and moved for a directed verdict. Overruled; exception.

The defendant offered no evidence.

Verdict: Guilty of involuntary manslaughter.

Judgment: Imprisonment in the State's Prison for a term of not less than five nor more than seven years.

Defendant appeals, assigning as error the refusal of the court to dismiss the action as in case of nonsuit or to direct a verdict in his favor.

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

Childs & Childs and Jonas & Jonas for the defendant.

STACY, C. J. The single question presented for decision is the sufficiency of the evidence to overcome the demurrer and to withstand the motion for a directed verdict. The rulings of the trial court were favorable to the State, and we are disposed to approve.

It is true the evidence is not all one way and it was offered by the prosecution—the defendant electing not to go upon the witness stand or to offer any evidence—nevertheless it is the rule with us that on demurrer to the evidence or motion for directed verdict the State is entitled to have the evidence considered in its most favorable light, eliminating for the purpose any discrepancies or contradictions which the jury alone may reconcile or consider. *S. v. Rountree,* 181 N.C. 535, 106 S.E. 669. The court's inquiry on demurrer or such motion is directed to the sufficiency of the evidence to warrant its submission to the jury and to support a verdict for the prosecution. *S. v. Hart,* 116 N.C. 976, 20 S.E. 1014. Neither the weight nor the reconciliation of the evidence nor the credibility of the witnesses is for the court. *S. v. Utley,* 126 N.C. 997, 35 S.E. 428.

Then, too, all of the discrepancies and contradictions in the evidence, if such there be, come from variant statements made by the defendant to different witnesses. If these result in ultimate equivocation, the jury alone is authorized to find the facts or to say what they are, and to assess their value in the light of the attendant circumstances. A verdict is the jury's *veredictum*—the *dictum* of truth, or the pronouncement of the real truth of the matter.

Here, the defendant is quoted as saying to Henry Grayson that "we were fooling with an old gun and it went off," meaning he and the deceased were fooling with the gun when it fired, and Grayson quoted the defendant to the sheriff as saying, "he was fooling with an old gun and it went off."

On the other hand, the sheriff and the S.B.I. agent quote the defendant as saying to them that Mrs. Colbert was drinking on the afternoon in question; that she wanted more beer and he would not give it to her; whereupon she threatened to kill herself and had the gun up to her chest when the defendant attempted to stop her and it went off, thus resulting in a misadventurous homicide. *S. v. Eldridge,* 197 N.C. 626, 150 S.E. 125; *S. v. Whaley,* 191 N.C. 387, 132 S.E. 6.

Initially, the defendant says there is no real contradiction in his statements to Grayson, the sheriff and the S.B.I. agent; that his statement to Grayson was made under excitement and on the spur of the moment and was intended only as a short-hand statement of the occurrence which is readily reconcilable with his later statements to the sheriff and the S.B.I. agent. In the absence of the court's charge to the jury, which does not appear in the transcript, it is to be assumed the court correctly instructed

the jury to reconcile the evidence, where reasonably susceptible of reconciliation, and thus the defendant presumably was given full benefit of his position in this respect in the jury's consideration of the evidence.

Moreover, taking the State's view of the different statements, the defendant says the record presents this question: Where the State offers contradictory statements of the defendant, some initially made which are inculpatory and others later made which are exculpatory, is the State bound by the later statements thus entitling the defendant to a dismissal of the action?

An affirmative answer is urged by the defendant. He contends that "it is neither charity nor common sense nor law" to permit a jury to infer a criminal occasion when the State's evidence, with equal or greater certainty, points to accident or misadventure as the cause of decedent's death, *S. v. Massey,* 86 N.C. 658, and that a compulsory nonsuit or dismissal of the prosecution on demurrer to the evidence is suggested, if not required, by the following authorities: *S. v. Ray,* 229 N.C. 40, 47 S.E. 2d 494; *S. v. Watts,* 224 N.C. 771, 32 S.E. 2d 348; *S. v. Boyd,* 223 N.C. 79, 25 S.E. 2d 456, and cases cited; *S. v. Todd,* 222 N.C. 346, 23 S.E. 2d 47, and cases cited; *S. v. Cohoon,* 206 N.C. 388, 174 S.E. 91.

While defendant's counsel have presented his case cogently and with much force, we are constrained to think the record, viewed as a whole, hardly pushes the prosecution into this position. There is the evidence of Mrs. Nellie Pope and the attendant circumstances, including the defendant's previous threat to kill the deceased, which would seem to bring the case within the principle announced in *S. v. Phillips,* 227 N.C. 277, 41 S.E. 2d 766, and *S. v. Gregory,* 203 N.C. 528, 166 S.E. 387. The probative value of the evidence is for the twelve. The solicitor felt impelled to give the jury the benefit of all the evidence and to "let the chips fall wherever they may." An adverse answer to the question, however, may be found in *S. v. Robinson,* 229 N.C. 647, 50 S.E. 2d 740, and *Jackson v. Hodges,* 232 N.C. 694, *loc. cit.* 696, 62 S.E. 2d 326.

Finally, the defendant says there is nothing on the record to show an intentional killing on his part; that the jury has so found, and that no adverse presumption arises to overcome the presumption of innocence, or to support the verdict of involuntary manslaughter. *S. v. Cranford,* 231 N.C. 211, 56 S.E. 2d 423; *S. v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472; *S. v. Edwards,* 224 N.C. 577, 31 S.E. 2d 762; *S. v. Smith,* 221 N.C. 400, 20 S.E. 2d 360; *S. v. Godwin,* 227 N.C. 449, 42 S.E. 2d 617. And further, that his statements to the several witnesses, which were offered as worthy of belief, clearly reveal in their entirety, *S. v. Edwards,* 211 N.C. 555, 191 S.E. 1, an accidental homicide or a self-inflicted lethal injury. *S. v. Coffey,* 228 N.C. 119, 44 S.E. 2d 886; *S. v. Penry,* 220 N.C. 248, 17 S.E. 2d 4; *S. v. Shu,* 218 N.C. 387, 11 S.E. 2d 155; *S. v. Montague,* 195 N.C.

20, 141 S.E. 285; *S. v. Tillman,* 146 N.C. 611, 60 S.E. 902; *S. v. Goodson,* 107 N.C. 798, 12 S.E. 329. Again, we must refer to the absence of the charge from the transcript and assume the defendant's position in these respects was adequately explained to the jury. Evidently the defendant desires or craves complete vindication or nothing. No presumption is required to support a verdict of involuntary manslaughter, where the evidence permits such an inference. *S. v. Coble,* 177 N.C. 588, 99 S.E. 339; *S. v. Stitt,* 146 N.C. 643, 61 S.E. 566. Where one engages in an unlawful and dangerous act, such as "fooling with an old gun," *i.e.,* using a loaded pistol in a careless and reckless manner, or pointing it at another, and kills the other by accident, he would be guilty of an unlawful homicide or manslaughter. G.S. 14-34; *S. v. Vines,* 93 N.C. 493; *S. v. Trollinger,* 162 N.C. 618, 77 S.E. 957; *S. v. Limerick,* 146 N.C. 649, 61 S.E. 568.

Involuntary manslaughter has been defined to be, "Where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part not amounting to a felony, or from a lawful act negligently done." 1 Wharton Cr. Law, Sec. 305; *S. v. Williams,* 231 N.C. 214, 56 S.E. 2d 574; *S. v. Stansell,* 203 N.C. 69, 164 S.E. 580; *S. v. Turnage,* 138 N.C. 566, 49 S.E. 913. Of course, nothing said herein militates in any way against the doctrine upheld in *S. v. Horton,* 139 N.C. 588, 51 S.E. 945; *S. v. Satterfield,* 198 N.C. 682, 153 S.E. 155, and other cases, of a misadventurous homicide.

After a searching investigation of the record and with full appreciation of the forceful argument of defendant's counsel, we are constrained to approve the submission of the case to the jury. Hence, on the record as presented, the verdict and judgment will be upheld.

No error.

STATE OF NORTH CAROLINA ON RELATION OF THE UTILITIES COMMISSION, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 28 March, 1951.)

1. Utilities Commission § 5—

While the orders of the Utilities Commission must be considered on appeal as *prima facie* just and reasonable, appellant nevertheless may show that the order appealed from was not supported by competent, material and substantial evidence upon the entire record, and thus rebut the *prima facie* effect of the order. G.S. 62-26.10.

2. Carriers § 1½—

The power of the Utilities Commission to require transportation companies to maintain substantial service to the public in the performance of

the absolute duty to provide transportation facilities will not be denied even though the service will be unremunerative when singled out and related only to a particular instance or locality if the loss is incidental and collateral when viewed in relation to and as a part of all its transportation operations as a whole.

3. Same—

Where the discontinuance of an agency at a railroad station would result only in requiring that incoming freight be prepaid and in inconvenience to individual shippers from possible delay in notifying consignees of the arrival of freight, though otherwise the same freight service would be available, *held* the maintenance of the agency is incidental to the carrier's primary and absolute duty of furnishing transportation facilities, and loss to the carrier is properly considered in determining whether convenience to individuals and to the public outweigh the benefit which would inure to the carrier from the abandonment of the agency.

4. Same—

No absolute rule can be set for determining a carrier's application to discontinue a particular service, but each case must be considered upon its own facts in accord with the criterion of reasonableness and justice to determine whether public convenience and necessity require the service to be maintained or permit its discontinuance, weighing the benefit to the carrier of abandonment against the inconvenience to which individual shippers may be subjected.

5. Same—Record held not to support order denying carrier's application to discontinue agency at station.

Upon the undisputed evidence it appeared that the maintenance of an agency at a station by the carrier resulted in loss to the carrier and that the discontinuance of the agency would result only in inconvenience to the individual shippers, but that the public necessity would be met by the continuance of substantially the same freight service without an agent. *Held:* The conclusion of the Utilities Commission that the public convenience and necessity required the denial of the carrier's application to discontinue the agency is not supported by material and substantial evidence upon the whole record as being reasonable and just, and judgment affirming its order denying the application is reversed.

APPEAL by defendant Railroad Company from *Morris, J.*, September Term, 1950, of PITT. Reversed.

This was a proceeding instituted before the North Carolina Utilities Commission by the application of the Atlantic Coast Line Railroad Company for permission to close its agency at Stokes, North Carolina.

The application was denied by order of the Utilities Commission (two members dissenting), exceptions to the order overruled, and rehearing denied. On appeal to the Superior Court, the order of the Utilities Commission was affirmed and the Atlantic Coast Line Railroad Company appealed to this Court.

Attorney-General McMullan and Assistant Attorney-General Paylor for the State of North Carolina ex rel. North Carolina Utilities Commission, appellee.

Charles Cook Howell and Murray Allen for Atlantic Coast Line Railroad Company, appellant.

DEVIN, J. The application of the defendant Railroad Company filed with the Utilities Commission was not for the purpose of obtaining authority to close its railroad station at Stokes, but to close the agency, that is, to dispense with the services of a local agent at that station, for the reasons set out in the application.

The facts were not controverted. The question presented to us for decision is whether these facts afford substantial evidence, in view of the entire record, which would support the conclusion reached by the court below that public convenience and necessity warranted the continued operation of the agency, and that the order of the Utilities Commission denying application for discontinuance of this service was reasonable and just.

Stokes is a village of 325 inhabitants, without manufacturing or processing industry, situated in an agricultural community, traversed by paved roads. There are only six business establishments, and these are principally devoted to merchandising, including the handling and distributing of commercial fertilizers. Railroad freight transportation service is afforded by the defendant's branch line from Parmalee to Washington, North Carolina. No passenger service is maintained. Parmalee is seven miles northwest and Washington is sixteen miles southeast. It appeared that for the twelve months' period ended 30 September, 1949, two carloads were shipped from Stokes and ninety received. Of those received seventy-two contained fertilizer or fertilizer material. It was admitted, and so found by the Utilities Commission, that after giving the station of Stokes credit for all railroad revenues derived from shipments originating and received at that station, the loss for the year was $572.90. The expense incurred for the salary and expense of the local agent, which under wage agreement the defendant could not modify, was $3,339.14 per annum. The amount of time necessary for the performance of all the duties of an agent at this station would not exceed on an average thirty minutes per day. There was also uncontradicted evidence that in spite of effort over a period of ten years there had been no increase in freight shipments to and from this station, and that there was no possibility of expanding the railroad business or earnings there, and that on the other hand in small communities like this transportation by rail increasingly suffered from competition with motor vehicles operating over improved highways.

It also appeared that the absence of a local agent at Stokes would not affect freight shipments to and from that station. The same freight service would be available. The same freight trains would run, stopping on same schedules at Stokes. The only difference would be that incoming freight must be prepaid, and that notice of arrival would be mailed from Washington instead of Stokes, and that waybills and receipts for freight from Stokes would be handled by the train conductor. Less than carload shipments would be unloaded and deposited in the station building, and consignee notified. It also appeared that a large proportion of freight shipments to Stokes, particularly fertilizer, now arrives prepaid.

After notice of defendant's application was given, only one person appeared in opposition, Mr. W. F. Stokes of the firm of Stokes & Congleton, merchants, who received sixty-six of the ninety cars shipped to Stokes station during the year referred to. Mr. Stokes expressed the opinion that there was public need for the continuance of the agency, and that handling carload and other freight shipments without a local agent would cause inconvenience and sometimes delay, and that if the agency were discontinued it would result in his firm's transferring its freight business to motor carriers.

The Utilities Commission was of opinion that notwithstanding the applicant sustained a loss of $572.90 during the twelve months used as a basis this was not a sufficient showing to deprive the community of agency service to which it had been accustomed, and that if the agency were discontinued there would be no adequate substitute as there were no regular truck routes operating into Stokes, and that handling freight through other agencies and using train conductors would be unsatisfactory from the standpoint of the community. It was concluded that the public convenience and necessity of the agency at Stokes was sufficiently shown to warrant the continued operation of the agency. The application of the defendant was accordingly denied. Defendant filed numerous exceptions to the order of the Commission, and, among others, that there was no substantial evidence that public convenience and necessity warranted continuance of the agency at Stokes, or that the requirement that applicant continue to maintain such agency at a loss, under the circumstances here disclosed, was reasonable and just.

These exceptions having been overruled and petition to rehear denied (G.S. 62-26.6), defendant appealed to the Superior Court where the order of the Utilities Commission was affirmed. That court in affirming the Commission's order expressed the view that the fact that there were no regular motor carrier routes into the community and the absence of an adequate substitute for the service now rendered by the applicant bore "heavily upon the question of public convenience and necessity and upon

the reasonableness and justice of the order entered by the Utilities Commission."

By statute (G.S. 62-26.10) upon appeal the orders made by the Utilities Commission "shall be *prima facie* just and reasonable" (*Utilities Com. v. Great Southern Trucking Co.*, 223 N.C. 687, 28 S.E. 2d 201), but this does not preclude the appellant from showing that the evidence offered rebuts the *prima facie* effect of the order, and that the order was "unsupported by competent, material and substantial evidence in view of the entire record." Hence the question posed for our consideration is whether the evidence was sufficient to warrant the conclusion that public convenience and necessity required maintenance, at a substantial loss, of agency service at Stokes, and whether under the circumstances here shown the order of the Utilities Commission denying defendant's application was reasonable and just.

The power conferred by statute upon the Utilities Commission to require transportation companies to maintain substantial service to the public in the performance of an absolute duty will not be denied even though the service may be unremunerative when singled out and related only to a particular instance or locality, if the loss be viewed in relation to and as a part of the over-all operations of transportation, rather than as incidental and collateral thereto. *Washington ex rel. Oregon R. & N. Co. v. Fairchild,* 224 U.S. 510. The distinction was pointed out in *Kurn v. State,* 175 Okl. 379, where it was held as correctly stated in the syllabus: "In the performance of an absolute duty by the railway company the question of expense is not to be considered, but where the duty sought to be enforced is one of additional convenience rather than necessity, the question of expense to the company and relative benefit to the public is the deciding factor and may not be disregarded." This principle was again stated in same language in *Thomson v. Nebraska State Railway Com.,* 143 Neb. 52, and in *St. Louis-S. F. R. Co. v. State,* 195 Okl. 41.

This question was considered by the Supreme Court of South Carolina in *Southern Railway v. Public Service Commission,* 195 S.C. 247, 10 S.E. 2d 769, where the Court used this language: "And as we have pointed out there is clearly no absolute duty requiring a railroad company to maintain an agent at every one of its stations, for the simple reason that nonagency stations may provide reasonably sufficient service, taking into consideration the amount of the public patronage and other surrounding conditions. In other words, the duty of maintaining an agent is at most incidental to the railroad company's primary and absolute duty of furnishing transportation services. Manifestly in a case of this kind the question of loss is of greater importance." The same view was expressed in *Seward v. Denver & R. G. R. Co.,* 17 N.M. 557, and in the case of *A. C. L. R. R. Co. v. King,* 49 So. 2d 89.

In *A. C. L. R. R. Co. v. Commonwealth of Virginia*, 191 Va. 241. 61 S.E. 2d 5, the Supreme Court of Appeals of Virginia considered the application of the Railroad Company for authority to close its station at Carson, Virginia, as an agency station for the reason, as in our case, that it was being maintained at a loss. In a well considered opinion by *Chief Justice Hudgins* the denial of the railroad's application by the State Corporation Commission was reversed as unreasonable and unjust. From this opinion we quote: "There is no conflict in the evidence. Considering all of the facts and circumstances, we cannot escape the conclusion that it would be unreasonable and unjust to require appellant to maintain Carson as an agency station when the cost of such service is out of proportion to the revenue derived from that portion of the public benefited thereby, especially where it is shown, as in this case, that the substituted service proposed will afford the same essential transportation service, but at less convenience to the prospective passengers and shippers. This conclusion is supported by the principles applied in the following cases from other jurisdictions" (citing numerous cases).

In the case at bar the Utilities Commission found that in spite of loss to the applicant therefrom the public convenience and necessity for agency service at Stokes warranted its continued maintenance, and the Superior Court approved. The statute G.S. 62-39 empowers the Utilities Commission to require transportation companies "to establish and maintain all such public services and conveniences as may be reasonable and just." *Utilities Com. v. Great Southern Trucking Co.*, 223 N.C. 687, 28 S.E. 2d 201.

Questions of convenience to individuals and to the public find their limitations in the criterion of reasonableness and justice. No absolute rule can be set up and applied to all cases. The facts in each case must be considered to determine whether public convenience and necessity require the service to be maintained or permit its discontinuance. The benefit to the one of the abandonment must be weighed against the inconvenience to which the other may be subjected. The question to be decided is whether the loss resulting from the agency is out of proportion to any benefit to an individual or the public. In *Illinois Central R. Co. et al. v. Illinois Commerce Commission*, 397 Ill. 323, it was said, "The maintaining of an uneconomic service resulting in an economic waste cannot be justified or excused by the showing that the service has been in the convenience and necessity of some individual. The convenience and necessity required are those of the public and not of an individual or individuals." And in a later case decided by that Court, *Illinois Cent. R. Co. v. Illinois Commerce Commission*, 399 Ill. 67, it was said: "Recent decisions of this Court have established the rule that it is unreasonable to require the maintenance of an agency station where the cost of the

service is out of proportion to the revenue derived from the portion of the public benefited thereby, particularly where a substitute service may be provided affording the same essential, although less convenient service."

In the recent case of *Atlantic Coast Line R. Co. v. King,* 49 So. 2d 89, the Supreme Court of Florida reversed the order of the Utilities Commission of that state denying plaintiff's application to discontinue certain passenger train stops, the Court saying: "The disparity between the inconvenience to such a limited cross city traffic and the cost, delay and burden to appellant is so out of proportion that we think the application for conditional service was reasonable and just and should have been granted."

While on the hearing before the Utilities Commission the principal receiver of freight at Stokes expressed apprehension that inconvenience would result from discontinuance of agency service at that station, this would seem to involve individual rather than public inconvenience, as the same essential service would be retained as to both incoming and outgoing freight though with some inconvenience to the individual shipper, and raises the question whether the court should require the railroad to continue this service at a loss of $572.90 per annum, in order to save one or more shippers from inconvenience of the character about which the shipper testified.

We are inclined to the view, after considering the evidence heard by the Utilities Commission which was not in conflict, and on the entire record before us, that the railroad freight service which will be continued at Stokes if defendant's application be allowed, will measurably provide for the needs and convenience of the public, and that the disparity between the inconvenience resulting to the complaining shipper and the burden now imposed on the railroad tends to negative the conclusion reached below that it was reasonable and just to require the maintenance of agency service at a substantial loss to the applicant. *A. C. L. R. R. Co. v. Commonwealth of Virginia, supra.*

We think the finding of the Utilities Commission affirmed by the court below is not supported by material and substantial evidence, and that the order denying application for discontinuance of agency service at Stokes under the evidence did not measure up to the standard of reasonableness and justice required by the statute. The judgment affirming the order of the Utilities Commission is reversed and the cause remanded for appropriate orders in accord with this opinion.

Reversed.

TOMMY ANDERSON, EMPLOYEE, v. NORTHWESTERN MOTOR COMPANY, EMPLOYER, AND PENNSYLVANIA THRESHERMEN & FARMERS MUTUAL CASUALTY INSURANCE COMPANY, CARRIER.

(Filed 28 March, 1951.)

1. Master and Servant § 40c—

Claimant under the Workmen's Compensation Act must show not only that he has suffered personal injury by accident which arose out of and in the course of his employment but also that his injury caused him disability unless it is included in the schedule of injuries made compensable under G.S. 97-31 without regard to loss of wage earning power.

2. Same—

"Disability" as used in the Workmen's Compensation Act means impairment of wage earning capacity rather than a physical impairment. G.S. 97-2 (i).

3. Same—Findings held to sustain conclusion that injury did not materially accelerate or aggravate pre-existing infirmity.

Findings to the effect that claimant suffered an injury by accident which arose out of and in the course of his employment but that he lost no time or wages as a result thereof, and after working for about a month with this employer, entered into business for himself, and that the disability of claimant is not a result of the accident but of a congenital infirmity, *is held* to sustain decision denying compensation, since the findings support the conclusion that the injury neither of itself nor in combination with the pre-existing infirmity resulted in any disability, and claimant is not entitled to have the cause remanded for a specific finding as to whether the injury proximately contributed to his disability by accelerating or aggravating his pre-existing condition.

4. Same—

Where claimant's expert witness testifies to the effect that claimant had a congenital infirmity of the spine and that claimant now suffers a 10% disability, and further that claimant's disability could be the result of the accident or could have antedated it, such testimony does not impel the single conclusion that the injury accelerated or aggravated claimant's pre-existing infirmity, and further, the testimony related to a physical impairment rather than an impairment of wage earning capacity.

5. Master and Servant § 52—

In passing upon issues of fact the Industrial Commission is the sole judge of the credibility of the witnesses and of the weight to be given their testimony, and may accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves the same.

6. Master and Servant § 55d—

Findings of fact of the Industrial Commission are conclusive when supported by legal evidence. G.S. 97-86.

ANDERSON *v.* MOTOR CO.

APPEAL by plaintiff from *Bobbitt, J.*, at January Term, 1951, of WILKES.

Proceeding under the North Carolina Workmen's Compensation Act in which the plaintiff, Tommy Anderson, seeks compensation from his employer, Northwestern Motor Company, and its insurance carrier, Pennsylvania Threshermen & Farmers Mutual Casualty Insurance Company, for an alleged injury by accident arising out of and in the course of his employment.

The parties concede that they are subject to the provisions of the Act.

The only evidence of legal importance offered in the proceeding was that of the plaintiff and his physician.

The plaintiff testified to the effect that on 7 March, 1949, his employment by the defendant required him to assist a fellow employee in unloading a heavy safe from a truck; that while he was in an awkward and unusual position the safe unexpectedly slipped and fell, wrenching his back and producing much pain; that despite this mishap he continued to work for the defendant without any loss of time or wages until the defendant terminated its business "a month or so" later; that he had been operating a small garage of his own ever since the defendant had closed, but was "not making anything"; and that he had not been able to do anything except light work since 7 March, 1949. The plaintiff admitted that he had drawn compensation under the North Carolina Workmen's Compensation Act on two previous occasions on account of back injuries suffered by him in 1946 and 1948 while working for a former employer, the Gaddy Motor Company.

The plaintiff's physician testified, in substance, that he had examined and treated the plaintiff's back both before and after 7 March, 1949; that the plaintiff has a congenital infirmity of the spine, "which precludes mechanically the normal functioning (of his) back, and tends to subject it to stress and strain more easily"; and that "viewing the average person as one hundred per cent," the plaintiff now suffers a permanent physical disability of ten per cent. The physician stated that this disability "could be the result of the last injury received while working for the Northwestern Motor Company," or could have arisen before that time.

The Hearing Commissioner denied the plaintiff's claim for compensation, and the plaintiff appealed to the Full Commission, which made these specific findings of fact bearing on the questions involved on the present appeal: (1) "That the plaintiff on March 7, 1949, sustained an injury by accident that arose out of and in the course of his employment, and as a result thereof he has lost no time or wages." (2) "That after working for about a month more with this employer, the plaintiff removed himself from the labor market, and entered into business for himself." (3) "That any disability the plaintiff has sustained is not a result of the

accident of March 7, 1949, but is a result of a congenital condition." The Full Commission concluded as a matter of law on the basis of these findings that the plaintiff had not suffered a compensable injury by accident within the purview of the Act, and entered its decision accordingly.

The plaintiff thereupon appealed from the Full Commission to the Superior Court, and the Superior Court rendered judgment affirming the decision of the Full Commission. The plaintiff excepted to this judgment, and appealed therefrom to this Court, assigning errors.

W. H. McElwee, Jr., for plaintiff, appellant.

Trivette, Holshouser & Mitchell for defendants, appellees.

ERVIN, J. To obtain an award of compensation for an injury under the North Carolina Workmen's Compensation Act, an employee must always show these three things: (1) That he suffered a personal injury by accident; (2) that his injury arose in the course of his employment; and (3) that his injury arose out of his employment. *Withers v. Black*, 230 N.C. 428, 53 S.E. 2d 668. Furthermore, he must establish a fourth essential element, to wit, that his injury caused him disability, unless it is included in the schedule of injuries made compensable by G.S. 97-31 without regard to loss of wage-earning power. *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865. As used here, the term "disability" signifies an impairment of wage-earning capacity rather than a physical impairment. This is necessarily so for the very simple reason that the Act expressly specifies that "the term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." G.S. 97-2 (i).

The assignments of error permit the plaintiff to challenge the validity of the judgment of the Superior Court on alternative grounds. This he does. He insists primarily that the decision of the Full Commission is not sustained by its findings of fact, and he asserts secondarily that such findings of fact are not supported by the evidence before the Commission. *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760.

While there seems to be no case on the specific point in this State, courts in other jurisdictions hold with virtual uniformity that when an employee afflicted with a pre-existing disease or infirmity suffers a personal injury by accident arising out of and in the course of his employment, and such injury materially accelerates or aggravates the pre-existing disease or infirmity and thus proximately contributes to the death or disability of the employee, the injury is compensable, even though it would not have caused death or disability to a normal person. Schneider's

Workmen's Compensation (Perm. Ed.), Text Volume 6, section 1543 (i); 58 Am. Jur., Workmen's Compensation, section 247; 71 C.J., Workmen's Compensation Acts, section 358.

When this proceeding was heard before the Commission, the plaintiff invoked these outside authorities, and argued that he was entitled to an award of compensation under them because the evidence established these three propositions: (1) That he was afflicted with a pre-existing infirmity of the spine; (2) that on 7 March, 1949, he suffered a personal injury by accident arising out of and in the course of his employment; and (3) that such personal injury accelerated or aggravated his pre-existing infirmity of the spine and in that way proximately contributed to a disability on his part. The defendant denied the validity of this argument.

The plaintiff's primary position on the appeal may be summarized as follows: The Commission rejected the outside legal authorities invoked by plaintiff as the basis for his claim, and for that reason did not find the facts in respect to the plaintiff's third proposition. As a consequence, the findings are silent on the main issue joined between the parties, fail to determine the controversy involved in the proceeding, and do not support the decision, denying compensation to the plaintiff. Hence, the Superior Court erred in refusing a request by plaintiff that the proceeding be remanded to the Commission with an instruction that the Commission find from the evidence whether the personal injury by accident suffered by plaintiff on 7 March, 1949, proximately contributed to a disability on his part by accelerating or aggravating his pre-existing spinal infirmity. *Evans v. Lumber Co.*, 232 N.C. 111, 59 S.E. 2d 612; *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E. 2d 797.

The plaintiff's primary position is untenable because his fundamental premise, *i.e.*, that the Commission rejected the outside legal authorities invoked by him as the basis for his claim and by reason thereof did not find the facts in respect to his third proposition, lacks validity.

When the record is read aright, it reveals that the Full Commission assumed that the principle of law relied on by plaintiff prevails in North Carolina, and that the Full Commission denied the claim for compensation because it found as a fact from the evidence before it that the plaintiff had not sustained a compensable injury within the purview of that principle. The first, second, and third specific findings mean simply this: Although the plaintiff suffered a personal injury by accident arising out of and in the course of his employment on 7 March, 1949, such injury was inconsequential in nature, and did not, either of itself or in combination with the pre-existing infirmity of the plaintiff, cause any disability, *i.e.*, loss of wage-earning power, to the plaintiff.

This being true, the findings cover the material issues of fact arising in the proceeding, determine the entire controversy between the parties,

and support the decision of the Commission. The plaintiff's injury does not fall within the schedule embodied in G.S. 97-31, and is not compensable in the absence of a resulting disability.

The plaintiff adopted his secondary position against the eventuality of an adverse interpretation of the findings of fact of the Commission. He advances these interesting arguments in its support: The evidence presented by the plaintiff before the Commission pointed unerringly to the single conclusion that the injury by accident which he sustained on 7 March, 1949, accelerated or aggravated his pre-existing spinal infirmity and in that way proximately contributed to a disability on his part. As this evidence was uncontradicted, it was obligatory for the Commission to accept it and to make accordant findings of fact. Instead of doing this, the Commission made findings diametrically contrary to the uncontradicted evidence. As a consequence, its findings of fact are not supported by evidence, and the Superior Court ought to have vacated its decision on that ground.

The plaintiff's secondary position is not maintainable. In the first place, its underlying premise, *i.e.*, that the evidence before the Commission engendered a single conclusion favorable to the plaintiff, crumbles when the testimony of the plaintiff's chief witness, the physician, is analyzed. His evidence to the effect that the plaintiff has a ten per cent disability refers to a physical impairment, and not to an impairment of wage-earning capacity. Besides, the physician stated that the plaintiff's disability could have antedated the mishap of 7 March, 1949. When the evidence before the Commission is considered as a whole, it is completely compatible with the Full Commission's determinative finding that the personal injury by accident sustained by plaintiff on 7 March, 1949, was inconsequential in character, and did not, either of itself or in conjunction with his pre-existing infirmity, cause him any disability, *i.e.*, loss of wage-earning power.

Moreover, the notion that it is obligatory for the Commission to accord an involuntary or unquestioned credence to any particular testimony runs counter to the statute which confers upon it full fact-finding authority. G.S. 97-84; *Beach v. McLean*, 219 N.C. 521, 14 S.E. 2d 515. In passing upon issues of fact, the Commission, like any other trier of facts, is the sole judge of the credibility of the witnesses, and of the weight to be given to their testimony. *Henry v. Leather Co., supra.* This being true, it may accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves the same. *Johnson's Case*, 258 Mass. 489, 155 N.E. 460; *Fitzgibbons' Case*, 230 Mass. 473, 119 N.E. 1020.

Inasmuch as the findings of fact of the Full Commission are supported by legal evidence, they cannot be disturbed. G.S. 97-86.

For the reasons given, the decision of the Commission is Affirmed.

JOSEPH H. CHAFFIN v. C. W. BRAME.

(Filed 28 March, 1951.)

1. **Automobile § 8a—Duty of motorist to be able to stop within range of his lights.**

The rule that a motorist traveling at nighttime must not exceed a speed at which he can stop within the distance that objects can be seen ahead of him on the highway is not a rule of thumb but requires of him only that he exercise that degree of care for his own safety which a reasonably prudent person would exercise in like circumstances and be able to stop before striking an object on the highway which he sees or should see in maintaining a proper lookout and attention to the road, but not that he should be able to bring his automobile to an immediate stop upon the sudden arising of a dangerous situation which he could not reasonably have anticipated, or require him to see that which is invisible to a person exercising due care.

2. **Negligence § 11—**

A plaintiff cannot be guilty of contributory negligence unless he acts or fails to act with knowledge and appreciation, either actual or constructive, of the danger of injury which his conduct involves.

3. **Negligence § 9—**

A person is not bound to anticipate negligent acts or omissions on the part of others, but in the absence of anything which gives or should give notice to the contrary, he is entitled to assume and to act upon the assumption that every other person will perform his duty and obey the law and that he will not be exposed to danger which can come to him only from the violation of duty or law by such other person.

4. **Automobiles § 18b—**

A motorist traveling at nighttime may assume, until he has notice to the contrary, that no other motorist will permit his vehicle to move or stand on the highway without displaying the lights required by G.S. 20-129 (d), G.S. 20-134, that the driver of any truck disabled on the highway will display the red flares or lanterns required by G.S. 20-161 and that a motorist approaching from the opposite direction will seasonably dim his headlights as required by G.S. 20-181.

5. **Automobiles § 18h (3)—Evidence held not to show contributory negligence as a matter of law on part of motorist striking unlighted vehicle on highway at nighttime.**

Plaintiff's evidence was to the effect that he was traveling at nighttime at a speed of about forty miles per hour, that upon being partially blinded by the undimmed lights of a vehicle approaching from the opposite direc-

tion, he substantially reduced his speed and blinked his lights as a signal to the approaching motorist, that the other motorist nevertheless failed to dim his lights so that plaintiff could not see defendant's truck, which was parked on the highway in his lane of travel without lights, until plaintiff passed the approaching vehicle some thirty feet before reaching the parked truck, and that immediately upon seeing the truck plaintiff attempted to avoid the collision by bearing to his left, but that the right side of his car struck the rear of the truck at a time when plaintiff's speed did not exceed twenty miles per hour, resulting in the injuries in suit. *Held:* The evidence fails to disclose contributory negligence as a matter of law on the part of plaintiff, and defendant's motion to nonsuit on this ground was properly refused.

6. Pleadings § 22c—

The trial court may allow an amendment, even after verdict, to make the pleading conform to the evidence when the amendment does not change the claim of plaintiff. G.S. 1-163.

APPEAL by defendant from *Gwynn, J.*, and a jury, at the January Term, 1951, of LINCOLN.

Civil action for damage inflicted upon plaintiff's moving automobile in collision with rear of defendant's truck, which was parked on highway at night without lights or warning signals.

These issues arose on the pleadings, and were submitted to the jury:

1. Was the plaintiff's automobile damaged by the negligence of the defendant, as alleged in the complaint?

2. If so, did the plaintiff, by his own negligence, contribute to his own damage, as alleged in the answer?

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

The jury answered the first issue "Yes," the second issue "No," and the third issue "$550.00." The court entered judgment for plaintiff on the verdict, and the defendant appealed, assigning errors.

M. T. Leatherman, C. E. Leatherman, and J. Francis Paschal for plaintiff, appellee.

J. Laurence Jones and Sheldon M. Roper for defendant, appellant.

ERVIN, J. The assignments of error raise these questions:

1. Did the court err in refusing to dismiss the action upon a compulsory nonsuit after all the evidence on both sides was in?

2. Did the court err in permitting the plaintiff to amend his complaint after verdict and before judgment?

We consider these questions in their numerical order.

There was sharp conflict in the testimony offered by the parties at the trial. We omit reference to the evidence adduced by the defendant because it is not necessary to an understanding of the questions arising

on the appeal. The plaintiff made out this case: At 9 p.m. on 8 March, 1950, plaintiff was driving his Ford car southward on Route 18, a paved highway 18 feet wide, in Wilkes County, North Carolina. Defendant's truck was parked upon the right side of the highway without lights or warning signals. It was headed southward, blocked the entire right traffic lane, and virtually blended with the darkness of the night. As plaintiff neared the Dodge truck at a rate not exceeding 40 miles an hour, he met a passenger automobile driven by one Garland, which was proceeding northward along the highway at an extremely low speed, and which was displaying glaring and undimmed headlights. Plaintiff tilted the beams of his front lamps downward. When plaintiff came within 200 feet of the Dodge truck, he was partially blinded by the glaring and undimmed headlights on the approaching automobile driven by Garland. He forthwith substantially reduced the speed of his car, and signaled his discomfiture to Garland by blinking his lights. Despite this, Garland failed to dim his headlights. As a consequence of the unlighted state of the parked truck and the partial blindness induced by the glaring and undimmed headlights confronting him, plaintiff could not see defendant's truck until his car passed the headlights of the Garland automobile. At that time the truck was only 30 feet away. Plaintiff attempted to avoid the collision by veering to the left side of the highway, but the right side of his car struck the rear of the truck and sustained damage. The plaintiff's speed did not exceed 20 miles an hour at the instant of impact. The defendant admitted shortly after the accident that his negligence caused the collision.

The defendant concedes that the evidence indicating that he parked his truck on the traveled portion of the highway at night without displaying lights or warning signals is sufficient to establish actionable negligence on his part. He contends, however, that plaintiff was guilty of contributory negligence as a matter of law because he did not so control his car as to be able to stop within the range of his lights.

To sustain his position, the defendant invokes the long line of cases beginning with *Weston v. R. R.*, 194 N.C. 210, 139 S.E. 237, and ending with *Marshall v. R. R., ante,* 38, 62 S.E. 2d 489, declaring either expressly or impliedly that "it is negligence as a matter of law to drive an automobile along a public highway in the dark at such a speed that it cannot be stopped within the distance that objects can be seen ahead of it."

The rationale of these cases was considered in *Thomas v. Motor Lines,* 230 N.C. 122, 52 S.E. 2d 377, where this elucidation appears: "Few tasks in trial law are more troublesome than that of applying the rule suggested by the foregoing quotation to the facts in particular cases. The difficulty is much enhanced by a tendency of the bench and bar to regard

it as a rule of thumb rather than as an effort to express in convenient formula for ready application to a recurring factual situation the basic principle that a person must exercise ordinary care to avoid injury when he undertakes to drive a motor vehicle upon a public highway at night. The rule was phrased to enforce the concept of the law that an injured person ought not to be permitted to shift from himself to another a loss resulting in part at least from his own refusal or failure to see that which is obvious. But it was not designed to require infallibility of the nocturnal motorist, or to preclude him from recovery of compensation for an injury occasioned by collision with an unlighted obstruction whose presence on the highway is not disclosed by his own headlights or by any other available lights. When all is said, each case must be decided according to its own peculiar state of facts. This is so because the true and ultimate test is this: What would a reasonably prudent person have done under the circumstances as they presented themselves to the plaintiff?"

It thus appears that the cases invoked by the defendant enunciate no mere shibboleth. They simply apply to the factual situations involved in them the fundamental truth that the law charges every person with the duty of exercising ordinary care for his own safety.

Since the nocturnal motorist is subject to this universal duty, his conduct on a given occasion must be judged in the light of the general principle that the law does not require a person to shape his behavior by circumstances of which he is justifiably ignorant, and the resultant particular rule that a plaintiff cannot be guilty of contributory negligence unless he acts or fails to act with knowledge and appreciation, either actual or constructive, of the danger of injury which his conduct involves. *Patterson v. Nichols,* 157 N.C. 406, 73 S.E. 202.

The duty of the nocturnal motorist to exercise ordinary care for his own safety does not extend so far as to require that he must be able to bring his automobile to an immediate stop on the sudden arising of a dangerous situation which he could not reasonably have anticipated. Any such requirement would be tantamount to an adjudication that it is negligence to drive an automobile on a highway in the nighttime at all. The law simply decrees that a person operating a motor vehicle at night must so drive that he can stop his automobile or change its course in time to avoid collision with any obstacle or obstruction whose presence on the highway is reasonably perceivable to him or reasonably expectable by him. It certainly does not require him to see that which is invisible to a person exercising ordinary care.

It is a well established principle in the law of negligence that a person is not bound to anticipate negligent acts or omissions on the part of others; but in the absence of anything which gives or should give notice to the contrary, he is entitled to assume and to act upon the assumption

that every other person will perform his duty and obey the law and that he will not be exposed to danger which can come to him only from the violation of duty or law by such other person. *Gaskins v. Kelly,* 228 N.C. 697, 47 S.E. 2d 34; *Cummins v. Fruit Co.,* 225 N.C. 625, 36 S.E. 2d 11; *Hobbs v. Coach Co.,* 225 N.C. 323, 34 S.E. 2d 211; *Cab Co. v. Sanders,* 223 N.C. 626, 27 S.E. 2d 631; *Tarrant v. Bottling Co.,* 221 N.C. 390, 20 S.E. 2d 565; *Murray v. R. R.,* 218 N.C. 392, 11 S.E. 2d 326; *Hancock v. Wilson,* 211 N.C. 129, 189 S.E. 631; *Jones v. Bagwell,* 207 N.C. 378, 177 S.E. 170; *Shirley v. Ayers,* 201 N.C. 51, 158 S.E. 840; *Wilkinson v. R. R.,* 174 N.C. 761, 94 S.E. 521; *Wyatt v. R. R.,* 156 N.C. 307, 72 S.E. 383.

The task of applying these legal principles to the instant case must now be performed.

When the plaintiff undertook to drive his automobile on the public highway during the nighttime, he had the right to act upon the following assumptions until he had notice to the contrary: (1) That no other motorist would permit a motor vehicle either to move or to stand on the highway without displaying thereon a lamp projecting a red light visible under normal atmospheric conditions from a distance of five hundred feet from its rear, G.S. 20-129 (d), 20-134; (2) that the driver of any truck becoming disabled on the highway after sundown would display red flares or lanterns at least two hundred feet to the rear of the disabled truck as a warning to approaching motorists of the impending peril, G.S. 20-161; and (3) that whenever he met another motor vehicle traveling in the opposite direction, its driver would seasonably dim its headlights and not persist in projecting a glaring light into his eyes, G.S. 20-181.

When the plaintiff's evidence is taken in the light most favorable to him, it reasonably warrants these inferences: The plaintiff was keeping a proper lookout and driving at a reasonable speed as he traveled southward along Route 18. On being partially and temporarily blinded by the glaring lights of Garland's approaching automobile, the plaintiff reduced the speed of his car, and proceeded with extreme caution. The plaintiff exercised due care in adopting this course of action instead of bringing his car to a complete stop because he reasonably assumed that Garland would seasonably dim his headlights in obedience to the law, and thus restore to the plaintiff his full normal vision. The plaintiff had no reason whatever to anticipate or expect that the defendant's truck had been left standing on the traveled portion of the highway ahead of him without lights or warning signals until his car came within 30 feet of it. He did everything possible to avert the collision just as soon as the truck became visible.

This being true, we cannot hold that the plaintiff was guilty of contributory negligence as a matter of law. This conclusion finds full support in these decisions: *Thomas v. Motor Lines, supra; Cummins v. Fruit Co., supra; Leonard v. Transfer Co.*, 218 N.C. 667, 12 S.E. 2d 729; *Clarke v. Martin*, 215 N.C. 405, 2 S.E. 2d 10; *Cole v. Koonce*, 214 N.C. 188, 198 S.E. 637; *Williams v. Express Lines*, 198 N.C. 193, 151 S.E. 197.

The amendment to the complaint made the pleading conform to the evidence, and did not change the claim of the plaintiff. Its allowance was, therefore, permissible under the statutory provision that "the judge . . . may, before and after judgment, in furtherance of justice, . . . amend any pleading . . . when the amendment does not change substantially the claim or defense, by conforming the pleading . . . to the fact proved." G.S. 1-163.

There is in law

No error.

STATE v. CARSON WEBB AND PAUL WEBB.

(Filed 28 March, 1951.)

1. Criminal Law § 52a (1)—

Upon demurrer to the evidence it must be taken in the light most favorable to the State. G.S. 15-173.

2. Criminal Law § 28—

Defendant's plea of not guilty puts in issue every element of each offense of which he stands charged.

3. Intoxicating Liquor § 4b—

Possession of intoxicating liquor within the meaning of G.S. 18-2 and possession of property designed for the manufacture of intoxicating liquor within the meaning of G.S. 18-4 may be either actual or constructive, it being sufficient if the liquor or the property is within the power of the defendant in such sense that he can and does command its use.

4. Criminal Law § 52a (3)—

While circumstantial evidence is an accepted instrumentality in the ascertainment of truth, in order to be sufficient to overrule nonsuit the circumstances must be so connected or related as to point unerringly to defendant's guilt and exclude any other reasonable hypothesis, and circumstantial evidence which is consistent with innocence or merely shows it possible that defendant committed the offense or raises a mere conjecture of guilt is insufficient to be submitted to the jury.

STATE *v.* WEBB.

5. Intoxicating Liquor § 9d—Circumstantial evidence of defendants' guilt of possession of intoxicating liquor and utensils of manufacture held insufficient for jury.

The State's evidence tended to show that each of the two appealing defendants and also another defendant who did not appeal, lived in apartments in a large farmhouse with their respective kinsmen or families, that a quantity of corn beer, liquor and property susceptible to use in the manufacture of intoxicating liquor were found on the premises, with tracks or paths running therefrom to the house. There was no evidence tending to identify any of the tracks as those of defendants, or that the tracks from the back of the house led from any particular apartment. *Held:* There is no sufficient evidence to support a finding that either of the appealing defendants had constructive possession of either the liquor or the utensils but leaves the matter in conjecture and speculation and is insufficient to be submitted to the jury.

APPEAL by defendants from *Burgwyn, Special Judge,* at Special October Term, 1950, of JOHNSTON.

Criminal prosecution upon a bill of indictment containing two counts charging that Carson Webb, Paul Webb and W. G. Royall did on 11 October, 1950, unlawfully (1) "have in their possession 18 barrels of beer, one liquor still, oil cans, oil intended for the use in the unlawful manufacturing of intoxicating liquor," and (2) "have and possess 27½ gallons intoxicating liquor for the purpose of sale" against the form of the statute, etc.

The defendants pleaded not guilty as to both counts.

Upon the trial in Superior Court, the State offered evidence tending to show, as of 11 October, 1950, the date of the alleged offenses, a narrative substantially as follows:

Defendants reside in a large house near Four Oaks,—Golden Royall and his sister in one apartment, Paul Webb and his sister in another, and Carson Webb and his wife and family in another. They are all related by blood or marriage. The house is located "just off," and about midway a two-miles long State-maintained dirt road between two hard-surfaced highways. It turns off the hard-surfaced highway "coming from Benson," near an old millpond.

About seventy-five feet south of the house, there is a path or road or cartway leading from the dirt road in front of the house to, and by, and beyond a tobacco barn into a wooded area. This barn is about 125 yards from the dirt road, and about 100 yards from the house. There were fields around the house up to the yard and around the barn, both cultivated by Royall, and a cornfield beyond and about 150 yards from the barn. This cornfield is cultivated by Paul Webb.

Deputy Sheriff Hales, and three other officers, visited the premises above described on the day above stated. Traveling by car, they entered

the path or road leading from the dirt road. They intended to stop in the yard, but seeing a "bunch of men" at the barn, they drove on to it. As they approached, Royall went around behind the barn shelter and reappeared in a second or two, having two men with him. The testimony of the officers varied as to who the two were. There were four men at the barn, Royall and Paul Webb and two others, Colon McGee and Charlie Tart. According to testimony of one officer the two were Paul Webb and McGee. Carson Webb was not there.

Behind, and about 12 feet from the barn, where there were several fresh foot tracks, the officers found about a quart of fresh corn meal beer in a half-gallon jar in a stump hole under a piece of tin. From the barn the officers followed fresh footprints, "going and coming" down the "wagon path or old cart path" to and across a branch, to the edge of a cornfield and into the woods,—beyond "a little streak of woods," where they found a still,—600 to 700 yards from the house and about 600 yards from the barn,—but not in sight of either the house or the barn.

The still was a 400-gallon submarine type, a 24-barrel outfit, operated by oil. Six barrels had been run out, and there were 18 to run. It was corn meal beer,—similar to the kind found at the tobacco barn.

Between the barn and the still the officers found an automobile pump,—10 or 15 steps from the still, and two demijohns and an oil can which had the odor of liquor and oil in them. The pump was the kind used to pump air into the oil burner tank.

Also at the tobacco barn there was a big 5-gallon oil can with about a gallon of oil in it,—hanging under a big drum. About 50 feet from the barn there was a half-gallon jar of whiskey. And following a path across an oak ridge, the officers found below the ridge a pit with four or five demijohns full of "bootleg" whiskey. Close by there was another 5-gallon jar in a hole—not over 50 yards from the house. The liquor found in the wooded area or oak ridge was about 150 yards from, and in sight of the house.

Between the house and barn there was a half-gallon jar with the odor of corn beer in it,—the same kind of beer found at the tobacco barn.

At the rear of the house, under the well shelter, located about 20 feet from the house, there were a half-gallon jar with the "drainings" or corn beer in it, four or five gallon oil cans with the odor of kerosene oil in them, and a beer can with beer in it. "They got water out of the same well and under the well shelter," the officers testified. And there was a wash pot in the yard. From it there was "a little traffic," that is, footprints or foot path, across the cotton patch. On the fourth row of cotton behind the wash pot there were three half-gallon jars of white whiskey—about 25 feet from Paul Webb's door—and a short distance from the back door of Carson Webb's apartment. In this connection, Deputy

Sheriff Hales was asked the question, "Was there any sign or any path of traffic from the door to where you found the liquor?" In reply he stated: "One at the back door and another went out back across just on the left just behind the pump; straight out from the well shelter there was traffic, I would say as near as from here to the wall, if not nearer. The one from the corner of the back door I would say was not but just a little ways; went out here, back here and around to the left and the well shelter was straight here." And, under cross-examination, Deputy Sheriff Hales continued: "I do not know how many used that back door, as there is a back porch comes out of one apartment, and then there is a back porch from another one coming out of that kitchen. You come out on the back porch to the kitchen; they all use it, so I don't know whose tracks lead to the liquor."

The officers testified that they did not know who owned the land where the still, whiskey and beer were found. There is testimony that Annie Royall owned the house and rented it "to these people." And there is testimony that the house and premises "were in the names" of Annie Royall and Carson Webb's wife. But there is no evidence as to who owns the land where the still was found or as to whose land it adjoins.

And as to the tracks or footprints, Deputy Sheriff Hales testified: "I could not identify any of the tracks leading to the beer, the still, or any of the whiskey as being made by either of defendants." He further testified: "I cannot say that the liquor belonged to either of the defendants or to some other person in that vicinity. All I can tell is where I found it." There is other testimony to like effect.

The officers arrested Paul Webb and Royall while on the premises. They arrested Carson Webb later on the night of the day of their visit.

Paul Webb was drinking something that smelled like beer. "He was high." He did not say anything about whose whiskey it was the officers found. Royall denied knowing anything about it, or about the still. When arrested he seemed a little nervous. There was no smell of alcohol on him.

Verdict: Guilty as charged in said bill of indictment in manner and form as charged.

Judgment: As to Paul Webb: Confinement in the common jail for a period of six months, and assigned to work the roads under the supervision of the State Highway and Public Works Commission.

As to Carson Webb: Sentenced to jail for 12 months to work under direction of State Highway and Public Works Commission.

To the foregoing judgment the defendants Carson Webb and Paul Webb except and appeal to the Supreme Court, and assign error.

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

J. R. Barefoot for defendants, appellants.

WINBORNE, J. The defendant Royall has not appealed from judgment on the verdict rendered against him. So this appeal is concerned with the defendants Paul Webb and Carson Webb who have appealed from the judgments on verdicts against them. It challenges the correctness of the action of the trial court in overruling their demurrers to the evidence. G.S. 15-173. When so challenged, the evidence is to be taken in the light most favorable to the State. So considered under applicable principles of law, we hold that the evidence shown in the record is not sufficient.

In this State it is unlawful for any person to possess any intoxicating liquor for the purpose of sale. G.S. 18-2. It is also unlawful to have or possess any "property" designed for the manufacture of intoxicating liquor intended for use, or which has been used in violating the prohibition laws of North Carolina. G.S. 18-4.

Defendants are charged with violating each of these statutes. Their pleas of not guilty put in issue every element of each of the offenses charged. *S. v. Meyers,* 190 N.C. 239, 129 S.E. 600; *S. v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472; *S. v. Hendrick,* 232 N.C. 447, 61 S.E. 2d 349.

Possession, within the meaning of the above statute, may be either actual or constructive. *S. v. Lee,* 164 N.C. 533, 80 S.E. 405; *S. v. Meyers, supra; S. v. Penry,* 220 N.C. 248, 17 S.E. 2d 4.

In the *Meyers case, supra,* it is stated: "If the liquor was within the power of the defendant in such a sense that he could and did command its use, the possession was as complete within the meaning of the statute as if his possession had been actual." The principle applies alike to possession of "property" designed for the manufacture of intoxicating liquor within the meaning of the statute. G.S. 18-4.

Concededly there is no evidence that either defendant had actual possession of the liquors or of the "property" found. But the State relies upon circumstantial evidence to support the conviction of appealing defendants on the theory that the circumstances testified to show that each of them had constructive possession of both the liquor and the "property."

While circumstantial evidence is a "recognized and accepted instrumentality in the ascertainment of truth," *S. v. Coffey,* 210 N.C. 561, 187 S.E. 754, when the State relies upon such evidence for a conviction, 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. Jones,* 215 N.C. 660, 2 S.E. 2d 867; *S. v. Harvey, supra; 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; *S. v. Fulk,* 232 N.C. 118, 59 S.E. 2d 617.

Moreover, the guilt of a person charged with the commission of a crime is not to be inferred merely from facts consistent with his guilt. They must be inconsistent with his innocence. *S. v. Massey,* 86 N.C. 658; *S. v. Harvey, supra.*

"Evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict and should not be left to a jury." *S. v. Vinson,* 63 N.C. 335; *S. v. Harvey, supra,* and cases cited. See also *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730; *S. v. Boyd,* 223 N.C. 79, 25 S.E. 2d 456; *S. v. Murphy,* 225 N.C. 115, 33 S.E. 2d 588.

In the *Murphy case* defendant being charged with highway robbery, the evidence showed that others had equal opportunity with defendant for taking the money. It is there held that under such circumstances to find that any particular person took the money is to enter the realm of speculation, and that verdicts so found may not stand.

Just so in the case in hand, to hold that there is sufficient evidence to support a finding that either of the appealing defendants had constructive possession of either the liquor or the "property," as charged, is conjecture and speculation. They ought not to be convicted on such evidence. Hence their demurrers to the evidence should have been sustained.

Therefore, the judgments from which this appeal is taken are hereby Reversed.

EUNICE M. IPOCK v. CHARLES J. IPOCK.

(Filed 28 March, 1951.)

1. Divorce and Alimony § 14—

Alimony without divorce may not be awarded unless the husband separates himself from his wife and fails to provide her with the necessary subsistence according to his income and condition in life, or unless he shall be guilty of such misconduct or acts as would constitute a cause for divorce, either absolute or from bed and board.

2. Divorce and Alimony § 12—

Alimony *pendente lite* and counsel fees may not be awarded in an action for alimony without divorce unless plaintiff alleges in her complaint facts sufficient to constitute a good cause of action under the statute.

3. Same—

The court does not have an absolute and unreviewable discretion to allow temporary subsistence upon motion therefor made in an action for alimony

without divorce, but is expected to look into the merits of the action and determine the matter in the exercise of his sound legal discretion, after considering the allegations of the complaint and the evidence of the respective parties, and it is error for the court to refuse to hear the evidence of the defendant in support of his contention that the separation was due to the fault of plaintiff and to enter the order based solely upon the allegations of the complaint and the plaintiff's evidence in support thereof. G.S. 50-15, G.S. 50-16.

APPEAL by defendant from *Godwin, Special Judge,* November Term, 1950, of CRAVEN.

This is an action instituted by the plaintiff on 14 July, 1950, against her husband for alimony without divorce.

The plaintiff, in her complaint, alleges that she and the defendant intermarried 1 March, 1930, and lived together as man and wife until about 1 August, 1943, when the defendant abandoned her without just cause until sometime in October, 1944, when the marital relationship was resumed; that the defendant again abandoned her in October, 1945, and that on 27 May, 1946, they entered into a separation agreement, but subsequent thereto they became reconciled and renewed their marital relations and lived together as man and wife until June, 1950, when the defendant again abandoned her and has failed and refused to provide her with the necessary subsistence according to his means and condition in life.

The defendant, in his answer, denied the material allegations of the complaint, and alleged that the present separation of the plaintiff and the defendant was due to the fault of the plaintiff.

When this cause came on to be heard on a motion for alimony *pendente lite* and for counsel fees, the plaintiff offered oral testimony and submitted affidavits in support of her motion. The defendant, however, was not permitted to offer any evidence in support of his allegation to the effect that the separation of the plaintiff and defendant was due to the fault of the plaintiff. Defendant excepted.

The court entered an order directing the defendant to pay alimony *pendente lite* and counsel fees, from which order the defendant appeals and assigns error.

H. P. Whitehurst and William Dunn, Jr., for plaintiff.

Charles L. Abernethy, Jr., for defendant.

DENNY, J. Alimony without divorce may not be awarded unless the husband separates himself from his wife and fails to provide her with the necessary subsistence according to his income and condition in life, or unless he shall be guilty of such misconduct or acts as would constitute a cause for divorce, either absolute or from bed and board. G.S. 50-16.

And alimony *pendente lite* and counsel fees should not be awarded in such action unless the plaintiff alleges in her complaint facts sufficient to constitute a good cause of action under the provisions of the statute. *McManus v. McManus,* 191 N.C. 740, 133 S.E. 9; *Price v. Price,* 188 N.C. 640, 125 S.E. 264.

It has been repeatedly held by this Court that on a motion of this kind, in an action brought under the provisions of G.S. 50-16, the judge is not required to find the facts as a basis for his order for temporary subsistence of the wife, except when her adultery is alleged by the husband as a bar to her recovery, *Phillips v. Phillips,* 223 N.C. 276, 25 S.E. 2d 848; *Holloway v. Holloway,* 214 N.C. 662, 200 S.E. 436; *Southard v. Southard,* 208 N.C. 392, 180 S.E. 665; *Byerly v. Byerly,* 194 N.C. 532, 140 S.E. 158; *McManus v. McManus, supra,* although it is better for him to do so when the facts are in dispute, *Price v. Price, supra.*

This does not mean, however, that in considering a motion for alimony *pendente lite,* in such action, that unless the adultery of the wife is pleaded, the court may exercise an absolute and unreviewable discretion based solely upon the allegations of the complaint and the plaintiff's evidence offered in support thereof, and refuse to hear the evidence of the defendant. For it is expressly provided in G.S. 50-15, "That no order allowing alimony *pendente lite* shall be made unless the husband shall have had five days notice thereof, and in all cases of application for alimony *pendente lite* under this or section 50-16, whether in or out of term, it shall be permissible for the husband to be heard by affidavit in reply or answer to the allegations of the complaint."

Consequently, in passing on such motion the judge is expected to look into the merits of the action and determine in his sound legal discretion, after considering the allegations of the complaint and the evidence of the respective parties, whether or not the movant is entitled to the relief sought. *Butler v. Butler,* 226 N.C. 594, 39 S.E. 2d 745; *Holloway v. Holloway, supra.* And where it affirmatively appears the defendant was not permitted to offer evidence which was pertinent to the allegations of the complaint, the exception thereto will be sustained. *Holloway v. Holloway, supra.*

The defendant is entitled to a rehearing on the motion, and it is so ordered.

Error.

STATE v. JOHN HENRY ROGERS.

(Filed 11 April, 1951.)

1. **Homicide §§ 4d, 25—Murder committed in perpetration of robbery or rape is murder in the first degree.**

Where the State's evidence tends to show a murder committed in the perpetration of robbery and rape, and tends to identify defendant as the perpetrator of the crime by testimony of his confession, foot tracks, presence at the scene shortly before the crime was committed, discovery of articles connected with the crime in his possession or where he had hidden them, together with other circumstantial evidence and testimony of conflicting statements made by him when questioned after the occurrence, *is held* sufficient to be submitted to the jury on the charge of murder in the first degree.

2. **Criminal Law § 42d—**

Where a State's witness testifies concerning certain matters, testimony of consistent statements made by the witness prior to the trial is properly admitted for the restricted purpose of corroboration.

3. **Criminal Law § 38c—**

Where the State's evidence tends to show that a wrist watch was worn by the deceased at the time of the homicide and that it was subsequently found detached from her person where the death-dealing blows were apparently struck by her slayer, the State is entitled to offer the watch in evidence and exhibit it to the jury.

4. **Criminal Law § 38d—**

Where the photographer identifies pictures made by him and states they were correct and true representations of the body of the deceased and the place where it was found, the photographs are rightly received in evidence for the limited purpose of explanation or illustration, notwithstanding that they may be of a shocking nature and tend to arouse passion or prejudice.

5. **Criminal Law § 33—**

An extrajudicial confession of guilt by an accused is admissible against him when, and only when, it was in fact voluntarily made.

6. **Same—**

A confession is presumed voluntary until the contrary is made to appear.

7. **Same—**

Where the voluntariness of a confession is challenged, the matter is to be determined by the trial judge after affording both the prosecution and defense a reasonable opportunity to present evidence on the question in the absence of the jury.

8. Same—

The admissibility of a confession is to be determined by the facts appearing in evidence when it is received or rejected, and not by the facts appearing in evidence at a later stage of the trial.

9. Same—

The finding by the trial court that a confession is voluntary is not subject to review if it is supported by any competent evidence.

10. Same—

A confession is not rendered incompetent by the mere fact that the accused was under arrest or in jail or in the presence of armed officers at the time it was made.

11. Same—

Where, on preliminary inquiry, the State offers testimony tending to show that defendant's confession was voluntarily made, and defendant, after being afforded an opportunity to do so, offers no evidence to the contrary, the ruling of the trial court that the confession was voluntary is conclusive, since it is supported by the evidence at the time of the admission of the confession in evidence.

12. Criminal Law § 31e—

Where the State's witness testifies that he has studied the science of comparing fingerprints and footprints of human beings for the purpose of identification and had had years of practical experience in such work, the trial court properly admits testimony of the witness that the bare footprints found at the scene of the crime were identical with prints taken from defendant's corresponding foot when the evidence discloses that the prints found at the scene of the crime could have been impressed only at the time the crime was perpetrated.

13. Same: Constitutional Law § 35—

Objection by defendant that the taking of his footprint violated his constitutional right not to be compelled to give evidence against himself, Constitution of N. C., Article I, Section 11, *held* untenable both because the evidence disclosed defendant voluntarily suffered his footprint to be taken and because the constitutional protection does not extend to physical facts.

14. Criminal Law § 56—

Motion in arrest of judgment on the ground that the grand jury which indicted defendant had not been sworn cannot be allowed when the record proper reveals that the requisite oath was administered to all the grand jurors.

APPEAL by prisoner from *Burney, J.*, and a jury, at the October Term, 1950, of SAMPSON.

Criminal prosecution upon an indictment charging the prisoner with the murder of Mrs. Eunice Kornegay.

The facts shown by the State's evidence are as follows:

1. Mrs. Kornegay, a white woman, lived with her husband, Lester B. Kornegay, near the Piney Grove School in a rural section of Sampson County. He operated a small store, which stood near his residence and fronted on a paved highway. On the opposite side of the highway was a field, which had a depth of 100 yards or more and ended at a ditch on the edge of a dense wood. The prisoner, John Henry Rogers, a Negro man, who sometimes traded at the Kornegay store, lived about a mile away as the crow flies.

2. On 15 June, 1950, Lester B. Kornegay put Mrs. Kornegay in charge of the store, and went to Carolina Beach to fish. He left some sixty-five dollars in silver coins in a money box in a showcase inside the store. Mrs. Kornegay was last seen alive by the State's witnesses just after 3:15 p.m. unlocking the front door of the store for the apparent purpose of selling merchandise to the prisoner, who was standing nearby. The prisoner wore khaki pants and was barefooted. He was next seen between 5 and 6 p.m. a mile and a half away, coming out of some woods from the direction of the Kornegay store.

3. Lester B. Kornegay returned about 7 p.m., found the store locked up, and could not locate Mrs. Kornegay or the key. Becoming alarmed, he called on others for assistance, and a search ensued. The searchers discovered a fresh trail on the opposite side of the highway from the store, which had patently been made by dragging some object through the field, across the ditch, and into the dense wood beyond the ditch. They observed the imprints of bare feet at two or three places along the trail in the field, and found "a large quantity of blood and hair in the ditch." Nearby lay a wrist watch habitually worn by Mrs. Kornegay, and several broken pieces of wood "two or two and a half feet long," whose heavy ends were sticky with blood and hair.

4. The trail ended in the dense wood 25 yards beyond the ditch. Here the body of Mrs. Kornegay was found. Her skull had been fractured, and her left arm had been broken between the elbow and the hand. The left side of her head had been beaten until it was "just a mass of hair, flesh, and blood." "She had evidently been dragged across the field, feet first. All her clothes were rolled up around her breasts, and she was completely nude from there down." When discovered, her body rested on the back with the legs extended and widely separated. A sanitary napkin, which had apparently been removed from her person, lay beside the body. Medical examination revealed that death had resulted from the fracture of the skull.

5. On the morning of the next day, *i.e.*, 16 June, 1950, the store was opened and inspected by Lester B. Kornegay, Sheriff P. B. Lockerman,

and James Bradshaw, a representative of the State Bureau of Investigation. The inspection disclosed that a portion of the silver coins had been removed from the money box; that there was a puddle of blood, "five by eight or ten inches" on the floor "next to the icebox," which contained beverages; that a bag of onions had been placed upon the puddle of blood; that a copy of a newspaper, to wit, the *Sampson Independent,* dated at Clinton, North Carolina, on 15 June, 1950, lay on the floor "twelve or eighteen inches from the puddle of blood"; and that the exposed front page of the newspaper bore the imprint of a bare foot. Subsequently, to wit, on 21 June, 1950, James Bradshaw took the footprint of the prisoner, who was then confined to jail on the present charge, and compared it with that found on the newspaper, and ascertained that the two footprints were identical.

6. Meanwhile, to wit, immediately after the discovery of the body of Mrs. Kornegay, peace officers of Sampson County visited the prisoner at his home, and questioned him concerning his activities and whereabouts on the preceding afternoon and the source of a small quantity of silver coins he had in his possession. The prisoner stated that he had borrowed the coins, that he had not been near the Kornegay store for many days, that he had worn blue pants during the afternoon, and that he had spent the entire afternoon working for Percy Flowers. The falsity of these statements was disclosed by subsequent investigation, and the prisoner was arrested and jailed to await trial for the murder of Mrs. Kornegay.

7. For sometime next succeeding his incarceration, the prisoner made contradictory and sometimes fantastic statements either disclaiming all knowledge concerning the death of Mrs. Kornegay, or charging various others with perpetrating the homicide. On 22 June, 1950, however, he told Sheriff Lockerman that "he was guilty of murder, but . . . was not guilty of rape and robbery." On 25 September, 1950, he made the following confession to Sheriff Lockerman and Deputy Sheriff Weeks in the Sampson County jail: That he went to the store on the afternoon of 15 June, 1950, wearing khaki pants and carrying a wrench in his pocket; that after buying a beverage from Mrs. Kornegay, he struck her with the wrench, knocking her to the floor in an insensible state; that he picked her up, and "toted" and dragged her to the ditch, where she regained consciousness; that he thereupon beat her into insensibility with pieces of wood, which he left on the ditch bank, and dragged her onwards into the dense wood, where he abandoned her; that he returned to the store, took "two dollars in change" from the money box, and placed a sack of onions on a puddle of blood, which marked the spot where Mrs. Kornegay had fallen to the floor; and that he then locked the store up and departed from the premises.

8. Immediately after making these statements, the prisoner piloted peace officers to places where he said he had put the wrench and khaki pants, and produced a wrench and unearthed a rotting pair of khaki pants, which he identified as the wrench and khaki pants mentioned in his confession. While on this trip, the prisoner stated to three of his acquaintances in the presence of Deputy Sheriff Weeks "that he was the one that killed Mrs. Kornegay, and that he didn't know why he did it."

The prisoner testified in his own behalf that he wore shoes on the afternoon of 15 June, 1950; that he was not in the Kornegay store on that day; that he did not kill Mrs. Kornegay; and that he was afraid and "didn't know what he was doing" when he allegedly confessed to the officers. Witnesses for the prisoner deposed that they saw him between 5 and 6 o'clock on the afternoon of the homicide, and did not observe any blood on his person or clothing.

The jury returned a verdict finding the prisoner guilty of murder in the first degree, but did not recommend that his punishment should be imprisonment for life in the State's prison. The trial court entered judgment that the prisoner suffer death by the administration of lethal gas, and the prisoner excepted and appealed, assigning errors.

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

James F. Chestnutt and Robert C. Wells for the prisoner, appellant.

ERVIN, J. The prisoner insists primarily that he is entitled to a reversal for insufficiency of testimony. This claim is insupportable. The evidence for the State warrants the inference that the prisoner killed the deceased in an attempt to commit a rape and a robbery upon her. Hence, it sustains the verdict and the resultant judgment, for the relevant statute expressly provides that "a murder . . . which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree." G.S. 14-17 as rewritten by Section 1 of Chapter 299 of the 1949 Session Laws of North Carolina; *S. v. Streeton*, 231 N. C., 301, 56 S.E. 2d 649.

The prisoner contends secondarily that he is entitled to a new trial because the trial judge erred in permitting the State's witness, Alton J. Jordan, to testify as to extrajudicial statements made to him by Lester B. Kornegay; in admitting the wrist watch of the deceased; in receiving photographs of the body of the deceased, and of the place where it was found; in permitting Sheriff Lockerman and Deputy Sheriff Weeks to testify as to extrajudicial confessions made by the prisoner in their presence; and in permitting James Bradshaw, the representative of the

State Bureau of Investigation, to testify as to the footprint found in the store and the footprint taken from the prisoner.

The State's witness, Alton J. Jordan, gave evidence of statements made by Lester B. Kornegay before the trial as to relevant things he observed at the store and in the field and wood upon his return from Carolina Beach. Kornegay had already testified for the State concerning the same matters, and the evidence of Jordan was rightly received under the rule that a witness may be corroborated by proof that on a previous occasion he has made statements corresponding to the testimony given by him at the trial. *S. v. Tate,* 210 N.C. 613, 188 S.E. 91; *S. v. McKeithan,* 203 N.C. 494, 166 S.E. 336; *S. v. Rhodes,* 181 N.C. 481, 106 S.E. 456. The trial judge restricted the evidence of Jordan to corroborative purposes at the time of its admission. See: *S. v. Johnson,* 218 N.C. 604, 12 S.E. 2d 278.

The testimony for the State tended to show that the wrist watch was worn by the deceased at the time of the homicide, and that it was subsequently found detached from her person at the place where the death-dealing blows were apparently struck by her slayer. This being true, the State was entitled to offer the watch in evidence and to exhibit it to the jury in the courtroom to enable the jury to understand the evidence, and to realize more completely its cogency and force. *S. v. Speller,* 230 N.C. 345, 53 S.E. 2d 294; *S. v. Westmoreland,* 181 N.C. 590, 107 S.E. 438.

The State laid a proper foundation for the introduction of the photographs by the testimony of James Bradshaw, the person who made them. He identified them, and stated that they were correct and true representations of the body of the deceased, and of the place where it was found. The photographs were then admitted in evidence by the trial judge for the restricted purpose of enabling the witness to explain or illustrate to the jury his testimony as to the condition of the deceased's body and as to the place where it was found. The prisoner insists that the receipt of the photographs even for this restricted purpose constituted error because of their shocking nature and their tendency to arouse passion or prejudice. A similar argument was rejected in the recent case of *S. v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824, where *Mr. Justice Winborne* declared that "if the testimony sought to be illustrated or explained be relevant and material to any issue in the case, the fact that an authenticated photograph is gory, or gruesome, and may tend to arouse prejudice will not alone render it incompetent to be so used." Inasmuch as the testimony of the State's witness, James Bradshaw, respecting the condition of the deceased's body and the place where it was found bore directly upon the crucial issues in the case, the photographs were rightly received in evidence for the limited purpose of explanation or illustration. *S. v. Chavis,* 231 N.C. 307, 56 S.E. 2d 678.

The rules of law germane to the exceptions reserved by the prisoner to the admission of the confessions allegedly made by him in the presence of Sheriff Lockerman and Deputy Sheriff Weeks are summarized in the next paragraph.

An extrajudicial confession of guilt by an accused is admissible against him when, and only when, it was in fact voluntarily made. *S. v. Thompson,* 227 N.C. 19, 40 S.E. 2d 620; *S. v. Moore,* 210 N.C. 686, 188 S.E. 421; *S. v. Anderson,* 208 N.C. 771, 182 S.E. 643. A confession is presumed to be voluntary, however, until the contrary appears. *S. v. Mays,* 225 N.C. 486, 35 S.E. 2d 494; *S. v. Grier,* 203 N.C. 586, 166 S.E. 595; *S. v. Christy,* 170 N.C. 772, 87 S.E. 499. When the admissibility of a confession is challenged on the ground that it was induced by improper means, the trial judge is required to determine the question of fact whether it was or was not voluntary before he permits it to go to the jury. *S. v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84; *S. v. Andrew,* 61 N.C. 205. In making this preliminary inquiry, the judge should afford both the prosecution and the defense a reasonable opportunity to present evidence in the absence of the jury showing the circumstances under which the confession was made. *S. v. Gibson,* 216 N.C. 535, 5 S.E. 2d 717; *S. v. Alston,* 215 N.C. 713, 3 S.E. 2d 11; *S. v. Smith,* 213 N.C. 299, 195 S.E. 819; *S. v. Blake,* 198 N.C. 547, 152 S.E. 632; *S. v. Whitener,* 191 N.C. 659, 132 S.E. 603. The admissibility of a confession is to be determined by the facts appearing in evidence when it is received or rejected, and not by the facts appearing in evidence at a later stage of the trial. *S. v. Richardson,* 216 N.C. 304, 4 S.E. 2d 852; *S. v. Alston, supra.* When the trial court finds upon a consideration of all the testimony offered on the preliminary inquiry that the confession was voluntarily made, his finding is not subject to review, if it is supported by any competent evidence. *S. v. Hairston,* 222 N.C. 455, 23 S.E. 2d 885; *S. v. Manning,* 221 N.C. 70, 18 S.E. 2d 821; *S. v. Alston, supra.* A confession is not rendered incompetent by the mere fact that the accused was under arrest or in jail or in the presence of armed officers at the time it was made. *S. v. Litteral, supra; S. v. Bennett,* 226 N.C. 82, 36 S.E. 2d 708; *S. v. Thompson,* 224 N.C. 661, 32 S.E. 2d 24; *S. v. Wagstaff,* 219 N.C. 15, 12 S.E. 2d 657.

The record discloses that the trial judge made due preliminary inquiry into the voluntariness of the confessions allegedly made by the prisoner. After hearing the State's witnesses, Sheriff Lockerman and Deputy Sheriff Weeks, who testified to specific facts pointing to the single conclusion that the prisoner made the confessions of his own volition, the trial court expressly extended to the prisoner the opportunity to present evidence showing that the confessions were not voluntary on his part, and was expressly informed by counsel for the prisoner that the prisoner did not have any testimony to offer upon the preliminary inquiry then in

progress. The trial judge thereupon found that the confessions were voluntary, and adjudged that they were admissible in evidence. This ruling cannot be disturbed on this appeal because it is supported by all the facts appearing in evidence at the time of the admission of the confessions. *S. v. Alston, supra; S. v. Perry,* 212 N.C. 533, 193 S.E. 729.

This brings us to the question whether the trial judge committed error in admitting the footprint evidence given by the State's witness, James Bradshaw.

Bradshaw testified in specific detail that he had studied the science of taking and comparing the fingerprints and footprints of human beings for the purposes of identification at various schools, and had had ten years of practical experience in that work. The trial judge thereupon found, in substance, that Bradshaw was qualified to testify as an expert in fingerprinting and footprinting, and permitted him to give the following testimony over the exception of the prisoner: That the Kornegay store was locked up from the time of the discovery of the body of the deceased until the morning of 16 June, 1950, when he and others entered and inspected the building; that he found a newspaper, to wit, the *Sampson Independent,* dated at Clinton, North Carolina, on 15 June, 1950, lying beside a puddle of blood on the floor of the store; that he observed the imprint of a bare foot on the exposed front page of the newspaper, and made enlarged photographs of it; that six days later he took the print of the corresponding bare foot of the prisoner, made enlarged photographs of it, and by that means compared the footprint on the newspaper with that of the prisoner; and that the friction ridges on the two footprints were identical. The enlarged photographs of the footprints were received in evidence over the exception of the prisoner for the limited purpose of enabling the witness to explain or illustrate to the jury his testimony as to the characteristics of the footprints.

Diligent search has failed to uncover a single decision in any jurisdiction involving the admissibility of this precise type of footprint evidence. It is a matter of common knowledge, however, in the fields of crime detection and medical jurisprudence that the permanence of the friction ridges on the sole of the foot makes a naked footprint a means of identification. See these publications: O'Hara and Osterburg: An Introduction To Criminalistics, pages 112-114; and Herzog: Medical Jurisprudence, Section 244. Moreover, Bradshaw testified with positiveness that the friction ridges on the soles of the feet of human beings are as individual and permanent as those on their fingers, and that the technique used in identifying naked footprints is the same as that employed in identifying fingerprints.

As a consequence, the action of the trial judge in admitting the footprint evidence given by Bradshaw is sanctioned by this well settled rule

of evidence: That proof of fingerprints corresponding to those of the accused found in the place where the crime was committed, under such circumstances that they could only have been impressed at the time when the crime was perpetrated, is receivable in evidence to identify the accused as the person who committed the crime charged. *S. v. Helms,* 218 N.C. 592, 12 S.E. 2d 243; *S. v. Huffman,* 209 N.C. 10, 182 S.E. 705; *S. v. Combs,* 200 N.C. 671, 158 S.E. 252; *Moon v. State,* 22 Ariz. 418, 198 P. 288, 16 A.L.R. 362.

We have not overlooked the contention of the defense that the footprint evidence ought to have been excluded without regard to its probative value because of the circumstances under which the prisoner's footprint was obtained by the prosecution. This contention is as follows: The prisoner was forced to submit to the taking of his footprint. Consequently, the introduction of evidence of its correspondence with the footprint found at the scene of the crime violated Section 11 of Article I of the Constitution of North Carolina, which provides that the accused in a criminal case cannot be compelled to give evidence against himself.

This contention is untenable for the very simple reason that its underlying premise, *i.e.,* that the prisoner's footprint was procured by compulsion, has no factual foundation. The prisoner voluntarily suffered his footprint to be taken, and for that reason cannot complain of the admission of the footprint evidence on the ground now assigned. *S. v. Cash,* 219 N.C. 818, 15 S.E. 2d 277; *S. v. Eccles,* 205 N.C. 825, 172 S.E. 415; *Garcia v. State,* 26 Ariz., 597, 229 P. 103; *Moon v. State,* 22 Ariz. 418, 198 P. 288, 16 A.L.R. 362; *State v. Watson,* 114 Vt. 543, 49 A. 2d 174; *State v. Johnson,* 111 W. Va. 653, 164 S.E. 31.

But the prisoner's standing would not be bettered a whit if the record did in fact disclose that he had furnished his footprint to the State under compulsion. The point in principle is decided against the prisoner in the following North Carolina cases: (1) *S. v. Riddle,* 205 N.C. 591, 172 S.E. 400, where it was held that the constitutional guarantee that the accused shall not be compelled to testify against himself does not preclude testimony by a witness as to marks on the accused's body tending to identify him as the perpetrator of the crime; (2) *S. v. Graham,* 74 N.C. 646, 21 Am. Rep. 493, and *S. v. Thompson,* 161 N.C. 238, 76 S.E. 249, where it was decided that no violation of the constitutional privilege against self-incrimination was involved in the admission of the testimony of an officer, who had the accused in custody, that he made the accused put his foot in tracks found at the scene of the crime, and that his foot fitted such tracks; and (3) *S. v. Garrett,* 71 N.C. 85, where it was adjudged that the constitutional inhibition against self-incrimination was not infringed by the receipt of the evidence of witnesses as to the condition of the accused's hand at the time of the holding of the coroner's inquest,

although the accused was then compelled to exhibit her hand to the witnesses by the coroner against her will. These North Carolina cases are in accord with well considered decisions in other jurisdictions to the effect that the constitutional privilege against self-incrimination is not violated by the introduction of evidence of fingerprints to identify the accused, even where the fingerprints of the accused are obtained by coercion. *Shannon v. State,* 207 Ark. 658, 182 S.W. 2d 384; *People v. Jones,* 112 Cal. App. 68, 296 P. 317; *Bartlette v. McFeeley,* 107 N. J. Eq. 141, 152 A. 17; *Conners v. State,* 134 Tex. Cr. 278, 115 S.W. 2d 681; *McGarry v. State,* 82 Tex. Cr. 597, 200 S.W. 527; *Owens v. Commonwealth,* 186 Va. 689, 43 S.E. 2d 895.

Simon Greenleaf, a master of the law of evidence, explained the reason supporting these and like holdings in substantially these words: The scope of the privilege against self-incrimination, in history and in principle, includes only the process of testifying by word of mouth or in writing, *i.e.,* the process of disclosure by utterance. It has no application to such physical, evidential circumstances as may exist on the accused's body or about his person. Greenleaf on Evidence (16th Ed.), section 469e. See, also, in this connection: *S. v. Cash, supra; S. v. Riddle, supra;* Wigmore on Evidence (3rd Ed.), section 2265.

Although judicial utterances often commingle and confuse the two exclusionary rules, there is a basic distinction between the rule rejecting involuntary confessions and that excluding statements inhibited by the constitutional privilege against self-incrimination. An involuntary confession is "made under circumstances that would reasonably lead the person charged to believe that it would be better to confess himself guilty of a crime he had not committed." *S. v. Grier, supra.* For this reason, the law deems involuntary confessions to be testimonially unreliable, and rejects them because they are likely to be false. *S. v. Patrick,* 48 N.C. 443. The constitutional privilege against self-incrimination, however, bars the introduction of all statements falling within its scope without regard for their truth or falsity. *People v. Fox,* 319 Ill. 606, 150 N.E. 347.

This being so, the footprint evidence in the instant case cannot be likened to an involuntary confession for reasons similar to those invoked by a New York court in sustaining a statute which provided, among other things, that no person convicted of specified crimes should be sentenced until fingerprint records were searched "with reference to the particular defendant," for the purpose of ascertaining whether or not there had been a prior conviction. "No volition—that is, no act of willing—on the part of the mind of the defendant is required. Fingerprints of an unconscious person, or even of a dead person are as accurate as are those of the living . . . By the requirement that the defendant's fingerprints be

taken there is no danger that the defendant will be required to give false testimony. The witness does not testify. The physical facts speak for themselves; no fears, no hopes, no will of the prisoner to falsify or to exaggerate could produce or create a resemblance of her fingerprints or change them in one line, and therefore there is no danger of error being committed or untruth told." *People v. Sallow,* 100 Misc. 447, 165 N.Y.S. 915. See, also, Inbau: Self-Incrimination, pages 32-41.

When this case was heard in this Court, the prisoner moved in arrest of judgment on the supposition that the grand jury which indicted him had not been sworn. This motion is disallowed because the record proper reveals that the requisite oath was administered to all the grand jurors.

As the trial judge did not commit error in any matter of law or legal inference, the proceedings had in the court below must be upheld.

No error.

C. D. KISTLER v. THE BOARD OF EDUCATION OF RANDOLPH COUNTY. R. C. WHITE, G. F. LANE, K. A. MARTIN, T. S. BOULDIN, A. B. COX, EARL JOHNSON, J. F. PARRISH, E. W. FREEZE, W. B. WOODLIEF, COLON ALLRED AND C. V. REDDING.

(Filed 11 April, 1951.)

1. Schools § 6a—

The selection of sites for schoolhouses in local school districts in a county, except in city administrative units, is vested in the sound discretion of the county board of education, and its action cannot be restrained by the courts unless there has been a manifest abuse of discretion or its action is in violation of some provision of law. G.S. 115-85.

2. Schools § 4d—

In a suit to restrain the purchase of a school site selected by the board of education of the county, the demurrer of the individual members of the board is properly sustained, since the board is authorized to prosecute and defend suits for or against it in its corporate capacity, G.S. 115-45, and the individuals have no authority to exercise any of the powers plaintiff seeks to enjoin.

3. Public Officers § 5a—

Where there is no allegation that members of a board of education were not duly appointed to their respective positions as required by law, the legality of the acts of these appointees is not open to attack in an action to enjoin the board from purchasing a school site selected by it.

4. Schools §§ 4b, 6a—

The fact that the selection of a school site was voted at a special session of the board of education rather than at a regular meeting, G.S. 115-48, has

no bearing on the question of bad faith or abuse of discretion in the selection of the site.

5. Same—

The fact that a member of the county board of education promises to call a public mass meeting to discuss and consider the selection of a school site, and later refused to do so, has no bearing upon the question of bad faith or abuse of discretion in the selection of a site by the board at a subsequent special meeting, since promises made by individual members of the board have no binding effect on it unless expressly authorized, and the board has no authority to transact business except at a regular or special meeting.

6. Schools § 6a: Public Officers § 7b—

While the courts are alert to impeach any transaction where a public official has any pecuniary interest in a matter decided by him, mere allegation that a member of the board of education owns property in the vicinity of a site selected by the board for a school is insufficient to support a finding of bad faith on the part of the board in the absence of allegation that the member exercised an improper or corrupt influence over the other members of the board.

7. Schools § 4b—

A county board of education is not precluded by law from holding executive sessions.

8. Schools §§ 4b, 6a—

The law may not require a county board of education to hold a mass meeting in connection with the selection of a school site in the discharge of the board's discretionary responsibility.

APPEAL by plaintiff from *Sharp, Special Judge,* October Term, 1950, of RANDOLPH.

This is an action instituted by the plaintiff for and on behalf of himself and other citizens and taxpayers in Randleman School District, Randolph County, North Carolina, to restrain the defendants from purchasing a site selected by the Board of Education of Randolph County for the location of a new high school for the Randleman School District.

The sum and substance of the allegations of the seventeen page complaint may be summarized as follows:

1. That the defendants Lane, Cox, Bouldin, Martin and Johnson, at the times herein complained of, purported to hold and "occupy the offices of the Board of Education of Randolph County; that the defendant R. C. White, has at the times herein complained of . . . purported to hold the office of Superintendent of Public Instruction of Randolph County; that the defendants Parrish, Freeze, Woodlief, Allred and Redding have at the times complained of . . . purported to hold the offices of the Randleman School District Committee; but this plaintiff, upon

information and belief, denies that any of said defendants are legally holding the various offices above described, none of them having properly qualified themselves for said respective offices under and in accordance with the General Statutes of North Carolina."

2. That sometime after 4 June, 1949, certain State and local funds were allotted for the purpose of constructing a new high school building for the Randleman School District; that on or about 1 February, 1950, the defendants had tentatively selected a site on which to build the new high school building, whereupon certain citizens informed the defendant, J. F. Parrish, a member of the Randleman School District Committee, that they felt a public meeting should be called and the interested citizens and patrons of the school should be apprised as to what sites were being considered—to the end that a public discussion might be had on the relative merits of the various sites considered and to be considered. Pursuant to this request, a meeting was held on 14 February, 1950, at the Randleman High School. This meeting was attended by certain citizens of the community and the defendants R. C. White, Guy Lane, Earl Johnson and a majority of the members of the Randleman School District Committee. The defendants presented maps and data on five sites which the County Board of Education had under consideration, including the site which has been selected, known as the High Point Street site, which lies on the northwest of the Town of Randleman. It is alleged that the defendant Guy Lane was asked by several persons present if the defendant Board of Education would consider the present high school site in the Town of Randleman, if a survey was made to determine the correct acreage within the site and the correct acreage of available land contiguous thereto, and that Lane promised, in the presence of the entire group that if a survey was made by the group present, he would call another meeting of the group to study and discuss the matter further. The survey was made at the expense of the local Chamber of Commerce of Randleman, but the defendant Lane refused to call another meeting.

3. "That on 3 March, 1950, according to the information and belief of this plaintiff, the defendant Board held a secret special meeting attended by the defendants Lane, Johnson, Cox and Bouldin, and voted . . . unanimously to purchase the High Point Street site; that this was done without any notification to the local Chamber of Commerce or to other interested citizens, and no announcement of the action of the Board was made until the publication of the March 6th issue of *The Courier-Tribune* in Asheboro."

4. That, thereafter, the patrons of the Randleman School District and the Mayor and members of the Board of Aldermen of the Town of Randleman, called a public meeting of all the citizens and residents of the School District, on 7 March, 1950; that some 200 persons attended the

meeting and that an overwhelming majority of them voiced their objection to the selection of the High Point Street site and voted to circulate a petition, protesting the selection thereof. The petition, containing approximately 988 signatures of citizens and residents of the School District, was filed with the County Board of Education at a special meeting on 13 March, 1950, requesting the local Board and the State Board of Education to withhold and deny approval of the proposed site until further investigation of the advantages and disadvantages of each proposed site could be presented to the State Engineers and such other parties as may be interested, but recommended that the new high school be built on the present site of the Randleman High School. Representatives of the protesting group were then assured that no further action would be taken on the selection of a site until the matter could be discussed with Dr. Erwin, State Superintendent of Public Instruction. Thereafter a delegation of some 60 citizens and patrons of the Randleman School District went to Raleigh and expressed to Dr. Erwin their disapproval of the selection of the High Point Street site. Dr. Erwin agreed to make a personal inspection of the various sites proposed, and on 4 April, 1950, made such inspection of the five sites under consideration, including the present site of the Randleman High School. He recommended only two of the five sites, viz., the Swaim property and the High Point Street property, giving no intimation of a preference as between the two.

5. It appears that what was known as the Bostic site, as well as other proposed sites, including the Randleman High School property, having been rejected by Dr. Erwin, the plaintiff and other interested parties then sought to have the Board of Education select a site across the road from the original Bostic site, which is also Bostic property. This property lies south of Randleman on Highway 220. The offer was rejected at a meeting of the defendant Board of Education on 21 August, 1950, for the following reasons: (1) the price of the property was too high; (2) a deep ravine runs through the property; (3) the railroad runs through this site; and (4) the Board did not know whether the proper State officials would approve the site. Whereupon, the Board again approved the purchase of the High Point Street property.

6. It is further alleged that the defendants Lane, Martin, Bouldin, Cox and Johnson are guilty of misfeasance and arbitrary, dictatorial and capricious abuse of power in illegally attempting to select a site for the new school building in Randleman School District in direct opposition to the expressed opinion of approximately 90% of the citizens and patrons of the District; that the defendant Johnson, member of the County Board of Education, and E. W. Freeze and J. F. Parrish, members of the Randleman School District Committee, each own large tracts of land in

the immediate vicinity of the High Point Street site, and that the construction of a school on this site will greatly enhance the value of the property of these three defendants, and that this factor was the major consideration in the minds of the three defendants in selecting and recommending the selection of the High Point Street site; that the Bostic offer was rejected at a meeting which the public was not permitted to attend and the members of the Board failed to contact railroad officials to determine whether some solution could be had to the objection that the railroad ran through the proposed Bostic site.

Whereupon, the plaintiff prays for an injunction, restraining the defendants from acquiring the High Point Street site, and the issuance of a writ compelling the defendant, Board of Education of Randolph County, to issue a notice for a public meeting inviting all citizens interested in "this project to present their case for or against any particular site available."

When the cause came on for hearing, the individual defendants demurred *ore tenus*, on the ground that the complaint did not state a cause of action against them. The demurrer was sustained, and the plaintiff excepted.

The defendant Board of Education of Randolph County, thereupon, through its attorney, demurred *ore tenus* to the complaint, on the ground that the same did not state a cause of action against it. The demurrer was likewise sustained, and the plaintiff excepted.

Plaintiff appeals to this Court and assigns error.

L. T. Hammond and Ottway Burton for plaintiff.

Miller & Moser for defendants.

DENNY, J. The selection of sites for schoolhouses in local school districts in a county, except in city administrative units, is vested in the sound discretion of the county board of education, and its action cannot be restrained by the courts, unless in violation of some provision of law, or there has been a manifest abuse of discretion. G.S. 115-85; *Feezor v. Siceloff*, 232 N.C. 563, 61 S.E. 2d 714; *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; *McInnish v. Board of Education*, 187 N.C. 494, 122 S.E. 182; *School Committee v. Board of Education*, 186 N.C. 643, 120 S.E. 202; *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; *Pickler v. Board of Education*, 149 N.C. 221, 62 S.E. 902.

The Board of Education of Randolph County is a body corporate and by that name it shall hold all school property belonging to Randolph County, and it is authorized to purchase and hold real and personal property, to build and repair schoolhouses and to prosecute and defend suits for or against it in its corporate capacity. G.S. 115-45.

The demurrer *ore tenus* to the complaint by the individual defendants was properly sustained. These defendants as individuals possess no authority to exercise any of the powers the plaintiff seeks to enjoin. *Board of Education v. Commissioners,* 192 N.C. 274, 134 S.E. 852.

The plaintiff takes an anomalous position with respect to the defendant Board of Education. In his complaint he alleges that the individuals purporting to be members of this board are not legally qualified to serve as members thereof, because they have not "properly qualified themselves, in accordance with the General Statutes of North Carolina." In his brief, however, he argues and contends that the individuals named as board members are *de facto* officials and that their acts are the acts of the Board of Education; that no other person or persons are claiming the offices or contesting the right of these individuals to their respective offices, and that this action is not a *quo warranto* proceeding to remove them therefrom.

There being no allegation in the complaint to the effect that the members of the defendant Board of Education were not duly appointed to their respective positions as required by law, the legality of the acts of these appointees is not open to attack in this proceeding. *Crabtree v. Board of Education,* 199 N.C. 645, 155 S.E. 550.

It appears from the allegations of the complaint that this is an unfortunate local fight, waged originally by persons primarily interested in having the new high school located on the present site of the Randleman High School, and presently by a small group who appears to be primarily interested in having the school located on the Bostic site.

It is well to keep in mind, however, that the Board of Education of Randolph County was charged with the legal duty to select a suitable site for a new high school, not only for the Town of Randleman but for the whole district, of which the Town of Randleman constitutes but a part. And it will be noted that the complaint does not allege that the site chosen is an improper one from the standpoint of the local district as a whole. Moreover, the petition signed by the 988 citizens and patrons of the school, and filed with the defendant Board of Education, merely requested that approval of the High Point Street site be withheld until further investigation. This request was granted and the State Superintendent of Public Instruction, at the request of the protestants, inspected each proposed site and recommended the selection of the High Point Street property or the Swaim property. The present site of the Randle-

man High School, recommended in the petition referred to herein, not having been approved by the State Superintendent of Public Instruction, a new site was then proposed, which the Board considered and stated the reasons for its rejection.

The plaintiff is relying upon the following allegations to show bad faith and abuse of discretion: (1) That on 3 March, 1950, the defendant Board held a secret meeting and voted unanimously to purchase the High Point Street property as a site for the new high school; (2) that a member of the County Board of Education, Guy F. Lane, promised to call another public mass meeting to discuss and consider the selection of a site for the new high school, which he later refused to do; (3) that Earl Johnson, a member of the defendant Board, owns a large tract of land in the immediate vicinity of the High Point Street property which will be greatly enhanced in value if the high school is built on that site; and (4) that the Bostic offer was rejected at a meeting which the public was not permitted to attend.

These allegations will be discussed in the order above set forth. (1) The meeting on 3 March, 1950, is designated a secret meeting because it was not held on a first Monday in the month. Such an allegation has no bearing on the question of bad faith or abuse of discretion, in light of the provisions of G.S. 115-48, which read as follows: "The county board of education shall meet on the first Monday in January, April, July and October. It may elect to hold regular monthly meetings, and to meet in special sessions as often as the school business of the county may require."

(2) A county board of education has no authority to transact business except at a regular or special meeting, and statements or promises made by the individual members thereof have no binding effect on the board unless it expressly authorized them. *Tuttle v. Building Corp.*, 228 N.C. 507, 46 S.E. 2d 313, and cited cases. "As a rule authorized meetings are prerequisite to corporate action based upon deliberate conference and intelligent discussion of proposed measures. . . . The principle applies to corporations generally and by the express terms of our statute . . . every county is a corporate body." *O'Neal v. Wake County*, 196 N.C. 184, 145 S.E. 28; *Hill v. R. R.*, 143 N.C. 539, 55 S.E. 854.

(3) The courts are alert to impeach any transaction where a public official has any pecuniary interest in a matter decided by him. *Venable v. School Committee, supra.* But where a member of a county board of education has no financial interest in property selected as a school site, the mere allegation that he owns property in the neighborhood or immediate vicinity of such site, is not sufficient to support a finding of bad faith on the part of the board, in the absence of an allegation that in the selection of such site he exercised an improper or corrupt influence over other members of the board.

(4) While it may not be wise or expedient for boards such as the defendant Board of Education to hold executive sessions and exclude the public therefrom, we know of no statute or decision which prohibits the holding of such sessions.

In the final analysis, the plaintiff is simply seeking to eliminate the High Point Street property from the list of available sites for the new high school, by having the defendant Board permanently enjoined from procuring the property; and, to require the Board to call a mass meeting to discuss other available sites.

The law does not require a county board of education to hold a mass meeting in connection with the selection of a school site, and the courts have no authority to direct it to do so. The responsibility for the selection of schoolhouse sites, as heretofore pointed out, has been committed by the Legislature to the sound discretion of the respective local boards of education or to the respective boards of trustees in city administrative units; and the courts may not interfere with the exercise of discretionary powers conferred upon such boards, "unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion." *Newton v. School Committee,* 158 N.C. 186, 73 S.E. 886.

The complaint contains numerous allegations against the individual defendants, who are not necessary or proper parties and whose demurrer *ore tenus* was sustained in the court below, as well as many allegations which are conclusions of the pleader, but in our opinion the complaint does not state a cause of action against the defendant Board of Education.

The ruling of the court below, in sustaining the demurrer *ore tenus* interposed by the defendant Board and by the individual defendants, will be upheld.

Affirmed.

TROY LUMBER COMPANY, A CORPORATION, v. STATE SEWING MACHINE CORPORATION.

(Filed 11 April, 1951.)

1. Appeal and Error § 6c (3)—

A sole exception to the signing of the judgment presents only whether the facts found by the trial judge support the judgment and whether error in matters of law appear upon the face of the record, and does not bring up for review the findings of fact or challenge the sufficiency of the evidence upon which they are based.

2. Process § 12—

The sheriff's return raises the implication that the process was served according to law.

3. Process § 7—

Where the summons commands the sheriff to serve defendant corporation, the sheriff's return of service on "Al Chaliff—Service Mgr. for State Sewing Machine Corp." is service on the corporation and not on the service manager individually.

4. Process § 8d—

A foreign corporation engaged in the business of contracting for the manufacture of sewing machine cabinets which it sells to its customers, entered into contracts with two North Carolina companies for the manufacture of the cabinets and had two full time agents here for the purpose of inspecting cabinets manufactured here and looking after its business within the State. *Held:* The foreign corporation was doing business in this State so as to subject it to the jurisdiction of our laws and render it amenable to process here.

5. Process § 8a—

Whether an officer or employee of a foreign corporation is an agent upon whom process may be served within the purview of G.S. 1-97 (1) is to be determined by the nature of the business and the extent of the authority given to and exercised by such person, and under the statute a process agent is not limited to agents with authority to receive money on behalf of the corporation, but extends to those persons regularly employed here who have some charge or measure of control over the business sufficient in character to afford reasonable assurance of notice to the corporation.

6. Same—

A foreign corporation maintained a full time employee here to look after and manage the business of the corporation in this State with authority to settle, adjust, manage and compromise the very subject matter of the action. *Held:* Such employee is a "managing or local agent" of the corporation within the purview of G.S. 1-97 (1) upon whom process in an action against the corporation may be served.

APPEAL by defendant from *Phillips, J.*, holding courts of 15th Judicial District, in Chambers at Rockingham, 3 February, 1951.

Civil action instituted by Troy Lumber Company, a North Carolina Corporation, against State Sewing Machine Corporation, a corporation organized and existing under the laws of the State of New York, to recover for alleged breach of contract for the manufacture of sewing machine cabinets, etc.

Summons in the action was issued, under seal, to sheriff of Forsyth County by Clerk of Superior Court of Montgomery County, on 30 November, 1950, and was returned by said sheriff, bearing this endorsement: "Received Nov. 30, 1950. Served Nov. 30, 1950 by delivering a copy of the within summons, a copy of the application for extension of time to file complaint and a copy of the order extending the time for filing com-

plaint, to each of the following defendants: 'Al Chaliff—Service Mgr. for State Sewing Machine Corp.' Fee, $1.00 pd. E. G. Shore, Sheriff Forsyth County, By: Jack Gough, D.S."

The State Sewing Machine Corporation, in due time thereafter, entered a special appearance and moved "to vacate and dismiss the purported service of summons and process in this cause, and to that end, and solely for that purpose" set forth in summary the following: That it is a corporation organized and existing under the laws of the State of New York, and is a sales organization with its only office located at 11 W. 42nd Street in the city, county and State of New York; and that it has done nothing to render it amenable to process under statutes of North Carolina.

When the motion so made by defendant came on for hearing before judge holding courts of Fifteenth Judicial District, it was "heard out of Montgomery County and out of term by consent upon the written motion filed, the answer of the plaintiff used as an affidavit, the complaint filed in this cause, summons, return, order extending time to file complaint, order continuing the hearing on the motion from the January Term of the Superior Court of Montgomery County to this hearing, affidavits, and other evidence and exhibits as appear in the record," and the judge made findings of fact substantially these:

That plaintiff is a corporation organized and existing under the laws of the State of North Carolina, with its principal office and place of business in Troy, Montgomery County, North Carolina;

That defendant is a corporation organized and existing under the laws of the State of New York, with an office and place of business in the city of New York, and "engaged in manufacturing and selling sewing machine cabinets to its customers, and so far as the evidence discloses had no manufacturing plant in New York, or elsewhere, except its contract manufacturers in North Carolina"; and "that in order to carry out its corporate functions and the purposes for which it was evidently formed, its duly constituted officers and agents came to North Carolina and entered into a contract with plaintiff herein to manufacture sewing machine cabinets, the terms and conditions of said contract being as set forth in the complaint filed herein"; and that in addition thereto it also entered into a contract with Winston Manufacturing Company, of Forsyth County, North Carolina, for the manufacture of sewing machine cabinets, similar in terms to the said contract entered into with the plaintiff;

That the said contract between plaintiff and defendant was entered into orally on 10 September, 1950, as result of negotiations had at Troy, North Carolina, between the presidents of the two corporations;

That the terms and conditions of the contract are these: Plaintiff would convert its manufacturing plant to the manufacture of sewing machine cabinets for defendant, and upon such conversion would manu-

facture 12,000 of them of specified models upon order and according to specifications of defendant for fixed price f.o.b. Troy, North Carolina; and would do the work at its plant, and furnish all labor and material in connection with such manufacture, except defendant would furnish the sewing machine motors, knee switches and lights,—the knee switches to be installed by plaintiff, but the motors and lights to be packed in separate cartons and included in the cartons in which the cabinets were to be packed for shipment; "that defendant would procure, employ and furnish an inspecting agent" at plaintiff's plant "with express authority as such agent, servant and employee of the defendant to inspect, accept, or reject all cabinets manufactured by the plaintiff, and that upon inspection and acceptance by said agent, the cabinets would be deemed in all and every respect and detail in accordance with all requirements and specifications, and such would constitute irrevocable acceptance of the cabinets by the defendant, and that they should be immediately shipped to customers of the defendant, and upon such shipment, title would immediately pass to defendant and it would therefore become liable, and would honor sight draft for the cabinets;

That pursuant to the contract plaintiff converted its plant, as it had agreed, and defendant appointed M. L. Page as its inspecting agent, and plaintiff manufactured, and after their inspection and acceptance by said inspecting agent, M. L. Page, and on orders furnished to it by said M. L. Page, shipped 96 cabinets on 26 October, 1950, to Charlotte, North Carolina, 75 cabinets on same day to St. Louis, Mo., and 146 two days later to Brooklyn, N. Y.;

That plaintiff drew sight drafts on defendant for the contract price of cabinets so shipped, but defendant refused to honor same and to pay plaintiff;

That in addition to the above numbers of cabinets, plaintiff manufactured others;

That from 23 September, 1950, to 23 November, 1950, the Winston Manufacturing Company manufactured under the terms of its contract with defendant and delivered to defendant f.o.b. Winston-Salem, N. C., 530 sewing machine cabinets; and at the times set forth in plaintiff's complaint, defendant had two full-time employees looking after its business operations in North Carolina, making, accepting, and shipping cabinets;

That at the time the summons was served on Al Chaliff on 30 November, 1950, he was not only admitted to be an employee of defendant but was also the "Managing Agent" and "Business Agent" of defendant,—"having been sent to North Carolina to look after and to manage its general business in North Carolina, . . . and instructed to settle, adjust, manage for defendant's benefit and compromise the very subject matter

of this action, and . . . clothed with exclusive supervision and control over defendant's business operations in North Carolina, and particularly with the differences existing between plaintiff and defendant, . . . with authority to exercise his independent judgment and discretion in connection with defendant's business operations and contract obligations with plaintiff," and, therefore, he was an employee, "business agent" and "managing agent" of defendant while in North Carolina, and, when summons was served on him, was of such rank, position and duties as to come within the provisions of G.S. 1-97, subsection 1, and to meet the reasonable requirements of North Carolina statutes so as to make it reasonably certain that service of summons upon him would result in notice to defendant, which the record shows did actually result.

The court further found as facts that defendant has property in Montgomery County, North Carolina, consisting of sewing machine motors, knee controls and plugs and lights of approximate value of $5,000; and that plaintiff's alleged cause of action arose in said county.

Upon the facts found, the judge held as a matter of law that the service of summons herein challenged by defendant is legal, valid and binding upon defendant.

And, from judgment in accordance therewith, and dismissing the motion, defendant appeals to Supreme Court and assigns error.

David H. Armstrong for plaintiff, appellee.
Jones & Jones for defendant, appellant.

WINBORNE, J. The assignments of error presented by appellants on this appeal are founded upon exception to the signing of the judgment from which the appeal is taken. Such assignment of error raises only the questions as to (1) whether the facts found by the judge of Superior Court support the judgment, and (2) whether error in matters of law appear upon the face of the record. *Simmons v. Lee,* 230 N.C. 216, 53 S.E. 2d 79; *Culbreth v. Britt Corp.,* 231 N.C. 76, 56 S.E. 2d 15, and cases there cited. See also *S. v. Black,* 232 N.C. 154, 59 S.E. 2d 621. It does not bring up for review the findings of fact or challenge the sufficiency of the evidence upon which they are based. *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351; *Bailey v. McPherson, ante,* 231, and cases cited, and numerous others.

Within the purview of these principles, appellant states and debates in this Court three questions of law:

1. Does the return of the sheriff entered on the summons show service of it on defendant?

2. Was defendant doing business in the State of North Carolina?

3. Was Al Chaliff a proper person upon whom service on defendant, a corporation, could be had?

We hold that each question merits an affirmative answer.

In this connection it is appropriate, at the outset, to note certain pertinent statutory provisions.

"An action against a corporation created by or under the law of any other State or government may be brought in the Superior Court of any county in which the cause of action arose, or in which the corporation usually did business, or has property, or in which the plaintiffs, or either of them, resides, by a resident of this State for any cause of action." G.S. 1-80 (1).

Moreover, every corporation having property or doing business in this State, whether incorporated under its laws or not, shall have an officer or agent in this State upon whom process in all actions or proceedings against it can be served. G.S. 55-38.

A summons in a civil action must be directed to the sheriff, or other proper officers of the county or counties in which the defendants, or any of them, reside or may be found; and it must command the sheriff or other proper officer to summon the defendant, or defendants, to appear and answer, etc. G.S. 1-89.

"The officer to whom the summons is addressed must . . . serve it by delivering a copy thereof to each of the defendants." G.S. 1-94.

The manner of delivering summons, if the action be against a corporation, shall be to, among others, the "managing or local agent thereof"; and "any person receiving or collecting money in this State for a corporation of this or any other State or government is a local agent for the purpose of this section"; but "such service can be made in respect to a foreign corporation only when it has property, or the cause of action arose, or the plaintiff resides, in this State, or when it can be made personally within the State upon the president, treasurer or secretary thereof." G.S. 1-97 (1).

These statutes prescribe how the sheriff shall make service, and his duty as to the manner of discharging it. And when the sheriff returns that he has "served" the summons, this implies that he has discharged his official duty in that respect, that is, that he has served it according to law. *Strayhorn v. Blalock,* 92 N.C. 293; *McDonald v. Carson,* 94 N.C. 498; *Isley v. Boon,* 113 N.C. 249, 18 S.E. 174; *S. v. Moore,* 230 N.C., 648, 55 S.E. 2d 177.

In the *Moore case, supra, Barnhill, J.,* considering a sheriff's return on a *sci. fa.,* pertinently stated: " 'Served' implies service as by law required. So then the return 'Served' or as here 'Served on Tar Heel Bonding Company' . . . signed by the officer in his official capacity is sufficient—at least *prima facie*—to show service."

Testing the return, now being considered, by the provisions of the statutes, and decisions of this Court, expressly service was made on each defendant. And since there is only one defendant, State Sewing Machine Corporation, and since Al Chaliff is not a defendant, the service on him was manifestly in his capacity as an agent of the corporation.

On the other hand, appellant, while conceding that the summons commands the sheriff to serve the defendant, contends that the return does not show service of it on defendant, and purports to show only service on the individual named. In support of this position, appellant cites and relies upon the cases of *Plemmons v. Improvement Co.*, 108 N.C. 614, 13 S.E. 188, and *Hassell v. Steamboat Co.*, 168 N.C. 296, 84 S.E. 363.

These cases, however, are clearly distinguishable from, and inapplicable to the case in hand.

In the *Plemmons case, supra,* the summons commanded the sheriff to summon "A. H. Bronson, President of the Southern Improvement Company," and it was so served. The Court held the service was legal only as to the individual, and that the super-added words "President, etc." were a mere *descriptio personae,* as would be the words "Jr." or "Sr." A similar situation was involved in the *Hassell case.* Also the case of *Hogsed v. Pearlman,* 213 N.C. 240, 195 S.E. 789, cited by appellant is distinguishable.

Passing to the second question: On the facts found, was defendant doing business in the State of North Carolina so as to render it amenable to process in the courts of the State?

The phrase "doing business in the State" has been the subject of consideration in several decisions of this Court with respect to statutes relating to service of process on foreign corporations. In *Timber Co. v. Ins. Co.*, 192 N.C. 115, 133 S.E. 424, it is said: "No all-embracing rule as to what is 'doing business' has been laid down. The question is one of fact, and must be determined largely according to the facts of each individual case, rather than by the application of fixed, definite and precise rules."

Also in *Trust Co. v. Gaines,* 193 N.C. 233, 136 S.E. 609, we find these expressions: "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," citing *Timber Co. v. Ins. Co., supra,* and other cases.

And in *Ruark v. Trust Co.*, 206 N.C. 564, 174 S.E. 441, the Court declared: "The expression 'doing business in this State' as used in C.S. 1137, 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." (The statute C.S. 1137 is now G.S. 55-38 hereinabove cited.)

See also the case of *C. T. H. Corp. v. Maxwell, Commr. of Revenue*, 212 N.C. 803, 195 S.E. 36, in which the term "doing business," as used in statute imposing corporate franchise tax, is treated.

Moreover, the case of *St. Louis S. W. R. Co. v. Alexander*, 227 U.S. 218, 33 S. Ct. 245, 57 L. Ed. 486, the Supreme Court of the United States had this to say: "This Court has decided each case of this character upon the facts brought before it, and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction. In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served, and in which it is bound to appear when a proper agent has been served with process."

Measuring the facts found in the present case by these principles, it is clear that defendant was engaging in, carrying on, and exercising in this State some of the functions for which it was created,—which are of such character and extent as to warrant the inference that it has subjected itself to the jurisdiction and laws of the State of North Carolina in which it is served.

The third question then arises: Was the service of summons upon a proper agent of defendant—within the meaning of the term "managing or local agent" as used in the process statute G.S. 1-97 (1)?

This Court has held that the words in the statute "any person receiving or collecting money within this State for or on behalf of any corporation of this or any other State or government shall be deemed a local agent for the purpose of this Section," Code 217, now G.S. 1-97 (1), are not intended to limit service to such class of agents, but to extend the meaning of the word "agent" to embrace them; that the authority to receive money, of itself, constitutes the one so authorized a local agent, but this is not the exclusive test of agency. *Copland v. Telegraph Co.*, 136 N.C. 11, 48 S.E. 501; *Whitehurst v. Kerr*, 153 N.C. 76, 68 S.E. 913.

In the *Whitehurst case, supra, Hoke, J.*, speaking to the subject of the meaning of the term "local agent" as used in Rev. 440 (1) now G.S. 1-97 (1), gave this summary: "While there is some apparent conflict of decision in construing these statutes providing for service of process on corporations arising chiefly from the difference in the terms used in the various statutes on the subject, the cases will be found in general agree-

ment on the position that in defining the term agent it is not the descriptive name employed, but the nature of the business and the extent of the authority given and exercised which is determinative, and the word does not properly extend to a subordinate employee without discretion, but must be one regularly employed, having some charge or measure of control over the business entrusted to him, or of some feature of it, and of sufficient character and rank as to afford reasonable assurance that he will communicate to his company the fact that process has been served upon him."

To like effect are *Lumber Co. v. Finance Co.*, 204 N.C. 285, 168 S.E. 219; *Service Co. v. Bank*, 218 N.C. 533, 11 S.E. 2d 556.

Applying these principles to the facts found in this case, we concur in the ruling that Al Chaliff was a "managing or local agent" of defendant within the purview of G.S. 1-97 (1), on whom process could be served in the State of North Carolina at the time summons was served.

Hence the judgment below is

Affirmed.

PAUL R. ERVIN, ADMINISTRATOR OF THE ESTATE OF MARION LIPE, DECEASED, v. CANNON MILLS COMPANY AND FRED ALLEN.

(Filed 11 April, 1951.)

1. **Trial § 22a—**

In determining a motion to nonsuit, the evidence must be viewed in the light most favorable for plaintiff, giving him the benefit of every reasonable inference to be drawn therefrom and assuming to be true all facts in evidence tending to support his cause of action.

2. **Trial § 22b—**

On motion to nonsuit, evidence offered by defendants will be considered to the extent to which it is favorable to plaintiff or tends to clarify and explain plaintiff's evidence.

3. **Automobiles § 8c—**

A motorist making a left turn on the highway is not only required by statute to give the statutory signal during the last fifty feet traveled, but is also required first to exercise reasonable care to ascertain that the movement can be made in safety, G.S. 20-154, and further is under the common law duty to exercise that degree of care which an ordinarily prudent person would exercise under like conditions to avoid injury to others.

4. **Same—**

A motorist turning left into an intersection is required to pass beyond the center of the intersection before making the turn. G.S. 20-153.

5. Automobiles § 7—

The violation of a public statute regulating the operation of motor vehicles on a public highway constitutes negligence, and is actionable if the proximate cause of the injury.

6. Automobiles § 18h (2)—Evidence of negligence in making left turn held sufficient to be submitted to the jury.

The evidence, considered in the light most favorable to plaintiff, tended to show that defendant truck driver in making a left turn into the driveway entrance to the corporate defendant's plant, extended his hand in the statutory signal for less than fifty feet before starting the turn, "angled" into the driveway before reaching the center of the intersection, giving no signal after he started to turn, and failed to look into his rear view mirror to ascertain whether the movement could be made in safety, although had he done so he could have seen plaintiff's intestate who was following him on a motorcycle. Plaintiff's intestate was fatally injured when the motorcycle collided with the left side of the truck's front bumper on the left side of the street two to five feet from the curb. *Held:* The evidence was sufficient to be submitted to the jury on the issue of negligence, and defendants' motion to nonsuit was properly denied.

7. Automobiles § 14—

The statutory requirement that a motorist before attempting to pass another vehicle traveling in the same direction shall sound his horn does not apply in a business district of a city. G.S. 20-149.

8. Automobiles § 18h (3)—Evidence held not to show contributory negligence of motorcyclist in hitting truck attempting to make left turn.

Evidence disclosing that a motorcyclist following a truck on a city street collided with the left front bumper of the truck two to five feet from the left curb after the truck had slowed down and turned to its left to enter a driveway on the left side of the street without giving the cyclist proper warning, *is held* not to show as a matter of law contributory negligence on the part of the cyclist constituting a proximate cause of his injury, since the evidence does not show that the cyclist attempted to pass the truck until it had slowed down to make the turn and tends to show that the cyclist turned left in an attempt to avoid the collision, there being no evidence of anything unusual in the manner or speed at which the motorcycle was being operated immediately prior to the accident.

9. Negligence § 5—

What is the proximate cause of an injury is ordinarily a question to be determined by the jury as a fact in view of the attendant circumstances.

APPEAL by defendants from *Phillips, J.*, January Term, 1951, of IREDELL. No error.

This was an action to recover damages for injury and death of plaintiff's intestate alleged to have been caused by the negligence of the defendants in the operation of a motor truck.

Issues of negligence, contributory negligence and damage were submitted to the jury and answered in favor of the plaintiff. From judgment in accord with the verdict defendants appealed.

Guy T. Carswell, Shannonhouse, Bell & Horn, and Burke & Burke for plaintiff, appellee.

Hartsell & Hartsell and Scott & Collier for defendants, appellants.

DEVIN, J. The only assignment of error brought forward in defendants' appeal is the denial of their motion for judgment of nonsuit.

The determination of this question requires consideration of the evidence offered in accord with the rule that it be viewed in the light most favorable for the plaintiff, and that he be given the benefit of every reasonable inference to be drawn therefrom. *Nash v. Royster,* 189 N.C. 408, 127 S.E. 356; *Graham v. Gas Co.,* 231 N.C. 680, 58 S.E. 2d 757. On this motion not only will the evidence offered by plaintiff be considered, but also that offered by defendants which is favorable to the plaintiff, or which may be used to clarify and explain plaintiff's evidence. *Harrison v. R. R.,* 194 N.C. 656, 140 S.E. 598; *Gregory v. Ins. Co.,* 223 N.C. 124, 25 S.E. 2d 398. All the facts in evidence which tend to support plaintiff's cause of action are assumed to be true. *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307.

The evidence offered tended to show that on the morning of 4 October, 1946, about 10 a.m. the truck of defendant Mills Company was being driven by its employee, defendant Allen, in the regular course of his employment, westward along McGill Street in the City of Concord. The street was paved, 30 feet wide, straight and practically level, with slight down grade westward. The street crossed the main line of Southern Railway and a spur track, and then Bruton Street, and 40 or 50 feet farther, on the south side of McGill Street, and to the truck driver's left, was the entrance into the plant of the defendant Mills Company, into which defendant Allen intended to drive the truck. The day was clear and the pavement dry. Proceeding along the street in the same direction behind the truck was the plaintiff's intestate riding a motorcycle. The truck was being driven at 20 or 25 miles per hour and was slowed down to make a left turn across the street. The defendant Allen on his examination said he gave the left turn signal, extending his hand and arm out of the truck cab window, and then "angled" across the street toward the entrance to the driveway, so that the distance across instead of being 15 feet was 25 or 30 feet, and that after giving the signal for left turn as soon as he began to turn he withdrew his hand in order to hold the wheel of the truck with both hands to make the turn. He said, "When I got

ready to turn I took my hand in . . . I did not keep my hand out until the impact. I had brought it back in. You can't make the turn with one hand." In making the left turn the truck did not pass to the right of the point at which the center line of the mill driveway extended would intersect the center line of McGill Street. The truck had proceeded across the street to a point two to five feet from the south curb line of McGill Street, just east of the entrance to the driveway, when it was struck by the motorcycle of plaintiff's intestate. The left front bumper of the truck was knocked loose, the motorcycle damaged, and plaintiff's intestate so severely injured that as result he died five days later. There were marks on the pavement indicating the motorcycle had traveled from about the center of the street diagonally 30 feet to the point of impact, which was indicated by the appearance of dirt on the pavement. The officer who investigated the collision testified the defendant Allen stated at the time that he did not use his rear view mirror. And defendant Allen testified the truck was equipped with outside rear vision mirror, that he did not look out the back window of cab and did not see the motorcycle until the instant of impact; that he had looked back farther east and seen nothing. "But I didn't look back at the time I turned." Looking east, vision is unobscured 700 or 800 feet. It is 376 feet from the railroad track to the entrance to the mill. Shortly before the collision the motorcycle was observed at the railroad crossing where it had momentarily stopped, and a witness testified that it then moved on going west with nothing unusual as to manner or speed.

The statute prescribes that the driver of a motor vehicle upon a highway "before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, . . . and when the operation of any other vehicle may be affected by such movement shall give a signal as required in this section plainly visible to the driver of such other vehicle. . . . Left Turn—hand and arm horizontal, forefinger pointing. All signals to be given from left side of vehicle during last fifty feet traveled." G.S. 20-154.

It is also provided by statute that at an intersection the driver of a vehicle "intending to turn to the left shall approach such intersection in the lane for the traffic to the right of and nearest to the center of the highway, and in turning shall pass beyond the center of the intersection, passing as closely as practicable to the right thereof before turning such vehicle to the left." G.S. 20-153. *Banks v. Shepard,* 230 N.C. 86, 52 S.E. 2d 215; *Ward v. Bowles,* 228 N.C. 273, 45 S.E. 2d 354. Violation of a public statute regulating the operation of motor vehicles on the highway is a breach of legal duty and constitutes negligence, but it does not afford ground for action unless it be the proximate cause of resultant injury. *Holland v. Strader,* 216 N.C. 436, 5 S.E. 2d 311.

From the evidence offered, the inference seems permissible that the driver of defendants' truck in making a left turn across the street on this occasion failed to give the left turn signal with his hand "during last 50 feet traveled," as according to his statement he extended his hand when he was 40 or 50 feet away from the driveway into the mill but withdrew his hand when he began to turn, or as he expressed it when he "got ready to turn," and that due to his "angling" course across the street he began his turn 25 or 30 feet from the entrance. During that time he gave no signal. Though he estimated he kept his hand out about a "minute and a half," the short distance traveled at the rate given would indicate not more than a second or two of time could have been consumed. "A statutory warning must be substantially complied with, in order to avoid the imputation of negligence." Huddy 3-4 sec. 53. It is the purview of the statute that the prescribed hand signal should be maintained for a sufficient length of time to enable the driver of the following vehicle to observe it and to understand therefrom what movement is intended. According to defendant Allen's testimony he did not pass to the right of the point where the line of the mill driveway extended would have intersected the center line of the street. There is thus some evidence the defendants did not comply in all respects with the provisions of the statutes.

But on the motion for judgment of nonsuit the plaintiff is entitled to a favorable consideration of the evidence in another aspect. We do not regard the requirement in G.S. 20-154, that a prescribed hand signal be given of intention to make a left turn in traffic, as constituting in all cases full compliance with the mandate also expressed in this statute that before turning from a direct line the driver shall first see that such movement can be made in safety, nor do we think the performance of this mechanical act alone relieves the driver of the common law duty to exercise due care in other respects.

Under the allegations and testimony here the obligation rested upon the defendants in the operation of their motor truck upon the streets of the City of Concord to exercise due care not to injure others rightfully using the street by conduct or omission the injurious consequences of which under the circumstances they could reasonably have foreseen and avoided. Failure to perform a duty, whether required by statute or imposed by the circumstances in which the parties are placed, becomes actionable when it is shown to be the proximate cause of injury.

Here the evidence shows the intestate's motorcycle was proceeding in the same direction as the truck, following behind. The defendants' truck was equipped with an outside rear view mirror. A glance at this would have revealed the presence of the following vehicle and admonished the driver to exercise care to see that adequate warning of his intention to turn was given, and that the movement of slowing down to 10 or 15 miles

per hour and then turning diagonally across the street to the left in front of the following vehicle could be made in safety. The duty devolves upon one driving a motor vehicle on the highway, intending to make a left turn, to exercise care to avoid injury to a following vehicle by keeping proper lookout, by giving proper signals of his intention, and by keeping his motor vehicle under control. 6 A.L.R. 2d 1246 note. Performing the requirement of giving appropriate hand signals does not necessarily relieve the driver of a motor vehicle of the duty also to make proper observation of the movement of vehicles approaching from the rear, and the giving of a hand signal quickly withdrawn without observing traffic to the rear may not be considered as measuring up to the full duty imposed upon the driver under the circumstances. *Bauer v. Davis,* 43 Cal. App. 2d 764. "The giving of the statutory signals is the least the law requires of a driver of a motor vehicle. After giving the statutory signals he cannot close his eyes. If he sees a person in danger from his car, he must do what is reasonably necessary to avoid injuring him." *Kullman & Co. v. Samuels,* 148 Miss. 871. "He (the driver) is held to the duty of seeing what he ought to have seen." *Wall v. Bain,* 222 N.C. 375 (379), 23 S.E. 2d 330. "The circumstances and conditions may be such that the reasonable and ordinary care of the prudent person is not satisfied or fulfilled by mere compliance with the regulation, but requires the exercise of more or other care. Whatever precautions ordinary and reasonable care and prudence require for the protection of others must be taken even though not exacted by statutory provisions." *Richards v. Begenstos,* 237 Iowa 398.

Considering a similar statute, the Court of Civil Appeals of Texas, in *Theater Corp. v. Rehmeyer,* 115 S.W. 2d 985, used this language: "This duty is separate from the duty prescribed by the words immediately following, which is to give a 'plainly visible or audible' signal to the driver of any car the movement of which might be affected by such change of course. Obviously the signal would be futile if the movement could not be made in safety; and, therefore, there is a complete failure of duty upon the part of the driver of the turning car, if he does not first use reasonable care to see that the turn may be made in safety." In Blashfield, sec. 703, we find the principle stated concisely: "The giving of the statutory signals will not necessarily relieve a motorist from the duty of giving other signals. In other words, such statutes call for the minimum of care and not the maximum." From Huddy Automobile Law 3-4, sec. 52, we quote: "The driver of an automobile may be required to give, not only the statutory signals, but also other signals, or to slacken speed or take other steps to avoid a collision, if the surrounding circumstances and conditions require it. The giving of the statutory signals is the least the law requires."

This view was expressed by *Justice Ervin,* speaking for the Court in *Grimm v. Watson, ante,* 65, 62 S.E. 2d 538: "Under the statute codified as G.S. 20-154, any person who undertakes to drive a motor vehicle upon a highway must exercise reasonable care to ascertain that such movement can be made in safety before he turns either to the right or the left from a direct line. Besides he is required by the same statute to signal his intention to turn in the prescribed manner and for the specified distance before changing his course 'whenever the operation of any other vehicle may be affected by such movement.' A motorist violates G.S. 20-154 and in consequence is negligent as a matter of law if he fails to observe either of these statutory precautions in changing the course of his vehicle upon the highway, and his negligence in such respect is actionable if it proximately causes injury to another." See also *Cooley v. Baker,* 231 N.C. 533, 58 S.E. 2d 115.

The defendants in their brief base their argument for reversal of the ruling below solely on the ground that there was no evidence of negligence on the part of the defendants. The question of the contributory negligence of plaintiff's intestate is not there presented. However, we have considered the evidence in the record also as it relates to this phase of the case. There was no evidence as to the speed of the motorcycle ridden by plaintiff's intestate. One witness saw him as he stopped at the railroad crossing and then proceeded on his way in the direction of the place of collision 376 feet away, and saw nothing unusual in the manner or speed with which the motorcycle was being operated. Defendant Allen said no signal was given by the rider of the motorcycle, but as this was in a business district of the City of Concord the requirement that the driver of the following vehicle shall sound his horn before attempting to pass (G.S. 20-149) does not apply. Nor does it appear that the rider of the motorcycle in the first instance was attempting to pass until the truck had slowed down and began turning to the left, as the marks on the pavement would seem to indicate that at that point he turned to his left, apparently to avoid the truck, applied his brakes and traversed a distance of 30 feet before colliding with the truck, which was also turning to the left.

In any event, the question of proximate cause was one for the jury. What is the proximate cause of an injury is ordinarily a question to be determined by the jury as a fact in view of the attendant circumstances. In the language of *Justice Barnhill* in *Conley v. Pearce-Young-Angel Co.,* 224 N.C. 211, 29 S.E. 2d 740, "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 the injury or not. But this is rarely the case." *Nichols v. Goldston,* 228 N.C. 514, 46 S.E. 2d 320; *Morris v. Transportation Co.,* 208 N.C. 807, 182 S.E. 487. We

think the evidence is lacking in probative value to show such contributing negligence on the part of plaintiff's intestate as would require nonsuit as a matter of law on that ground.

The decision in *Stovall v. Ragland,* 211 N.C. 536, 190 S.E. 899, cited by defendants, is not controlling on the facts of this case. There the plaintiff, driver, looked both ways, front and rear, and seeing no vehicle approaching, the road being straight for 500 feet, turned to his left without hand signal, and was entering his driveway when struck by defendant's automobile traveling rapidly. It was held that plaintiff having looked carefully and observed no vehicle approaching was not required under the circumstances to give the signal prescribed by the statute, and nonsuit was reversed.

A careful analysis of the evidence in the record in the case at bar leads to the conclusion that considering it in the light most favorable for the plaintiff and giving him the benefit of every reasonable inference therefrom it was sufficient to warrant submission to the jury, and that the motion for judgment of nonsuit was properly denied.

As the judge's charge was not sent up, it is presumed that the pertinent principles of law applicable to the facts of this case were fully and correctly stated to the jury.

In the trial we find

No error.

D. C. DUNCAN (EMPLOYEE) v. CARPENTER AND PHILLIPS (EMPLOYER) AND COAL OPERATORS CASUALTY COMPANY (CARRIER).

(Filed 11 April, 1951.)

1. Master and Servant § 40f—

In recognition of the insidious character of asbestosis and silicosis, the Legislature has provided that disablement from such diseases means the event of becoming actually incapacitated by such diseases from performing normal labor in the last occupation in which the employee was remuneratively employed; but that in all other cases of occupational disease "disablement" should be equivalent to "disability" and should mean incapacity because of injury to earn wages which the employee was receiving at the time of the injury in the same or any other employment. G.S. 97-54, G.S. 97-2 (i).

2. Statutes § 5d—

Statutes *in pari materia* are to be construed together reconciling them so that no part of either statute should be meaningless, and where the language is ambiguous the courts must construe it to determine the true legislative intent.

3. Statutes § 5a—

Where a strict, literal interpretation of the language of a statute would contravene the manifest purpose of the Legislature, the reason and purpose of the law should control, and the strict letter thereof should be disregarded.

4. Master and Servant § 40f—

In order to be compensable, disablement from asbestosis, silicosis and lead poisoning must occur within two years from the last exposure to the hazards of the respective diseases. G.S. 97-58 (a).

5. Master and Servant § 43—

A claim for compensation for disablement resulting from asbestosis, silicosis or lead poisoning is not barred if filed within one year from the date the employee has been advised by competent medical authority that he has such disease, notwithstanding that the disablement may have existed from the time the employee quit work more than a year prior to the filing of claim. G.S. 97-58 (b) (c).

APPEAL by plaintiff from *Armstrong, J.*, September Term, 1950, of MITCHELL.

This is a proceeding for compensation under the provisions of the North Carolina Workmen's Compensation Act, for disability due to silicosis.

The facts are not in dispute and may be summarized as follows:

1. It is stipulated and agreed that the parties are subject to and bound by the provisions of the North Carolina Workmen's Compensation Act, and that the defendant Coal Operators Casualty Company became the insurance carrier of its codefendant on 30 June, 1947, and has continued as such carrier since that time.

2. That on and prior to 23 April, 1948, the plaintiff was regularly employed by the defendant employer at an average weekly wage of $44.00; that the plaintiff has been exposed to silica dust in North Carolina for two years or more during the last ten years and was exposed to silica dust for as much as thirty working days or parts thereof within the seven consecutive calendar months immediately preceding the month of April, 1948.

3. It was further found as a fact from the Case History and Medical Report on the plaintiff, prepared by Dr. Otto J. Swisher, Director of the Division of Industrial Hygiene, North Carolina State Board of Health, "that he was employed in dusty trades for Carolina Minerals from 1912-1917 as foreman; by Clinchfield Products Company, 1918-1922, and it was determined by an examination on August 5, 1935, that the plaintiff had pulmonary tuberculosis, adult type. The plaintiff continued his labors in the dusty trades as foreman and driller in spar mines, and an examination on November 17, 1936, revealed 'usual fibrosis with healed

adult type of tuberculosis.' His next examination was on September 12, 1946, while employed by the defendant in this case and at a time when he had been shearing mica for approximately one year inside the plant. This examination disclosed no change since his last examination with the exception of 'probably a little more fibrosis than usual.' The plaintiff's next examination on May 17, 1949, disclosed a cough which he had had for eighteen months, hacking in the daytime and productive mostly in the early morning, shortness of breath upon the slightest exertion, which condition seemed to be getting worse, sore lungs. The final diagnosis was 'tuberculosis moderately advanced activity questionable with early silicosis II.'"

4. The plaintiff, by reason of his physical condition, quit work in 1948 for about a month, and returned thereafter to his job for about two months, and finally quit in April of that year.

5. That the plaintiff was first advised by competent medical authority that he had silicosis on or about 29 November, 1948.

6. That the plaintiff is actually incapacitated because of silicosis from performing normal labor in the last occupation in which remuneratively employed, and is thus disabled within the meaning of G.S. 97-54; that such disablement occurred at the time of the plaintiff's last exposure on 23 April, 1948.

7. That the plaintiff filed his claim with the North Carolina Industrial Commission for compensation on 25 April, 1949.

Upon the facts found from the evidence and the stipulations, the hearing Commissioner concluded as a matter of law that the plaintiff filed his claim in time, and was entitled to compensation, and made an award as provided in G.S. 97-29, reduced by reason of his tubercular condition, as provided in G.S. 97-65.

The defendants appealed to the Full Commission, which affirmed the opinion and award of the hearing Commissioner. On appeal therefrom to the Superior Court, his Honor held as a matter of law that the plaintiff did not file his claim with the Industrial Commission within one year after his disablement, and was, therefore, not entitled to compensation and entered judgment accordingly.

The plaintiff appeals and assigns error.

McBee & McBee and W. E. Anglin for plaintiff.

Proctor & Dameron for defendants.

DENNY, J. The only question for decision is whether upon the facts in this case the plaintiff filed his claim with the Industrial Commission in time, in light of the provisions of G.S. 97-58, which read as follows:

"(a) An employer shall not be liable for any compensation for asbestosis, silicosis or lead poisoning unless disablement or death results within two years after the last exposure to such disease, or, in case of death, unless death follows continuous disability from such disease, commencing within the period of two years limited herein, and for which compensation has been paid or awarded or timely claim made as hereinafter provided and results within seven years after such last exposure.

"(b) The report and notice to the employer as required by Sec. 97-22 shall apply in all cases of occupational disease except in case of asbestosis, silicosis, or lead poisoning. The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has same.

"(c) The right to compensation for occupational disease shall be barred unless a claim be filed with the industrial commission within one year after death, disability or disablement as the case may be."

It is well to note that our Legislature has recognized the insidious character of asbestosis and silicosis. Every employer in whose business his employees or any of them are subjected to the hazards of asbestosis or silicosis, is required, by G.S. 97-60, to provide prior to employment necessary examinations of all new employees for the purpose of ascertaining if any of them are in any degree affected by asbestosis or silicosis or peculiarly susceptible thereto; and every such employer shall from time to time, as ordered by the Industrial Commission provide similar examinations for all of his employees whose employment exposes them to the hazards of asbestosis or silicosis. And where an employee, though not actually disabled, is found by the Industrial Commission to be affected by asbestosis or silicosis, and such disease has progressed to such a degree as to make it hazardous for him to continue in his employment, the Industrial Commission may require his removal therefrom. G.S. 97-61.

Furthermore, when compensation payments have been made and discontinued, and further compensation is claimed, whether for disablement, disability, or death from asbestosis, silicosis, or lead poisoning, the claim for such further compensation may be made within two years, but as to all other occupational diseases claim for further compensation shall be made within one year after the last payment. G.S. 97-66.

It should also be kept in mind that there is a distinction between the words "disablement" and "disability," when used in connection with certain occupational diseases, under the provisions of our Workmen's Compensation Act. Disablement "as applied to cases of asbestosis and silicosis, means the event of becoming actually incapacitated, because of such occupational disease, *from performing normal labor in the last occupation in which remuneratively employed;* but in all other cases of occupational disease shall be equivalent to 'disability' as defined in Section

97-2 (i)." G.S. 97-54. Disability, as defined in Section 97-2 (i), "means incapacity because of injury to earn wages *which the employee was receiving at the time of injury in the same or any other employment.*" *Young v. Whitehall Co.,* 229 N.C. 360, 49 S.E. 2d 797.

The appellees seriously contend that in passing G.S. 97-58 (b), the intent of the Legislature is obvious. Thirty days is not, in the average case, sufficient time for an employee to discover, with certainty, that he is suffering from an occupational disease. Such diseases, by their nature, are gradual in their development and difficult of diagnosis. Consequently, the Legislature relieved the employee of the necessity of giving any notice pursuant to the provisions of G.S. 97-22, to the employer in cases of asbestosis, silicosis and lead poisoning, and extended the time for giving the notice in all other cases of occupational diseases to thirty days after the employee was advised by competent medical authority that he was suffering from an occupational disease.

The appellees further contend that subsection (b) applies only to the notice to be given the employer, and does not in any way affect or extend the time in which notice and claim of death, disability or disablement must be filed with the Industrial Commission, as provided in subsection (c) of the statute.

If we concede this to be a correct interpretation of the statute, then the Legislature did a vain and useless thing when it enacted subsection (c) of the statute. For such an interpretation would make the time for filing a claim for compensation for an occupational disease identical with that fixed for filing a claim for an accident, resulting in injury or death, as provided in G.S. 97-24, irrespective of the date the employee was advised by competent medical authority that he had such disease.

Statutes *in pari materia* are to be construed together and where the language is ambiguous, the court must construe it to ascertain the true legislative intent. *Young v. Whitehall Co., supra; Mullen v. Town of Louisburg,* 225 N.C. 53, 33 S.E. 2d 484; *Supply Co. v. Maxwell, Comr. of Revenue,* 212 N.C. 624, 194 S.E. 117; *S. v. Humphries,* 210 N.C. 406, 186 S.E. 473. And where a strict literal interpretation of the language of a statute would contravene the manifest purpose of the Legislature, the reason and purpose of the law should control, and the strict letter thereof should be disregarded. *S. v. Barksdale,* 181 N.C. 621, 107 S.E. 505.

In our opinion, by enacting G.S. 97-58, subsections (a), (b) and (c), the Legislature intended to authorize the filing of a claim for compensation for asbestosis, silicosis or lead poisoning where disablement occurs within two years after the last exposure to such disease; and, although disablement may have existed from the time the employee quit work, such disablement, for the purpose of notice and claim for compensation, should

date from the time the employee was notified by competent medical authority that he had such disease. This view is supported by decisions from other jurisdictions, among them being *Roschak v. Vulcan Iron Works,* 157 P. Super. 227, 42 A. 2d 280, citing *Blassingame v. Asbestos Co.,* 217 N.C. 223, 7 S.E. 2d 478; *Consolidated Coal Co. v. Porter* (Maryland), 64 A. 2d 715; *Free v. Associated Indemnity Corp.,* 78 Ga. 839, 52 S.E. 2d 325; *Marsh v. Industrial Accident Commission,* 217 Cal. 338, 18 P. 2d 933, 86 A.L.R. 563; *Greener v. E. I. DuPont De Nemours & Co.,* 188 Tenn. 303, 219 S.W. 2d 185. Were we to rule otherwise, it would be necessary to hold that it was the legislative intent to require an employee, in many instances, suffering from any one of these occupational diseases to make a correct medical diagnosis of his own condition or to file his notice and claim for compensation before he knew he had such disease, or run the risk of having his claim barred by the one year statute.

It follows, however, as a matter of course, that the finding of the competent medical authority must be to the effect that disablement occurred within two years from the last exposure in cases of asbestosis, silicosis and lead poisoning, and in claims involving other occupational diseases that disability occurred within one year thereof.

Now, in applying the above construction to the facts disclosed on this record, let us review briefly the pertinent evidence with respect to the physical condition of the plaintiff prior to the hearing below. There is no evidence in this record that tends to show the plaintiff ever lost any time from his work on account of his physical condition prior to 1948. In fact, a work card, good in dusty trades, was issued to him on 28 January, 1947. Moreover, Dr. Swisher, the Director of the Division of Industrial Hygiene, a department of the State Board of Health, created for the purpose of making periodic examination of persons exposed to the hazards of occupational diseases, testified "the first date on which my examination revealed that the plaintiff had silicosis *disabling in its nature and extent was 17 May, 1949.* I had examined him on 12 September, 1946. At that time it could not be definitely determined if any silicotic pathology was present."

Likewise, Dr. C. D. Thomas, Medical Director of the Western North Carolina Sanitorium at Black Mountain, testified "the plaintiff was examined at the Sanitorium on 22 August, 1949. It is my opinion that the plaintiff had silicosis as we usually list moderately advanced, grade 2, with no tuberculosis. I examined an X-ray taken by Dr. Webb, on 29 November, 1948. This showed the presence of tuberculosis, but not active. It is my opinion that the plaintiff was disabled, due to silicosis, from doing normal labor in his last occupation in which he was remuneratively employed."

The plaintiff in his testimony said: "I was sick when I came from the mines. I did not know what was wrong. The first notice to me that I had silicosis was from Dr. Thomas on 29 November, 1948."

Thus the record reveals that from the periodic examinations of the plaintiff by the Division of Industrial Hygiene, it was not ascertained that the plaintiff was suffering from silicosis until 17 May, 1949, twenty-three days after he had filed his notice and claim for compensation with the Industrial Commission, pursuant to the information he had received from Dr. Thomas on or about 29 November, 1948. And while Dr. Thomas notified the plaintiff, on or about 29 November, 1948, that he had silicosis, there is nothing in his testimony that would tend to show that he had concluded that the disease had progressed to the extent of preventing the plaintiff from doing normal labor in the last occupation in which he was remuneratively employed, until he was examined at the Sanitorium on 22 August, 1949.

In light of this evidence, we hold that the plaintiff was entitled to file his notice and claim for compensation at any time within one year from the time he was notified by Dr. Thomas that he had silicosis. This is a case of first impression with us, involving this particular statute, but we think the construction we have given it is in keeping with the spirit and purpose of the law.

The judgment of the court below is reversed and the cause remanded for judgment, in accord with this opinion.

Reversed.

GOLDSTON BROTHERS, INC., v. J. A. NEWKIRK AND WIFE, MARY ANNE NEWKIRK.

(Filed 11 April, 1951.)

1. Contracts § 18—

As a general rule, nonperformance of antecedent obligations may not be excused by inability to perform due to unexpected difficulties or unforeseen impediments unless caused by wrongful act or conduct of the other party to the contract.

2. Brokers § 10—Under contract in this case, broker was not entitled to commissions until sale was completed.

The contract in suit provided that the corporate broker should be entitled to commissions at the close of sales as evidenced by contracts signed by purchasers, and that the broker should collect from the purchasers' first payment on property sold. After auction by the broker and the collection by it of initial payments on part of the property, *lis pendens* was filed in a suit instituted by a third person against the owners of the land, and

thereafter the broker, without authorization from the owners, refunded the initial payments of those purchasers who had not stopped payment on their checks. *Held:* In the absence of evidence by the broker that the purchasers were bound in writing by their bids, or that performance was prevented by wrongful act of the owners, the broker is not entitled to commissions, since it had not shown performance of its antecedent obligations in respect to closing the sales, nor waiver of performance by the owners.

3. Contracts § 18—

As a general rule, prevention by one party excuses nonperformance of an antecedent obligation by the other provided such prevention is wrongful, but prevention of performance by interference of a third party, independent of wrongful conduct on the part of the other party to the contract, will not excuse nonperformance of an antecedent obligation.

4. Brokers § 10—

Where consummation of sale of realty by a broker is prevented by the filing of *lis pendens* in an action brought by a third party, and consummation of sale is an antecedent obligation to the right to commissions, the broker must introduce evidence tending to show that the filing of *lis pendens* was due to wrongful conduct on the part of the owners in order to maintain that its nonperformance was excused.

5. Trial § 6—

Where plaintiff is not entitled to recover in the action as constituted, the court may not postpone further proceedings on the ground that the determination of another suit against one of the parties by a third person might affect the rights of the parties to the instant action, but must render final judgment.

6. Quasi-Contracts § 1—

Ordinarily recovery on *quantum meruit* may not be had where no benefit accrues to the party sought to be charged, and where the contract sued on is entire, and the party sought to be charged has received no benefit from the attempted performance by plaintiff, the refusal to submit the issue of *quantum meruit* is proper.

7. Appeal and Error § 31a—

Where there are no assignments of error and no exceptions are brought forward in appellant's brief, the appeal will be dismissed.

APPEAL by plaintiff from *Carr, J.*, at October Term, 1950, of LEE.

Civil action by auction-broker to recover commissions for selling land.

The plaintiff, by written contract dated 2 August, 1948, agreed to offer for sale for the defendants on or before 15 October, 1948, a five thousand acre tract of land. Pursuant to the terms of the contract, the plaintiff supervised the subdivision of the land into parcels and, after due advertisement, offered it for sale on the premises, commencing the morning of 12 October, 1948. Some thirty-four parcels, aggregating about three

thousand acres, were sold that day to various purchasers at bid prices totaling $46,484.70; and deposits for the initial payments on the land, amounting to $8,345.55, were made to the plaintiff's sale clerk. All sales were confirmed by the defendants at the bid prices. Plaintiff also claims to have negotiated a private sale the next day for the remaining acreage at a price of $16,000. On the morning of 13 October, 1948, Babcock Lumber Company, Inc., instituted in the United States District Court for the Eastern District of North Carolina a civil action against the defendants, and at ten o'clock that morning "filed *lis pendens* and complaint" in the office of the Clerk of the Superior Court of Harnett County against the land then in process of being sold.

After the notice of *lis pendens* was filed, the bidders refused to accept deeds for the property and requested return of the deposits. Some of the bidders stopped payment on their checks. Thereafter, all funds so deposited with the plaintiff's clerk were returned to the bidders and the sales have never been consummated.

Plaintiff thereafter instituted this action, alleging full performance on its part of the provisions of the contract, breach by the defendants, and asking a recovery of $6,248.47,—commissions and compensation in accordance with the terms of the contract. The defendants answered, denying the material allegations of the complaint. They allege, among other things, that plaintiff, without fault of the defendants, never closed the sales and that therefore the plaintiff is not entitled to recover the commissions and compensation fixed by the contract.

At the close of the evidence in the trial below, the plaintiff tendered an issue on *quantum meruit,* and the court ruled that upon the pleadings and the evidence offered the plaintiff was not entitled to submit the issue to the jury. The plaintiff excepted.

"Counsel for plaintiff and defendants thereupon agreed that in respect to the issue arising on the pleadings relating to damages for breach of an express contract, the Court might find the facts and render judgment thereon without the intervention of the jury."

The judgment thereafter entered contains these recitals:

"The Court, having considered the pleadings and the evidence, is of the opinion that no cause of action in favor of the plaintiff and against the defendants has been shown to exist which entitles the plaintiff to a judgment at this time against the defendants. The Court finds as a fact that this action is so interwoven with the action of *Babcock Lumber Company v. J. A. Newkirk and wife, Mary Anne Newkirk,* pending in the District Court of the United States for the Eastern District of North Carolina, referred to in the pleadings and the evidence in this action, that there may be developments in the said *Babcock Lumber Company case* which will entitle the plaintiff to a recovery against the defendants by

reason of the matters and things alleged in plaintiff's complaint. In order to preserve the rights of the plaintiff, if any there be, the Court in the exercise of its equitable powers declines to dismiss this action to the end that the action may be continued for the purpose of permitting such motions in this case as are deemed advisable by the plaintiff in the light of future developments in the *Babcock Lumber Company case.*"

Thereupon, it was adjudged by the court "that the plaintiff is not at the present time entitled to a judgment against the defendants; and it is . . . ordered that this action be not dismissed and that it be continued for the purpose of enabling the plaintiff to file such motions in this cause as the plaintiff deems necessary in the light of future developments in the said *Babcock Lumber Company case.*"

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

Gavin, Jackson & Gavin for plaintiff, appellant.
Rivers D. Johnson and S. Ray Byerly for defendants, appellees.

JOHNSON, J. The contract declared on provides that the plaintiff shall be paid "at the close of sale ten per cent in cash of the gross receipts of sale, as evidenced by contracts signed by purchasers." The contract also stipulates that the plaintiff shall collect for the defendants "the first payment on the property sold."

Hence, plaintiff's duties did not terminate on knocking the land off to the high bidders. Plaintiff was required to close the sale for the defendants by collecting the initial payments of purchase money and turning over to defendants purchasers who were bound by signed contracts. These duties to collect purchase money and bind the purchasers stand as antecedent obligations which were required to be performed by the plaintiff as conditions precedent to its right to receive commissions. Page on Contracts, Vol. 5, Sec. 2960, p. 5226; 17 C.J.S., Contracts, Secs. 452 and 456, pp. 932 and 937; 12 Am. Jur., Contracts, Secs. 327 and 328, pp. 881 and 883. *Corinthian Lodge v. Smith,* 147 N.C. 244, 61 S.E. 49; *Ducker v. Cochrane,* 92 N.C. 597. See also *Jones v. Realty Co.,* 226 N.C. 303, 37 S.E. 2d 906; *Horney v. Mills,* 189 N.C. 724, 128 S.E. 324; *Clark v. Seay,* 140 Okla. 198, 282 P. 357.

In 12 Am. Jur., p. 882, it is stated: "If one promise is first to be performed as the condition of the obligation of the other, that which is first to be performed must be done or tendered before the party who is to do it can sustain a suit against the other."

And the general rule is that performance of antecedent obligations may not be excused by subsequent inability to perform on account of unexpected difficulties or unforeseen impediments, short of prevention by wrongful act or conduct of the other party to the contract. 12 Am. Jur.,

pp. 883 and 884; *Mizell v. Burnett,* 49 N.C. 249. See also *Clancy v. Overman,* 18 N.C. 402.

This appeal is grounded on the assumption that plaintiff was entitled to recover below on either of three theories, namely: (1) performance, (2) prevention of performance by wrongful conduct of the defendants; or (3) recovery on implied *assumpsit* or *quantum meruit.* The court below declined to allow recovery on either theory, and no error has been made to appear upon the record as presented.

1. *Performance.* The plaintiff alleges that it "performed and discharged all of its duties in making said sale in accordance with said contract." And in its brief plaintiff contends that the evidence offered below supports the allegations of performance. However, we are unable to so interpret the record. The evidence fails to show that the plaintiff closed the sale by binding the purchasers with signed contracts and collecting the initial payments of purchase money out of which commissions were to be paid. True, the witness J. W. Goldston, Jr., on cross-examination referred to certain "tickets of agreement of purchasers." However, none of these tickets were introduced in evidence, nor were their contents shown. It nowhere appears that the purchasers were bound in writing by their bids. There is evidence that plaintiff collected the initial payments of purchase money from some of the purchasers; but it likewise appears that these payments were refunded after some of the purchasers had stopped payment on their checks. It does not appear that the defendants authorized the return of these deposits. Performance of the plaintiff's antecedent obligations in respect to closing the sale has not been made to appear. Therefore the rule explained in *Eller v. Fletcher,* 227 N.C. 345, 42 S.E. 2d 217, and companion cases cited by plaintiff does not control here. Nor does it appear that the plaintiff either alleged or proved waiver of performance. 17 C.J.S., Contracts, Sec. 574, p. 1209.

2. *Prevention of performance by wrongful conduct of the defendants.* As a general rule, prevention by one party excuses nonperformance of an antecedent obligation by the adversary party, and ordinarily the party whose performance is thus prevented is discharged from further performance and may recover as in case of breach. *McCurry v. Purgason,* 170 N.C. 463, 87 S.E. 244; *Hayman v. Davis,* 182 N.C. 563, 109 S.E. 554; 12 Am. Jur., p. 885; 17 C.J.S., p. 966, *et seq.*

However, in order to excuse nonperformance, the conduct on the part of the party who is alleged to have prevented performance "must be wrongful, and, accordingly, in excess of his legal rights." Page on Contracts, Vol. 5, Sec. 2919, p. 5145. And it is generally held that the prevention of performance by interference of a third party, independent of wrongful conduct of the other party to the contract, will not excuse performance of an antecedent obligation. 17 C.J.S., p. 949, and 17 C.J.S.,

p. 967; *Cremer v. Miller,* 56 Minn. 52, 57 N.W. 318. Here the suit and notice of *lis pendens* filed by Babcock Lumber Company against the defendants is the only circumstance in evidence tending to show that the defendants prevented the plaintiff from closing the sale according to the terms of the contract. There is no supporting evidence tending to show that the Babcock *lis pendens* was justifiably filed because of some previous breach of its legal rights occasioned by wrongful conduct of the defendants. Nor does the record suggest connivance between Babcock Lumber Company and the defendants. Besides, defendants do not allege wrongful prevention. Therefore upon the record as presented, the court below did not err in declining to allow recovery on the theory that plaintiff's failure to close the sale was prevented by wrongful conduct of the defendants.

The intimation in the judgment below that further proceedings in this case be held in abeyance pending the trial of the Babcock case has practical pertinency. But it is assumed that the intimation was intended only as a suggestion. It may not be interpreted as requiring a postponement of further proceedings in the instant case. 17 C.J.S., pp. 196 and 205.

3. *Implied assumpsit or quantum meruit.* Ordinarily, where one party has endeavored in good faith to perform his contractual obligations and while partially performing, though failing in some particulars, he has conferred on the other party substantial benefits, he may recover on *quantum meruit* as upon an implied promise to pay for the benefits so received from partial performance. 17 C.J.S., Contracts, Secs. 508 and 511, pp. 1085 and 1093. Ordinarily, however, this rule does not apply where no benefit accrues to the party sought to be charged. Elliott on Contracts, Vol. 3, Sec. 2101, p. 293. Nor can there be a "recovery on a *quantum meruit* for services rendered under a special contract, where by reason of a failure to meet its conditions no pay was due on such contract." 12 Am. Jur., Contracts, Sec. 328, p. 884. Here the sale was never closed. It does not appear that any benefits accrued to the defendants from the plaintiff's services. The contract sued on is entire (*Brewer v. Tysor,* 48 N.C. 180) and not divisible (*Chamblee v. Baker,* 95 N.C. 98). The plaintiff may recover, if at all, only upon the special contract sued on. See McIntosh, Selected Cases on Contracts, Synopsis p. 39. The court below correctly declined to submit the issue on *quantum meruit.*

The defendants also excepted to the judgment below and appealed. However, no errors were assigned and no exceptions were brought forward in their brief. The appeal appears to have been abandoned. It is dismissed. *Bank v. Snow,* 221 N.C. 14, 18 S.E. 2d 711; *In re Will of Hargrove,* 207 N.C. 280, 176 S.E. 752.

Except as herein modified, the judgment of the court below is upheld.

Modified and affirmed.

O. LEE ICENHOUR, JAY STAFFORD, BURETTE STAFFORD, ROM C. DEAL, RALPH STAFFORD, AND WAITSELL ICENHOUR, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS WHO HAVE OR CLAIM AN INTEREST OR RIGHT BY WAY OF EASEMENT OR OTHERWISE TO PROPERTY OR RIGHTS REFERRED TO IN THE COMPLAINT IN THIS ACTION, v. MARSHALL BOWMAN, PERRY WHITE, JAYSON FOX, WILLARD PRICE, ELBERT BOWMAN, SWAN BLANKENSHIP, DEXTER DEAL, MARVELEE DAGENHART, MARLOW ICENHOUR, GARLAND HEFNER, TERRILL BOSTIAN, AND EUGENE CLINE, TRUSTEES OF FRIENDSHIP LUTHERAN CHURCH, AND THEIR SUCCESSORS IN OFFICE.

(Filed 11 April, 1951.)

1. Constitutional Law § 22—

Where the parties to a civil action do not waive trial by jury, nor consent that the judge find the facts, it is error for the judge to enter judgment without the aid of a jury on controverted issues of fact raised by the pleadings. Constitution of N. C., Art. I, Sec. 19; Constitution of N. C., Art. IV, Sec. 13; G.S. 1-172; G.S. 1-184.

2. Same: Trial § 20—

In an action by heirs to recover land on the ground of breach of condition of a conditional fee, defendants' answer asserting an unqualified fee simple, denying breach of condition, and setting up the defenses of waiver, estoppel and statutes of limitation, raises issues of fact for the determination of the jury, and it is error for the court in the absence of waiver of jury trial or consent that the court find the facts, to render judgment without the intervention of a jury.

APPEAL by defendants from *Godwin, Special Judge,* at January Term, 1951, of ALEXANDER.

Civil action to have certain land described in complaint declared a public burial ground, and, in the event of failing in this, to adjudge plaintiffs the owners of so much of it as had not been heretofore used to bury the dead, etc.

Plaintiffs, on behalf of themselves as heirs at law of Nimrod Lunsford and all other persons who are interested with them, allege and say in their complaint substantially the following: That on or about 16 August, 1832, Nimrod Lunsford executed and delivered to Daniel Bowman, Daniel Fry, George Deal and Nimrod Lunsford, Commissioners and their successors, a deed for three and one-half acres of land in Burke County, North Carolina, lying on waters of Lower Little River on the south side of a small branch, specifically described, "for the only use of a Meeting and School house as long as the above named commissioners and their successors will keep them for that purpose"; that the commissioners named took charge of the property and for a number of years conducted a school and meeting house on the premises and used a portion of same

as a burial ground for the general public, and while the school and meeting house were not kept up and maintained as a school and meeting house, the land has been maintained as public burial ground, without interference; that approximately one and a half acres has been so taken, and it has been understood that in case so desired the remainder of the property should be kept and used for general burial ground without regard to denomination or church affiliation, but for the general public under proper management; that the defendants have violated such understanding and are seeking to use it for other purposes, and in fact are now doing so,—they having erected a barn on, and fenced a portion of that which has not been used for the burial of the dead,—their purpose being to acquire title thereto, etc.; that, as the plaintiffs are advised, when the property ceased to be used for the purposes mentioned in the deed it reverted to Nimrod Lunsford, and, he being dead, the portion not actually used as a burial ground reverted to his heirs at law; that the heirs at law are agreeable to the continued use of the property as a public burial ground; but that, if satisfactory adjustment to that end cannot be had, they, as such heirs at law, are the owners of the land in fee, and are entitled to the immediate possession of same.

Defendants, answering, admit that Nimrod Lunsford executed and delivered to Daniel Bowman, *et al.*, Commissioners, a deed for three and a half acres of land in Burke County, now in Alexander County, as described in said deed; that the commissioners took charge of the lands; that a school and meeting house were erected thereon; that a portion of the land was used as a burial ground or cemetery for the benefit of the people of that community,—the privilege of burying their dead there not being denied to any one by said commissioners and their successors of the Friendship Lutheran Church, including the defendants; that the Friendship Lutheran congregation and the successor commissioners and trustees moved the school and meeting house, and erected and have maintained through the years what is known as the Friendship Lutheran Church; and that they and their predecessors in office have erected a barn at the northwest corner of said 3.5 acre tract and used a portion of said land not used for cemetery purposes as a pasture. But defendants deny all other material allegations of the complaint, and aver that in addition to the land described in the complaint the Friendship Lutheran congregation and the successor commissioners and trustees have purchased and set aside additional grounds for said church and burial purposes, across the public road, and have been and are now using all said property as one church plant; that two public roads go through the church property, and the property described in the complaint lies on the east of one of these roads; that approximately two acres of the 3.5-acre tract have been taken

and are now used as a burial ground, and approximately 1.5 acres "remain for such use during the coming years."

And for a further defense, defendants aver in pertinent part:

1. That the deed from Nimrod Lunsford to the commissioners "conveyed an indefeasible fee simple title to said land to said commissioners, as defendants are advised and believe . . ."

2. That two of the commissioners named in the deed, namely Daniel Fry and George Deal, in 1833, were communing members and Elders, and a third one, Daniel Bowman, in 1836, was a communing member of the Lutheran congregation of Frienship Meeting House, and each so remained until his death; and was buried on said land.

3. That as they are advised and believe, the Lutheran congregation of Friendship Church, by and with the consent of the commissioners named in said deed, erected a school and meeting house upon the land described in the complaint in the year 1833, and used the same as a meeting and school house continuously for approximately 25 years or until the year 1858, and also used a portion of said land as a burying ground; and that during said period Nimrod Lunsford, the grantor in the deed, withdrew and was succeeded as commissioner, and waived any and all rights that he may have had in and to said property, and delivered same over to his successor or successors in the Lutheran congregation of Friendship Meeting House.

4. That Nimrod Lunsford died about the year 1846.

5. That as defendants are advised and believe, in about the year 1858, the portion of the said land fronting along the public road having been used for burying grounds, and no suitable portion of same remained near the highway for the erection of a new meeting house or church, the then successor commissioners, who were officers and trustees of the Friendship Lutheran congregation, deemed it advisable to purchase additional lands across the pubic road on which to erect a new school and meeting house, and said new house was erected to take the place of the old log school and meeting house; "that thereafter and continuously through the years the officers and trustees of Friendship Lutheran congregation were the sole successor commissioners and trustees to, the owners of, and in full charge and possession of said land . . . and have conscientiously endeavored to carry out the wishes and intent of the original grantor in the uses of the land," etc.

6. That the officers and trustees, including the pastor of said Friendship Lutheran congregation of Alexander County, as successors to the original commissioners, by virtue and under said deed, are now the owners in fee simple absolute of the lands therein described, "or that the said Friendship Lutheran congregation and the officers and trustees thereof have been in open, notorious and continuous adverse possession under a claim

of fee simple title since the year 1858, and are the owners thereof by adverse possession under the laws of North Carolina, and as such owners, for a long period of years, have properly kept up and maintained said land, and in the exercise of Christian virtues and principles, have voluntarily given the privilege to, not only Lutherans, but to all citizens of that community, with or without religion, to bury their dead upon said premises . . . and it is the intention and purpose of said defendants and owners to continue this Christian practice."

7. That, for causes and in manner stated, defendants plead waiver and estoppel, and also statutes of limitations as a bar to plaintiffs' right to recover herein.

Plaintiffs, replying, deny in material aspects the said averments of defendants' further answer and defense.

When the cause came on for hearing, and a jury having been selected and impaneled, and the pleadings read, and considered, the court announced that in his opinion the intervention of a jury was not necessary. Defendants objected. Objection overruled. Defendants excepted. Exception No. 1.

Thereupon the court proceeded to find facts, and on facts found adjudged and declared that the property described in the complaint and deed referred to, and all parts thereof, to be a public burial ground, etc., and ordered that the fencing, barn, etc., placed upon the unused portion of the premises be removed, etc., and that plaintiffs recover costs to be taxed.

Defendants excepted, and appeal to Supreme Court and assign error.

A. C. Payne and Burke & Burke for plaintiffs, appellees.

Jesse C. Sigmon, Jesse C. Sigmon, Jr., and John C. Stroupe for defendants, appellants.

WINBORNE, J. In North Carolina the Constitution guarantees, the statutes of the General Assembly preserve, and the decisions of the courts enforce, the right to trial by jury. Constitution of N. C., Art. I, Section 19, Art. IV, Section 13, G.S. 1-172, G.S. 1-184. *Andrews v. Pritchett,* 66 N.C. 387; *Chasteen v. Martin,* 81 N.C. 51; *Driller Co. v. Worth,* 117 N.C. 515, 23 S.E. 427; *Hershey Corp. v. R. R.,* 207 N.C. 122, 176 S.E. 265; *McCullers v. Jones,* 214 N.C. 464, 199 S.E. 603.

The Constitution, Article I, Section 19, proclaims that "in all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." The Constitution, Article IV, Section 13, also declares that "in all issues of fact, joined in any court, the parties may waive the right to have the same determined by a jury . . ." And in implementation of these Constitutional provisions, the General Assembly

of North Carolina has enacted these statutes: G.S. 1-172, which provides that "an issue of fact must be tried by a jury, unless a trial by jury is waived or a reference ordered," and G.S. 1-184, which provides that "trial by jury may be waived by the several parties to an issue of fact . . ."

Thus where the parties to a civil action do not waive trial by jury nor consent that the judge find the facts, it is error for the judge to enter judgment without the aid of the jury on the controverted issues of fact raised by the pleadings. *McCullers v. Jones, supra.*

Hence the assignment of error predicated on exception of defendant to the action of the trial judge in dispensing with a jury trial, now presented, in absence of waiver and consent of parties, is well founded. The averments in the answer of defendants, particularly in the further answer and defense, raise issues of fact as to which defendants may not be deprived of the right to a jury trial,—without their consent. Here, as in *McCullers v. Jones, supra,* there is no waiver of jury trial, and no consent that the judge find the facts. Hence there is error in the judgment from which appeal is taken. Therefore the judgment is stricken out, and the cause is remanded for the proper determination of the issues arising upon the pleadings.

Error and remanded.

STATE v. JAMES PATTERSON SIMPSON.

(Filed 11 April, 1951.)

1. Automobiles § 30d—

Direct and positive testimony by the prosecuting witness that defendant was highly intoxicated and was under the steering wheel immediately after the collision, *is held* sufficient to be submitted to the jury on a charge of drunken driving, G.S. 20-138, the probative value of the testimony being for the jury.

2. Criminal Law § 50d—Arrest of defendant and his witnesses to the knowledge of jury held impeachment of their testimony entitling defendant to new trial.

Where the record discloses that the trial court immediately upon adjournment for noon lunch ordered the sheriff to take defendant and his two witnesses into custody, and that when the court reconvened, the jury being in the box, defendant and his two witnesses were brought into the courtroom in the custody of the sheriff and his officers, a new trial must be awarded for impeachment and depreciation by the court of defendant's evidence and that of his witnesses, there being no suggestion of any contumacy justifying the court in acting peremptorily, and it is not necessary that the record affirmatively show the jury had any knowledge of the

occurrence, since the jurors are presumed to know what goes on in their presence.

3. Criminal Law § 53f—

The trial court may not in any manner, whether directly or indirectly, by comment on the testimony, by arraying the evidence unequally in the charge, by imbalancing the contentions of the parties, by choice of language in stating the contentions, or by general tone and tenor of the trial, indicate what impression the evidence has made on his mind or what deductions he thinks should be drawn therefrom.

4. Same—Misstatement of evidence and manner and language in stating the State's contentions held error as expression of opinion upon evidence.

An erroneous statement that defendant never denied his driving the car at the time in question although "he had every opportunity" to do so (notwithstanding the failure to call the inadvertence to the court's attention in apt time) and the language of the charge in stating the State's contentions that the prosecuting witness had been shown to be a responsible colored man worthy of belief whose "character alone in contradiction of the defendant and his witnesses is worth more than a dozen of them" and that defendant and his witnesses were trying to embarrass the prosecuting witness by the testimony of admitted criminals and that the testimony of the prosecuting witness should be given more weight and credit than a "courthouse full of the kind and stripe and character" of defendant and his witnesses, must be held for prejudicial error as an expression of opinion upon the weight of defendant's evidence in violation of G.S. 1-180.

APPEAL by defendant from *Phillips, J.*, January Term, 1951, of CABARRUS.

Criminal prosecution on warrant charging the defendant with operating a motor vehicle upon a public highway in Cabarrus County, this State, while under the influence of intoxicants in violation of G.S. 20-138.

The case was tried originally in the Recorder's Court of Cabarrus County and *de novo* on appeal to the Superior Court.

The State's evidence is to the effect that on the night of 15 May, 1950, between 8:00 and 9:00 o'clock, Jesse Banner, a Negro school teacher, was driving his Chevrolet automobile southwardly on Zion Road in Cabarrus County when a Ford car, traveling northwardly on the same road and driven by the defendant, struck the Chevrolet car of the prosecuting witness and knocked it into the ditch on the side of the road. The defendant was in "a high state of intoxication, very drunk, and had approximately one-half pint of whisky in a bottle. . . . He was under the steering wheel" (immediately after the collision).

The defendant testified that the Ford car in question belonged to Gene Green; that he and Homer Hurlocker were on the back seat; that he was asleep when the wreck occurred, and that he "was not driving the car. . . . I had not been driving that car at any time that night." The de-

fendant admitted that he and Hurlocker were drinking. They were both arrested for public drunkenness.

Gene Green, a witness for the defendant, testified that he was with the defendant on the night in question. "It was my car and I was driving. James Simpson did not drive the car at any time that evening. He was sitting in the back seat with Hurlocker at the time of the wreck."

Homer Hurlocker, a witness for the defendant, testified that the Ford car belonged to Green and that Green was driving; that Simpson did not operate the car at any time that evening, and that he and Simpson were drinking. On cross-examination, he admitted that he had been convicted of public intoxication a number of times. "I don't know whether it was as many as 59 or not."

At this point, the court took a recess for the noon lunch. Immediately upon adjournment, some of the jurors being still in the courtroom, the trial court called the sheriff to his rostrum, and ordered him to take the defendant and his two witnesses, who had been on the witness stand, into custody. They were immediately arrested in the courtroom and placed in jail. When the court reconvened after the noon recess, the jury being in the box, the defendant and his two witnesses were brought into the courtroom in the custody of the sheriff and his officers, and the trial of the case was resumed. Later in the day the court instructed the solicitor to draw indictments against the defendant and his two witnesses for perjury in connection with the Simpson case. They were held in jail for several days until they were able to give appearance bonds. Exception.

In the court's charge to the jury, he stated in the form of a contention, that the defendant went on the stand "and never denied it (that he was driving the car), didn't say he didn't do it, and he had every opportunity." Exception.

Again, "the state contends that Banner (prosecuting witness) holds a responsible position . . . that he is a man worthy of your belief; that he has proven a good character by a white man who has known him for a number of years, and that his character alone in contradiction of the defendant and his witnesses is worth more than a dozen of them." Exception.

And again, "the State contends . . . that they (defendant and his witnesses) are trying to embarrass the witness Banner and are trying to discredit his testimony by three admitted criminals and a little 15-year-old girl that they brought up here whose mother is mad with Banner." Exception.

And again, "the State contends . . . that the defendant on numerous occasions has been convicted of crime, that all of his witnesses have been convicted of crime, one of them 57 times, or thereabouts, for public drunkenness . . . and contends that one colored man's testimony, such as

Banner, should be given more weight and credit by you than a courthouse full of the kind and stripe and character that the defendant has shown upon admission upon the stand and his witnesses have shown." Exception.

Verdict: Guilty.

Judgment: Eight months on the roads.

The defendant appeals, assigning errors.

Attorney-General McMullan, Assistant Attorney-General Moody, and Charles G. Powell, Jr., Member of Staff, for the State.

B. W. Blackwelder and R. Furman James for defendant.

STACY, C. J. The defendant is well advised in abandoning his demurrer to the sufficiency of the evidence to carry the case to the jury. The prosecuting witness was direct and positive in his testimony. Its probative value was for the twelve. *S. v. Hovis, ante,* 359.

A new trial must be granted, however, because of the impeachment and depreciation by the court of the defendant's evidence and that of his witnesses, Green and Hurlocker. This was done, first, by ordering the defendant and his two witnesses into custody during the trial, which action by the court came to the attention of the jury trying the case, *S. v. McNeill,* 231 N.C. 666, 58 S.E. 2d 366; and, secondly, by the manner in which the court's charge was given to the jury. *S. v. Rhinehart,* 209 N.C. 150, 183 S.E. 388.

First. It would be begging the question to say that "it does not appear on the record" the jury had any knowledge of the order of arrest or the actual incarceration of the defendant and his witnesses during the trial. *Kelly v. Boston,* 201 Mass. 86, 87 N.E. 494. The jury was in the courtroom and saw what transpired, some of them at the beginning of the noon recess, and all of them after the court had reconvened for the afternoon session. They are presumed to know what goes on in their presence. The case of *S. v. McNeill, supra,* is controlling on the point.

There is no suggestion of any contumacy on the part of the defendant or his witnesses such as might have justified the court in acting peremptorily, without prejudice to the defendant. *S. v. Slagle,* 182 N.C. 894, 109 S.E. 844; *Seawell v. R. R.,* 132 N.C. 856, 44 S.E. 610; 53 Am. Jur. 82.

Second. The authorities are to the effect that no judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility. G.S. 1-180, as rewritten, Chap. 107, S.L. 1949; *S. v. Cantrell,* 230 N.C. 46, 51 S.E. 2d 887; *S. v. Owenby,* 226 N.C. 521, 39 S.E. 2d 378; *S. v. Woolard,* 227 N.C. 645, 44 S.E. 2d 29; *S. v. Auston,* 223 N.C. 203, 25 S.E. 2d 613.

The judge may indicate to the jury what impression the evidence has made on his mind, or what deductions he thinks should be drawn therefrom, without expressly stating his opinion in so many words. This may be done by his manner or peculiar emphasis or by his so arraying and presenting the evidence as to give one of the parties an undue advantage over the other, or, again, the same result may follow the use of language or form of expression calculated to impair the credit which might otherwise and under normal conditions be given by the jury to the testimony of one of the parties. *Speed v. Perry,* 167 N.C. 122, 83 S.E. 176; *S. v. Dancy,* 78 N.C. 437; *S. v. Jones,* 67 N.C. 285.

It can make no difference in what way or manner or when the opinion of the judge is conveyed to the jury, whether directly or indirectly, by comment on the testimony of a witness, by arraying the evidence unequally in the charge, by imbalancing the contentions of the parties, by the choice of language in stating the contentions, or by the general tone and tenor of the trial. The statute forbids any intimation of his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. *Withers v. Lane,* 144 N.C. 184, 56 S.E. 855. "The slightest intimation from a judge as to the strength of the evidence or as to the credibility of a witness will always have great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by an expression from the bench which is likely to prevent a fair and impartial trial"—*Walker, J.,* in *S. v. Ownby,* 146 N.C. 677, 61 S.E. 630.

It is true, where the court misquotes the evidence, *e.g.,* here, "the defendant went on the stand and never denied that he was driving the car," when the fact is he did deny it, the misquotation or inadvertence should be called to his attention at some appropriate time before the case is given to the jury, so as to afford an opportunity of correction. Where this is done and no correction is made, the party is entitled to his exception on appeal. *Harris v. Draper, ante,* 221, 63 S.E. 2d 209.

We think the court inadvertently conveyed to the jury an expression of opinion upon the weight of the defendant's evidence in violation of the provisions of G.S. 1-180, as rewritten, Chap. 107, S.L. 1949. The error may have been one of those casualties which, now and then, befalls the most circumspect in the trial of causes on the circuit. *S. v. Kline,* 190 N.C. 177, 129 S.E. 417; *S. v. Griggs,* 197 N.C. 352, 148 S.E. 547; *S. v. Stiwinter,* 211 N.C. 278, 189 S.E. 868; *S. v. Buchanan,* 216 N.C. 34, 3 S.E. 2d 273; *S. v. Floyd,* 220 N.C. 530, 17 S.E. 2d 658; *In re Will of Lomax,* 225 N.C. 31, 33 S.E. 2d 63. Even so, the question is presented on appeal, and we must "Hew to the line, and let the chips fall wherever they may." *Barnes v. Teer,* 219 N.C. 823, 15 S.E. 2d 379; *S. v. Hovis, ante,* 359.

The defendant is entitled to a new trial. It is so ordered.

New trial.

FANNIE V. BOWEN v. GEORGE DARDEN AND WIFE, HILDRED DARDEN.

(Filed 11 April, 1951.)

1. Reformation of Instruments § 6—

The life tenant may not maintain an action against the remainderman to reform the deed without the joinder of the grantors.

2. Deeds § 16c—

Breach of agreement by the remainderman to care for the life tenant during the remainder of her life, cannot entitle the life tenant to judgment declaring her the owner of the land free of the remainder.

3. Trusts § 5c—

An action by the life tenant against the remainderman and her husband to have the remainderman declared trustee *ex maleficio* cannot be maintained in the absence of evidence that the remainderman was guilty of any fraud or that there was collusion between the remainderman and her husband so as to charge her with liability for fraud alleged to have been committed by him.

4. Same—

There must be allegation that provision in the deed conveying the remainder was inserted therein without the knowledge and consent of the life tenant in order to entitle the life tenant to have the remainderman declared a trustee for her use and benefit on the ground that the husband of the remainderman had the provision conveying the remainder inserted in the deed in violation of the trust and confidence reposed in him by the life tenant.

5. Pleadings § 3a—

Plaintiff must choose the cause of action upon which she relies and state same in a clear and concise manner so that defendants will not be left in doubt as to how to answer and what defense to make. G.S. 1-122.

6. Pleadings § 25—

The pleadings must raise the precise issues which are to be submitted to the jury so as to clearly define the nature of the cause of action.

7. Pleadings § 24a—

Allegation and proof must correspond, and where the proof offered is not directed to any issue raised by the pleadings, there is fatal variance requiring a dismissal.

APPEAL by plaintiff from *Morris, J.*, September Term, 1950, PITT. Affirmed.

Civil action in which plaintiff seeks relief against the terms of a deed.

The deed under attack conveys the Massey property in New Bern to plaintiff for life with remainder in fee to the *feme* defendant, her daughter. Claiming that the property should have been conveyed to her in fee, plaintiff now seeks to avoid the effect of the provision conveying the property to the *feme* defendant in fee, subject to her life estate. Defendants then lived with plaintiff and the male defendant supervised her farm and transacted much of her business.

From the plaintiff's complaint we glean the following allegations: (1) Plaintiff, on account of her age and infirmity, decided to move from the country to town where she would be more comfortable and could more easily obtain medical attention; (2) she obtained an option to buy the Massey home in Greenville for $21,000; (3) to supplement the cash she had on hand she borrowed $1,500 from a daughter and $6,500 from the savings and loan association; (4) when she went to the lawyer's office to close the deal and receive the deed, she discovered she lacked $2,300 having the amount required to pay the purchase price; (5) the male defendant, her son-in-law, agreed to and did advance this amount as a loan, and she agreed to give him security for it. She was unduly influenced by the defendants to secure or arrange for the repayment of this loan by having the deed to the Massey property made so the title would vest "in the name of the plaintiff first as the life tenant with the remainder in fee simple to the defendants," upon the representation that the interest of defendants would be discharged by the repayment of the loan; (6) the deed was written in its present form so as to afford the defendants security for the repayment of the loan; (7) the plaintiff has offered to repay said loan and now stands ready, able, and willing to repay same, but defendants refused and still refuse to accept the same; (8) for some seventeen years prior to said purchase, the defendants, plaintiff's daughter and son-in-law, had lived in plaintiff's home. The male defendant supervised her farm and attended to other business for her, and she had great confidence in him and relied upon his assistance; (9) the arrangement consummated, unless corrected to reflect the actual lending agreement rather than the conveyance of the remainder interest in the property to defendants, "would constitute an unconscionable and inequitable bargain."

She prays that she be declared the owner of said property, free of any right or claim thereto by defendants, that the purported remainder interest be charged with a trust in her favor and "that the purported remainder interest of the plaintiff (defendants?) therein be removed and stricken from the record as a cloud upon plaintiff's title."

The testimony offered tends to show two conflicting situations:

(1) The defendants agreed to live with plaintiff during the remainder of her life and they were to have the house and lot at her death. "If they

had stayed with me they would have been welcome to that place after I died." The agreement was made when the deed was being prepared. The defendants lived with plaintiff for about one year thereafter and then moved elsewhere, thereby breaching their agreement to live with and care for plaintiff during her natural life; and

(2) Plaintiff purchased the Massey property but let the male defendant look after closing the deal because of her enfeebled condition and because of her confidence in him. He had the deed made just as he wanted it, and she believed he would "do it right." By reason of her confidence in him she did not even read the deed. She did not discover its true contents until about a year later, after defendants had left her home.

At the conclusion of plaintiff's evidence in chief, defendants moved for judgment as of nonsuit. The motion was allowed and plaintiff appealed.

Dink James, Kenneth G. Hite, and Albion Dunn for plaintiff appellant.

Blount & Taft, E. H. Taft, Jr., and W. H. Watson for defendant appellees.

BARNHILL, J. The complaint is an extended and somewhat laborious recital of numerous events, facts, and circumstances. Occurrences both before and after the execution of the deed under attack are detailed at some length. This prolixity renders it difficult, if not impossible, for us to ferret out with any degree of certainty the exact nature of the cause of action plaintiff seeks to allege. On the argument here her counsel was unable to give us any assistance in this respect. *Jackson v. Hodges, Comr. of Insurance,* 232 N.C. 694.

If she seeks to reform the deed, then the grantors are necessary parties. If she rests her case upon the alleged breach of an agreement by defendants to live with and care for her during the remainder of her life, she must seek another remedy. *Minor v. Minor,* 232 N.C. 669. If it is her purpose to have the grantee of the remainder interest declared trustee, *ex maleficio,* for that the inclusion of that provision was procured by the fraud and undue influence of the defendants, she is met by the fact there is no evidence the grantee in any wise took advantage of any confidential relation or participated in procuring the inclusion of the remainder provision in the deed. Nor is there allegation or proof that there was any collusion between the two defendants such as would charge the *feme* defendant, grantee, with liability for the acts of the male defendant.

On the other hand, if she seeks to impress a trust upon the remainder interest conveyed to Hildred Darden and have her declared trustee for the use and benefit of plaintiff for the reason the male defendant abused

and betrayed his position of trust and confidence by having the deed prepared in its present form, without the knowledge and consent of plaintiff, then there is no sufficient allegation in the complaint to support testimony to that effect. Plaintiff was unduly influenced to agree to insert that provision in the deed as a means of securing the money borrowed from the male defendant. So it is alleged. And this allegation imports knowledge of the contents of the deed at the time it was executed.

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. *Maddox v. Brown,* 232 N.C. 542; *Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14.

It may be, as counsel for plaintiff so earnestly insists here, the facts alleged entitle plaintiff to some relief. Yet the law requires the plaintiff to choose the cause of action upon which she desires to rely, and she must state that cause of action in her complaint in a clear and concise manner, G.S. 1-122, so that the defendants will not be left in doubt as to how to answer and what defense to make. *Hussey v. R. R.,* 98 N.C. 34. The pleadings must raise the precise issues which are to be submitted to the jury, *Hunt v. Eure,* 189 N.C. 482, 127 S.E. 593, so that the court itself may not be left in a quandary as to the cause of action it is trying. *King v. Coley,* 229 N.C. 258, 49 S.E. 2d 648.

The proof offered is not directed to any issue raised by the pleadings, and for this reason there is a variance between allegation and proof. This requires a dismissal. *Whichard v. Lipe, supra.*

The judgment below is

Affirmed.

HAROLD L. DAIL, EMPLOYEE, v. THE KELLEX CORPORATION, EMPLOYER, AND TRAVELERS INSURANCE COMPANY, CARRIER.

(Filed 11 April, 1951.)

1. Master and Servant § 40a (1)—

Disability as used in the Workmen's Compensation Act is to be measured by the employee's capacity or incapacity to earn the wages he was receiving at the time of the injury, and a general physical disability not resulting in loss of wages is not compensable under the Act. G.S. 97-2 (i).

2. Master and Servant § 47—

Where at the time of the hearing the employee has returned to work, and the Industrial Commission awards him compensation for the amount of wages that he has lost as a result of the injury it has discharged its

full duty and has no authority to retain jurisdiction upon its finding that the employee had suffered a general disability which might in the future result in loss of wages. G.S. 97-30. *Branham v. Panel Co.*, 223 N.C. 233, distinguished.

APPEAL by plaintiff from *Burney, J.*, November Term, ONSLOW.

Claim for compensation under the Workmen's Compensation Act.

On 27 June 1947, plaintiff, while in the employ of defendant Kellex Corporation, suffered an injury by accident which arose out of and in the course of his employment. He and his employer entered into an agreement for the payment of compensation which was duly approved by the Industrial Commission. Payments were made as stipulated in the agreement until 5 January, 1948, on which date plaintiff returned to work.

Thereafter plaintiff quit his employment with the Kellex Corporation, accepted employment with and is now employed by the State of North Carolina.

On 13 November 1948, plaintiff requested the Commission to reopen his claim to determine the amount of additional compensation, if any, to which he was entitled. The claim was reopened and a hearing had. At the hearing it was made to appear that plaintiff, due to his injury, had suffered a loss of wages from 23 August to 18 September 1948 and three days in November 1948. He had also incurred certain expenses for medical treatment, etc. Except for the period stated, he has been regularly employed and has suffered no loss of wages.

It was also made to appear that his injuries have produced a "chronic and permanent" physical condition "of a general nature" which has resulted in a twenty per cent physical disability which may in the future cause further loss of wages.

The Commission made an award to compensate plaintiff for loss of wages during the period he was unable to work and for expenses incurred.

The award also included the following finding of fact:

"C. That as a result of the condition hereinbefore mentioned which resulted naturally and unavoidably from the injury by accident which the plaintiff suffered on June 27, 1947, said plaintiff has a twenty per cent permanent partial disability of a general nature."

It also included conclusions of law as follows:

1. ". . . that if at any time within three hundred weeks from the date of the injury by accident the plaintiff, as a result of said injury by accident or as a result of the disease caused naturally and unavoidably by said accident, is totally disabled for any period of time and does not earn any wages, that he will be entitled to compensation for temporary total disability for said period and that if as a result of said injury by accident

the plaintiff is partially disabled and does not earn wages equal to the average weekly wage which he was receiving at the time he suffered his injury by accident, that he will be entitled to compensation as set out in G.S., Paragraph 97-30, above quoted."

2. ". . . the Industrial Commission has jurisdiction of said case in connection with any change in the plaintiff's physical disability or ability to earn wages for a period of three hundred weeks from the date of the injury by accident. BRANHAM v. DENNY ROLL & PANEL CO., 223 N.C. 233."

The defendant excepted and appealed to the Superior Court. On the hearing in the court below the trial judge concluded:

(1) There is no sufficient evidence in the record to support a finding that the plaintiff has an incapacity for work resulting from the injury which is either permanent or partial within the purview of G.S. 97-30; (2) the facts found by the Commission do not support the conclusion that the Commission has jurisdiction of this claim for a period of three hundred weeks in connection with any change in plaintiff's physical disability or ability to earn wages; and (3) the Commission is without authority to find as a fact that plaintiff has "a disability of a general nature" and that such finding does not confer upon the Commission jurisdiction in this case for a period of three hundred weeks.

Thereupon judgment was entered affirming the specific award made and ordering stricken from the award the quoted provisions thereof through which the Commission undertook to retain jurisdiction of the claim for a period of three hundred weeks. Plaintiff excepted and appealed.

Guy Elliott for plaintiff appellant.

Thos. J. White for defendant appellees.

BARNHILL, J. The Industrial Commission found as a fact that plaintiff has suffered no loss of wages for which he has not been compensated except during the period from 23 August to 18 September 1948 and three days in November 1948. For this additional loss compensation was awarded. But the Commission further found that plaintiff has a twenty per cent permanent partial disability of a general nature which may in the future develop into a compensable disability, and undertook to retain jurisdiction for three hundred weeks pending future developments. In this the Commission exceeded its jurisdiction.

The disability of an employee because of an injury is to be measured by his capacity or incapacity to earn the wages he was receiving at the time of the injury. *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865; *Anderson v. Motor Co., ante*, p. 372. Loss of earning capacity is the

criterion. If there is no loss of earning capacity, there is no disability within the meaning of the Act.

The function of the Industrial Commission in respect of plaintiff's claim was to determine whether and to what extent he had suffered a disability within the meaning of the Workmen's Compensation Act and to make an award either granting or denying compensation as the evidence might warrant. This it has done and in so doing it discharged its full duty.

There is nothing in the statute, G.S. Chap. 97, that contemplates or authorizes an anticipatory finding by the Commission that a physical impairment may develop into a compensable disability. Neither does the statute vest in the Commission the power to retain jurisdiction of a claim, after compensation has been awarded, merely because some physical impairment suffered by the claimant may, at some time in the future, cause a loss of wages. The Commission is concerned with conditions existing prior to and at the time of the hearing. If such conditions change in the future, to the detriment of the claimant, the statute affords the claimant a remedy and fixes the time within which he must seek it. G.S. 97-47.

Branham v. Panel Co., supra, is cited by the Commission and relied on by plaintiff as authority for the order asserting and retaining jurisdiction of the plaintiff's claim. But that decision is bottomed on a substantially different factual situation. It is not controlling here.

The plaintiff has been awarded compensation for the disability he was able to establish at the hearing. This award was affirmed by the court below. Thus he has recovered in full the compensation to which he was entitled.

For that reason the judgment entered is

Affirmed.

CHARLEY SCARBORO, JOHN SCARBORO, WILL SCARBORO, CHESTER SCARBORO, ARTHUR SCARBORO, DOC SCARBORO, AND JEFF SCARBORO v. MARY MORGAN, ALIAS MARY SCARBORO,

and

MARY SCARBORO v. CHARLEY SCARBORO, ADMINISTRATOR UPON THE ESTATE OF EVERETTE SCARBORO, DECEASED.

(Filed 11 April, 1951.)

1. Quieting Title § 2—

In an action to remove claim of dower as a cloud on title, plaintiff's evidence and defendant's admissions tending to establish that at the time of defendant's marriage to deceased she had a living husband by a former

marriage, and that the first marriage had not been dissolved by divorce at the time of the second ceremony, is sufficient to take the case to the jury.

2. Marriage § 7—

Where suit for annulment on the ground that plaintiff was under fourteen at the time of the marriage is instituted after the ratification of Chap. 1022, Session Laws of 1949, and it is made to appear that children of the marriage were alive at the time decree of annulment was entered, the decree is in conflict with the statute and was improvidently entered. G.S. 51-3 as amended.

3. Marriage § 2f—

A bigamous marriage cannot be given validity by a subsequent annulment of the first marriage.

4. Evidence § 35—

Ordinarily a judgment in another cause is not admissible to prove a fact in issue in the present action.

5. Judgments § 29—

The wife's decree of annulment of a prior marriage rendered after the death of the male party to a second ceremony is not binding upon his heirs at law, since they were not parties thereto.

APPEAL by Mary Morgan, *alias* Mary Scarboro, from *Carr, J.*, and a jury, at September-October Term, 1950, of JOHNSTON.

Two civil actions consolidated by consent for trial. Both cases involve the single question of whether the marriage between Everette Scarboro, deceased, and Mary Morgan, *alias* Mary Scarboro, was bigamous and void on the ground that at the time of her marriage to Everette Scarboro Mary Morgan had a living husband from whom she had not been divorced.

The first action was brought by the children of Everette Scarboro by a former marriage, against Mary Morgan, *alias* Mary Scarboro, alleging that she was not lawfully married to Everette Scarboro and that her dower claim against two tracts of land belonging to him at the time of his death constitutes a cloud upon the title which they seek to remove. Also involved in the action is title to a third tract of land which Mary Morgan (Scarboro) claims as surviving tenant by the entirety. The defendant denies the material allegations of the complaint and alleges that she was Everette Scarboro's lawfully wedded wife at the time he died intestate in August, 1948.

The second case is a proceeding brought by Mary Scarboro against the administrator of Everette Scarboro for the allotment of her year's allowance. The proceeding was instituted before the Clerk of Superior Court, but upon issues joined, the case, by consent, was tried in the first instance in the Superior Court along with the other case.

The jury verdict in each case was adverse to Mary Morgan (Scarboro), indicating a finding that her second marriage was bigamous and void. Judgment was entered in the first case adjudging that she has no dower estate in the two tracts of land owned by Everette Scarboro, and that she owns only an undivided one-half interest in the so-called entirety tract. In the other case in which she was seeking a year's allowance, judgment was entered on the verdict denying her claim.

From judgment in each case, Mary Morgan (Scarboro) appeals, assigning errors.

Lyon & Lyon and Sharpe & Pittman for Mary Morgan (Scarboro), appellant.

Leon G. Stevens, Hooks, Mitchiner & Spence, and Mary H. Lehew for appellees.

JOHNSON, J. The appellant, Mary Morgan (Scarboro) insists that her motion for nonsuit, renewed at the close of the evidence, should have been sustained for failure to make out a case of bigamous marriage against her. A study of the record impels the opposite view.

It appears in evidence that Mary Knight married Herman Morgan in Wilson County in December, 1914; that she lived with him about seven years, bore him three children, and thereafter was deserted by him in 1921; that thereafter she went through a marriage ceremony with Everette Scarboro in Johnston County in November, 1934. Certified copies of both marriages were introduced in evidence. It was further shown that at the time of the second marriage Herman Morgan was living; and substantial evidence was offered tending to show that the first marriage had not been dissolved by divorce at the time of the second ceremony. Mary Morgan (Scarboro) admitted upon the witness stand that she went through both marriage ceremonies. She also admitted that about two years after the second marriage, Herman Morgan came to her Scarboro home looking for the children, and she stated she talked with him at that time. She further admitted that she had never been divorced from Herman Morgan. It would seem that the foregoing evidence, supported as it was by other testimony, exceeded the minimum requirements necessary to overcome the demurrer and take the case to the jury. See *S. v. Williams,* 224 N.C. 183, p. 190, 29 S.E. 2d 744; *S. v. Herron,* 175 N.C. 754, p. 759, 94 S.E. 698. Also annotations: 34 A.L.R. 464, pp. 491 and 495; 77 A.L.R. 729, pp. 740 and 741. The motion to nonsuit was properly overruled.

The rest of appellant's exceptions relate to the admission and exclusion of evidence. Chief emphasis is placed on the exception relating to the action of the court in refusing to permit appellant to offer in evidence a

certified copy of a judgment rendered in the Superior Court of Wilson County in an action entitled "Mary Knight Morgan (Scarboro) *v.* Herman Morgan," purporting to decree an annulment of the marriage between Mary Knight and Herman Morgan. The judgment recites personal service of summons on Herman Morgan. It also recites a jury verdict, finding, among other things, that Mary Knight and Herman Morgan were married in December, 1914; that Mary was then under the age of fourteen, and that she "disaffirmed the purported marriage to the defendant before she reached the age of 14." How she disaffirmed the marriage while living with Herman seven years and bearing him three children is not made to appear. But nevertheless, the judgment decrees that the marriage was and is "null and void *ab initio* for all intents and purposes." The judgment in the annulment case was rendered in June, 1949, after the instant actions were instituted in October, 1948. It also appears that the annulment judgment was rendered after the ratification of Chapter 1022, Session Laws of 1949, which amends G.S. 51-3 by adding the following proviso: "Provided further, that no marriage by persons either of whom may be under sixteen years of age, and otherwise competent to marry, shall be declared void when the girl shall be pregnant, or when a child shall have been born to the parties unless such child at the time of the action to annul shall be dead." Two children of Mary and Herman Morgan were alive at the time this judgment was entered. The record indicates that both of them testified in the trial below. Therefore, the decree of the Superior Court of Wilson County, being in conflict with the cited statute, was improvidently entered.

But should we concede, *arguendo,* that the judgment is valid, it would be effective only from the date of rendition and would not affect the instant case so as to give retroactive validity to a prior bigamous marriage. *Sawyer v. Slack,* 196 N.C. 697, 146 S.E. 864; *Watters v. Watters,* 168 N.C. 411, 84 S.E. 703. Here the rights of the parties became fixed and determined as of the date of the death of Everette Scarboro in August, 1948. *Simpson v. Cureton,* 97 N.C. 112, 2 S.E. 668.

The annulment judgment does not come within the exceptions to the rule "that a judgment in another cause, finding a fact now in issue, is ordinarily not receivable" in evidence. Wigmore on Evidence, 3d Ed., Vol. 5, Sec. 1671a, p. 687, *et seq.;* Wigmore on Evidence, 3d Ed., Vol. 4, Sec. 1346a, p. 671. In any event, the heirs at law of Everette Scarboro, not being parties to the action in Wilson County, are not bound by the annulment judgment. 30 Am. Jur., p. 951. The judgment was properly excluded.

We have examined the other exceptions brought forward in appellant's brief and find in them no cause to disturb the results below.

No error.

STATE v. ERNEST RHODES.

(Filed 11 April, 1951.)

1. Searches and Seizures § 2: Criminal Law § 43—

Where one officer armed with a "John Doe" warrant and another officer armed with a valid warrant correctly identifying the owner of the premises, act in concert in making the search, it will be presumed that both officers acted under the valid writ, and evidence discovered by such search is competent.

2. Same—

Where the warrant and the supporting affidavit recite compliance with the statutory requirements, G.S. 18-13, G.S. 15-27, it will be presumed that the issuing officer properly examined the complainant and otherwise observed the requirements of the statute.

3. Intoxicating Liquor § 9d—Circumstantial evidence held sufficient to support conviction of possession of nontax-paid liquor.

Evidence disclosing that a quantity of nontax-paid liquor was found in a locked smokehouse on defendant's premises, that defendant admitted having the key to the smokehouse but failed to produce it, that in another locked building to which defendant's employee had the key, fifteen hundred or more empty pint taxpaid liquor bottles were found, that a path led from defendant's dwelling to the smokehouse, *is held*, together with the other incriminating circumstances, sufficient to be submitted to the jury on the charge of possession of nontax-paid whiskey for the purpose of sale, it further appearing that the garage apartments occupied by the defendant's tenants were separate from his dwelling from which the incriminating path led.

APPEAL by defendant from *Stevens, J.*, and a jury, at 27 November Term, 1950, of LENOIR.

Criminal prosecution tried upon a warrant charging the defendant with the unlawful possession of nontax-paid whiskey for the purpose of sale.

The State's evidence tends to show that the defendant's premises (consisting of dwelling, combination filling station and general store, two garage apartments occupied by tenants, and other buildings) located on the Deep Run Road about a mile and a half from Kinston, were searched by two county alcoholic beverage control officers on 7 October, 1950. All of the defendant's buildings are located within a radius of one hundred twenty-five feet or less from the filling station.

When the officers arrived at defendant's place, he was not there. After searching out several buildings on the premises, the officers went to an old smokehouse owned by the defendant located about sixty feet behind a house rented to one Phillips and about one hundred fifty feet from the

defendant's dwelling house. A well-worn path led from the defendant's house to the smokehouse. Finding the smokehouse locked, the officers waited at the store for the defendant to return. He rode by in an automobile and, seeing the officers, did not stop, but returned an hour or so later. He was told by the officers that they had a search warrant and would like to search the smokehouse. When he was requested to give them the key, he admitted having it, but failed to find or produce it. The hasp was pried off the smokehouse door by the officers and four one-gallon jugs of nontax-paid whiskey were found inside, along with some forty-odd empty jugs and over one hundred fifty empty pint bottles. The empty jugs and bottles smelled like whiskey.

In a feed bin about fifty feet behind the defendant's store, which was also locked, the officers found, while waiting for the defendant to return, fifteen hundred to two thousand empty pint tax-paid liquor bottles. They gained access to the building with a key furnished by a clerk at the defendant's store.

The defendant did not go upon the witness stand, but offered evidence tending to show that he did not have a key to the smokehouse and that it was not occupied by him.

From a verdict of guilty, and judgment thereon imposing penal servitude of eighteen months, the defendant appeals, assigning errors.

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

Jones, Reed & Griffin for defendant, appellant.

JOHNSON, J. The State in making out its case relied mainly upon the testimony of officer G. C. Cox. The defendant objected to all incriminating facts given in evidence by this witness on the ground that his knowledge in respect thereto was obtained in the execution of illegal search warrants. The exceptions preserving these objections have been brought forward and form the basis of the defendant's main challenge to the validity of the trial below.

It appears in evidence that officer Clarence Bland obtained a search warrant to search the premises of the defendant Ernest Rhodes, described as including "his dwelling, garage, filling station, barn and outhouses, and premises, which is located on Deep Run Road and near Jenkinsville, which is located in Neuse Township, Lenoir County, N. C."

A similar warrant was obtained by officer Cox, naming "John Doe" as the person whose property was to be searched and describing the same property as it set out in the companion warrant against the defendant.

In the court below, the defendant contended that the testimony of officer Cox was incompetent on the ground that both search warrants

were invalid. The court ruled with the defendant as to the John Doe warrant, announcing that "I will admit any evidence that is competent under the search warrant against Ernest Rhodes, on the premises: the dwelling, garage, filling station, outhouse and premises of Ernest Rhodes, and I will exclude any evidence under the other warrant." The presiding judge further qualified his ruling by stating: "I will admit evidence as to all buildings occupied by this defendant, but not as against the buildings occupied by tenants." The foregoing rulings in effect amounted to a quashal of the John Doe warrant.

The testimony of officer Cox then appears to have been offered by the State and admitted in evidence by the court upon the theory that the search was made by officers Cox and Bland together, acting in concert under the warrant of officer Bland, which was held to be valid. This ruling is sustained by the presumption that the officers acted, not under the invalid warrant, but under the valid writ. Wharton's Criminal Evidence, Vol. 1, p. 177. No error may be predicated upon this ruling in the absence of a showing that the search warrant against the defendant was not issued according to the procedural formalities of G.S. 15-27, which provides as follows: "Any officer who shall sign and issue or cause to be signed and issued a search warrant without first requiring the complainant or other person to sign an affidavit under oath and examining said person or complainant in regard thereto shall be guilty of a misdemeanor; and no facts discovered by reason of the issuance of such illegal search warrant shall be competent in the trial of any action."

The defendant in attacking the validity of the search warrant against him specifies no particular defect therein. He simply contends that the State did not offer evidence showing affirmatively that the warrant was issued in accordance with the statutory requirements. The contention is without merit. Officer Cox testified: "Mr. Bland obtained a search warrant on or about October 7th, to search the premises of Ernest Rhodes. I was with Mr. Bland at the time; this is the search warrant." The warrant and supporting affidavit are set out in the record and it appears that they comply with the requirements of the statutes, G.S. 18-13 and G.S. 15-27. This being so, it is presumed that the issuing officer properly examined the complainant and otherwise observed the requirements of the statute. Wharton's Criminal Evidence, Vol. 1, pp. 176 and 179. See also *S. v. Shermer,* 216 N.C. 719, 6 S.E. 2d 529; *S. v. Elder,* 217 N.C. 111, 6 S.E. 2d 840. It follows that the testimony of officer Cox was properly admitted by Judge Stevens.

The defendant's remaining exceptions test the sufficiency of the evidence to take the case to the jury. The record indicates that the nontax-paid whiskey was found on property owned by the defendant, near his dwelling and place of business. A path led from his dwelling to the

smokehouse in which the liquor was found; the smokehouse was padlocked, and the defendant, when told that the officers would like to search the building, replied that "You won't find anything in there." He later said, "I have the key here some place," but failed to produce it, and upon being told that the officers would break in, he said, "If you break in you will have to fix it back." Elsewhere on the defendant's property, within about fifty feet of his store, in a building which was locked, were found fifteen hundred to two thousand empty pint tax-paid liquor bottles, and an employee of the defendant had in his possession the key to the building. This evidence, with other incriminating circumstances shown in evidence, it would seem, was sufficient to take the case to the jury. *S. v. Meyers,* 190 N.C. 239, 129 S.E. 600; *S. v. Pierce,* 192 N.C. 766, 136 S.E. 121; *S. v. Weston,* 197 N.C. 25, 147 S.E. 618.

No error.

ISHAM REGISTER, ADMINISTRATOR FOR THE ESTATE OF CHARLES EDWARD REGISTER, DECEASED, v. GUSTON MONROE GIBBS AND C. M. BLACKMON.

(Filed 11 April, 1951.)

1. Trial § 22a—

On motion to nonsuit, all the evidence, whether introduced by plaintiff or defendant, which tends to support plaintiff's claim will be taken as true and considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference that can legitimately be drawn therefrom and resolving any contradictions or discrepancies in his favor.

2. Trial § 22b—

On motion to nonsuit, defendant's evidence in conflict with that of plaintiff is to be ignored.

3. Automobiles §§ 17, 18h (2)—"Sudden appearance doctrine" held not to warrant nonsuit in action for death of child struck on highway.

Evidence tending to show that decedent, a six-year-old boy, was playing with companions in the yard of a house on the east side of a highway running north and south through a hamlet of some fifteen houses, that he suddenly left his companions and ran from behind a parked car into the highway some ten or fifteen yards ahead of defendant's approaching car, but that the driver's view of the yard and the children was unobstructed except for the parked car for a distance of some 900 feet and that the driver, traveling north, proceeded at an unabated speed of from forty-five to fifty miles per hour without giving any warning of his approach until he overtook and struck the child at a spot some two-thirds across the highway, and then traveled some 102 feet after the brakes were applied, *is held* sufficient to be submitted to the jury upon the issue of negligence of defendant in failing to keep a reasonably careful lookout, in failing to

keep the automobile under control, in driving at a speed that was not reasonable and prudent under the existing conditions, G.S. 20-141 (a), and in failing to give a reasonable and timely warning of his approach, G.S. 20-174 (e), and whether such negligence was a proximate cause of the injury.

APPEAL by defendants from *Carr, J.*, and a jury, at the September Term, 1950, of HARNETT.

Civil action by administrator to recover damages for death of six-year-old boy, who was struck and killed by an automobile while crossing the highway.

The tragedy occurred about four o'clock p.m. on 23 August, 1949, upon Highway 82 in front of premises occupied by Earl Coats near Tart's Mill in Harnett County. The automobile involved in the accident was operated by the defendant Guston Monroe Gibbs, who was carrying out a business mission for his employer, the defendant, C. M. Blackmon. Both sides offered evidence at the trial.

These issues arose on the pleadings, and were submitted to the jury:

1. Was the plaintiff's intestate killed by the negligence of the defendants, as alleged in the complaint?

2. If so, what damages is the plaintiff entitled to recover of the defendants?

The jury answered the first issue "Yes," and the second issue "$2,500.00." The trial judge entered judgment for plaintiff in accordance with the verdict, and the defendants excepted and appealed.

J. R. Barefoot and Everette L. Doffermyre for plaintiff, appellee.

Neill McK. Salmon for defendants, appellants.

ERVIN, J. The assignments of error raise this single issue: Did the trial court err in refusing to dismiss the action upon a compulsory nonsuit after all the evidence on both sides was in?

The plaintiff contends that this inquiry should be answered in the negative upon the authority of the decisions defining 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; *Sparks v. Willis,* 228 N.C. 25, 44 S.E. 2d 343; *Yokeley v. Kearns,* 223 N.C. 196, 25 S.E. 2d 602; *Smith v. Miller,* 209 N.C. 170, 183 S.E. 370; *Moore v. Powell,* 205 N.C. 636, 172 S.E. 327; *Goss v. Williams,* 196 N.C. 213, 145 S.E. 169. The defendants insist, however, that the query should be answered in the affirmative because the evidence at the trial compels the conclusion that Gibbs was free from actionable negligence as a matter of law. *Fox v. Barlow,* 206 N.C. 66, 173 S.E. 43.

Undoubtedly the testimony offered by the defendants was sufficient to exonerate them from all legal liability for the death of the plaintiff's intestate under the "sudden appearance doctrine." Blashfield's Cyclopedia of Automobile Law and Practice (Perm. Ed.), section 1498. Moreover, much of the evidence presented by the plaintiff harmonized with that of the defendants. But these considerations, in and of themselves, did not entitle the defendants to an involuntary nonsuit in the court below.

In determining the legal sufficiency of testimony to withstand a motion for a compulsory nonsuit after all the evidence on both sides is in, the testimony is interpreted most favorably to plaintiff, and most strongly against defendant. Thus all facts in evidence, whether introduced by plaintiff or defendant, which make for the plaintiff's claim or tend to support his cause of action are assumed to be true. *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307. Furthermore, plaintiff is given the benefit of every inference favorable to him that can be legitimately drawn from such facts. *Graham v. Gas Co.,* 231 N.C. 680, 58 S.E. 2d 757. If there are contradictions or discrepancies in the testimony offered by plaintiff, they are resolved in his favor. *Bailey v. Michael,* 231 N.C. 404, 57 S.E. 2d 372; *Thomas v. Motor Lines,* 230 N.C. 122, 52 S.E. 2d 377. Any evidence presented by defendant which contradicts that of plaintiff, or tends to establish a different state of facts is ignored. *Bundy v. Powell, supra.*

When the testimony at the trial is subjected to these rules, it makes out this case for the plaintiff:

1. Route 82 is a paved highway, 20 feet in width, with earth shoulders 4 or 5 feet wide on each side, and without adjacent sidewalks. It courses northwardly and southwardly through a small hamlet near Tart's Mill in Harnett County, where the decedent's parents and their near neighbor, Earl Coats, reside. The hamlet consists of a cluster of about 15 dwellings fronting the roadway. The home of the decedent's parents and that of Coats are located on the east side of the highway. The front yard at the Coats residence has a depth of only 30 feet. At the time of the accident, a passenger carrying automobile, which belonged to Cecil Bagley and which was headed north, stood on the right side of the highway in front of the premises occupied by Coats, half on the pavement and half on the adjacent earth shoulder. Notwithstanding, a motorist traveling northward on Route 82 at that time had an unobstructed view of the entire front yard at the Coats residence, and of all the highway before him, except the narrow strip immediately in front of the Bagley car, for a distance of at least 900 feet.

2. On the afternoon of the accident, the decedent, a small boy aged six years, and three other little children were playing near the east edge of Route 82 in the front yard at the Coats residence. The decedent sud-

denly abandoned his companions, and undertook to run westwardly across the highway. In so doing, he ran from the Coats yard into the roadway just ahead of the Bagley car, passed in front of that vehicle until he emerged from its left front corner, and continued his westward journey until he reached a spot "two-thirds across the highway."

3. Meantime, Gibbs approached the decedent in Blackmon's automobile, which he was driving northward along Route 82 at a speed of "45 to 50 miles per hour." While so doing, Gibbs had an unobstructed view of the decedent as he played with his small companions in the Coats yard near the east side of the highway, as he ran from the Coats yard into the highway just ahead of the Bagley car, as he emerged from the left front corner of the Bagley car some "10 or 15 yards" ahead of the oncoming Blackmon automobile, and as he undertook to continue his travel northward across the highway. Though there was nothing to obstruct his view of these things, Gibbs persisted in driving the Blackmon automobile northward at an unabated speed of "45 to 50 miles per hour" without giving the decedent any warning of its approach until he overtook the decedent at a spot "two-thirds across the highway" and struck the decedent with the front end of the automobile, inflicting fatal injuries upon the decedent. Gibbs thereupon undertook to bring the Blackmon automobile to a stop, but that vehicle traveled 102 feet after the brakes were applied, carrying the decedent's body 87 feet of that distance.

This evidence suffices to show that the defendant Gibbs was negligent in the operation of his employer's automobile in these respects: (1) That he failed to keep a reasonably careful lookout, *Bobbitt v. Haynes*, 231 N.C. 373, 57 S.E. 2d 361; *Henson v. Wilson*, 225 N.C. 417, 35 S.E. 2d 245; (2) that he failed to keep the automobile under reasonable control, *Hobbs v. Coach Co.*, 225 N.C. 323, 34 S.E. 2d 211; *Tarrant v. Bottling Co.*, 221 N.C. 390, 20 S.E. 2d 565; *Reeves v. Staley*, 220 N.C. 573, 18 S.E. 2d 239; (3) that he drove the automobile on the highway at a speed greater than was reasonable and prudent under the conditions then existing, G.S. 20-141 (a); and (4) that he failed to give a reasonable and timely warning of the approach of the automobile to the decedent. G.S. 20-174 (e); *Sparks v. Willis, supra; Yokeley v. Kearns, supra; Smith v. Miller, supra.* It likewise warrants a finding that such negligence on the part of Gibbs was the proximate cause of the death of the decedent. These things being true, the trial court rightly refused to nonsuit the action.

No error.

STATE v. JULIUS WINFRED GOINS.

(Filed 11 April, 1951.)

1. Automobiles § 28e—Evidence of culpable negligence held sufficient in this manslaughter prosecution.

Evidence tending to show that defendant drove his automobile at a speed of eighty miles an hour or more upon a sharp curve at the crest of a steep grade with the left wheels some three or four feet to the left of the clearly visible center line placed on the highway by the State Highway and Public Works Commission, and struck a car traveling in the opposite direction, killing three occupants of the other car, *is held* sufficient to be submitted to the jury on the charge of involuntary manslaughter, since it tends to show an intentional or reckless disregard of statutes enacted for the safety of persons on the highway, proximately causing the deaths of the occupants of the other car. G.S. 20-141 (b), G.S. 20-146, G.S. 20-148, G.S. 20-150 (d).

2. Criminal Law § 78e (2)—

Objection to the court's recapitulation of the evidence and statement of the State's contentions based thereon may not be taken for the first time in the case on appeal.

APPEAL by defendant from *Gwyn, J.*, and a jury, at the December Term, 1950, of RANDOLPH.

Criminal prosecution for involuntary manslaughter arising out of three homicides caused by a collision of two motor vehicles on a public highway.

Three separate indictments were returned against the defendant, Julius Winfred Goins, charging him with the unlawful slaying of Robert Bell, Bailey Martin, and Everett B. Martin. The three indictments were consolidated for trial by consent, and were treated by the court below as separate counts in the same bill. The defendant pleaded not guilty to all charges.

The accident out of which the prosecution arose happened on Route 64 three miles east of Asheboro in Randolph County. Route 64 runs east and west, and is 20 feet wide.

The only evidence at the trial was that of the State. When this evidence is taken in the light most favorable to the prosecution, it is sufficient to establish the matters set out in the next paragraph.

On the afternoon of 7 October, 1950, the defendant was driving a Mercury automobile westerly on Route 64. He met a Plymouth car, which was proceeding along the highway in the opposite direction, upon a sharp curve at the crest of a steep grade where a clearly visible center line had been placed on the highway by the State Highway and Public Works Commission. The Mercury struck the Plymouth at that point, killing Robert Bell, Bailey Martin, and Everett B. Martin, who were

riding in the Plymouth. At the time of the collision, the defendant was driving the Mercury automobile "three or four feet" to his left side of the center line of the highway at a speed of "80 miles an hour or more."

The jury found the defendant guilty as charged in each indictment, and the trial judge imposed sentence as follows: "It is the judgment of the court that the defendant be confined in the State Prison at Raleigh, North Carolina, for a period of not less than four nor more than six years, to be assigned to work under the supervision of the State Highway and Public Works Commission." The defendant excepted and appealed, assigning errors.

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

John G. Prevette for the defendant, appellant.

ERVIN, J. The defendant's first exception challenges the refusal of the trial court to dismiss the charges against him upon compulsory nonsuits under G.S. 15-173.

The testimony suffices to show that the accused violated statutes enacted by the Legislature to protect human life and limb on the public highways of the State in these particulars: (1) That he drove a passenger carrying motor vehicle upon a public highway in a place outside a business or residential district at a speed greater than fifty-five miles an hour, G.S. 20-141 (b), as rewritten by Section 17 of Chapter 1067 of the 1947 Session Laws of North Carolina; (2) that he failed to drive his motor vehicle upon the right half of the highway, when it was practicable for him to travel on that side of the highway, G.S. 20-146; (3) that he failed to yield to the Plymouth car at least one-half of the main traveled portion of the roadway as nearly as possible when he met it proceeding along the highway in the opposite direction, G.S. 20-148; (4) that he drove his motor vehicle to the left side of the visible center line of the highway upon the crest of a grade in the highway where such center line had been placed upon the highway by the State Highway and Public Works Commission, G.S. 20-150 (d); and (5) that he drove his motor vehicle to the left side of the visible center line of the highway upon a curve in the highway where such center line had been placed upon the highway by the State Highway and Public Works Commission. G.S. 20-150 (d).

The testimony is likewise sufficient to establish both of these additional propositions:

1. That the defendant's violation of the statutes was either (a) intentional, or (b) such as disclosed a reckless disregard of consequence or a heedless indifference to the rights and safety of others and reasonable foresight that injury would probably result.

2. That the defendant's violation of the statutes proximately caused the deaths of the persons named in the indictments.

These things being true, the trial court rightly refused to exonerate the defendant from criminal responsibility for the three deaths by dismissing the charges against him upon compulsory nonsuits. *S. v. Lowery,* 223 N.C. 598, 27 S.E. 2d 638; *S. v. Cope,* 204 N.C. 28, 167 S.E. 456; *S. v. Stansell,* 203 N.C. 69, 164 S.E. 580; *S. v. Agnew,* 202 N.C. 755, 164 S.E. 578.

All remaining exceptions other than those strictly formal in character are addressed to portions of the charge in which the trial court undertook to state the facts in evidence and the contentions of the State based upon them. These exceptions are not subject to review here because they were noted for the first time in the defendant's case on appeal. *S. v. Lambe,* 232 N.C. 570, 61 S.E. 2d 608. But even if they had been taken at the time the charge was delivered, they would be unavailing to defendant for the very simple reason that the trial court stated the testimony given in the case and the contentions of the State legitimately arising upon it with commendable correctness.

As no error was committed on the trial in any matter of law or legal inference, the proceedings had in the court below must be upheld.

No error.

EUGENE G. MORRIS, JR., v. J. H. WRAPE.

(Filed 11 April, 1951.)

Appeal and Error § 40e—

The verdict of the jury upon controverted issues of fact is conclusive in the absence of prejudicial error of law committed in the trial of the cause.

APPEAL by plaintiff from *Sharp, Special Judge,* October Term, 1950, of RANDOLPH. No error.

This was an action to recover broker's commission alleged to be due for sale of defendant's real property.

Issues were submitted to and answered by the jury as follows:

"1. Did the defendant agree to pay the plaintiff the sum of $500.00 as a realtor's commission to sell the Mills property for him, as alleged in the complaint? Answer: No.

"2. If so did the plaintiff procure E. C. Bruton as a purchaser, ready, willing and able to purchase the Mills property on defendant's terms? Answer: No.

"3. In what amount, if any, is the defendant indebted to the plaintiff? Answer: No."

From judgment on the verdict plaintiff appealed.

Smith & Walker for plaintiff, appellant.
Miller & Moser for defendant, appellee.

DEVIN, J. The plaintiff assigns error in the ruling of the trial court in the admission of certain testimony, and in the court's charge to the jury in the particulars specified. We have examined each of these assignments of error and are unable to perceive harm to the plaintiff as result of any of the rulings complained of.

Though the evidence was sharply contradictory, this was submitted to the jury fairly, and the applicable principles of law arising thereon correctly stated. G.S. 1-180; *Gibbs v. Armstrong, ante,* 279, 63 S.E. 2d 551. The issues of fact raised by the pleadings and the testimony were decided by the jury against the contentions of the plaintiff, and the result will not be disturbed.

No error.

REBECCA TARLTON YOST, ADMINISTRATRIX OF THE ESTATE OF WILLIAM ROBERT YOST, JR., PLAINTIFF, v. MYRON H. HALL AND WILLIAM FRANCIS BROADDUS, DEFENDANTS, AND THE RETAIL CREDIT COMPANY, ADDITIONAL DEFENDANT.

(Filed 18 April, 1951.)

1. Automobiles § 8i—

Where a vehicle on a servient highway approaches an intersection at approximately the same time as a vehicle on his right traveling on the dominant highway, the vehicle on the dominant highway has the right of way both under G.S. 20-155 (a) and G.S. 20-158.

2. Automobiles § 18g (5)—

The physical facts at the scene may be more convincing than oral testimony.

3. Automobiles § 18g (1)—

In the absence of evidence to the contrary it will not be assumed that either motorist involved in a collision was operating his vehicle in excess of the legal limit permitted under the circumstances.

4. Automobiles § 8i—

The fact that a motorist on a servient highway reaches an intersection a hairsbreadth ahead of one on the dominant highway does not give him the right of way, but it is his duty to yield the right of way to the motorist on the dominant highway unless such motorist is a sufficient distance from

the intersection to warrant the assumption that he can cross in safety before the other vehicle, operated at a reasonable speed, reaches the crossing. G.S. 20-158.

5. Automobiles § 18g (2)—

Where each defendant testifies that his injury in the collision at an intersection produced a state of retrograde amnesia so that neither could say whether he saw the other vehicle involved in the accident, testimony of statements made immediately after the collision by defendant driver in the presence of defendant owner, who was a passenger, that they were in a hurry, that he did not see the railroad track or stop sign, did not remember seeing the other vehicle or the stop sign before the intersection with a dominant highway, *held* for the jury as to whether they amounted to nothing more than a disavowal of memory, the asserted amnesia not applying to such statements.

6. Automobiles § 18g (5)—

Where a motorist is mortally wounded in a collision so that he may not have been in condition to apply his brakes or make any effort to stop his vehicle after the impact, the fact that his vehicle traveled a distance of ninety feet after the collision is a mere circumstance for the consideration of the jury, and does not compel the conclusion that he was traveling at an excessive speed at the time.

7. Automobiles §§ 8i, 18h (2)—Physical evidence held to show negligence in operation of car along servient highway causing collision at intersection.

Intestate was killed at an intersection in a collision between his car, which was traveling a dominant highway, and the automobile owned by one of the defendants and driven by the other, which approached the intersection from intestate's left along the servient highway, there being appropriate signs along each of the highways before the intersection. Defendants' car was damaged across its front end and intestate's car was damaged on its left side. Immediately after the accident defendant driver stated he did not see the stop signs or intestate's car until the impact. At the trial both defendants testified they were suffering with retrograde amnesia and could not remember anything immediately preceding or at the time of the collision, so that there was no eyewitness testimony as to the accident. *Held:* Considering the evidence in the light most favorable to plaintiff, it warrants an inference that the two automobiles approached the intersection at approximately the same time and that defendants failed to see, or seeing, failed to heed the presence of intestate's car and yield it the right of way, and therefore the evidence was sufficient to be submitted to the jury on the issue of negligence.

8. Appeal and Error § 39a—

Alleged errors which do not challenge the validity of the trial in respect to the verdict as rendered must be deemed immaterial and harmless.

9. Highways § 8e—

The State Highway and Public Works Commission has authority to designate one highway as the dominant highway at an intersection not-

withstanding that it was built and is maintained in part by Federal funds and forms a link in an interstate system designated as U. S. highways. G.S. 20-158.

10. Automobiles § 18g (1)—

The fact that a party is prevented from testifying as to events relating to the collision because of amnesia resulting from injuries received in the accident raises no presumption that he exercised due care when there is positive evidence of negligence on his part, and in such event the loss of memory should not be considered either in favor or against him.

11. Same—

The presumption that a motorist exercised due care in the absence of evidence to the contrary cannot be used to create a presumption of negligence on the part of the other driver involved in the collision.

12. Automobiles § 18i—

An instruction in general terms on the questions of negligence and proximate cause will not be held for error as failing to apply the law to the facts in evidence when theretofore the court has correctly instructed the jury with particularity as to the acts of negligence relied on, the evidence in support thereof, and the facts necessary to be found by the jury to support an affirmative answer to the issue.

13. Trial § 7—

Comment by counsel in their arguments relating to compensation received by intestate's widow under the Workmen's Compensation Act and as to who got the benefit thereof, *held* cured by the court's correct categorical instruction that the jury should not consider the matter in determining the issue of damages.

14. Death § 8—

Any error in instructions upon the rule for ascertaining the present cash value of decedent's life to his dependents or in failing to elaborate upon the rule upon the request of the jury, *held* cured by the subsequent submission of a mathematical formula, to which counsel for both sides agreed, the formula, not appearing of record, being presumed correct and to have fully satisfied the members of the jury.

15. Trial § 7: Death § 8—

Comment by counsel in contrasting the financial condition of the widow of plaintiff's intestate with counsel's projected probable earnings of defendants, although highly improper, *held* cured, upon the record in this case, by the court's instruction that the jury should not consider the circumstances of the parties in determining the issue of damages and should disregard the argument, and should take the law from the court.

APPEAL by defendants from *Gwyn, J.*, October Term, 1950, ROWAN. No error.

Civil action to recover compensation for wrongful death and for damages to an automobile in which defendants plead counterclaims.

On the afternoon of 18 March 1949, plaintiff's intestate was traveling in a northwesterly direction on U. S. Highway 52, going from Hamlet to Salisbury. Defendants Hall and Broaddus, together with their wives, were traveling in a northeasterly direction on Highway 49, going from Charlotte to Raleigh. The automobile they were using belonged to Hall and was being operated by Broaddus. Highway 52 extends in a northwesterly and southeasterly, and Highway 49, in a northeasterly and southwesterly direction. The two highways intersect at approximately right angles at a point in Stanly County. On Highway 49 west of the intersection there are a number of warning signs, including a "SLOW DANGEROUS INTERSECTION," "JUNCTION," "HIGHWAY 52," and a "THROUGH TRAFFIC—STOP" sign. Similar signs, other than a "THROUGH TRAFFIC—STOP" sign, were along Highway 52 to the south of the intersection.

The two cars collided in the intersection, each car at the time being on its right-hand side of the road. The Yost car was damaged on its left side from the door to the bumper. It proceeded across Highway 49 for a distance of ninety feet and stopped at or near the road ditch. Yost was in a dazed condition and died the next morning. The Hall car was damaged across its front end. It traveled on across Highway 52 a distance of 42 feet. When found, it was on its right side. The top was badly damaged and its right side was practically demolished. Just how far it traveled on its side is not made clear. All the occupants of the Hall car were injured.

The plaintiff's intestate was employed by the Retail Credit Company. In their answers each individual defendant pleads a counterclaim against plaintiff's intestate and his employer for damages on account of injuries sustained by him. On their motion the Credit Company was made a party defendant.

There were no eyewitnesses to the wreck other than the occupants of the two cars. Each defendant testified that the injuries he received produced retrograde amnesia, and he could not recall anything immediately preceding or at the time of the collision. The wife of neither defendant was present.

The court below submitted ten issues to the jury. The first three—negligence, contributory negligence, and damages—were directed to plaintiff's cause of action. The remaining six were directed to the two cross actions or counterclaims. The jury answered the first three issues in favor of plaintiff and returned same as their verdict. From judgment on the verdict the individual defendants—hereafter referred to as defendants—excepted and appealed.

Linn & Shuford for plaintiff appellee.

Deal & Hutchins, Craige & Craige, and Smith, Sapp, Moore & Smith for defendant appellants, Myron H. Hall and William Francis Broaddus.

C. H. Gover for additional defendant appellee, The Retail Credit Company.

BARNHILL, J. The absence of direct testimony in respect to the circumstances surrounding the collision is provocative of much speculation as to just what did happen. Such speculation might well generate contradictory surmises. But we are interested only in the fact situation disclosed by such evidence as the parties were able to produce.

If the two automobiles approached the intersection at approximately the same time, then it was the duty of the defendants to yield the right of way to Yost. This, for two reasons: (1) the Yost car was to their right, G.S. 20-155 (a), and (2) they were traveling on the servient highway, G.S. 20-158.

There was no eyewitness account of the collision. In appraising the testimony for the purpose of determining whether there is any evidence of negligence on the part of the defendants, in that they breached this duty, sufficient to warrant the submission of the cause to a jury, we are driven in large measure—though not altogether—to the consideration of the physical facts developed by the testimony. Even so, physical facts are sometimes more convincing than oral testimony. *Powers v. Sternberg*, 213 N.C. 41, 195 S.E. 88.

The court, in the absence of proof to the contrary, may not assume that either motorist was operating his vehicle in excess of the legal limit permitted under the circumstances. We review the evidence with that in mind.

The two automobiles collided within the intersection. They arrived at the same point at the same time. Their approach was so timed that both could not proceed in safety. If neither stopped, a collision was inevitable.

The Hall car evidently entered the intersection when the Yost vehicle was at least four feet away. But the fact a motorist on a servient road reaches the intersection a hairsbreadth ahead of one on the dominant highway does not give him the right to proceed. It is his duty to stop and yield the right of way unless the motorist on the dominant highway is a sufficient distance from the intersection to warrant the assumption that he can cross in safety before the other vehicle, operated at a reasonable speed, reaches the crossing. *S. v. Hill, ante*, 61, and cases cited.

Shortly after the accident Broaddus, in the presence of Hall, made the statement that he did not see the railroad track or the stop sign. They were in a hurry. He told the officer that he did not remember seeing the

Yost car until he hit it. When asked if he saw the stop sign, he replied: "I won't say I did nor I won't say I didn't; I don't remember seeing the sign." While each defendant testified his injury produced a state of retrograde amnesia and that is the reason they cannot say whether they saw the sign or the Yost car, no such qualification was attached to these statements made shortly after the collision. So then, it was for the jury to say whether the statements amounted to nothing more than a disavowal of memory.

But the defendants insist the fact the Yost automobile continued on for a distance of ninety feet after the collision indicates that Yost was traveling at an excessive speed at the time. Standing alone and unqualified by any other circumstance, this fact might compel, or at least permit, that inference. This we need not now decide, for it appears that Yost was in a dazed or unconscious condition, was mortally wounded, and died in less than twenty hours after the collision. It may well be he was in no condition to apply his brakes or make any other effort to stop his vehicle. The distance he traveled after the collision, under the circumstances here disclosed, was for the consideration of the jury. *Bailey v. Michael,* 231 N.C. 404, 57 S.E. 2d 372.

The evidence, considered in the light most favorable to plaintiff, clearly warrants the inference that the two automobiles approached the intersection at approximately the same time, and defendants failed to see, or seeing, failed to heed the presence of Yost approaching the intersection on the dominant road. *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239.

The jury's verdict on the first three issues is determinative. Any exceptions or assignments of error relied on by defendants which do not challenge the validity of the trial in respect to the verdict as rendered may be by-passed. Even if they point out error in the trial, the error must be deemed immaterial and harmless. *Winborne v. Lloyd,* 209 N.C. 483, 183 S.E. 756; *Randle v. Grady,* 228 N.C. 159, 45 S.E. 2d 35; *In re Will of Kestler,* 228 N.C. 215, 44 S.E. 2d 867; *Coach Co. v. Motor Lines,* 229 N.C. 650, 50 S.E. 2d 909; *Call v. Stroud,* 232 N.C. 478, 61 S.E. 2d 342.

Certain of our highways are built and maintained in part out of funds contributed by the Federal government. They form links in an interstate system and are designated as U. S. highways. They are, nonetheless, State highways under the supervision and control of the State Highway and Public Works Commission. G.S. 20-158 is applicable to these just as it is to other State highways. The contention that Highway 52 was not a dominant or through highway for want of authority in the State Commission to so designate it is without validity.

When a person survives an accident but is unable to testify concerning the events leading to the accident, by reason of the loss of memory result-

ing from injuries he sustained in the accident, it will be presumed, in the absence of evidence to the contrary, that he exercised due care. Anno. 141 A.L.R. 872. The defendants seek to invoke this rule and assert that the court's charge in respect thereto deprives them of the benefit thereof. In this we cannot concur.

Presumptions of this type are created to fill a complete hiatus in the testimony. They are "bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts." *Mockowik v. Railroad,* 196 Mo. 550. If there is any evidence to the contrary, the presumption fades out of the picture. It cannot be accorded evidential value or probative force, or be weighed against the evidence offered. *In re Will of Wall,* 223 N.C. 591, 27 S.E. 2d 728.

The rule has no application here for the reason there is evidence of negligence on the part of defendants to be considered by the jury. On this record the loss of memory, if it be a fact—and that was for the jury to decide—should not be considered either in favor of or against the defendants on the issue of negligence.

In considering this rule it is well to note that the absence of evidence of negligence on the part of one of the parties involved in a collision cannot be used to create a presumption of negligence on the part of the other.

In concluding its charge on the first issue, the court instructed the jury as follows:

"Upon the evidence you are instructed that if the plaintiff has satisfied you from the evidence and by the greater weight thereof that the defendants, in the operation of their automobile were negligent, that is, the defendants Hall and Broaddus, and has further satisfied you from the evidence and by the greater weight thereof that such negligence was the proximate cause of injury and death of the plaintiff's intestate and injury to his property, then it would be your duty to answer that issue yes. If the plaintiff has failed to so satisfy you, it will be your duty to answer that issue no."

This instruction is in general terms and is defective in that it fails to point out the particular acts of negligence alleged upon which plaintiff must rely, and does not state the facts, supported by evidence, which, if found to be true, would constitute negligence on the part of the defendants. Standing alone, it might be held for error in this respect. *Chambers v. Allen, ante,* 195. A consideration of the charge as a whole, however, leads to the conclusion the court below pointed out with sufficient particularity the acts of negligence relied on, the evidence in support thereof, and the facts necessary to be found by the jury to support an affirmative answer to the first issue. When it instructed the jury "that if the plaintiff has satisfied you . . . that the defendants, in the operation

of their automobile were negligent . . .," they, as intelligent men, considering what the court had theretofore said, must have understood that the court meant "negligent in the manner alleged and as heretofore particularized by the court."

For the purpose of establishing the employer-employee relation existing between the additional defendant, Retail Credit Company, and Yost, defendants offered evidence tending to show that the credit company was paying or had paid compensation to plaintiff under the Workmen's Compensation Act. Plaintiff, in rebuttal, testified that she understood the law under which she would have to reimburse the credit company out of any recovery she might obtain. There was some comment in the argument on this evidence. In respect thereto the court, in charging the jury on the third issue, instructed it as follows:

"Now, gentlemen, in this connection, before I give you that rule, I want to give you a further caution. The evidence which has been offered and talked about with relation to compensation and what becomes of it, who gets it or who doesn't, if your verdict as to damages should in anywise be affected by that evidence, then this trial would not represent justice, that would be a mistake.

"Now if there is any question in the mind of any juror as to whether you can follow the instructions which I shall presently give you as to the measure of damages, the yardstick that you have to apply to this evidence,—if there is any question in your mind as to this evidence as to compensation, if you will suggest it now I will withdraw a juror and we will try the case over and we won't have any further trial. I want that assurance."

In this the court was careful to caution the jury that any evidence regarding the payment to and receipt by plaintiff of compensation under the Workmen's Compensation Act was not to be considered by them on the issue of damages. The statement was correct. The caution was timely. It is as favorable to the defendants as to the plaintiff. Certainly, defendants were not entitled to any credit for the amounts so paid. That being true, the evidence had no bearing on the issue of damages.

In instructing the jury on the third issue, the court gave the correct rule on measure of damages to be applied in wrongful death cases. After the jury had been out for some time, it returned to the courtroom and the foreman stated to the court: "We would like for you to explain the yardstick for measuring damages." Thereupon the court again gave the correct rule. The foreman then stated: "What we want to know is how to determine the cash value." In answer thereto the court explained the rule in the language of our decisions. The foreman, apparently still uncertain that the jury understood the rule as stated, said: "How are we to determine the present cash value of that worth?" To this the court

replied: "The formula which I have given you is the rule laid down by the Supreme Court, and I doubt that I should undertake to elaborate upon it further." The jury retired.

"The court then recalled the jury and gave a mathematical rule for the computation of present cash value which was agreed to by counsel for all parties."

If there was any error in the instruction on damages respecting the rule for ascertaining the present cash value of the net amount the jury should find the deceased would have earned but for his untimely death, or in declining to elaborate further on the rule, it was rendered harmless by the action of counsel in submitting, or having the court submit, a mathematical rule to which they agreed. Just what that rule was, the record does not disclose. We must presume that it was correct and that it answered the question of the foreman to the satisfaction of the members of the jury.

This brings us to the most troublesome exception in the record. During his argument to the jury, Mr. Shuford, of counsel for plaintiff, drew a diagram on the blackboard for the purpose of showing that during the next five years defendants may earn some $75,000, and compared that to the situation of the widow. On objection and motion for new trial, the court cautioned the jury that the financial situation of defendants, so far as capacity to respond in damages is concerned, was not a matter for the jury to consider; that it should disregard the argument and render its verdict under the instructions of the court without regard to the comparative positions of the parties or the capacity of the defendants to earn money, and that the argument was improper and should be erased from their minds.

Again, later, after some further discussion of arguments made by counsel, the court instructed the jury:

"Gentlemen of the jury, any pitiable situation in which the widow may find herself and any pitiable situation which the minor child may be found is not a circumstance to affect in the least your verdict in this case. The Court will give you the scale that will be necessary for you to use in measuring any damage which may be recovered. The Court will give you the formula to apply if and when you come to apply the rule, and the Court will ask you to abide the rules as they are given and as they are announced by the Court. It is proper, gentlemen, for lawyers for all parties to argue their cases and to tell you what their conception of the law is, but in the final analysis it is the duty of the Court to tell you what the law is, and when the Court tells you what the law is and what the rules are, it is your duty under oath, gentlemen, to follow just those rules. If there is any question whether the jury can do that, I will withdraw a juror and direct a mistrial now."

The argument made by counsel exceeded the bounds of propriety. It constituted such an appeal to the sympathy of the jury as to warrant a new trial unless its prejudicial effect was fully effaced by the court. For that reason, we have weighed the question at some length. The deceased was a young man, robust and active. He was a highly satisfactory employee. His life expectancy, his ability, and his earning capacity warranted a finding that the present cash value of his prospective net income was substantial. Under all the circumstances, we are unprepared to say that the recovery may be considered excessive or above that to be expected under the evidence offered. It would seem, therefore, that the caution of the careful and painstaking judge who presided at the trial served to remove from the minds of the jurors any prejudicial impression aroused by the argument.

We have carefully examined the other exceptive assignments of error to which we have not specifically referred. They fail, either severally or in combination, to disclose any sufficient cause for disturbing the verdict.

In the trial we find

No error.

MRS. T. C. COUNCIL v. DICKERSON'S, INC.

(Filed 18 April, 1951.)

1. Pleadings §§ 3a, 31—

Matter in a pleading is irrelevant and should be stricken on motion aptly made if it has no substantial relation to the controversy between the parties in the particular action. G.S. 1-153.

2. Negligence § 1—

The law imposes upon every person who enters upon an active course of conduct, regardless of whether he does so in his own behalf or under contract with another, the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence.

3. Highways § 4b—

When a contractor undertakes to perform work on a highway under a contract with the State Highway and Public Works Commission he is under positive legal duty to exercise ordinary care for the safety of the general public traveling over the road on which he is working.

4. Same: Negligence § 16: Pleadings § 31—

In an action by a motorist against a road contractor for alleged negligence causing injury to plaintiff when she undertook to drive across a highway being worked on where it intersected the highway on which plaintiff was traveling, allegation that defendant was performing the work under contract with the State Highway and Public Works Commission is

relevant as stating the circumstance out of which arose the duty owed by defendant to the traveling public to exercise ordinary care, and motion to strike such allegation was properly denied.

5. Torts § 2—

An omission to perform contractual obligation is never a tort unless such omission is also the omission of a legal duty.

6. Highways § 4b: Negligence § 16: Pleadings § 31—

Allegations to the effect that a road contractor performing work on a highway under contract with the State Highway and Public Works Commission failed to provide flagmen and warning signs at particularized places as ordered to do by the highway engineer acting under the provisions of the contract, *held* irrelevant and should have been stricken on motion aptly made since the allegations relate to a breach of contractual obligations to the Commission and not the violation of a legal duty to the general traveling public.

7. Appeal and Error § 40f—

Exception to the refusal to strike certain allegations from the complaint upon motion aptly made will be sustained when the matter is irrelevant and its retention in the pleading will cause harm or injustice to movant.

APPEAL by defendant from *Bone, J.*, at the February Term, 1951, of WAKE.

Civil action to recover damages for actionable negligence heard upon motion to strike allegations contained in the complaint.

The complaint alleges, in detail, that on 16 September, 1949, the defendant, Dickerson's, Inc., a highway contractor, made a contract with the State Highway and Public Works Commission whereby the defendant agreed "to hard-surface the public highway known as the Apex-McCullers Road in southern Wake County"; that the defendant entered upon the performance of the contract; that while prosecuting work under the contract, to wit, on 1 December, 1949, the defendant was guilty of various allegedly negligent acts and omissions, which proximately caused injury to the plaintiff's person and damage to her automobile, as she approached and undertook to cross the place where the Apex-McCullers Road intersected with another highway on which she was traveling; and that by reason of the premises the plaintiff is entitled to "judgment against the defendant for the sum of . . . $3,300.00 for her personal injuries and automobile damages."

Before answering, demurring, or obtaining an extension of time to plead, the defendant moved to strike out these parts of the complaint:

1. The portion of paragraph 3 alleging that the defendant contracted with the State Highway and Public Works Commission "to hard-surface the public highway known as the Apex-McCullers Road in southern Wake County."

2. The three portions of paragraph 5 averring, in substance, "that the plaintiff's injuries and the damages to plaintiff's automobile . . . were directly and proximately caused by the negligence of the defendant . . . in that the defendant failed" to provide flagmen and warning signs at particularized places along the plaintiff's approach to the scene of the accident as ordered by the engineer of the State Highway and Public Works Commission acting under this provision of the contract between the Commission and the defendant: "The contractor shall place and maintain such signs, danger lights, and furnish watchmen and flagmen to direct traffic as in the opinion of the engineer may be deemed necessary."

The presiding judge refused to strike these portions of paragraphs 3 and 5 from the complaint, and the defendant appealed, assigning such ruling as error.

Simms & Simms and John M. Simms for plaintiff, appellee.

Bickett & Banks for defendant, appellant.

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.

Matter in a pleading is irrelevant within the purview of the statute if it has no substantial relation to the controversy between the parties in the particular action. *Howell v. Ferguson,* 87 N.C. 113.

No occasion arises in the instant case for us to express any opinion as to whether the plaintiff can sue the defendant for breach of its contract with the State Highway and Public Works Commission. This is so for the very simple reason that the plaintiff sues for a tort and bases her action upon the complaint that she suffered personal injury and property damage as the proximate consequence of the negligence of the defendant in pursuing an affirmative course of conduct, *i.e.,* paving a highway.

Although the plaintiff sues in tort and not in contract, the contract between the defendant and the State Highway and Public Works Commission created the state of things which furnished the occasion for the tort for reasons stated below. *Jackson v. Central Torpedo Co.,* 117 Okl. 245, 246 P. 426, 46 A.L.R. 338.

The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence. It is immaterial

whether the person acts in his own behalf or under contract with another. Prosser on Torts, section 33.

When the defendant undertook to perform the promised work under his contract with the State Highway and Public Works Commission, the positive legal duty devolved upon him to exercise ordinary care for the safety of the general public traveling over the road on which he was working. *Furlough v. Highway Commission,* 195 N.C. 365, 142 S.E. 230, rehearing denied in 196 N.C. 160, 144 S.E. 693; *Evans v. Construction Co.,* 194 N.C. 31, 138 S.E. 411; *Hughes v. Lassiter,* 193 N.C. 651, 137 S.E. 806; *Kahm v. Dilts,* 222 Iowa 826, 270 N.W. 388; *Toler v. Hawkins,* 188 Okl. 58, 105 P. 2d 1041.

The judge rightly refused to strike out the bare allegation of paragraph 3 of the complaint that the defendant contracted with the State Highway and Public Works Commission to "hard-surface . . . the Apex-McCullers Road." That allegation must be read in combination with succeeding allegations of the complaint that the plaintiff was injured in her person and property by the negligent conduct of the defendant while it was actually working on the road under its contract with the Commission. When these allegations are thus read, they state facts showing that the defendant owed the plaintiff as a member of the traveling public the positive legal duty to exercise ordinary care to protect her from harm at the time and place named in the complaint because it was then and there engaged in an active course of conduct, *i.e.,* paving a highway, under its contract with the State Highway and Public Works Commission; that the defendant violated this legal duty; and that such violation of this legal duty proximately resulted in injury to the plaintiff's person and property. Thus the allegation of paragraph 3 of the complaint bears a substantial relation to the controversy between the parties when it is considered contextually.

But it is otherwise with respect to the three portions of paragraph 5 of the complaint challenged by the defendant's motion to strike. When these particular allegations are reduced to simple terms, they merely charge that the defendant inflicted injury on the plaintiff's person and property by failing to perform an agreement embodied in its contract with the State Highway and Public Works Commission whereby the defendant promised to station flagmen and to place warning signs at such places as the engineer of the State Highway and Public Works Commission should designate while the road was being paved. To be sure, the allegations under scrutiny undertake in general terms to characterize the nonperformance of the promise as negligence. An omission to perform a contract obligation is never a tort, however, unless that omission is also the omission of a legal duty. *Franceschi v. De Tord,* 71 F. 2d 95; *Attleboro Mfg. Co. v. Frankfort Marine, etc., Ins. Co.,* 153 C.C.A. 337, 240 F. 573;

Dantzler Lumber & Export Co. v. Columbia Casualty Co., 115 Fla. 541, 156 So. 116; *Dice v. Barbour*, 161 Ky. 646, 171 S.W. 195, L.R.A. 1916 F, 1155; *Tuttle v. George H. Gilbert Mfg. Co.*, 145 Mass. 169, 13 N.E. 465; *Cox v. Mason*, 89 App. Div. 219, 85 N.Y.S. 973; *Frank v. Mandel*, 76 App. Div. 413, 78 N.Y.S. 855; *Dustin v. Curtis*, 74 N.H. 266, 67 A. 220, 11 L.R.A. (N.S.) 504, 13 Ann. Cas. 169.

While it required the defendant to exercise ordinary care for the safety of the general public traveling over the highway on which the defendant was working, the law did not impose upon the defendant a duty to obey the orders of the engineer of the State Highway and Public Works Commission respecting the stationing of flagmen and the placing of warning signs. Any such obligation was simply a creature of contract. This being true, the portions of paragraph 5 of the complaint under attack aver a breach of a contract obligation, and not a violation of a duty imposed by law. Hence, this matter has no substantial relation to the controversy between the parties as to whether the plaintiff suffered injury to her person and property on account of actionable negligence on the part of the defendant, and ought to have been stricken from the complaint pursuant to the defendant's motion.

Inasmuch as the complaint is so phrased as to give an exaggerated prominence to this irrelevant matter, we are constrained to hold that the retention of such matter in the pleading will cause harm or injustice to the defendant. *Hinson v. Britt*, 232 N.C. 379, 61 S.E. 2d 185. The action is remanded to the Superior Court of Wake County with directions that an order be entered striking out the three portions of paragraph 5 of the complaint designated with particularity in the defendant's motion.

Error and remanded.

SALLIE COUNCIL v. DICKERSON'S, INC.

(Filed 18 April, 1951.)

APPEAL by defendant from *Bone, J.*, at the February Term, 1951, of WAKE.

Civil action to recover damages for actionable negligence heard upon motion to strike allegations from complaint.

This is a companion case to the action this day decided entitled *Mrs. T. C. Council versus Dickerson's, Inc.* The plaintiff, who was riding in the automobile belonging to Mrs. T. C. Council, sued the defendant for damages for personal injury allegedly sustained by her in the same acci-

dent. She couched her complaint in practically the same language as that employed in the complaint in the *Mrs. T. C. Council case,* and the defendant moved to strike therefrom allegations virtually identical with those set out in its motion in the *Mrs. T. C. Council case.* The presiding judge made rulings on the motion similar to those made in the *Mrs. T. C. Council case,* and the defendant appealed, assigning such rulings as error.

Simms & Simms and John M. Simms for plaintiff, appellee.
Bickett & Banks for defendant, appellant.

ERVIN, J. For the reasons stated in the *Mrs. T. C. Council case,* this cause is remanded to the Superior Court of Wake County with directions that an order be entered striking out the three portions of paragraph 5 of the complaint designated with particularity in the defendant's motion.

Error and remanded.

STATE v. HOYLE BENTON BUCHANAN.

(Filed 18 April, 1951.)

1. Intoxicating Liquor § 4a—

Possession of any intoxicating liquor for the purpose of sale, except as authorized by law, is unlawful, and possession within the meaning of the statute may be actual or constructive. G.S. 18-32.

2. Intoxicating Liquor § 9b—

Proof of possession of more than one gallon of spirituous liquors at one time, whether in one or more places, constitutes *prima facie* evidence of possession for sale. G.S. 18-32.

3. Criminal Law § 28—

Defendant's plea of not guilty puts in issue every element of the offense charged.

4. Intoxicating Liquor § 9d—

Evidence tending to show that defendant operated a rooming house and that the officers found more than one gallon of tax-paid whiskey in the two rooms occupied by him, is sufficient to make out a *prima facie* case and overrule defendant's motion to nonsuit in a prosecution under G.S. 18-32.

APPEAL by defendant from *Hatch, Special Judge,* at December Term, 1950, of WAKE.

STATE *v.* BUCHANAN.

Criminal prosecution upon a warrant issued out of the City Court of Raleigh, City of Raleigh, Wake County, North Carolina, charging that Hoyle Benton Buchanan did on 24 June, 1950, at and in the City of Raleigh "unlawfully sell, barter, transport, import, export, deliver, furnish, purchase or possess, intoxicating liquor for the purpose of sale—to wit, forty-nine pints of tax-paid whiskey, against the form of the statute," etc., heard *de novo* in Superior Court on appeal thereto from judgment of said city court.

Defendant pleaded not guilty.

Upon the trial in Superior Court, the State offered evidence, briefly stated in the light most favorable to the State, as follows:

On 24 June, 1950, defendant was in charge of, and living in a rooming house in the 300 block of South Blount Street in the city of Raleigh, for probably six or seven months. Steps lead up to a large room or hallway. Around this hall are small adjoining rooms. There is a door from the hall into each room, and connecting doors between all rooms. Officer Goodwin testified in pertinent part: "I found which room was occupied by Buchanan,—the one on the south and southeast corner. We went in that room. In one of the rooms, he has two rooms there that he claims. In one of those rooms we found 7 pints of tax-paid whiskey . . . In the adjoining room, as I say, each room is joined. The door from that room was open into the adjoining room. In that room we found 8 pints of whiskey and a broken pint bottle which was about a fifth full, and a broken fifth bottle which had just a small amount in it, I'd say a tablespoon . . . We went into all the rooms and we found whiskey in seven of the rooms . . . 8 broken pints and a broken fifth in one room; in the next . . . 8 pints . . . in another 8 pints . . . one of them was locked; we never did get into that; . . . in another room there were 8 pints . . . in another . . . 7 pints, a total of 48 pints . . . This is the whiskey. The whiskeys were in bags . . ."

Officer Peebles testified in pertinent part: "I went on up to the room that Buchanan told me several times was his room, and I went in that room and the one on each side, the one just east of his room, and the one joining at the west. They were open from his room . . . When I went in his room I found 7 pints in Buchanan's room; there were 7 pints in the room adjoining on the east side, and . . . 8 pints in a bag in the room joining his on the west; then there was a piece of a pint . . . I found 22 full pints in the two rooms."

And Officer Nichols testified in pertinent part: "The doors were unlocked between the rooms we went into. You can go from Buchanan's room to each of the other rooms without unlocking any doors . . . I was in Buchanan's apartment, two rooms; we found several pints there."

The State also offered, over objection by defendant, evidence tending to show that the officers had observed the place since Buchanan has been in charge of it, two or three Saturday nights during the month, and had seen "considerable traffic in and out other than the roomers . . . people drive up, park their cars, go in and stay a while, and come out." And Officer Nichols, without objection by defendant, testified to like effect.

Defendant offered no evidence, but reserved exceptions to denial of his motions, aptly made for judgment as of nonsuit.

Verdict: Guilty as charged.

Judgment: Confinement in common jail of Wake County for a term of nine months and assigned to work the public roads "under the order and direction" of the State Highway and Public Works Commission.

Defendant appeals to Supreme Court, and assigns error.

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

Jones & Farmer for defendant, appellant.

WINBORNE, J. Defendant, on this appeal, challenges, in the first instance, the correctness of the action of the trial court in overruling his demurrer to the evidence under provisions of G.S. 15-173.

In this State G.S. 18-32 declares it unlawful for any person to have or keep in possession for the purpose of sale, except as otherwise authorized by law, any spirituous liquor, and proof of the possession of more than one gallon of spirituous liquors at any one time, whether in one or more places, shall constitute *prima facie* evidence of the violation of this section.

Possession, within the meaning of this statute, G.S. 18-32, may be either actual or constructive. *S. v. Lee,* 164 N.C. 533, 80 S.E. 405; *S. v. Meyers,* 190 N.C. 239, 129 S.E. 600; *S. v. Penry,* 220 N.C. 248, 17 S.E. 2d 4; *S. v. Webb, ante,* 382.

In the *Meyers case, supra,* it is stated: "If the liquor was within the power of the defendant, in such a sense that he could and did command its use, the possession was as complete within the meaning of the statute as if his possession had been actual."

The defendant here, by his plea of not guilty, put in issue every element of the offense charged. *S. v. Meyers, supra; S. v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472; *S. v. Hendrick,* 232 N.C. 447, 61 S.E. 2d 349; *S. v. Webb, supra.*

The question therefore arises here as to whether there is evidence sufficient to support a finding by the jury, beyond a reasonable doubt, that defendant had in his possession, actual or constructive, more than one

gallon of spirituous liquors. While the record on appeal recites evidence from which the jury might have found otherwise, we are of opinion and hold that the quoted portions of the evidence are sufficient to make out a *prima facie* case against defendant on the charge of unlawful possession of more than one gallon of spirituous liquors on 24 June, 1950, within the meaning of G.S. 18-32.

This case is distinguishable in factual situation from the case of *S. v. Hanford,* 212 N.C. 746, 194 S.E. 481, on which defendant relies. It too is distinguishable from *S. v. Webb, supra.*

Other assignments of error have been given due attention and are found to be without merit.

Hence, in the judgment below, we find

No error.

CLARA BLAKE v. CITY OF CONCORD, ET AL.

(Filed 18 April, 1951.)

1. Municipal Corporations § 14a: Trial § 31c—Charge held supported by inference of fact arising upon the facts in evidence.

The evidence disclosed that in the middle of an eight foot sidewalk there was a hole two and one-half to three feet long and two feet wide which had been refilled with tamped dirt differing in color from the sidewalk, and that at the time of the injury the dirt was two and one-half to three inches below the level of the sidewalk. Plaintiff testified that pedestrians standing in front of the hole obstructed her vision, that when they moved aside to permit her to pass, she stepped into the hole and fell to her injury, and that she did not see the hole until after she fell. *Held:* That plaintiff must have seen the hole before stepping into it is a permissible inference of fact upon the facts in evidence, and therefore an instruction by the court to the effect that a person *sui juris* who selects a dangerous way when a safe way is open to use is guilty of contributory negligence, cannot be held for error.

2. Trial § 19—

Inferences of fact are for the jury and not the court.

3. Negligence § 18—

The physical facts at the scene may outweigh the testimony of some of the witnesses.

APPEAL by plaintiff from *Bennett, Special Judge,* November Term, 1950, of CABARRUS.

Civil action to recover damages for personal injuries suffered by plaintiff when she fell on one of the public sidewalks of the City of Concord

due to an open hole or depression alleged to have been negligently dug or allowed to remain therein.

There is allegation and evidence to the effect that sometime prior to 25 April, 1950, the defendants dug a hole or excavation in the cement sidewalk on the west side of North Union Street in the City of Concord to locate a leak in an underground pipe from a nearby restaurant. After locating and repairing the leak, the hole was refilled with dirt, packed down with a tamper, gravel placed on top, and left in this condition to settle before covering over with new cement or asphalt.

According to the plaintiff's evidence "the hole was about two and one-half to three feet long and about two feet wide." And according to plaintiff's sister, "it was about three feet from the curb . . . and two feet from the building, I would think."

Plaintiff further testified that the clay which had been put into the hole "was irregular and did not come up to the pavement; . . . I would say two and one-half to three inches."

On Sunday afternoon about 6:30 p.m., the plaintiff came along North Union Street, did not see the hole or excavation in the sidewalk because of three men and a girl standing there in front of the hole engaged in conversation, whom she asked to let her pass, and she says, "when they did move, being in front of the hole, I didn't have clear vision and stepped right into the deep hole and rough pavement and lost my balance and fell out into the street and crushed my arm, my wrist and little finger on the pavement. . . . I couldn't see the hole for the men there. . . . My shoulder was knocked out of place; . . . my elbow was hurt. . . . I looked at the hole after I fell . . . and that is when I noticed it."

The defendant's evidence is to the effect that when the hole was refilled with dirt and gravel "it was up level with the sidewalk." The sidewalk was examined by the City Superintendent of Streets and another employee on the morning following plaintiff's accident, and "the hole was down something like half an inch at the lower end, and around the edge it had settled a little bit; . . . approximately half an inch, and in the middle it was almost level. The surface was hard."

Plaintiff's nephew and witness, William B. Cothran, testified: "I didn't have any trouble seeing this place when I went by. . . . I didn't pay any attention to the hole, just avoided it as I passed. . . . I could easily step over it or to the side." Cross-examination: "I saw the hole the day after the plaintiff fell. It was then safe, had been worked on. . . . I saw it from my car, it might not have been the next day."

The jury answered the issues of negligence and contributory negligence in the affirmative and awarded no damages.

From judgment on the verdict, the plaintiff appeals, assigning errors.

E. T. Bost, Jr., and W. Preston White, Jr., for plaintiff, appellant.

Hartsell & Hartsell and C. S. Morgan, Jr., for defendant, City of Concord, appellee.

Jones & Small and John Hugh Williams for defendant, Board of Light & Water Commissioners, appellee.

STACY, C. J. The following excerpt from the charge constitutes the only exception brought forward and discussed in plaintiff's brief: "Our court has held in *Groome v. Statesville* (207 N.C. 538), that if there are two ways open to a person to use—one safe and the other dangerous—the choice of the dangerous way with knowledge of the danger constitutes contributory negligence, and where a person *sui juris*, that is, above the age of minority, and so on, knows of a dangerous condition and voluntarily goes into the place of danger, he is guilty of contributory negligence which will bar his recovery."

The plaintiff has no quarrel with this instruction as an abstract statement of the law, applicable to the facts in the *Groome Case*, but as applied to the facts of the instant record, she contends that serious injury was occasioned to her suit, because of its impertinency and distracting or misleading effect. *S. v. Sally, ante,* 225, 63 S.E. 2d 151; *S. v. Lee,* 193 N.C. 321, 136 S.E. 877; *S. v. Bryson,* 200 N.C. 50, 156 S.E. 143; *S. v. Anderson,* 222 N.C. 148, 22 S.E. 2d 271.

The inapplicability of the instruction, so plaintiff says, arises from the fact that she had no previous knowledge of the defective condition of the street; that she was warranted in acting on the assumption the authorities of the city had used ordinary care in the discharge of their duty to keep the sidewalk reasonably safe for pedestrian travel, *Russell v. Monroe,* 116 N.C. 720, 21 S.E. 550, and that hence she never was presented with the choice of using a safe or a dangerous way to pass the hole or depression in question. 25 Am. Jur.—Highways, Sec. 462.

It is conceded that plaintiff states a sound principle of law, applicable to the facts as outlined which she thinks is pertinent here, but which the defendants say is impertinent to the facts of the present record, because according to the plaintiff's own testimony the hole or depression in the sidewalk was necessarily visible and apparent to any person exercising reasonable care and keeping a proper lookout. *Fitzgerald v. Concord,* 140 N.C. 110, 52 S.E. 309; *Rivers v. Wilson, ante,* 272, 63 S.E. 2d 544. It is contended that a hole in the middle of an eight-foot concrete sidewalk 2½ to 3 feet long, 2 feet wide, and 2½ to 3 inches deep and differing in color from the pavement, could hardly be unnoticed by a pedestrian who was at all observant of the path ahead. *Watkins v. Raleigh,* 214 N.C. 644, 200 S.E. 424. If other pedestrians on the sidewalk mo-

mentarily obstructed the plaintiff's view, the hole or depression would necessarily loom into focus immediately upon their stepping aside or clearing the pathway, so the defendants assert. They further say that they could not foresee or anticipate a situation comparable to the one described by the plaintiff, and that they are liable only for negligence and are not insurers of the plaintiff's safety. *Gettys v. Town of Marion,* 218 N.C. 266, 10 S.E. 2d 799; *Walker v. Wilson,* 222 N.C. 66, 21 S.E. 2d 817; *Beaver v. China Grove,* 222 N.C. 234, 22 S.E. 2d 434; *Ferguson v. Asheville,* 213 N.C. 569, 197 S.E. 146, and cases cited.

The conflicting contentions and theories of the parties arise from different interpretations and conceptions of the operative facts. Both positions are supported by seemingly permissible inferences from the record, with neither compellable as a matter of law, hence the case was properly submitted to the jury. Inferences of fact are for the twelve, not the court. The physical facts of a case sometimes outweigh the testimony of some of the witnesses. *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88. There can be no debate over a fact once established. The witnesses may see or understand it differently, but this would not change the fact. It is this difference of opinion or different understanding of the witnesses which calls for the intervention of a jury to determine the fact in dispute. Here, the trial court regarded the evidence as sufficiently equivocal to require the aid of a jury to determine the exact facts of the case, and, therefore, he called in the twelve.

It would seem that the following doubtful queries or jury matters are presented by the record:

Was the hole or depression as deep and dangerous as plaintiff says?

Why did she not see it?

If unsafe and clearly so, Was there an obviously safe passageway around it?

Where does the fault or blame lie?

The jury has answered, attributing the injury to the negligence of both parties. We cannot say there was error in the trial, or that the challenged instruction was harmful or prejudicial to the plaintiff's cause.

On the record as presented, the verdict and judgment will be upheld.

No error.

CLYDE BUTLER, ADMINISTRATOR OF CARSON EUGENE BUTLER, DECEASED, v. J. R. ALLEN AND BOBBY ALLEN, BY HIS GUARDIAN AD LITEM, J. R. ALLEN.

(Filed 18 April, 1951.)

1. Trial § 22a—

On motion to nonsuit, the evidence is to be considered in the light most favorable for plaintiff, giving him the benefit of all reasonable inferences fairly deducible therefrom.

2. Automobiles § 17—

While ordinarily a motorist proceeding at a lawful and reasonable speed is not liable for injuries to a child who darts from behind another vehicle or other object into the street so suddenly that he cannot avoid striking the child, where the motorist travels at a speed in excess of the statutory limit or greater than is reasonable and prudent under the existing conditions he is not relieved of liability if his excessive speed prevents him from avoiding the accident after he saw or should have seen the child in the exercise of due care.

3. Automobiles § 12a—

It is unlawful for a motorist to drive at a speed greater than is reasonable and prudent under the existing conditions, and the fact that the speed of a vehicle is lower than the statutory limit does not relieve the driver of the duty to decrease speed when special hazards exist with respect to pedestrians or other traffic. G.S. 20-141 (a) (c).

4. Negligence § 1—

The standard of care required by law is always that care which a reasonably prudent man would exercise under the same or similar circumstances.

5. Automobiles § 18h (2)—"Sudden appearance doctrine" held not to justify nonsuit in this action for death of child struck on street.

Evidence tending to show that the driver of a car was proceeding northerly at a speed of sixty miles an hour on a street in a town along a block on which several houses fronted, that a wagon was proceeding in a southerly direction along the street, that intestate, a five-year-old boy, was on the west side of the street and other children were playing on the sidewalk on the opposite side thereof, and that the boy suddenly ran into the street from behind the wagon into the path of the car, and was struck some twenty-five to fifty feet north of an intersection, *held* sufficient to be submitted to the jury upon the question of whether the driver was guilty of negligence in speeding and, if so, whether it was a proximate cause of the injury and death of intestate.

BARNHILL, J., concurring.

APPEAL by plaintiff from *Godwin, Special Judge,* December Term, 1950, of CABARRUS.

This is an action instituted to recover damages for the wrongful death of plaintiff's intestate, Carson Eugene Butler, a boy five years of age.

He died as the result of injuries sustained, on 12 November, 1948, from being struck by an automobile owned by the defendant J. R. Allen, while being driven by his minor son, the defendant Bobby Allen.

At the conclusion of the plaintiff's evidence, the defendants moved for judgment as of nonsuit, the motion was allowed, and the plaintiff appeals, assigning error.

John Hugh Williams for plaintiff.

B. S. Brown, Jr., Hugh Q. Alexander, and R. Furman James for defendants.

DENNY, J. The evidence, when considered in the most favorable light to the plaintiff, tends to establish the following facts: the defendant, Bobby Allen, at the time of the accident, was driving his father's automobile in a northerly direction on South Juniper Street, in Kannapolis, N. C., at a speed of sixty miles an hour, and struck the plaintiff's intestate when he ran into the street from behind a wagon which was proceeding in a southerly direction on said street. The child was struck at a point in the street somewhere between 25 and 50 feet north of the intersection on South Juniper and West C. Streets, and "was knocked forward and North on the road, 12 to 15 feet." The body of the child came to rest about three feet from the curb on the west side of the street. The street is 26 feet wide, paved from curb to curb, and is slightly upgrade in the direction in which the Allen car was traveling. There were skid marks in the street which started 10 or 12 feet north of where plaintiff's intestate was lying, and continued north about 35 or 40 feet. The automobile came to rest on the east side of the street, 52 feet from where the plaintiff's intestate lay. The right rear wheel of the Allen car was against the curb with the front end headed across the street. There were some children on the sidewalk on the opposite side of the street from where the plaintiff's intestate attempted to cross the street. The Allen car and the wagon referred to herein were the only vehicles on the street at or near the scene of the accident at the time it occurred. The wagon had a bed on it which was about waist high. "It was a shallow top." The evidence would indicate the accident may have occurred in a residential district. There is a grocery store, service station and barber shop at the intersection of South Juniper and West C. Streets, according to the testimony of the witnesses, and at least four residences on the west side of the street in the block in which the accident occurred. Be that as it may, the plaintiff never undertook to clarify the facts in this respect.

The question for determination is whether the evidence adduced in the trial below, when considered in its most favorable light for the plaintiff, together with the reasonable inferences fairly deducible therefrom, as it

must be on motion for judgment as of nonsuit, is sufficient to carry the case to the jury on the issue of defendants' negligence. We are inclined to the view that it is sufficient to do so. *Edwards v. Cross, ante,* 354, 64 S.E. 2d 6; *Chambers v. Allen, ante,* 195, 63 S.E. 2d 212; *Thomas v. Motor Lines,* 230 N.C. 122, 52 S.E. 2d 377; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307.

Ordinarily, where a motorist is proceeding at a lawful rate of speed and such speed is reasonable and prudent under the circumstances then existing, he is not liable for injuries to a child who darts from behind another vehicle or other object in front of his automobile so suddenly that he cannot stop or otherwise avoid the injury. *Kennedy v. Lookadoo,* 203 N.C. 650, 166 S.E. 752; *Henklemann v. Metropolitan Life Ins. Co.,* 180 Md. 591, 26 A. 2d 418; *Peabody Coal Co. v. Industrial Commission,* 308 Ill. 133, 139 N.E. 7. See also the case of *Fox v. Barlow,* 206 N.C. 66, 173 S.E. 43. But, on the other hand, where one is driving an automobile at a speed in excess of the statutory limit, or at a greater speed than is reasonable and prudent under the conditions then existing, the mere fact that a child suddenly runs in front of the moving vehicle, does not necessarily relieve the driver from liability. There still remains the question whether the negligent driving of the automobile made it impossible for the driver of the car, under the circumstances, to avoid the accident after seeing the child, or whether by the exercise of reasonable care, such driver could have seen the child in time to avoid the injury. *Goss v. Williams,* 196 N.C. 213, 145 S.E. 169; *Moore v. Powell,* 205 N.C. 636, 172 S.E. 327; *Kelly v. Hunsucker,* 211 N.C. 153, 189 S.E. 664.

It is provided in G.S. 20-141, subsection (a), that "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing." And it is further provided in subsection (c) of the same statute that the fact that the speed of a vehicle is lower than that fixed by statute, such fact does not relieve the driver from the duty to decrease his speed when special hazards exist with respect to pedestrians or other traffic, and "speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care."

The due care required in fixing responsibility for negligence is the rule of the prudent man. The standard is always that care which a reasonably prudent man should exercise under the same or similar circumstances. *Rea v. Simowitz,* 225 N.C. 575, 35 S.E. 2d 871. And, as stated by *Barnhill, J.,* in speaking for the Court in the last cited case: "The quality of care required to meet the standard must be determined by the circumstances in which plaintiff and defendant were placed with respect to each other. And whether defendant exercised or failed to exercise

ordinary care as understood and defined in our law of negligence is to be judged by the jury in the light of the attendant facts and circumstances."

This is a borderline case, but in view of the fact that the evidence discloses the presence of children on the sidewalk near the scene of the accident at the time of its occurrence, and that a number of families were living in the block in which the accident occurred, coupled with the further testimony as to the speed of the car, the evidence is sufficient, in our opinion, to justify the submission of the case to the jury. We think it should be left to the twelve to say whether the defendant Bobby Allen was guilty of negligence in the operation of his father's car, and, if so, whether such negligence was the proximate cause of the injury and death of the plaintiff's intestate. *Hughes v. Thayer,* 229 N.C. 773, 51 S.E. 2d 488; *Sparks v. Willis,* 228 N.C. 25, 44 S.E. 2d 343; *Smith v. Miller,* 209 N.C. 170, 183 S.E. 370.

The judgment of the court below is

Reversed.

BARNHILL, J., concurring: The evidence considered in the light most favorable to plaintiff tends to show that defendant operated his automobile through a built-up area at a street intersection in Kannapolis at about sixty miles per hour. His conduct, in so doing, evidenced a wanton indifference to the safety of others. Such use of an automobile converts it into a deadly weapon. And one who, by the reckless use of a deadly weapon, injures or kills another is both criminally and civilly liable. It is on this theory of liability I concur.

STATE v. JOHNNY RUSSELL.

(Filed 18 April, 1951.)

1. Criminal Law § 81c (1)—

Where upon defendant's confession admitted in evidence, which was not challenged or repudiated by him, he is guilty of murder in the second degree at least, his contention that in the manner in which the court permitted the solicitor to cross-examine his witnesses and in the general conduct of the trial, the court impeached the testimony of witnesses and conveyed an expression of opinion to the jury on the merits in violation of G.S. 1-180, is feckless, and any error in this respect will be held harmless upon appeal from conviction of second degree murder.

2. Criminal Law § 81b—

Where the charge of the court is not in the record it will be assumed that the charge properly instructed the jury upon the law arising upon the evidence.

STATE *v.* RUSSELL.

APPEAL by defendant from *Rudisill, J.,* January Term, 1951, of BUNCOMBE.

Criminal prosecution on indictment charging the defendant with the murder of one Willard Jackson.

The record discloses a confession on the part of the defendant. In it he says that on Saturday, 29 July, 1950, Willard Jackson came to his place of business, 26 Clingman Avenue, Asheville, began cursing, "walked up to me and smacked me across the face. I saw a gun in his pocket." The defendant ordered him from his premises. "He went on up the street and said he was going to kill me before dark." The defendant then says he went home, got his pistol, put it in his pocket and returned to Clingman Avenue "where Willard Jackson was standing." When the defendant came within 10 or 12 feet of Jackson, he called to him. Jackson turned around, so he says, and "I started shooting at him. I thought that Jackson might shoot me and I was so mad that I started shooting at him when I saw him. I shot Jackson till I saw him fall."

The forgoing is taken from the defendant's confession which he gave to one of the officers after his arrest.

On the trial, the defendant testified that he did not go to his house to get his pistol but got it out of his laundry or place of business and stayed at his home for sometime, hoping that he would not again come in contact with the deceased who was a violent and dangerous man; that when he did return and approached the point where the deceased was standing, the deceased drew his knife and started towards the defendant; that he thereupon shot one time and missed the deceased and as the deceased kept coming towards him, he fired two or three more shots which were fatal; that they were facing each other when the shooting started.

The defendant sought to justify the killing on the grounds of self-defense.

The doctor who examined the deceased testified that he found two bullet wounds, one in the right back, 3 or 4 inches over the middle of the spine, and the other in the back of the head; that in his opinion the first did and the second could have caused his death. "I don't think Willard lived long. I think he was dead on arrival at the hospital."

Verdict: Not guilty of murder in the first degree; guilty of murder in the second degree.

Judgment: Imprisonment in the State's Prison for a term of not less than 25 nor more than 30 years.

Defendant appeals, assigning errors.

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

I. C. Crawford and George Pennell for defendant.

STACY, C. J. The record discloses no challenge to the voluntariness of defendant's confession, either before or after its reception in evidence; nor was there any repudiation, disavowal, or denial of the statements contained therein, save the defendant's testimony to the effect that he "was all upset and had been worried to death all morning." *S. v. Rogers, ante,* 390. On the strength of the confession, the jury was fully justified in returning the verdict they did, albeit the confession seems to have been offered only in corroboration of the officer's testimony.

The defendant took a number of exceptions to the manner in which the solicitor cross-examined his witnesses and to the general conduct of the hearing. He contends that these exceptions, taken as a whole, or in their totality, if not singly, make it quite clear that the presiding judge inadvertently allowed the solicitor to take charge of the proceeding.

For example, the solicitor was allowed to ask one of defendant's witnesses on cross-examination if he did not know "that John Dailey is the man that is financing this trial?" This was before the defendant had gone upon the witness stand and his character had not then been put in issue. *S. v. Fowler,* 230 N.C. 470, 53 S.E. 2d 853; *S. v. Choate,* 228 N.C. 491, 46 S.E. 2d 476. The answer was, "I do not know." Then, this question: "Do you know this entire shooting occurred over a white liquor war here between the deceased and this Johnny Russell and John Dailey and another white man here in town? Objection. Answer: "No, Sir, I don't know what the trouble was." And this further question: "What were you talking to John Dailey about here a while ago in the courtroom? Objection. "He is a well known bootlegger here in town, isn't he?" Objection sustained.

Similar questions were asked other witnesses and in this way, the defendant contends, his character was impeached and his defense prejudiced, notwithstanding the seemingly harmless and even favorable answers to the questions. *S. v. Jones,* 229 N.C. 276, 49 S.E. 2d 463. Of course, it is possible for the court, by the manner of conducting the trial, to impeach the testimony of witnesses, or to convey an expression of opinion to the jury on the merits of the case in violation of G.S. 1-180 as rewritten, Chap. 107, S.L. 1949. *S. v. Simpson, ante,* 438. The defendant thinks this was done here.

The defendant has pressed his position in respect of the totality of his exceptions with force and conviction; and but for the acquittal of defendant on the capital offense, it might prove difficult to resist his appeal. *S. v. Hart,* 186 N.C. 582, 120 S.E. 345. Here, however, the defendant's confession makes him guilty at least of murder in the second degree, if not of the capital offense, and hence the errors assigned were apparently harmless. *S. v. Muse,* 230 N.C. 495, 53 S.E. 2d 529.

The defendant could not explain to the satisfaction of the jury, nor is it apparent from the record, how he and the deceased were facing each other, when the shooting occurred, and yet the deceased was shot in the right back and in the back of the head. The jury did not accept his plea of self-defense.

The court's charge to the jury has not been brought forward in the transcript and we must assume the judge properly instructed the jury in respect of the matters about which the defendant now complains. *S. v. Hovis, ante,* 359.

On the record as presented, the exceptions, taken singly or in their total impact, seem insufficient to justify a disturbance of the result below. Hence, the verdict and judgment will be upheld.

No error.

W. H. RENN, JR., AND WIFE, MILDRED CARTER RENN; EUTICUS THOMAS RENN AND WIFE, RACHEL ADAMS RENN; MARY E. RENN TAFF AND HUSBAND, C. B. TAFF, v. BETTIE WILLIAMS, NANNIE WILLIAMS AND ELLIS NASSIF, GUARDIAN FOR BETTIE WILLIAMS AND NANNIE WILLIAMS.

(Filed 18 April, 1951.)

1. Wills § 38—

In the absence of an apparent intention to the contrary, a residuary clause will be construed to pass not only all interests in land not otherwise specifically devised or provided for, but also any interest included in a devise which lapses or becomes void or incapable of taking effect, G.S. 31-42, so as to prevent intestacy as to any part of the estate.

2. Wills § 32—

It will be presumed that a person who makes a will does not intend to die intestate as to any part of his property, and where a will is susceptible to two interpretations, one resulting in complete testacy and the other in partial intestacy, the former will be adopted.

3. Wills § 38—

Property included in a devise to a person who attested the execution of a will so that the devise is void under G.S. 31-10 passes under the residuary clause of the will, there being nothing in the instrument to indicate a contrary intention.

APPEAL by defendants from *Harris, J.,* at Chambers, 17 March, 1951. From WAKE. Affirmed.

This was a suit to determine the devolution of certain real property under the will of Mary Alice Williams, heard upon an agreed statement of facts. From the judgment rendered, defendants appealed.

Manning & Joslin for plaintiffs, appellees.
Ellis Nassif for defendants, appellants.

DEVIN, J. The will of the decedent, which was duly admitted to probate 11 June, 1945, contained the following pertinent provisions:

"1. To Bennie Corbitt Hall one hundred acres of land where he now lives. . . .

"3. To Rudolph Renn I give the rest of my real and personal property at the death of my three sisters. My sisters to have full possession till their death."

One of the sisters of the testatrix died intestate and without issue, and the two surviving have been adjudged incompetent and are represented by their general guardian.

Rudolph Renn died intestate and without issue in 1950 leaving the named plaintiffs as his only heirs.

The wife of Bennie Corbitt Hall having attested the execution of the will of Mary Alice Williams, the devise to him of one hundred acres of land was rendered void by the statute G.S. 31-10. It was so adjudged by the clerk and admitted by all parties. *Hampton v. Hardin,* 88 N.C. 592 (595); 2 Mordecai Law Lectures, p. 1180.

The question presented by this appeal then is whether the real property covered by the ineffectual devise in item 1 of the will, admittedly rendered void by the statute, should be included in the residuary devise set up in item 3, or pass as undevised real property to the heirs at law of Mary Alice Williams, the testatrix.

One of the rules for the construction of wills is prescribed by G.S. 31-42 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 was intended by this statute, enacted in 1844, that the property passing by residuary clause of a will should comprise all the estate owned by the testator at time of his death not otherwise specifically devised or provided for, and should include any described in a devise which may have lapsed, or become void or incapable of taking effect. *Faison v. Middleton,* 171 N.C. 170, 88 S.E. 141; *Trust Co. v. Cowan,* 208 N.C. 236, 180 S.E. 87; *Shoemaker v. Coats,* 218 N.C. 251, 10 S.E. 2d 810.

Furthermore, as a general rule it is required in the construction of a will that the residuary clause be so interpreted as to prevent intestacy as to any part of the estate, unless there is an apparent intention to the

contrary. *Featherstone v. Pass,* 232 N.C. 349, 60 S.E. 2d 236; *Ferguson v. Ferguson,* 225 N.C. 375, 35 S.E. 2d 231; *Faison v. Middleton, supra.* The presumption is that one who makes a will does not intend to die intestate as to any part of his property. *Holland v. Smith,* 224 N.C. 255, 29 S.E. 2d 888; *Gordon v. Ehringhaus,* 190 N.C. 147, 129 S.E. 187. Testacy presupposes no intestacy, and "where a will is susceptible of two constructions, the one favorable to complete testacy, and the other consistent with partial intestacy, in the application of the presumption, the former construction will be adopted and the latter rejected." *Ferguson v. Ferguson, supra,* and cases there cited.

The language in which the will of Mary Alice Williams was expressed seems to indicate a purpose to dispose of all her property by that instrument. We perceive no expression of a contrary intention. Hence we conclude that Judge Harris has ruled correctly, and that the property described in the attempted devise to Bennie Corbitt Hall, which devise became void by reason of the statute, passed under the residuary clause in the will to Rudolph Renn, and upon his subsequent death descended to his heirs at law.

Judgment affirmed.

STATE v. EVERETT CLINTON EDWARDS.

(Filed 18 April, 1951.)

APPEAL by defendant from *Parker, J.,* October Term, 1950, of WAKE. No error.

The defendant was charged with making an indecent exposure of his person on a public street in the City of Raleigh, in violation of Chapter 273, Public Laws 1941, now G.S. 14-190.

The jury returned verdict of guilty as charged, and from judgment imposing sentence the defendant appealed.

Attorney-General McMullan and Assistant Attorney-General Bruton, and Charles G. Powell, Jr., Member of Staff, for the State, appellee.

E. D. Flowers and Robert W. Brooks for defendant, appellant.

PER CURIAM. The defendant noted several exceptions to the ruling of the trial judge in the admission of testimony and to a portion of the charge to the jury, but on examination we find none of them of substantial merit.

The evidence was sufficient to support the verdict, and in the trial we find.

No error.

IN THE MATTER OF DEANNA BLALOCK (SUZANNE CARTER).

(Filed 2 May, 1951.)

1. Appeal and Error § 6c (3)—

A sole exception and assignment of error to the judgment or to the signing of the judgment presents only whether the facts found by the court support the judgment and whether error in matters of law appears upon the face of the record.

2. Courts § 2—

Jurisdiction of the person of a defendant can be acquired only by service of process upon him or by his voluntary appearance. G.S. 1-103.

3. Appearance §§ 1, 2a—

Whether an appearance is special or general is to be determined not by its form but by its character; an appearance for the purpose of testing the jurisdiction of the court over the person of defendant is a special appearance, and an appearance for the purpose of invoking the judgment of the court in any manner on any question other than that of jurisdiction of the court over the person of defendant, such as the court's jurisdiction over the subject matter, is a general appearance.

4. Appearance § 2b—

A general appearance waives any defects in the jurisdiction of the court for want of valid summons or of proper service.

5. Appearance § 2a—

A purported special appearance in an adoption proceeding for the purpose of moving to dismiss for want of jurisdiction of the court over the minor child, the subject of the proceeding, is a general appearance waiving want of service upon movants.

6. Courts § 18—

Where a domestic relations court acquires jurisdiction of a child under sixteen upon adjudication in proceedings for its custody that such minor is a ward of the State, such jurisdiction continues until the minor becomes of age or until the issuance of a valid court order to the contrary. G.S. 7-103, G.S. 110-21.

7. Same: Adoption § 8—

An interlocutory order tentatively approving the adoption of a minor and expressly providing that the minor should remain a ward of the juvenile court, entered by the clerk upon the consent of the child's mother, does not oust the jurisdiction of the domestic relations court theretofore obtained in a proceeding for the custody of the child upon its adjudication that the child was a ward of the State. Furthermore, under G.S. 7-103 the domestic relations court would be included in the term "court" as used in the clerk's order. "Tentative" and "tentatively" defined. G.S. 110-23.

8. Adoption § 4: Clerks of Court § 7—

An adoption proceeding is before the clerk of the Superior Court. G.S. Chap. 48, G.S. 1-7, G.S. 1-13.

9. Judgments § 20a—

An "interlocutory order" is provisional or preliminary and does not determine the issues in the action, and is subject to change by the court during the pendency of the action to meet the exigencies of the case.

10. Courts § 18: Clerks of Court § 7—

Domestic relations courts and clerks of court are separate branches of the Superior Court, the former being given exclusive original jurisdiction involving the custody of juveniles, G.S. 7-103, and the latter jurisdiction of adoption proceedings with power to award the custody of a child to a petitioner pending final decree of adoption. G.S. Chap. 48, G.S. 1-7, G.S. 1-13.

11. Statutes § 5d—

Statutes relating to the same subject will be construed together so that effect may be given to all provisions of each if possible by any fair and reasonable interpretation.

12. Courts § 18—

A domestic relations court has jurisdiction to modify an order for the custody of a child entered in a proceeding in which both the mother and child were before the court personally, even though at the time of entering the order of modification neither the child nor its purported adoptive parents are within its territorial jurisdiction, *a fortiori* where the purported adoptive parents have brought themselves within the jurisdiction of the court by a general appearance. G.S. 110-36.

13. Courts § 19—

Persons awarded temporary custody of a child who is under the supervision and care of a domestic relations court have no right to take the child out of the State without the written consent of the State Board of Public Welfare, notwithstanding that they may have obtained the consent of the superintendent of a county board of welfare. G.S. 110-52.

14. Adoption § 4: Courts §§ 14, 18: Judgments § 28½—Foreign decree of adoption of child domiciled here, entered upon suppression of facts, held void.

Where a domestic relations court has obtained jurisdiction of a child born in North Carolina upon its adjudication that the child is a ward of the State, and the domicile of the child has not been changed, a decree of adoption entered by a court of another state upon the suppression by petitioners therein of the facts that the child was a ward of our domestic relations court, that its mother had moved in said court for modification of an order for the custody of the child, that the petitioners in such foreign court acquired possession of the child upon assurances that they would abide by the laws of this State, and that they failed to obtain the consent

of the State Department of Welfare of North Carolina or of any court of our State for removal of the child from this State, is void.

15. Domicile § 1—

Upon birth, an illegitimate child acquires the domicile of its mother, and such child is without power to change its domicile until its majority or emancipation.

16. Judgments § 28½: Constitutional Law § 28—

A judgment obtained in another state may be challenged in this State by proof of fraud practiced in obtaining the judgment which may have prevented an adverse trial of the issue, or by showing want of jurisdiction either of the subject matter or of the person of the defendant.

APPEAL by Mr. and Mrs. Robert K. McGowen from *Patton, Special Judge,* at August Civil Term, 1950, of BUNCOMBE.

Proceeding in the Domestic Relations Court of Buncombe County, North Carolina, pertaining to the custody of a dependent child, Deanna Blalock, born out of wedlock to Mary Blalock (now Mrs. J. W. Higgins), on 15 December, 1943, on petition of the mother for modification of order of 26 March, 1947, placing the child in the custody of Mr. and Mrs. L. E. Carter, on account of alleged changed conditions,—heard in said court on motion of Mr. and Mrs. Robert K. McGowen, the appellants, to dismiss the proceeding for lack of jurisdiction as hereinafter shown,—and heard again in Superior Court of Buncombe County, North Carolina, on appeal thereto by the movants Mr. and Mrs. McGowen from judgment of said Domestic Relations Court, the hearing in Superior Court being on the record as certified by the Clerk of said Domestic Relations Court.

The petition of the mother, Mrs. Higgins, subscribed and sworn to 13 January, 1950, as shown in the record, is addressed to the Domestic Relations Court of Buncombe County, and—(deleting immaterial words) —represents that she is a resident of said county; "that Deanna Blalock . . . a child . . . under the age of sixteen years . . . is . . . within the meaning of the law of this State a dependent child . . . in that the said child . . . by order of this court dated March 26, 1947, . . . was placed in the custody of L. E. Carter and wife, who at the time planned to adopt her"; that "for reasons of their own they felt unable to do so and turned her over to the Buncombe County Department of Public Welfare"; that "at that time petitioner was in such a condition as to be unable to care for said child; however, petitioner is now able and willing to provide said child a suitable home, adequate support and proper care, and desires the custody of said child." Thereupon, the petitioner "prays the court to inquire into the matter herein set forth and make such orders in the premises as the court may deem proper and for the best interests of the said child."

The record also shows that a notice, styled "Summons," was issued 14 February, 1950, by the Clerk of Domestic Relations Court, addressed to "Marcella Ponderly and Robert Kenneth McGowen, Hendersonville, N. C.," commanding them to appear before the Domestic Relations Court on 27 February, 1950, in regard to the custody of, and bring with them "Deanna Blalock, *alias* Suzanne Carter, *alias* Betsy McGowen, represented to this court as being a dependent child and there to abide by such order as may be made with reference to said child." But the record fails to show that the notice was served on those to whom it is addressed.

Nevertheless, the record does show that on 17 March, 1950, Mr. and Mrs. Robert K. McGowen, through their attorneys Williams & Williams, entered an appearance in the Domestic Relations Court of Buncombe County, State of North Carolina,—entitled "SPECIAL APPEARANCE AND MOTION TO DISMISS,"—"for the purpose, and only the purpose of moving to dismiss the above entitled matter, on the grounds that this court does not now have jurisdiction over said cause, for the following reasons:

"1. That the minor child, subject of this action, has resided and has been domiciled in the city of Chicago, State of Illinois, for more than (1) year preceding the institution of this action, and by virtue thereof is subject exclusively to the jurisdiction of the courts of the State of Illinois.

"2. That the said Mr. and Mrs. Robert K. McGowen, in whose custody the said minor child has been since approximately the first day of September, 1948, are citizens and residents of the city of Chicago, State of Illinois, and are not subject to the jurisdiction of this court, and have not been served with summons or process of any kind in this action."

The record also shows these matters of record:

(1) On 25 February, 1947, Mr. and Mrs. L. E. Carter, who resided at Sky Camp, Route 1, Asheville, N. C., filed a petition in the Domestic Relations Court of Buncombe County, N. C., praying that inquiry be made into the matter of the custody of Deanna Blalock, an illegitimate child of Mary Blalock,—a dependent child within the meaning of the law of this State, and such order to be made in the premises as the court may deem proper and for the best interests of the child. A copy of this petition together with a summons was served on Mary Blalock on 14 March, 1947. Judgment on this petition was entered on 26 March, 1947. The judgment recites that the proceeding being heard, with petitioners and their counsel, and the respondent Mary Blalock and Deanna Blalock personally present, the court found these facts from the evidence and sworn admissions of the respondent: (In pertinent part) That Deanna Blalock was born at Crossnore, North Carolina, on 15 December, 1943, to the respondent Mary Blalock, who herself was born in Avery County, North Carolina, 16 March, 1918; that respondent Mary Blalock is not

able or competent to care for said child and to provide it a fit home or adequate support; that the petitioners L. E. Carter and wife, Bonnie Carter, are fit and suitable persons to have the custody of said child; and that they are solvent, in good health and entirely capable of providing said child a suitable home, adequate support and proper care and education: "Whereupon, with the written consent of the respondent Mary Blalock (who has also agreed to consent to the adoption of said child by Mr. and Mrs. Carter)," the court awarded the custody and control of Deanna Blalock to L. E. Carter and wife,—but made provision for Mary Blalock to visit the child. And Mary Blalock signed and sealed her name in written consent to the entry of the above judgment.

(2) Thereafter on 27 March, 1947, Carter and wife, citizens and residents of Buncombe County, North Carolina, filed a petition before the Clerk of Superior Court of said county for the adoption for life of the minor child then in their custody,—the name to be changed to Mary Suzanne Carter. The petition so filed set forth that the mother has executed a written consent for the adoption of said child by the petitioners, and that she is the only necessary party to give consent for adoption. And thereupon, on the same day, 27 March, 1947, the Clerk of the Superior Court of said county entered an order referring the matter to the Superintendent of Public Welfare of said county with directions to investigate, and report on the conditions and antecedents of the child, etc.

(3) Thereafter on 23 February, 1948, the said Clerk of Superior Court entered an interlocutory order, in which after reciting that it appearing to the court the petitioners, Carter and wife, are residents of Buncombe County, North Carolina, that the minor was born in Avery County, North Carolina, and is now living in the custody of the petitioners at Asheville, N. C.; and that "the mother of said child has executed a written consent for the adoption of said child by the petitioners," the adoption of the child by the petitioners was "tentatively" approved, but it was ordered therein that "said minor . . . be and she is hereby placed in the care and custody of petitioners until further orders of this court." And the court further "expressly ordered that this order shall be provisional only and may be rescinded or modified at any time prior to the final order of adoption which shall be made not less than one year or more than two years after this date," and that "until said final order of adoption the said minor shall be and remain a ward of this court, and its care shall be under the supervision of George H. Lawrence, Superintendent of Public Welfare of Buncombe County, unless otherwise directed by the court."

(4) Thereafter at Asheville, N. C., on 9 September, 1948, George H. Lawrence, Superintendent, reported to the Clerk of Superior Court of Buncombe County, summarily stated, that on account of illness of Mrs. Carter, Mr. Carter had arranged for the return of the child, and she was

returned on 27 May, 1948; and that the Welfare Department arranged for her to be placed in a boarding home. And the Superintendent recommended that since the child had been returned by Mr. and Mrs. Carter, and was then under the supervision of the Welfare Department, a nonsuit in the adoption be issued.

(5) Thereafter on 22 September, 1948, upon hearing the report of George H. Lawrence, Superintendent of Public Welfare of Buncombe County, and it appearing therefrom that since the interlocutory order signed the 23rd day of February, 1948, placing said child with the petitioners, Leon Earle Carter and Bonnie Brookins Carter, his wife, they do not now desire to adopt the minor child, Mary Suzanne Carter (Deanna Helen Blalock) and have returned her to the Department of Public Welfare, Buncombe County, North Carolina, at Asheville, N. C., the Clerk of Superior Court "ordered, adjudged and decreed" that the said interlocutory order "be revoked and rescinded, and that the final order be not issued and that this proceeding be, and the same is hereby dismissed at the cost of the petitioner."

The record discloses that it was after the adoption proceeding was so dismissed that the petition of the mother, first hereinabove described was filed.

The record also shows that on 17 May, 1950, the North Carolina State Board of Public Welfare petitioned the Domestic Relations Court of Buncombe County to be permitted to appear as *amicus curiae* in the court for the purpose of filing briefs and presenting argument upon the question of jurisdiction raised by Mr. and Mrs. Robert K. McGowen, as hereinabove set forth. The permission was granted by order of court 19 May, 1950.

The record also contains copies of various affidavits, and of copies of court records filed in the proceeding in the Domestic Relations Court. Among the records so filed is purported transcript of an adoption proceeding in the County Court of Cook County, Illinois, entitled "In the Matter of the Petition of Robert K. McGowen and Marcella P. McGowen, His Wife, to Adopt Deanna Blalock, a Minor," instituted in March, 1950, and numbered "128 496." In the petition therein the petitioners name "Deanna Blalock, a minor, Mary Blalock Higgins, the mother of said minor, Leon E. Carter and Bonnie Carter, his wife, parties defendant in this cause," and ask, among other things, that the name of the minor child be changed to Elizabeth Lynn McGowen. And the record therein contains a notice to defendants, but it also contains form of an affidavit of Robert K. McGowen to the effect that "Mary Blalock Higgins, Leon E. Carter and Bonnie Carter, defendants, reside out of this State, and on due inquiry cannot be found within this State." Service of notice as to them is not shown in the transcript of the record.

And pursuant to hearing on 10 June, 1950, the Judge of Domestic Relations Court of Buncombe County entered a judgment in pertinent part as follows:

"The above named child first came to the attention of this court on February 25, 1947 upon a petition filed by L. E. Carter and wife; summons was served March 14, 1947 on the illegitimate mother of said child, Mary Blalock, and the court took jurisdiction of the child, after a lengthy investigation and hearing the court entered a judgment on March 26, 1947 placing the child in the custody of Mr. and Mrs. Carter—with the written consent of the mother.

"Immediately thereafter, to wit: On March 27, 1947, the Carters started an adoption proceeding in the Buncombe County Superior Court, to which the mother, Mary Blalock, consented. An interlocutory order was entered February 23, 1948 and the child remained in the possession of the petitioners, but as 'a ward of this (Superior) Court and its care shall be under the supervision of George H. Lawrence, Superintendent of the Public Welfare Department of Buncombe County, unless otherwise directed by this Court.'"

"Thereafter the Carters abandoned said adoption proceeding and returned said child to the custody of the Buncombe County Welfare Department which, on September 9, 1948, requested the Superior Court to nonsuit the adoption proceeding; an order of revocation was entered September 22, 1948.

"Said child remained in the custody of the Buncombe County Welfare Department and under the jurisdiction of this Court; the Buncombe County Welfare Department sought the assistance of Mrs. Lucinda Cole, Superintendent of the Henderson County Welfare Department, in placing said child; she did seek a home for said child and was contacted by Mr. and Mrs. Robert K. McGowen to whom she granted the temporary possession in Henderson County but on condition that if the said McGowens desired the permanent custody of and intended to adopt said child the laws of the State of North Carolina must be complied with. No petition was filed and no adoption proceeding was begun in Henderson County. However, in September 1948 (sometime after the 8th day) they took said child to their home in Chicago, Illinois, with the consent of Mrs. Cole, but upon assurance to her by Mrs. McGowen that the McGowens would comply with the requirements of the laws of this State; said temporary removal of said child was without the knowledge or consent of the Buncombe County Department of Public Welfare or of this Court.

"Meantime, the mother, Mary Blalock, had married one J. W. Higgins, and with him had established a home in Asheville, Buncombe County, North Carolina; on January 13, 1950 she filed a petition in this Court for the custody of said child; a copy of said petition and a summons were

sent to Mrs. Lucinda Cole, Superintendent of the Henderson County Department of Public Welfare, to be served on the temporary custodians of said child. By letter dated February 7, 1950 Mrs. Cole advised this Court for the first time that said child was in the possession of the McGowens and 'at the present time this family is visiting out of the State but they will be glad to return whenever you notify them to appear for the hearing. If you can let me know a few days prior to the hearing I shall appreciate it. Also, the family, if possible, would like the hearing before the first of March, as they had planned to spend the month of March in Florida.'

"It does not appear that the summons and petition were served on the McGowens but they were advised of the proceeding for on March 17, 1950 the McGowens filed a 'special appearance and motion to dismiss' alleging that this Court had no jurisdiction of said child. . . .

"This Court holds as a conclusion of law that having acquired jurisdiction over said child in 1947 it has not lost or surrendered said jurisdiction for that the adoption proceeding begun by the Carters on March 27, 1947 in the Buncombe County Superior Court was never completed and that when said Carters surrendered the child to the Buncombe County Welfare Department on September 9, 1948 said Department took said child as agents and officers of this Court; and subject to the jurisdiction and supervision of same; that notwithstanding the fact that the McGowens took said child to Illinois in September 1948 where, as they aver, she has lived since; said child being an unemancipated infant is *non sui juris,* and cannot of her own volition select, acquire or change her domicile; *Duke v. Johnston,* 211 N.C. 171 (175), and cases cited.

"Deanna Blalock (sometimes known as Suzanne Carter) was temporarily placed in the possession of the McGowens by the Henderson County Welfare Department as an agent of this Court; she did not lose her domicile within North Carolina (where her mother continued to live and reside) and the purported adoption of said child by the McGowens in the County Court of Cook County, Illinois, was void and of no effect.

"IT IS THEREFORE ADJUDGED that the special appearance be vacated; that the McGowens' motion to dismiss this action be denied and that said respondents, Mr. and Mrs. Robert McGowen, appear with said child in this Court and answer the petition of said Mary Blalock Higgins on its merits."

"To the entry of the foregoing judgment and the signing thereof, the respondents, Mr. and Mrs. Robert K. McGowen, excepted in apt time and gave notice of appeal in open court and further notice waived."

On appeal from the judgment of the Domestic Relations Court, as above shown, the Judge presiding over the August 1950 Term of Buncombe County Superior Court found these facts:

"(1) That the above named child became a ward of the Domestic Relations Court of Buncombe County on a petition filed by L. E. Carter and wife, summons being served on the mother of the child and the Order entered on March 26, 1947, placing the child in the custody of Mr. and Mrs. Carter with the written consent of the mother.

"(2) On March 27, 1947, L. E. Carter and wife instituted an adoption proceeding in the Superior Court of Buncombe County, to which proceeding the mother of the child consented, and an interlocutory order was entered on February 23, 1948, in said adoption proceeding and the child continued in the possession of Mr. and Mrs. Carter but as a ward of the Court with its care under the supervision of George H. Lawrence, Superintendent of Welfare of Buncombe County, unless otherwise directed by the Court.

"(3) Thereafter, L. E. Carter and wife abandoned said adoption proceeding, returned the child to the custody of the Buncombe County Welfare Department, and on September 22, 1948, the adoption proceeding was terminated by order of the Court.

"(4) Said child remained in the custody of the Buncombe County Welfare Department and under the jurisdiction of the Court at all times thereafter, although the Buncombe County Welfare Department sought the assistance of Mrs. Lucinda Cole, Superintendent of the Henderson County Welfare Department in placing said child and Mrs. Cole placed the temporary custody of the said child with Mr. and Mrs. Robert K. McGowen on condition that if the said McGowens desired permanent custody of said child and did adopt it, the laws of the State of North Carolina must be complied with.

"(5) That the temporary custody of the said child was placed with the McGowens in Henderson County, North Carolina, and they thereafter took said child to their home in Chicago, Illinois, with the consent of Mrs. Cole but without the consent of this Court or any other Court, and upon the assurance by the McGowens that they would comply with the requirements of all the laws of the State of North Carolina in respect to said child, said temporary removal from the State of North Carolina being without the consent or knowledge of the Buncombe County Welfare Department or of the Court.

"(6) That the mother of the said child has heretofore filed a petition in the Domestic Relations Court of Buncombe County for the custody of the said child and a copy of the petition and summons was sent to Mrs. Lucinda Cole, Superintendent of the Henderson County Welfare Department, to be served on the temporary custodians of said child.

"The Court was then advised that the child was in the possession of the McGowens and that they would like a hearing before the first day of March, as they planned to spend the month of March in Florida.

"On March 17, 1950, the McGowens filed a Special Appearance and Motion to Dismiss, alleging that the Court had no jurisdiction of the child; that since the McGowens have assumed the temporary custody of the said child they have undertaken in the State of Illinois to institute an adoption proceeding for the adoption of the said child."

And upon the foregoing Findings of Fact the Court made the following Conclusions of Law:

"FIRST: That the Domestic Relations Court of Buncombe County, North Carolina, acquired jurisdiction over said child in the year 1947 and has not lost or surrendered said jurisdiction since said date.

"SECOND: That said child was removed from the State of North Carolina in violation of the statutory laws of the State of North Carolina and without the consent of the Domestic Relations Court of Buncombe County which had jurisdiction over said child.

"THIRD: That said child has never lost her domicile within the State of North Carolina and that the purported adoption of the said child in the State of Illinois is void and of no effect."

Thereupon, it was "Ordered, Adjudged and Decreed by the Court that said Special Appearance and Motion to Dismiss be, and the same is hereby OVERRULED AND DENIED, and the judgment of the Domestic Relations Court heretofore entered is hereby AFFIRMED in all respects and this cause is remanded to the Domestic Relations Court of Buncombe County for further proceeding."

"To the foregoing Judgment and the signing thereof, Mr. and Mrs. Robert K. McGowen, appearing specially and for no other purpose than to determine the jurisdiction of the Court, OBJECT AND EXCEPT and give notice, in open Court, of appeal to the Supreme Court of North Carolina," and assign error.

Narvel J. Crawford for petitioner, appellee.

R. R. Williams and Robert Williams, Jr., for appellants.

Drury B. Thompson for State Board of Public Welfare as Amicus Curiae.

WINBORNE, J. The sole assignment of error presented on this appeal is predicated upon exception to the judgment and the signing of it. Such assignment of error raises only the questions as to (1) whether the facts found by the judge of the Domestic Relations Court of Buncombe County, North Carolina, and reiterated by the judge of the Superior Court on appeal, support the judgment from which appeal is taken, and (2) whether 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, and cases cited. See

also *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351; *S. v. Black,* 232 N.C. 154, 59 S.E. 2d 621; *Rice v. Trust Co.,* 232 N.C. 222, 59 S.E. 2d 803; *Smith v. Furniture Co.,* 232 N.C. 412, 61 S.E. 2d 96; *Paper Co. v. Sanitary Dist.,* 232 N.C. 421, 61 S.E. 2d 378; *Johnson v. Barham,* 232 N.C. 508, 61 S.E. 2d 374; *Hoover v. Crotts,* 232 N.C. 617, 61 S.E. 2d 705; *Weaver v. Morgan,* 232 N.C. 642, 61 S.E. 2d 916; *Gibson v. Ins. Co.,* 232 N.C. 712, 62 S.E. 2d 320; *Perkins v. Sykes, ante,* 147, 63 S.E. 2d 133, and numerous other cases.

In the light of the record, and facts found by the court, the movants, Mr. and Mrs. Robert K. McGowen, raise two questions, stated in reverse order: (1) Does the Domestic Relations Court of Buncombe County, North Carolina, have jurisdiction over the persons of movants? (2) Does said court have jurisdiction over the child Deanna Blalock, the subject of the action, or proceeding? Both questions are answered in the affirmative.

As to the first question: Jurisdiction over the person of a defendant can be acquired only in two ways: (1) By service of process upon him, whereby he is brought into court against his will; and (2) by his voluntary appearance and submission. 3 Am. Jur. 784. G.S. 1-103.

Concededly, in the case in hand, process issued to Mr. and Mrs. McGowen was not served on them. It remains, therefore, to inquire into the effect of their appearance.

An appearance may be either general or special. The distinction between the two is not so much in the manner in which, or the proceeding by which, the appearance is made, as in the purpose and the effect of an appearance. "The test is the relief asked,—the law looking to its substance rather than to its form. If the appearance is in effect general, the fact that the party styles it a special appearance will not change its character. The question always is what a party has done, and not what he intended to do." *Scott v. Life Asso.,* 137 N.C. 515, 50 S.E. 221; *Woodard v. Milling Co.,* 142 N.C. 100, 55 S.E. 70; *Motor Co. v. Reaves,* 184 N.C. 260, 114 S.E. 175; *Shaffer v. Bank,* 201 N.C. 415, 160 S.E. 481; *Buncombe County v. Penland,* 206 N.C. 299, 173 S.E. 609; see also 3 Am. Jur. 782; McIntosh N. C. P. & P. 323.

A special appearance by a defendant is for the purpose of testing the jurisdiction of the court over his person. *Scott v. Life Asso., supra. Motor Co. v. Reaves, supra; Denton v. Vassiliades,* 212 N.C. 513, 193 S.E. 737; *Williams v. Cooper,* 222 N.C. 589, 24 S.E. 2d 484. See also 3 Am. Jur. 782; McIntosh N. C. P. & P. 323.

An appearance merely for the purpose of objecting to the lack of any service of process or to a defect in the process or in the service of it, is a special appearance. In such case the defendant does not submit his person to the jurisdiction of the court. 3 Am. Jur. 783.

On the other hand, a general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person. 3 Am. Jur. 782, 6 C.J.S. 66, McIntosh N. C. P. & P. 323. *Scott v. Life Asso., supra; Motor Co. v. Reaves, supra.*

A general appearance waives any defects in the jurisdiction of the court for want of valid summons or of proper service thereof. *Motor Co. v. Reaves, supra; Bank v. Derby,* 215 N.C. 669, 2 S.E. 2d 875; *Credit Corp. v. Satterfield,* 218 N.C. 298, 10 S.E. 2d 914; *Williams v. Cooper,* 222 N.C. 589, 24 S.E. 2d 484; *Wilson v. Thaggard,* 225 N.C. 348, 34 S.E. 2d 140.

Indeed, in *Williams v. Cooper, supra,* in opinion by *Barnhill, J.,* it is said: "An objection that the court has no jurisdiction of the subject matter of the action is considered in law as taken to the merits and not merely to the jurisdiction of the court over the person of the defendant and an appearance for the purpose of entering such objection is, in fact, a general appearance which waives any defect in the jurisdiction arising either for want of service on the defendants or from a defect therein." See cases there cited.

Applying these principles to the case in hand, if the movants had, as is said in *Motor Co. v. Reaves, supra,* confined their motion to dismiss for want of jurisdiction over their persons, all would have been well with them, but when they asked the court to adjudge as to want of jurisdiction over the subject of the action, they converted their special appearance into a general one. It follows, therefore, that the movants have waived any defect in the jurisdiction arising for want of service on them,—and they are in court. *Williams v. Cooper, supra.*

This brings us to the second question: As to whether the Domestic Relations Court of Buncombe County, North Carolina, has jurisdiction over the child, Deanna Blalock, the subject of the proceeding.

The establishment of Domestic Relations Courts was authorized, and the machinery therefor provided by the General Assembly of 1929. See P.L. 1929, Chapter 343. While the act as originally passed did not apply to Buncombe County, it was made applicable thereto by an amendatory act—Chapter 208 of P.L. 1941. The act authorizing the establishment of such court, as amended from time to time, became sub-chapter IV of Chapter 7 of General Statutes entitled "Courts." And the General Statutes became effective 31 December, 1943, and have been in effect since then.

Section 3 of Act of 1929, now G.S. 7-103, provides, among other things, that Domestic Relations Courts, where established, shall have, and be vested with all the power, authority, and jurisdiction theretofore vested

in the juvenile courts of North Carolina,—said power, authority, and jurisdiction being as fully vested in the Domestic Relations Court as if therein particularly set forth in detail; and in addition thereto such Domestic Relations Courts shall have exclusive original jurisdiction over, among others, "(c) all cases involving the custody of juveniles, except where the case is tried in Superior Court as a part of any divorce proceeding." See *In re Morris,* 224 N.C. 487, 31 S.E. 2d 539, and *S. c.,* 225 N.C. 48, 33 S.E. 2d 243.

What then are the "power, authority and jurisdiction" given to juvenile courts? The Juvenile Court Act, enacted by the General Assembly of 1919, Chapter 97 of P.L. 1919, later becoming Article 2 of Chapter 90 of the Consolidated Statutes, on the subject "Child Welfare," and now Article 2 of Chapter 110 of the General Statutes, on the same subject, provides that the Superior Courts shall have exclusive original jurisdiction of any case of a child less than sixteen years of age residing in or being at the time within the respective districts "who are in such condition or surroundings or in such improper or inefficient guardianship or control as to endanger the morals, health, or welfare of such child." This jurisdiction when obtained in the case of any child shall continue for the purposes of the statute on "Child Welfare" during the minority of the child, unless a court order be issued to the contrary. G.S. 110-21. *S. v. Coble,* 181 N.C. 554, 107 S.E. 132; *In re Coston,* 187 N.C. 509, 122 S.E. 183; *In re Morris, supra.* See also *Phipps v. Vannoy,* 229 N.C. 629, 50 S.E. 2d 906.

This section of the statute, G.S. 110-21, also imposes upon the court the constant duty to give to each child subject to its jurisdiction such oversight and control in the premises as will conduce to the welfare of such child and to the best interest of the State. *In re Morris, supra.*

And for the purpose of hearing cases coming within the provisions of the statute the General Assembly established in each county of the State a separate part of the Superior Court of the district, such part to be called "The Juvenile Court" of the particular county, and appointed and authorized the Clerk of Superior Court of each county to act as judge of the Juvenile Court in the hearings of such cases within such county. G.S. 110-23.

The express intention of this statute is "that in all proceedings under its provisions the court shall proceed upon the theory that a child under its jurisdiction is the ward of the State and is subject to the discipline and entitled to the protection which the court should give such child under the circumstances disclosed in the case." G.S. 110-24.

Moreover, any order or judgment made by the court in the case of any child shall be subject to such modification from time to time as the court may consider to be for the welfare of the child, except in certain cases

not pertinent here. G.S. 110-36. *In re Morris, supra;* see also *S. v. Burnett,* 179 N.C. 735, 102 S.E. 711; *In re Coston, supra.*

The procedure for initiating a proceeding and for notice or summons to the parent is prescribed in the statute G.S. 110-25 to G.S. 110-28. And it is also provided that upon the return of the summons or other process, the court shall proceed to hear and determine the case in a summary manner. And that upon such hearing, the court, if satisfied that the child is in need of care, protection or discipline of the State, may so adjudicate, and may find the child to be delinquent, neglected, or in need of more suitable guardianship, and thereupon may, among other provisions, commit the child to the custody of a relative or other fit person of good moral character, subject, in the discretion of the court, to the supervision of a probation officer and the further orders of the court, or render such further judgment or make such further order of commitment as the court may be authorized by law to make in any given case. G.S. 110-29.

In the *Coston case, supra,* this Court in an opinion by *Hoke, J.,* referring to the Juvenile Court Act, as construed and applied in *S. v. Burnett, supra; S. v. Coble, supra,* and *In re Hamilton,* 182 N.C. 44, 108 S.E. 385, had this to say: "From the principles approved in these decisions and in further consideration of the statute and its terms and purpose, it appears that the law primarily conferred upon these juvenile courts the power to initiate and examine and pass upon cases coming under its provisions. That these powers are both judicial and administrative, and when, having acquired jurisdiction, a juvenile court has investigated the case and determined and adjudged that the child comes within the provisions of the law and shall be controlled and dealt with as a ward of the State, this being in the exercise of the judicial powers in the premises, fixes the status of the child, and the condition continues until the child is of age, unless and until such adjudication is modified or reversed by a further judgment of the court itself or by the Superior Court judge hearing the cause on appeal as the statute provides." See also *In re Prevatt,* 223 N.C. 833, 28 S.E. 2d 564.

Applying the provisions of the statute as so interpreted by this Court to the facts found by the judge of the trial court, as set forth in the judgment from which this appeal is taken, it clearly appears that the Domestic Relations Court of Buncombe County (standing in the stead of the Juvenile Court), by the proceedings had on the petition of the Carters in March, 1947, fixed the status of Deanna Blalock, as a ward of the State, which condition continues, and will continue until she is of age, unless and until such adjudication be modified or reversed by a further judgment of the court itself or by the Superior Court judge hearing the cause on appeal as the statute provides.

But the appellants say, in effect, that whatever jurisdiction the Domestic Relations Court obtained over the child by virtue of the order of that court dated 26 March, 1947, no longer exists for several reasons: First, that the order was terminated by the interlocutory order entered by the Clerk of Superior Court of Buncombe County on 2 September, 1947, in the adoption proceeding instituted by the Carters in that that order was a "court order . . . issued to the contrary" within the meaning of G.S. 110-21. This position is untenable. See opinion by *Hoke, J.*, in the *Coston case, supra.* Moreover, the statute expressly declares that the term "court" when used in the Juvenile Courts Act without modification refers to the juvenile courts established as provided therein. G.S. 110-23. See also *In re Hamilton, supra; In re Coston, supra; In re Prevatt, supra.* And since the "power, authority and jurisdiction" of the juvenile courts, G.S. 7-103, is vested in Domestic Relations Courts, the term "court" would refer to the latter.

On the other hand, a proceeding for adoption of a minor child, under the statute pertaining thereto, Chapter 48 of General Statutes, read in connection with the provisions of G.S. 1-7 and G.S. 1-13, is before the Clerk of Superior Court.

And the statute provides that when all the prescribed conditions satisfactorily appear the court "may *tentatively* approve the adoption and issue an order giving the care and custody of the child to the petitioner," and within two years of "the interlocutory order" the court shall complete the proceeding by an order granting letters of adoption, or, in its discretion by an order dismissing the proceeding; that the effect of any adoption so completed shall be retroactive to the date of the application; that during this interval the child shall remain the ward of the court and shall be subject to such supervision as the court may direct; and that the order granting letters of adoption shall state whether for the minority or for the lifetime of such child and shall have the effect forthwith to establish the relation of parent and child between the petitioner and the child. G.S. 48-5.

Here it is noted that the word "tentatively," as used in this statute, is the adverbial form of the word "tentative" which Webster defines "as of the nature of an attempt, experiment or hypothesis to which one is not finally committed; making trial; testing."

It is noted also that the order tentatively approving the adoption is denominated "interlocutory order." Such an order is provisional or preliminary, and does not determine the issues in the action but directs some further proceedings preliminary to a final decree. McIntosh N. C. P. & P., Section 614, p. 686. *Johnson v. Roberson,* 171 N.C. 194, 88 S.E. 231; *Russ v. Woodard,* 232 N.C. 36, 59 S.E. 2d 351.

Indeed, an interlocutory order differs from a final judgment in that an interlocutory order is "subject to change by the court during the pendency of the action to meet the exigencies of the case." See *Russ v. Woodard, supra,* and cases cited.

Thus it appears that the General Assembly has created both Domestic Relations courts and Clerks of Superior Court as separate branches of the Superior Court. To the former is given exclusive original jurisdiction over all cases involving the custody of juveniles, G.S. 7-103, and to Clerks of Superior Courts jurisdiction of proceedings for the adoption of minor children with right, incidental to temporary approval of application for adoption, to "issue an order giving the care and custody of the child to the petitioner." Chapter 48 of G.S. and G.S. 1-7 and G.S. 1-13.

And for the purpose of learning and giving effect to the legislative intention, all statutes relating to the same subject are to be compared and so construed in reference to each other that effect may be given to all provisions of each, if it can be done by any fair and reasonable interpretation. *Alexander v. Lowrance,* 182 N.C. 642, 109 S.E. 639.

In the light of this rule of construction, applied to the two statutes now being considered, we regard it clearly the intention of the General Assembly that the Domestic Relations Courts have the exclusive original jurisdiction in all cases of a child coming within the purview of the Juvenile Court Act and the Domestic Relations Court Act, which, when once acquired, and the status of the child is fixed, continues during the minority of the child.

And we regard it equally clear that the provision in the adoption statute that the court (the Clerk), if it be satisfied that the adoption be for the best interests of the child "may tentatively approve the adoption and issue an order giving the care and custody of the child to the petitioner" during the testing period, so to speak, is provisional, and is not intended to oust the jurisdiction of the Domestic Relations Court in a case involving question of custody of such child.

Secondly, appellants contend that since neither the child nor they, styled adoptive parents, are within the bounds of the State of North Carolina, and are in the State of Illinois, the Domestic Relations Court of Buncombe County, North Carolina, is without power to enforce its adjudication which is an essential to jurisdiction. In taking this position appellants lose sight of the fact that the petition filed by the mother is for the modification of an order of the Domestic Relations Court entered in the exercise of exclusive original jurisdiction acquired over both the mother and the child in a proceeding involving the custody of the child. The power to modify such order is expressly granted to the court by statute, G.S. 110-36, referred to hereinabove with citations of pertinent cases. And the question whether under such statute a court may alter

or modify its decree as to the custody of the children, in the absence of the parent or the child from its territorial jurisdiction, case annotators say, has been resolved, by the great weight of decisions, in favor of the existence of such power in the court. See Annotation 70 A.L.R. 526 of pertinent subject—citing among other cases *Hersey v. Hersey,* 271 Mass. 545, 171 N.E. 815, 70 A.L.R. 518. See also *In re Morris,* 225 N.C. 48, 33 S.E. 2d 243.

Indeed, the appellants are now in court. And the cases of *In re DeFord,* 226 N.C. 189, 37 S.E. 2d 516, and others cited and relied upon by appellants are distinguishable in factual situation.

Thirdly, appellants say "there was no violation of the court order or court jurisdiction when they took the child to their home, etc." As to this, attention is directed to the findings of fact made by the trial court and to the statute G.S. 110-52, a section of Article 4 of Chapter 110 of General Statutes, as rewritten by Section 3 of Chapter 609 of 1947 Session Laws of North Carolina, effective 1 July, 1947, which declares that "no child shall be taken or sent out of the State for the purpose of placing him in a foster home or in a child-caring institution without first obtaining the written consent of the State Board of Public Welfare . . ." The terms "he" or "his" or "him" used in the statute is made to apply to a female as well as to a male. G.S. 110-56.

Moreover, it is provided in G.S. 110-55, a section of Article 4 of Chapter 110 of General Statutes, that "every person acting for himself or for an agency who violates any of the provisions of this Article . . . shall, upon conviction thereof, be guilty of a misdemeanor and punished by fine of not more than two hundred dollars or by imprisonment for not more than six months, or by both such fine and imprisonment."

Lastly, while appellants in the statement of facts in their brief, say that the petitioner commenced this proceeding on 13 January, 1950, that they, appellants, first heard of the existence of this proceeding by a letter which was received some time after 7 February, 1950; that upon discovery that the matter had not been concluded in North Carolina, appellants, on 10 March, 1950, filed a petition for adoption of the child under the laws of the State of Illinois in the County Court of Cook County, Illinois, and that a final adoption decree was entered in which facts were found upon which jurisdiction of the Illinois Court was determined; and that appellee had opportunity to raise the question of Illinois jurisdiction, and upon failing so to do is estopped to deny the jurisdiction of that court.

In this connection it is noted that the Illinois Revised Statutes 1947, Chapter 4, pertaining to adoption of children, in Sec. 1-2 provides that the petition for adoption shall state:

"1. The name, if known, the sex, and the place and date of birth of the child sought to be adopted; and

"2. The name, if known, of the person or organization having the legal custody of the child; and

"3. The name, if known, of each of the parents or of the surviving parent of such child; and whether such parent or parents are or is a minor or otherwise under any legal disability; and

"4. That the child has resided in the home of the petitioners at least six consecutive months immediately preceding the filing of the petition, if such is the fact . . .," and, that "the petition shall be verified by the petitioner."

In the light of this Illinois statute, while the petition states that the child Deanna Blalock was born at Crossnore, Avery County, North Carolina, on 15 December, 1943, and that Mary Blalock, the mother, is the sole legal parent of said child, there is no disclosure of the facts (1) that the child became a ward of the Domestic Relations Court of Buncombe County, North Carolina, in March, 1947, a proceeding involving question of the custody of the child, and that the mother is moving in said court for modification of order made in March, 1947; (2) nor as to the circumstances under which they, the petitioners-appellants, acquired possession of the child; (3) nor as to the assurances given by them in respect to the child; (4) nor as to their removal of the child from North Carolina without, first, having obtained the consent of the State Department of Welfare of North Carolina, or of any court,—facts found by the trial court in present proceeding. Nor is there allegation of facts which would work a change of the domicile of the child.

Moreover, the judgment of the Illinois court indicates upon inspection that it is predicated upon the facts alleged, and there is no finding in respect of the matters so withheld from the petition.

Hence, we hold that the conclusions of law made by the trial court that the child has never lost her domicile in the State of North Carolina and that the purported adoption of the child in the State of Illinois is void and of no effect, are well founded and proper.

The Conflict of Laws, by Joseph H. Beale, Vol. 1, Chapter 2, on the subject of Domicile, declares that every person must have a domicile of origin; that this domicile comes into being as soon as the child becomes at birth an independent person; that this domicile is retained until it is changed in accordance with law; that if the child be illegitimate it takes its mother's domicile, *Thayer v. Thayer,* 187 N.C. 573, 122 S.E. 307; that there can be no change of domicile without an intention to acquire the new dwelling as a home, or as it is often phrased, without an *animus manendi.* Hence "an unemancipated infant, being *non sui juris,* cannot of his own volition, select, acquire, or change his domicile." *Thayer v. Thayer, supra; Duke v. Johnston,* 211 N.C. 171, 189 S.E. 504. See also *Allman v. Register, post,* 531.

Moreover, the Conflict of Laws, *supra,* Vol. 2, on the subject of adoption, states that jurisdiction to adopt would seem to depend strictly on common domicile of both parties, since the status of both is affected.

A judgment obtained in another State may be challenged in this State by proof of fraud practiced in obtaining the judgment which may have prevented an adverse trial of the issue, or by showing want of jurisdiction either of the subject matter or as to the person of the defendant. See *Hat Co. v. Chizik,* 223 N.C. 371, 26 S.E. 2d 871, and cases there cited.

For reasons stated, the judgment below is

Affirmed.

STATE v. STERLING L. HICKS.

(Filed 2 May, 1951.)

1. Constitutional Law § 36—

No person shall be twice put in jeopardy for the same offense.

2. Criminal Law § 21—

Upon defendant's plea of former acquittal, whether the facts alleged in the second indictment, if given in evidence, would sustain a conviction under the first indictment is to be determined by the court; whether the same evidence would support a conviction in each case is to be determined by a jury from extrinsic testimony if the plea of former jeopardy avers facts *dehors* the record showing the identity of the offenses.

3. Same—

Where the plea of former jeopardy avers no facts *dehors* the record showing the identity of the offenses, but merely sets forth the two indictments and the result of the former trial and draws the legal conclusion that defendant was being twice put in jeopardy for the same offense, *held:* the plea is determinable by the court and its refusal to submit issues to the jury as to the identity of the prosecutions is without error.

4. Same—

Acquittal of maliciously conspiring to damage or injure the property of one person will not support a plea of former jeopardy in a prosecution for maliciously conspiring to injure the property of another person, even though the evidence in both prosecutions is virtually the same except as to the ownership of the property.

5. Criminal Law § 12b—

Our courts have jurisdiction of a prosecution for conspiracy if any one of the conspirators commits within the State an overt act in furtherance of the common design, notwithstanding that the unlawful agreement was made outside the State.

6. Property § 2b—

Transformers placed upon the land of another without being physically annexed thereto retain the character of personalty, *a fortiori* where the contract with the landowner specifies they should remain the property of the owner of the transformers.

7. Property § 3—

Evidence tending to show defendant's participation in a conspiracy to damage or injure transformers which the owner had placed upon the land of another without annexation under a contract that they were to remain its property, *held* sufficient to support conviction of conspiracy to injure the personal property.

8. Criminal Law § 81c (4)—

Where defendant is convicted on two counts, and equal concurrent sentences are imposed on each, error relating solely to one count is unavailing on appeal when no error was committed in the trial in respect to the other count.

9. Criminal Law § 42d—

It is competent for a co-conspirator to testify that he was then serving sentence for his offense to forestall a contention on the part of defendant conspirator that the witness was testifying to obtain personal immunity.

10. Criminal Law § 42c—

A soldier witness may testify that he appeared as a witness in obedience to military orders for the purpose of counteracting the implication made by the defense on his cross-examination that he was a hired witness.

11. Criminal Law § 32½—

A witness who has heard defendant talk and who expresses his opinion that the voice he heard on the telephone was that of defendant, may testify as to the telephone conversation, the witness' lack of assurance as to the identity of the speaker going to the weight of the evidence and not to its admissibility, especially where the telephone conversation contains internal evidence tending to identify defendant as the speaker at the other end of the line.

12. Criminal Law § 38c—

Where the evidence tends to show that defendant furnished dynamite to his co-conspirator pursuant to a conspiracy to damage personalty, the State may properly introduce in evidence the dynamite which the co-conspirator found at the place designated by defendant in a telephone conversation and which was in the witness' possession at the time he was apprehended in attempting to consummate the conspiracy.

13. Criminal Law § 81c (3)—

The unsuccessful effort of the solicitor to have a witness identify certain dynamite caps connected with the offense cannot be prejudicial when the dynamite caps are not introduced in evidence.

14. Criminal Law § 32e—

In a prosecution for conspiracy to damage transformers used in connection with a radio station, antecedent threats made by defendant to injure the broadcasting company and his threats and expressions of ill will against the company are competent to show intent and motive.

15. Criminal Law § 40d—

The solicitor may impeach the defendant as a witness by cross-examining him as to antecedent acts of misconduct.

16. Criminal Law § 81c (2)—

Exceptions to the charge will not be sustained when the charge read contextually is free from prejudicial error.

APPEAL by defendant from *Clement, J.*, and a jury, at the January Term, 1951, of MECKLENBURG.

Criminal prosecution for conspiracy tried upon a two-count indictment.

The first count alleges that the defendant conspired "with Chesley Morgan Lovell and other persons to the State unknown" to violate G.S. 14-127 by maliciously committing damage and injury upon the real property of the Duke Power Company, and the second count charges that the defendant conspired "with Chesley Morgan Lovell and other persons to the State unknown" to commit the misdemeanor denounced by G.S. 14-160 by wantonly and willfully injuring the personal property of the Duke Power Company, to wit: "electrical transformers and other equipment of said Duke Power Company . . . located upon and near the property of the Jefferson Standard Broadcasting Company."

The events set forth in the next two paragraphs antedated the trial on the present indictment.

The defendant and Chesley Morgan Lovell made personal appearances at the March Term, 1950, of the Superior Court of Mecklenburg County to answer two consolidated indictments numbered respectively 15,772 and 15,773. Indictment 15,772 charged that the defendant "and Chesley Morgan Lovell and other persons to the State unknown" committed the felony denounced by G.S. 14-50 by conspiring "to wilfully and maliciously injure . . . a building owned by the Jefferson Standard Broadcasting Company, which said building was then and there in actual use by said Jefferson Standard Broadcasting Company for business purposes, by the use of dynamite and other high explosives." Indictment 15,773 contained two counts. The first count alleged that the defendant "and Chesley Morgan Lovell and other persons to the State unknown" conspired to violate G.S. 14-127 by maliciously committing damage and injury upon the real property of the Jefferson Standard Broadcasting Company, and the second count averred that the defendant "and Chesley Morgan Lovell and other persons to the State unknown" conspired to

commit the misdemeanor defined by G.S. 14-160 by wantonly and wilfully injuring the personal property of the Jefferson Standard Broadcasting Company."

Lovell pleaded guilty to the consolidated indictments, and was sentenced to imprisonment. A jury trial was had as to the defendant, who denied guilt. Virtually the same testimony was adduced by both the prosecution and defense at the March Term, 1950, as was presented by them at the trial now under review. The presiding Judge acquitted the defendant upon the second count in indictment 15,773 under G.S. 15-173 by sustaining his motion for a compulsory nonsuit thereon at the close of all the evidence; the jury found the defendant not guilty upon indictment 15,772; and the jury convicted the defendant upon the first count in indictment 15,773, *i.e.*, the count charging a conspiracy to damage the real property of the Jefferson Standard Broadcasting Company. The defendant appealed to this Court from the judgment pronounced against him on the verdict upon the last mentioned count, and won a reversal here solely on the ground that there was a fatal variance between the allegations of that count and the proof. This Court said: "There is a fatal variance between the indictment and the proof on this record. The indictment charges the defendants with conspiring to maliciously commit damage and injury to and upon the real property of the Jefferson Standard Broadcasting Company. The proof is to the effect that they conspired to maliciously commit damage and injury to the property of the Duke Power Company . . . The question of variance in a criminal action may be raised by motion for judgment as of nonsuit, or by demurrer to the evidence . . . The motion for judgment as of nonsuit should have been allowed with leave to the Solicitor to secure another bill of indictment, if so advised." See: *S. v. Hicks, ante,* 31, 62 S.E. 2d 497. After the decision of this Court in the former action was certified to the Superior Court, the present indictment was returned by the grand jury.

Before pleading to the present indictment, the defendant filed a plea of former acquittal, setting forth indictments 15,772 and 15,773 and the present indictment and the result of the former trial, and concluding from these matters that the crimes described in the present indictment are identical with those charged against him in indictments 15,772 and 15,773 and that by reason thereof his acquittal upon those indictments constitutes a bar to the present prosecution. The defendant tendered these two issues: (1) Has the defendant been formerly acquitted of the charge contained in the first count of the present bill of indictment? (2) Has the defendant been formerly acquitted of the charge contained in the second count of the present bill of indictment? He prayed the court to submit the issues to the jury before the submission of the general issue of guilt, and to allow him to offer evidence before the jury on the trial

of the issues to establish the identity of the two counts in the present indictment with the offenses charged in the previous indictments. Judge Clement "refused to submit to the jury the two issues tendered by the defendant . . ., and . . . held, as a matter of law, that there was no former acquittal or former jeopardy involved in this case." The defendant reserved exceptions to the rejection of his plea of former acquittal, and pleaded not guilty to the indictment.

The action was then tried on the merits before a petit jury.

The case made out by the State's testimony is summarized in the next two paragraphs.

The Jefferson Standard Broadcasting Company operates Radio Station WBT, which has offices in the City of Charlotte and a transmission station in a rural section of Mecklenburg County. The transmission station is located on a 19 acre tract owned by the Broadcasting Company, and is operated by means of electric power transmitted to it by the Duke Power Company through a transformer substation situated on the same land at a distance of 730 feet from the transmission station. The transformer substation is maintained and operated by the Duke Power Company, which placed it upon the 19 acre tract under a written contract binding the Jefferson Standard Broadcasting Company and specifying that the four transformers are the property of the Duke Power Company.

The defendant, a resident of Charlotte and a discharged employee of the Jefferson Standard Broadcasting Company, made several statements prior to 12 January, 1950, indicating that he entertained ill will for the Broadcasting Company and desired to put Radio Station WBT out of business. On the late afternoon of that day, he and Chesley Morgan Lovell made an agreement at Jimmy's Cafe near Columbia, South Carolina, whereby Lovell agreed to "blow up the transformers" at the transformer substation situated on the 19 acre tract and whereby defendant agreed to pay Lovell $250.00 for so doing. Seven days later the defendant caused a supply of dynamite to be concealed behind a signboard near Jimmy's Cafe, and notified Lovell of that fact by telephone. Lovell took the dynamite into his possession and carried it from South Carolina to Mecklenburg County, North Carolina, where he entered upon the 19 acre tract under cover of darkness on the night of 21 January, 1950, for the purpose of dynamiting the transformers pursuant to his agreement with the defendant. He was apprehended by peace officers with the dynamite as he approached the transformers, and for that reason was unable to accomplish his object.

The defendant offered evidence tending to show that he was not acquainted with Lovell and did not conspire with him or any other person to do any injury to the property of the Jefferson Standard Broadcasting Company, the Duke Power Company, or any other person.

The jury found the defendant "guilty on both counts set forth in the bill of indictment." The judge decreed that he should be imprisoned as a misdemeanant for two years on each count, but stipulated that the two sentences should run concurrently.

The defendant excepted and appealed, assigning as error the rejection of his plea of former acquittal, the refusal of his motions for compulsory nonsuits, various rulings in respect to evidential matters, and numerous portions of the charge.

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

Ralph V. Kidd and J. C. Sedberry for the defendant, appellant.

ERVIN, J. It is an ancient and basic principle of criminal jurisprudence that no one shall be twice put in jeopardy for the same offense. *S. v. Mansfield,* 207 N.C. 233, 176 S.E. 761. Several criteria have been prescribed by the authorities for determining in diverse situations whether two indictments are for the same offense. The one applicable on the present record is the "same-evidence test," which is somewhat alternative in character. It is simply this: Whether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first indictment (*S. v. Freeman,* 162 N.C. 594, 77 S.E. 780, 45 L.R.A. (N.S.) 977; *S. v. Hooker,* 145 N.C. 581, 59 S.E. 866; *S. v. Hankins,* 136 N.C. 621, 48 S.E. 593; *S. v. Nash,* 86 N.C. 650, 41 Am. Rep. 472; *S. v. Revels,* 44 N.C. 200; *S. v. Birmingham,* 44 N.C. 120; *S. v. Jesse,* 20 N.C. 95), or whether the same evidence would support a conviction in each case. *S. v. Clemmons,* 207 N.C. 276, 176 S.E. 760; *S. v. Bell,* 205 N.C. 225, 171 S.E. 50. See, also, in this connection: 22 C.J.S., Criminal Law, section 279.

Whether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first is always to be determined by the court from an inspection of the two indictments. *S. v. Nash, supra.* Whether the same evidence would support a conviction in each case is to be determined by a jury from extrinsic testimony if the plea of former jeopardy avers facts *dehors* the record showing the identity of the offense charged in the first with that set forth in the last indictment. *S. v. Bell, supra.*

When these rules are laid alongside the case at bar, it is clear that the judge rightly refused to submit to the jury the two specific issues tendered by the defendant and rightly rejected the plea of former acquittal. The plea merely set forth the several indictments and the result of the former trial, and drew the legal conclusion from these bare matters that the defendant was being twice put in jeopardy for the same offense. It did

not aver any facts *dehors* the record showing the identity of the crimes charged in the former indictments with those described in the present one. These things being true, the plea was insufficient, for it revealed on its face the nonidentity of the several offenses. The defendant's legal standing would not be bettered a whit, however, on this phase of the case if his plea of former acquittal had gone beyond the record and invoked the extrinsic testimony. This is so because evidence of a conspiracy to damage or injure property owned or used by the Duke Power Company will not support a conviction of a conspiracy to damage or injure property owned or used by the Jefferson Standard Broadcasting Company. *S. v. Hicks, supra; S. v. Crisp,* 188 N.C. 799, 125 S.E. 543.

This brings us to the question whether the trial judge erred in refusing to dismiss the prosecution on compulsory nonsuits under G.S. 15-173.

The defendant was not entitled to have the action nonsuited on the theory that the crime alleged was committed outside the State. While the conspiracy was formed in South Carolina, one of the conspirators, namely, Chesley Morgan Lovell, committed overt acts in Mecklenburg County, North Carolina, in furtherance of the common design. As a consequence, the Superior Court of Mecklenburg County had jurisdiction to try the action. *S. v. Davis,* 203 N.C. 13, 164 S.E. 737; 22 C.J.S., Criminal Law, section 136. In legal contemplation, a criminal conspiracy is continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. 11 Am. Jur., Conspiracy, section 23.

The defendant advances this additional argument in support of his contention that the trial court erred in refusing to nonsuit the action: The four transformers had been converted into realty by annexation to the land, and by reason thereof belonged to the Jefferson Standard Broadcasting Company. Hence, there was a fatal variance between the indictment charging a conspiracy to damage or injure the property of the Duke Power Company, and the proof showing a conspiracy to damage or injure the realty of the Jefferson Standard Broadcasting Company.

This position is untenable. The transformers were not physically annexed to the land. *S. v. Martin,* 141 N.C. 832, 53 S.E. 874. Moreover, they were placed on the land under a contract with the landowner specifying that they should remain the property of the Duke Power Company. Consequently, the transformers retained the character of personalty. *R. R. v. Deal,* 90 N.C. 110; *Feimster v. Johnson,* 64 N.C. 259. It necessarily follows that the testimony of the State was sufficient to carry the case to the jury and to support the verdict on the second count, *i.e.,* the count charging a criminal conspiracy to injure the personal property of the Duke Power Company.

There was no evidence at the trial, however, to sustain the verdict on the first count, *i.e.*, the count charging a criminal conspiracy to commit damage and injury upon the real property of the Duke Power Company. Nevertheless, the erroneous submission of the first count to the jury is unavailing to defendant unless he shows error affecting the second count. This is true because the jury convicted the defendant on both counts, and the court imposed upon him equal sentences running concurrently on both counts. *S. v. Merritt,* 231 N.C. 59, 55 S.E. 2d 804; *S. v. Warren,* 227 N.C. 380, 42 S.E. 2d 350.

A painstaking examination of the remaining exceptions discloses no prejudicial error affecting the second count.

The testimony of the State's chief witness, Chesley Morgan Lovell, that he was serving a sentence for complicity in the affair under investigation was competent to forestall a contention on the part of the defense that he was testifying for the prosecution to obtain personal immunity. The testimony of the State's witness, Frank Turbeyville, a soldier, that he appeared as a witness at the trial in obedience to orders of his military superior was admissible to counteract the imputation made by the defense on his cross-examination that he was there in the capacity of a hired witness.

The prosecution laid a proper foundation for the introduction of Lovell's evidence as to the telephone conversation in which he was informed of the concealment of the dynamite behind the signboard near Jimmy's Cafe. Lovell had heard the defendant talk, and expressed the opinion that the voice heard on the telephone was that of the defendant. Stansbury: North Carolina Evidence, section 129; *U. S. v. Easterday,* 57 F. 2d 165. Any lack of assurance on Lovell's part as to the identity of the speaker went to the weight of the evidence and not to its admissibility. Stansbury: North Carolina Evidence, section 96. Moreover, the telephone conversation contained internal evidence that the person at the other end of the line was a party to the criminal conspiracy formed a week before. *S. v. Strickland,* 229 N.C. 201, 49 S.E. 2d 469. It was proper for the State to introduce in evidence the dynamite which Lovell found at the signboard immediately after the telephone conversation and had in his possession at the time of his apprehension. The testimony indicated that the dynamite was provided by the defendant to enable Lovell to consummate the conspiracy. 22 C.J.S., Criminal Law, section 712. It is not perceived how the defendant suffered any prejudice through the unsuccessful effort of the Solicitor to have the witness Lovell identify the dynamite caps. *S. v. Coffey,* 210 N.C. 561, 187 S.E. 754. These articles were not received in evidence.

Since the testimony for the prosecution tended to establish that the ultimate object of the conspiracy was to silence Radio Station WBT, the

court rightly received the evidence of the State's witnesses, Fletcher Austin, James B. Patterson, and Alonzo G. Squires, as to antecedent threats of the defendant to injure the Jefferson Standard Broadcasting Company, the owner of the radio station. The same observation applies to the expressions of hostility for the Broadcasting Company contained in the handbill distributed by the defendant and the letter written by him. The threats and expressions of ill will were admissible to show intent and motive. Stansbury: North Carolina Evidence, section 83.

The Solicitor did not transgress legal proprieties in undertaking to impeach the defendant as a witness by cross-examining him as to antecedent acts of misconduct. *S. v. King,* 224 N.C. 329, 30 S.E. 2d 230.

The trial judge did not err in his instructions to the jury. When the charge is read contextually, it is manifest that the court instructed the jury accurately on the law of the case, summed up the evidence of the witnesses correctly, and stated the contentions of the prosecution and defense fairly.

For the reasons given, there is in a legal sense

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 2 May, 1951.)

1. Appeal and Error § 51a—

A decision of the Supreme Court on a former appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal.

2. Same—

Where, in granting a new trial, the Supreme Court expressly holds that the evidence was sufficient to be submitted to the jury, a motion to nonsuit in the subsequent retrial may be properly granted only if the evidence at the retrial varies in some material aspect from that offered on the first trial, and variances, discrepancies, omissions and additions in the evidence upon the second trial cannot justify nonsuit therein when such differences relate solely to minor details and the evidence at both trials is substantially the same.

3. Trial § 22c—

It is the province of the jury to dissolve discrepancies and dispose of contradictions in the evidence and therefore such discrepancies and contradictions cannot justify nonsuit.

4. Evidence § 22—

Much latitude is permitted on cross-examination to test the consistency and plausibility of matters related by a witness on direct examination, and therefore questions which might be improper on direct examination may be permitted upon cross-examination.

5. Automobiles § 18g (4): Evidence § 49—

Testimony of an eyewitness that a bus pulled over far enough to get around a motorcycle traveling ahead of it in the same direction had the motorcycle continued straight ahead, may be upheld as a statement of composite fact and not objectionable as invading the province of the jury by expressing a theoretical opinion about a matter of simple physical fact.

APPEAL by plaintiff from *Bennett, Special Judge,* 8 January, 1951, Extra Civil Term, of MECKLENBURG.

Civil action by plaintiff to recover damages for the alleged wrongful death of her intestate husband resulting from the collision of a passenger bus, driven by the individual defendant for the corporate defendant on a regular run, and a motorcycle which the intestate was riding. Both vehicles were traveling in the same direction on a four-lane highway. The collision occurred while the bus driver was attempting to pass to the left of the motorcycle. The point of collision was near the double lines that mark the center of the highway.

At the close of plaintiff's evidence, the defendants moved for judgment of nonsuit. The motion was allowed, and from judgment based on such ruling, the plaintiff appealed, assigning errors.

Smathers & Carpenter, R. Hoyle Smathers, and Lewis B. Carpenter for plaintiff, appellant.

Robinson & Jones for defendants, appellees.

JOHNSON, J. This case was here at the Spring Term, 1950, on appeal by the defendants from judgment on a verdict in favor of the plaintiff. The decision, sustaining the action of the lower court in submitting the case to the jury and in upholding the verdict and judgment below, is reported in 232 N.C. 244, 59 S.E. 2d 791. Thereafter, upon rehearing, this Court reaffirmed the action of the lower court in holding that the evidence was sufficient to overcome the defendants' motion for nonsuit, but a new trial was granted for errors committed by the trial court in charging the jury. The opinion on rehearing is reported in 232 N.C. 542, 61 S.E. 2d 613.

The case comes back this time on appeal of the plaintiff from judgment as of nonsuit on motion of the defendants at the close of the plaintiff's evidence upon the retrial below.

It is settled law that a decision of this Court on a former appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal. *Pinnix v. Griffin,* 221 N.C. 348, 20 S.E. 2d 366; *McGraw v. R. R.,* 209 N.C. 432, 184 S.E. 31; *Robinson v. McAlhaney,* 216 N.C. 674, 6 S.E. 2d 517.

Where the question of nonsuit has been decided in favor of the plaintiff on a prior appeal, it suffices for the plaintiff on retrial to offer substantially the same evidence. *Clark v. Sweaney,* 176 N.C. 529, 97 S.E. 474; *McGraw v. R. R., supra* (209 N.C. 432). A motion to nonsuit may be resolved against plaintiff only when the evidence on retrial varies in a material aspect from that offered on the first trial.. *George v. R. R.,* 217 N.C. 684, 9 S.E. 2d 373; *McCall v. Institute,* 189 N.C. 775, 128 S.E. 349.

Therefore, it would seem that decision on the instant appeal lies in a narrow compass. It turns on the question of whether the evidence on the retrial was substantially the same as, or materially different from, that adduced at the previous trial. *Clark v. Sweaney, supra* (176 N.C. 529); *George v. R. R., supra* (217 N.C. 684).

We have studied and analyzed the records on both appeals. The physical facts showing location, highway dimensions and markings, weather conditions, and other background facts, with the exception of a few immaterial details, were shown at each trial to have been substantially the same. These background facts are set out in the two former opinions (232 N.C. 244 and 232 N.C. 542) and will not be restated, except in broad outline: The collision occurred on the morning of 9 July, 1947, on Wilkinson Boulevard (U. S. Highway No. 29) between Charlotte and Gastonia, about one hundred fifty feet east of the Berryhill Crossroads intersection. Wilkinson Boulevard is a four-lane highway. The center of the highway was marked with a double line. The north half was marked with a line dividing it into two traffic lanes. The south half was marked with a single line dividing it into two traffic lanes. The highway runs generally east and west. The north half was used for traffic going west toward Gastonia; the south half was used for traffic moving east toward Charlotte. The pavement is about forty-two feet wide. The sun was shining, and the surface of the roadway was dry. Both vehicles,—the motorcycle ridden by the intestate and the bus driven by the defendant Brown,—were traveling westerly toward Gastonia.

At a point about six hundred fifty feet east of the Berryhill Crossroads intersection, on the Charlotte side thereof, both vehicles were observed on the inside passing lane, with the motorcycle a short distance ahead of the bus. From there on, the vehicles traveled a further distance of about five hundred feet, with the bus driver signaling by horn his desire to pass the motorcycle. In the passing movement, which occurred about one

hundred fifty feet east of the Berryhill Crossroads intersection, the two vehicles collided, resulting in the death of plaintiff's intestate.

Decision on this appeal, as on the former one, hinges on the evidence showing the movements of the two vehicles during the last four or five hundred feet traveled,—from the time the bus driver began blowing to pass the motorcycle until in attempting to do so the two vehicles collided. On this crucial phase of the case, we have examined and compared the evidence offered by the plaintiff at each trial. The comparison discloses variances, discrepancies, omissions and some additions, in minor details. But in basic trend and content there is no material difference in the evidence adduced. It is substantially the same.

On both trials the plaintiff relied in large part on the testimony of two eyewitnesses,—George Wallace and Mrs. John LeGette. The defendants point to and rely upon variances in the testimony of these two witnesses as supporting the lower court in nonsuiting the case upon the retrial.

The witness George Wallace was in the Richfield service station side of the highway, drinking a soft drink, when the two vehicles approached from the east. At both trials he testified in effect that he heard a horn blowing like it "was hung up." He "hurried and got done drinking his drink" and went out front "to see what was the matter." When he got out in front of the station he looked toward Charlotte and saw a motorcycle coming, with the bus about thirty-five feet behind; that both vehicles were about five hundred feet away when he first saw them. At the first trial, the witness said the motorcycle was in "the lane next to the center of the highway,—the lane right in the center of the highway." This time he said the motorcycle, when he first saw it, was in the middle of the highway, between the double lines marking the center. On the first trial, he said the man on the motorcycle "pulled back in front of the bus . . .; that when the motorcycle and the bus come together the man slid off on his face . . . The bus never even touched him." On cross-examination before, he said "the motorcycle did cut into the side of the bus . . . and I first said that the motorcycle cut into the left door, and I corrected that to say the right door." This time, he said "I watched them as they came on down the road towards me . . . well the bus went to pull around the motorcycle and the motorcycle pulled out in front of the bus, to the left side. . . . Both of them turned the same direction,—to the lefthand side . . . and when the bus turned to go around the left side, well the motorcycle turned left too, and run right into the front door." Wallace further testified the first time that the tail part of the motorcycle came into contact with the bus,—"The tail part back there," and that then the man slipped off on the left side of his face. He further said on cross-examination this time that the bus did not hit the rear of the motorcycle,

but that the motorcycle ran into the right door of the bus when the bus was pulling over and had pulled over to pass it.

The witness Mrs. LeGette testified each time to what she saw from her position in the bus. She was seated on the second seat from the front, on the right side, but next to the aisle. She was reading a magazine, but looked up when the bus driver started blowing his horn to pass. She looked out through the windshield and saw the intestate on the motorcycle. He was so close that she could see him only from his shoulders up. At both trials she said in effect that the intestate kept moving over toward the left as the bus moved over: "They moved to the left several times. I don't know how many times." At the first trial, she testified she "looked straight out" through the windshield and saw the intestate. This time, she said she was looking out of the "extreme right of the windshield." Before, in describing the actual impact, she said "I just braced myself because I knew it was going to,—and the man on the motorbike turned and looked directly around at us,—just like that—and then it happened." On cross-examination before, she also said "I don't know where he hit." This time, she said the man on the bike "got out just far enough in front of the bus and looked directly around at us and just about the time that he looked around and turned his head, well that's when he hit the side of the bus." Before, she said "I couldn't tell where in the highway the man was at the time the collision took place." This time, she said "I thought the accident happened about in the middle,—center of the highway."

There are other differences and inconsistencies in the testimony of Mrs. LeGette, and also in the testimony of George Wallace and that of other witnesses, but these variations are not material and controlling. This being our over-all appraisal of the evidence, we deem it advisable, in order that neither side may be prejudiced on the next hearing, to refrain from making further detailed comparisons of the proofs offered at the previous trials. It suffices to say that the statement of Mrs. LeGette in describing the impact at the last trial: "Well, that's when he hit the side of the bus," does not perforce withdraw from the jury the plaintiff's theory that the bus driver failed to exercise due care in the passing maneuver, nor is it sufficient, when considered with the rest of the evidence favorable to the defendants, to saddle the plaintiff with contributory negligence as a matter of law. Still stands sufficient evidence to justify a jury verdict either for or against the plaintiff on the issue of negligence, and either for or against her on the issue of contributory negligence. Upon the evidence adduced below, it would seem to be for the jury, and not for the Court, to resolve the discrepancies and dispose of the contradictions in the testimony. *Ward v. Smith,* 223 N.C. 141, 25 S.E. 2d 463; *Edwards v. Junior Order,* 220 N.C. 41, 16 S.E. 2d 466; *Childress v.*

Lawrence, 220 N.C. 195, 16 S.E. 2d 842. The evidence is susceptible of supporting dual, conflicting theories. See *Maddox v. Brown, supra* (232 N.C. 542, pp. 544 and 545).

We refrain from discussing the aspects of the evidence adduced at the last hearing which the plaintiff contends supports inferences tending to strengthen her case. Such matters we leave for the forum below.

We have examined plaintiff's assignment of error challenging a portion of the testimony of the witness George Wallace, elicited on cross-examination, upon the theory that the witness was thereby allowed to invade the province of the jury by expressing a theoretical opinion about a matter of simple, physical fact. The witness was asked on cross-examination: "And (the bus) pulled over enough to get around it (the motorcycle) if it (the motorcycle) had gone straight ahead?" The witness answered, "Yes, sir." On cross-examination much latitude is given counsel in testing for consistency and plausibility matters related by a witness on direct examination. *Bank v. Motor Co.,* 216 N.C. 432, 5 S.E. 2d 318. See also *Perry v. Jackson,* 88 N.C. 103. Besides, the answer here given may be treated, we think, as a "shorthand statement of fact,"—the statement of a composite fact. *Myers v. Utilities Co.,* 208 N.C. 293, p. 295, 180 S.E. 694. The exception is untenable.

However, for error in allowing the motion for nonsuit, the judgment below is

Reversed.

MRS. SARAH McCRAW, WIDOW, AND MRS. MARY McCRAW PREVATTE, DAUGHTER OF JOSEPH E. McCRAW, DECEASED EMPLOYEE, v. CALVINE MILLS, INC., EMPLOYER; LUMBERMEN'S MUTUAL CASUALTY COMPANY, CARRIER, AND S. J. AND HOMER GADDY.

(Filed 2 May, 1951.)

1. Master and Servant § 4a—

A person undertaking a specific job by contract under which he retains control of the manner of doing the work, and the hiring, firing and payment of persons working under him, without being subject to the contractee except as to the result of the work, is an independent contractor, but if the contractee retains the right of control over the manner or method of doing the work, whether exercised or not, the contract creates the relationship of employer and employee.

2. Master and Servant § 55d—

Findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence.

3. Master and Servant § 89b—Evidence held to show that decedent was employee of independent contractor.

The evidence tended to show that the individual defendants contracted to paint the corporate defendant's mill for a specified price in accordance with certain specifications, the corporation being interested only in the result of the work, the individuals retaining complete control over the employment, wages and firing of their employee-painters and the time, place and manner of doing the work, with the exception that the corporation designated the times at which the interior might be painted so as not to interfere with the operation of the mill, and advanced in a lump sum weekly an amount sufficient to meet the payroll, including an amount for the individual defendants which they charged against their anticipated profits. *Held:* The individual defendants were independent contractors liable under the Compensation Act for fatal injury to a painter resulting from an accident arising out of and in the course of the employment, and there is no evidence to sustain a finding that such painter was an employee of the corporate defendant.

4. Same—

Testimony of a partner as to his interpretation of the results which might follow conjectural situations under the contract cannot support a finding that the contract created the relationship of employer and employee rather than that of employer and independent contractor when such partner had no direct dealings in execution of the contract and had no personal knowledge thereof except as shown by the writings which disclosed an independent contract which was so treated by the parties in its practical interpretation in the performance of the work, since the question is not what the witness thought the contract meant but what was agreed upon.

5. Master and Servant § 4a—

The fact that the contractee retains the right to alter the specifications in immaterial aspects or provide for additional work for extra pay does not change the relationship of the parties from that of employer and independent contractor to that of master and servant.

APPEAL by plaintiffs and defendant Homer Gaddy from *Sink, J.*, March Term, 1951, of MECKLENBURG. Affirmed.

This was a claim under the Workmen's Compensation Act by the dependents of Joseph E. McCraw for compensation for his injury and death by accident arising out of and in the course of his employment by defendant Calvine Mills, Inc., or in the alternative by the defendants Gaddy, in the event the latter be determined to be independent contractors under contract with defendant Mills, Inc.

The Industrial Commission found that decedent suffered fatal injury by accident arising out of and in course of employment by defendant Mills, Inc., and that defendants Gaddy, self-insurers, though regularly employing five or more persons, were not independent contractors or employers of decedent under the circumstances here disclosed. Compensa-

tion was awarded the claimants as against defendant Mills, Inc., only, and not against defendants Gaddy. Defendant Mills, Inc., and the plaintiffs appealed to the Superior Court. In the Superior Court the Judge reversed the ruling of the Industrial Commission, being of opinion that there was no competent evidence to support the finding and conclusion that decedent was an employee of defendant Mills, Inc., at the time of his injury. The Judge also held that all the evidence was to the effect that decedent's injury arose out of and in the course of his employment by defendants Gaddy, and accordingly remanded the case to the Industrial Commission for an award in accord with his judgment.

The plaintiffs and defendant Homer Gaddy appealed.

Helms & Mulliss and James B. McMillan for plaintiffs, appellants.

Taliaferro, Clarkson & Grier for defendant Homer Gaddy, appellant.

Smathers & Carpenter for Calvine Mills, Inc., and Lumbermen's Mutual Casualty Company, defendants, appellees.

DEVIN, J. The question presented is whether under the evidence shown by the record Joseph E. McCraw, the decedent, at the time of his death by accident, was an employee of Calvine Mills, Inc., or was an employee of defendants Gaddy while the latter were engaged in work for the corporate defendant under an independent contract. The Industrial Commission found he was an employee of defendant Mills, Inc., while the Judge of the Superior Court adopted the contrary view, holding that decedent was an employee of defendants Gaddy as independent contractors, and not an employee of defendant Mills, Inc.

The definition of independent contractor and the distinction to be drawn between the relationship of independent contractor and that of employee, in cases arising under the Workmen's Compensation Act, have been frequently stated by this Court. *Scott v. Lumber Co.*, 232 N.C. 162, 59 S.E. 2d 425; *Perley v. Paving Co.*, 228 N.C. 479, 46 S.E. 2d 298; *Brown v. Truck Lines*, 227 N.C. 299, 42 S.E. 2d 71; *Smith v. Paper Co.*, 226 N.C. 47, 36 S.E. 2d 730; *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137; *Beach v. McLean*, 219 N.C. 521, 14 S.E. 2d 515; *Gadsden v. Craft*, 173 N.C. 418, 92 S.E. 174; *Denny v. Burlington*, 155 N.C. 33, 70 S.E. 1085. In its simplest form an independent contractor may be said to be one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work. *Perley v. Paving Co.*, 228 N.C. 479, *supra*. When one undertakes to do a specific job under contract and the manner of doing it, including employment, payment and control of persons working with or under him, is left entirely to him, he will be regarded as an independent contractor unless

the person for whom the work is being done has retained the right to exercise control in respect to the manner in which the work is to be executed. *Denny v. Burlington,* 155 N.C. 33, 70 S.E. 1085. The test is whether the party for whom the work is being done has the right to control the worker with respect to the manner or method of doing the work, as distinguished from the right merely to require certain definite results conforming to the contract. If the employer has right of control, it is immaterial whether he actually exercises it. *Scott v. Lumber Co.,* 232 N.C. 162, 59 S.E. 2d 425.

As the findings of fact made by the Industrial Commission must be held conclusive on appeal to the Superior Court and in this Court, if supported by competent evidence (*Vause v. Equipment Co., ante,* 88, 63 S.E. 2d 173), a careful examination and analysis of the testimony presented to the Industrial Commission is in order. The evidence shows these material facts: The defendant Calvine Mills, Inc., is and was at the times referred to engaged in the manufacture of cloth. Desiring to have the mill building painted, it accepted the written proposal of S. J. Gaddy to do this work on the terms set out in the following letter: "For the sum of ten thousand and five hundred dollars ($10,500) we propose to paint the Calvine Mill interior and exterior in accordance with the specifications drawn up by the DuPont Paint Company. You are to furnish all materials, drop cloths, and rigging. We are to furnish all brushes and skilled labor. As work progresses you are to advance weekly payroll. We will assume all responsibility and do A-1 job. Thanking you for this opportunity of quoting you and hoping to be awarded this work. (Signed) S. J. Gaddy."

The defendant Mills, Inc., was to make advancements on the contract to enable defendants Gaddy to meet their payrolls. The mill being in operation, it was understood that the painting on the inside of the building should be done at such times and places as would not interfere with the operation of the mill, and that this would be done on Saturdays and Sundays when the mill was usually closed. S. J. Gaddy and his son Homer Gaddy, who became interested with him, carried out this painting contract, employing a number of painters ranging from four on some days to twenty or more on week ends. Homer Gaddy kept the time of the employed painters, and each week obtained from defendant Mills, Inc., in a lump sum an amount sufficient to pay the wages of the workmen including an amount for the two Gaddys which they charged against their anticipated profits on the contract. The decedent McCraw was one of the painters on the job, employed by and carried on Gaddys' payroll, and had been so employed four or five weeks before his death. S. J. Gaddy had been for many years a painting contractor and painter but had retired from active work until he made this contract. Homer Gaddy had

been engaged for a number of years in the painting business with his son, brother and cousin.

S. J. Gaddy testified that he made the contract to paint the mill according to the specifications for $10,500, and to furnish all the labor, brushes and ladders; that he and Homer Gaddy did the job according to specifications in a satisfactory manner and were paid the contract price. "He (the mill superintendent) did not give us any orders or instructions. . . . There was no change in the specifications except when we got through the superintendent had an additional room and asked us about it. That was additional work and we got paid for it." On request and as an accommodation a certain pipe in the mill was painted red. "Nobody at the mill told us how to hire or fire; they never told us how much to pay anybody; they never told us how to work and how not to work. My son and I exercised all the control over employees. Nobody else controlled them in any way. I did not recognize any right on the part of the mill to give any different orders or instruction other than that contained in the letter, other than the specifications we had to work by. Other than that I did not recognize any right on the part of the mill to give me further orders."

Homer Gaddy testified for the plaintiffs that he participated with S. J. Gaddy in making the estimates for the work. This was based on the plans and specifications furnished by defendant Mills, Inc., and it was to be done in accordance with specifications drawn up by the DuPont Paint Company. He said the mill was to furnish the paint and all materials, including drop cloth and rigging, while he and S. J. Gaddy were to furnish skilled labor and all brushes and ladders. "We assumed all responsibility and were to do an A-1 job." He testified that in compliance with the contract he and his father employed the painters, put them on "our" payrolls and paid them. Neither of them was on the mill's payroll, nor were any of the painters they employed. "The mill didn't know who was on our payroll." Joseph McCraw, the decedent, had previously worked for S. J. Gaddy on a number of occasions. No one at the mill knew anything about his employment. Neither S. J. Gaddy nor Homer Gaddy used a brush. They directed the work of the painters.

Homer Gaddy further testified: "We employed the men and told them where to work, when to begin work, what place to work at, what work to do. We exercised all the control over the men that was exercised while they were at work. Nobody at the mill attempted to tell us what men we worked. We decided where the men were to work. The superintendent would tell me where I could work. He would tell us we could work in a certain room. I told my men when to go to work, and how to do the work, and what to do, and then I told them when to quit, and I kept their time

and paid them, and the mill didn't care whether we worked any single men or we didn't work a certain man. The only thing the mill looked for was an A-1 job finished in the agreed time. They weren't caring whether we worked three men, six men or twenty men. We worked as many men as we wanted to. No one had anything to do with that but me and my father. . . . We had the right to fire these men if they didn't work properly, and no one but my father and myself had the right to fire them. My father and I were the men that agreed with these men as to the rate of pay. We agreed with each painter as to his rate of pay. . . . The only instructions we got from the mill was the plans and specifications, and they would tell us from one day to the next what sections of the mill we could work in. They never told us who to work, or when to work there."

This evidence produced by the plaintiffs would seem to satisfy in all respects the definition of an independent contractor. *Hayes v. Elon College, supra.* S. J. Gaddy and Homer Gaddy were engaged in a separate and independent business, to wit, that of painting contractors, which required independent use of the special skill, knowledge and experience incident to that business. They were not in the employ of the mill, except for this contract, and were not subject to discharge as such. They were free to use such workmen painters and as many or few as they saw fit, with full control over them as to hiring and firing, wages and hours, times and places. S. J. Gaddy and Homer Gaddy were subject only to the terms of the contract and the specifications forming a part thereof. Any changes in the contract or specifications were matters of agreement between the contracting parties, and any additional work was to be done and paid for as should be agreed upon.

But the plaintiffs rely for reversal of the ruling below upon certain other testimony given by the witness Homer Gaddy, over objection, which we quote, as follows:

"Q. As far as you were concerned, Mr. Gaddy, the mill superintendent or the mill owner or the general manager, they had the right to make requests of you as to the manner in which you did the work, didn't they? A. Absolutely.

"Q. As far as you were concerned in doing that job, you recognized their right to tell you how to do it? A. Absolutely.

"Q. And they did have the right under your agreement to prescribe the way and manner in which you did that job? A. Yes, sir.

"Q. Or make changes in the specifications as they saw fit as the job went along? A. Yes, sir.

"Q. Or tell you to knock off work in a particular room so they could do whatever they wanted to do there? A. Yes, sir.

"Q. Or to prescribe the hours that your men would be permitted to paint overhead before they would resume operation of the machinery? A. Yes, sir."

It will be noted, however, that Homer Gaddy did not make the contract though he figured with S. J. Gaddy, his father, as to the cost and price proposed, and afterward became a partner with S. J. Gaddy in supervising the performance of the contract and sharing in the profits. He testified he had had no direct dealings with any of the mill officials, except to obtain weekly checks with which to pay his painters for their work, and that the letter of S. J. Gaddy and its acceptance by the mill, and the plans and specifications called for constituted the entire contract. He had no personal knowledge of the contract except as shown by these writings. Hence his quoted testimony elicited under examination would seem to set forth merely what he regarded as the effect of the contract, and his interpretation of the results which might follow conjectural situations. The question posed for us is to be determined not by what this witness thought the contract meant, but by what was agreed upon. *Overall Co. v. Holmes,* 186 N.C. 428, 119 S.E. 817. That the contracting parties could alter the specifications in immaterial respects or provide for additional work for extra pay would not change the relationship of the parties or make the employees of S. J. and Homer Gaddy employees of the mill. The fact that no control over the details of the work or of the employees of Gaddy was in fact exercised by the mill would indicate the practical interpretation of the contract by the parties thereto as one providing for an independent employment. *Smith v. Paper Co., supra.*

We conclude that the portions of the testimony of Homer Gaddy relied on by the plaintiffs, if competent, are not controlling so as to give decisive character to the relationship of the parties, and that the evidence as a whole presents an unmistakable picture of an independent contract for painting defendant's mill, and that the decedent at the time of his accidental injury and death was not an employee of defendant Calvine Mills, Inc., but of the defendants Gaddy.

The judgment of the Superior Court is

Affirmed.

MRS. JANE V. ALLMAN v. THURMAN BURNETT REGISTER, SR.

(Filed 2 May, 1951.)

1. Divorce § 21—

Where decree of divorce of another state awards the custody of the minor children of the marriage, our court has no jurisdiction in a proceeding under G.S. 50-13 to award the custody of the children except in conformity with the decree of the sister state unless the children are domiciled in this State at such time.

2. Domicile § 2—

While the domicile of unemancipated children is ordinarily that of their father during their minority, where the father abandons his wife and children or the parents are separated by judicial decree or divorce which awards the children's custody to the mother, the children's domicile follows that of the mother.

3. Domicile § 1—

The place of children's residence and the place of their domicile may not be the same.

4. Domicile § 2: Appeal and Error § 40d—

Where it affirmatively appears from the record that the husband had abandoned his wife and children and that the children had continuously thereafter lived with their mother in another state except for brief periods when they were permitted to visit their father in this State, the children's domicile is in such other state, and a finding by our court upon the record that the domicile of the children was in this State is a conclusion of law and not binding on appeal.

5. Domicile § 2—

An unemancipated infant cannot, of its own volition, select, acquire or change its domicile.

6. Divorce § 21: Constitutional Law § 28—

Where a court of another state has jurisdiction over the parties and the minor children of the marriage, its divorce decree granting the custody of the children of the marriage to their mother is binding on our courts under the full faith and credit clause of the Federal Constitution and the only forum in which such decree can be modified is the court in which the decree was entered.

7. Divorce §§ 20, 21: Constitutional Law § 28—

Where a court of a sister state, having jurisdiction of the parties and the children of the marriage, has entered a decree for divorce awarding custody of the children to their mother with direction that the father contribute to their support, and the mother and the children continue to be domiciled in such other state, our courts have jurisdiction to award the custody of the children only in accordance with such foreign decree and may render judgment for past due and unpaid installments for the support

and maintenance of such children, but not for the payment of future installments.

APPEAL by plaintiff from *Crisp, Special Judge*, December Term, 1950, of MECKLENBURG.

This is a special proceeding instituted pursuant to the provisions of G.S. 50-13, for the custody of Nancy Ann Register and Thurman Burnett Register, Jr.

It was agreed by the parties that the trial judge would hear the case upon the affidavits, letters and oral testimony of the parties, find the facts and enter his conclusions of law.

The pertinent facts are as follows:

1. That plaintiff and defendant intermarried in the City of Richmond, State of Virginia, on 14 September, 1934, and two children were born of the marriage, to wit, Nancy Ann Register on 11 October, 1937, and Thurman Burnett Register, Jr., on 12 April, 1940.

2. That the plaintiff has always lived in the State of Virginia, except for two years when she and her children resided with the defendant in Wilmington, North Carolina, from the fall of 1941 until the fall of 1943.

3. That plaintiff instituted an action for an absolute divorce against the defendant in the Circuit Court of Henrico County, Virginia, on or about 15 May, 1947, in which action she prayed the court to award her the custody and care of the aforesaid children, and further asked for an order directing the defendant to pay a sufficient sum of money for the support of said children; that at the time of the institution of such action the defendant was a citizen and resident of said Henrico County, Virginia, and was personally served with summons in said divorce action and with a Notice to Take a Deposition in connection therewith on 16 May, 1947. The Bill of Complaint which was subsequently filed by the plaintiff was not personally served on the defendant.

4. That the defendant failed to answer or demur to the Bill of Complaint, and on 7 July, 1947, a decree granting an absolute divorce to the plaintiff was entered on the ground that the defendant had deserted and abandoned her, in March, 1945, and the decree further awarded the full care and custody of Nancy Ann Register and Thurman Burnett Register, Jr., to the plaintiff, and ordered the defendant to pay to the plaintiff the sum of $20.00 per week, beginning as of 30 June, 1947, for the maintenance and support of the two said children until further orders of said court.

5. That according to the allegations in plaintiff's complaint and affidavit in support thereof, the defendant at the time this proceeding was instituted was in arrear in his payments under the above order in the sum

of $1,540.00, and that the decree of the Circuit Court of Henrico County, Virginia, has not been modified.

6. That on 9 July, 1949, the plaintiff intermarried with one Carl F. Allman, and she and her present husband reside with her mother on a 35-acre farm in Henrico County, near the City of Richmond, Virginia, where she and her children have lived since the fall of 1943.

7. That the defendant has remarried and now lives with his wife and her 14 year old son by a former marriage, in Charlotte, North Carolina.

8. That pursuant to an agreement between the plaintiff and defendant, the children in question were permitted to visit their father in Charlotte, North Carolina, during the summer vacation seasons of 1948, 1949 and 1950; that prior to 1950 the children were returned to Richmond each summer in time to enter school in the fall, but in 1950, the father refused to permit the children to return to Virginia, hence the institution of this proceeding.

The court found as a fact "that the home of the defendant is a suitable and desirable place for the rearing, care and supervision of the aforesaid minor children; that the said children are receiving proper religious and moral training." No finding was made in respect to the fitness of the mother or her ability to provide for her children. The plaintiff's evidence, however, was ample to show that she is a good mother and a woman of excellent character; that she and her folks have provided a comfortable home for these children and have heretofore made adequate provision for their education and religious training.

On the above facts the court below held that these children, at the time of the institution of this proceeding, "were living with and residing with the defendant and were residents of North Carolina"; and further held that the decree as to the custody of these children, entered in the Circuit Court of Henrico County, Virginia, was not binding on the courts of North Carolina, and awarded the care, custody and control of the children to the defendant.

The plaintiff appeals and assigns error.

Charles W. Bundy for plaintiff.
Ray S. Farris and Hugh M. McAulay for defendant.

DENNY, J. The question of the fitness or unfitness of the plaintiff to have custody of her children was not an issue in the hearing below. The validity of the judgment, from which she appeals, depends on whether the children involved herein were domiciled in North Carolina at the time this proceeding was instituted. It must be conceded that unless the children were domiciled in this State at such time, the court below was without jurisdiction to award their custody, except in con-

formity with the decree theretofore entered in the Circuit Court of Henrico County, Virginia. *Burns v. Shapley,* 16 Ala. App. 297, 77 So. 447; *Peacock v. Bradshaw,* 145 Texas 68, 194 S.W. 2d 551; Conflict of Laws, by Beale, Vol. II, Sec. 144.3, p. 717.

Ordinarily the domicile of an unemancipated child, during its minority, follows that of the father. *Thayer v. Thayer,* 187 N.C. 573, 122 S.E. 307; *In re Means,* 176 N.C. 307, 97 S.E. 39; *Yarborough v. Yarborough,* 290 U.S. 202, 78 L. Ed. 269, 90 A.L.R. 924; 17 Am. Jur., Domicile, Sec. 57, p. 625; 28 C.J.S., Domicile, Sec. 12, p. 21. However, where parents are separated by judicial decree or divorce and the custody of a child is awarded to the mother, or where a father abandons the mother and child, the child's domicile follows that of the mother. 28 C.J.S., Sec. 12 (2), p. 21, *et seq.;* 17 Am. Jur., Domicile, Sec. 59, p. 627; Restatement, Conflict of Laws, Sections 32 and 33, pp. 57 and 58; *In re Means, supra; Wear v. Wear,* 130 Kan. 205, 285 Pac. 606, 72 A.L.R. 425; *Moss v. Ingram,* 246 Ala. 214, 20 So. 2d 202; *State v. Peisen,* 233 Iowa 865, 10 N.W. 2d 645. And it should be kept in mind that a child may reside in one place and its domicile may be in another. *Duke v. Johnston,* 211 N.C. 171, 189 S.E. 504; *Sheffield v. Walker,* 231 N.C. 556, 58 S.E. 2d 356.

It affirmatively appears from the record that the defendant abandoned his wife in 1945, and that the children have lived with their mother continuously since that time, except for the brief periods they have been permitted to visit their father, in Charlotte, North Carolina. Therefore, the domicile of these children would have been the same as that of their mother, even though the Virginia Court had not awarded her the custody of them. Restatement, Conflict of Laws, Section 33, p. 58.

Consequently, the purported finding of fact to the effect that these children were residents of North Carolina at the time of the institution of this proceeding, is but a conclusion of law and cannot be sustained on this record.

"An unemancipated infant, being *non sui juris,* cannot of his own volition select, acquire, or change his domicile." *Thayer v. Thayer, supra; In re Reynolds,* 206 N.C. 276, 173 S.E. 789; *Duke v. Johnston, supra; In re Blalock, ante,* 493; *In re Webb's Adoption,* 65 Ariz. 176, 177 P. 2d 222.

There is no contention here that the plaintiff, who is the legal custodian of her children, under the Virginia decree, has become domiciled in North Carolina, as was the case in *In re Alderman,* 157 N.C. 507, 73 S.E. 126, and *Hardee v. Mitchell,* 230 N.C. 40, 51 S.E. 2d 884, decisions upon which the appellee is relying.

Moreover, it appears that the Virginia Court had jurisdiction over the parties to this proceeding, including the minor children involved, at the time the plaintiff's divorce decree was granted and she was awarded the

full care and custody of her children. Therefore, so long as the plaintiff and her children are domiciled in that State, and the decree awarding her the custody of her children remains unmodified, such decree is binding on our courts under the full faith and credit clause of the Constitution of the United States. *In re Biggers,* 228 N.C. 743, 47 S.E. 2d 32; *McMillin v. McMillin,* 114 Col. 247, 158 P. 2d 444, 160 A.L.R. 396; *Cole v. Cole,* 194 Miss. 292, 12 So. 2d 425; *Parsley v. Parsley,* 189 La. 584, 180 So. 417; *Fraley v. Martin* (Texas Civ. App.), 168 S.W. 2d 536; *Ex Parte Mullins,* 26 Wash. 2d 419, 174 P. 2d 790; 27 C.J.S., Divorce, Sec. 329, p. 1284. And the only forum in which the decree awarding custody of these children to the plaintiff may be amended or modified, is the court in which the decree was entered. *Howland v. Stitzer,* 231 N.C. 528, 58 S.E. 2d 104.

In cases like this, our courts are open for the purpose of obtaining custody of children, in accordance with the general law or a valid and binding court decree of a sister state, where such state is the domicile of the children; and, likewise in order to obtain a judgment for any past due and unpaid installments due under such decree, for the support and maintenance of such children. *Burns v. Shapley, supra; Bradley v. Bradley,* 309 Ky. 28, 214 S.W. 2d 1001; *Hatrak v. Hatrak,* 206 Miss. 239, 39 So. 2d 779; *Conwell v. Conwell,* 3 N.J. 266, 69 A. 2d 712; *Boyer v. Andrews,* 143 Fla. 462, 196 So. 825. But our courts are neither authorized nor required, under the full faith and credit clause of our Federal Constitution in such cases, to render judgment for the payment of future installments for the support of such children in conformity with a decree of a sister state in which the cause has been retained for further orders of such court. The law in this respect is similar to that which applies to the payment of future installments of alimony under a decree of a sister state. *Willard v. Rodman,* 233 N.C. 198, 63 S.E. 2d 106, and cited cases; *Green v. Green,* 239 Ala. 407, 195 So. 549.

The order awarding the custody of Nancy Ann Register and Thurman Burnett Register, Jr., to the defendant is set aside, and this cause is remanded for further proceedings in accord with this opinion.

Error and remanded.

NEW AMSTERDAM CASUALTY COMPANY, A CORPORATION, v. C. P. WALLER.

(Filed 2 May, 1951.)

1. Indemnity § 1—

While ordinarily a contract of indemnity refers to and is founded upon another contract, either existing or anticipated, between the indemnitee and a third party, it requires only the two parties of indemnitor and indemnitee and is an original promise by the indemnitor to the indemnitee to make good and save the indemnitee harmless from loss sustained by default or miscarriage of a third party when established by unsuccessful efforts by the indemnitee to collect from him, and creates no obligation to the third party, or to perform the contract of such third party.

2. Principal and Surety § 1—

A contract of suretyship requires the three parties of principal, surety and promisee or obligee, and is the collateral promise of the surety superadded to that of the principal which constitutes a direct promise to perform the obligation of the principal in the event the principal fails to perform.

3. Indemnity § 1—

An instrument under which one party promises the other party to save such other party harmless from all loss it might sustain by reason of the execution of the performance bond for a construction company in which the first party was a stockholder and also a silent partner in the making of the construction contract, *is held* an indemnity contract and not one of suretyship, and the promise of the indemnitor is an original and direct promise to pay indemnitee loss sustained by it under the performance bond, and further, the interest of the indemnitor in the construction contract was a substantial consideration for the execution of the indemnity agreement.

4. Indemnity § 6: Limitation of Actions § 6 (h)—

An action on an indemnity contract under seal is governed by the ten year, G.S. 1-47 (2), and not the three year, G.S. 1-52, statute of limitations.

APPEAL by plaintiff from *Harris, J.*, July Special Term, 1950; judgment signed 18 November 1950, *nunc pro tunc*, WAKE. Reversed.

Civil action to recover on an indemnity bond.

The Parkersburg Construction Company entered into a contract with the State of West Virginia to do certain construction work specified in the contract.

On 1 June 1938, defendant and other officers and stockholders of the Construction Company, for the purpose of inducing the plaintiff to issue its compliance bond assuring the faithful performance of the contract by the Construction Company and as a consideration therefor, executed and delivered to the plaintiff an indemnity bond in which they agreed to

indemnify and save the plaintiff harmless "from and against any and all loss, cost, claim, demand, liability and expenses of whatever kind or nature which it shall at any time sustain, incur, or be put to, for, by reason, or in consequence of" any fidelity bond plaintiff might execute to assure the faithful performance by the Construction Company of its contract with the State of West Virginia. This policy was under seal.

Thereupon, on 15 June 1938, plaintiff executed and delivered to the State of West Virginia its fidelity bond in the sum of $108,125.80, assuring the faithful performance of said construction contract.

The Construction Company defaulted on its contract by reason of which plaintiff was required to expend the sum of $74,872.24. It thereafter recouped $48,003.91, leaving a net loss of $26,868.33. Its cause of action against the indemnitors on account of said loss accrued in September 1941, and this action was instituted 17 September 1948.

The defendant, in his answer, asserts that in executing said indemnity bond he became a surety for the Construction Company and pleads the three-year statute of limitations, G.S. 1-52.

The parties waived trial by jury, stipulated the essential facts, and submitted the cause to the judge for his decision on the facts agreed. By and with the consent of the parties the court took the case under advisement with the understanding that judgment might be rendered out of term and out of the county.

The court, being of the opinion that plaintiff's cause of action is barred by the pleaded statute of limitations, entered judgment that plaintiff recover nothing and that defendant go hence without day. Plaintiff excepted and appealed.

Bickett & Banks for plaintiff appellant.

W. P. Farthing and Basil M. Watkins for defendant appellee.

BARNHILL, J. The contract sued upon is a contract of indemnity in which the defendant obligates himself to save the plaintiff harmless from any loss it might suffer by reason of its compliance bond issued in behalf of the Construction Company. In executing the same did the defendant become surety for the Construction Company? The court below answered in the affirmative. In this conclusion we are unable to concur.

Contracts of indemnity and of suretyship differ in a number of material repects. In indemnity contracts the engagement is to make good and save another harmless from loss on some obligation which he has incurred or is about to incur to a third party, and is not, as in suretyship, a promise to pay the debt of another. *Somers v. U. S. Fidelity & Guaranty Co.*, 217 P. 746; *Indemnity Co. v. Knott*, 136 So. 474.

A surety is directly and immediately liable for a debt; an indemnitor is liable for the loss established by unsuccessful efforts by the indemnitee to collect from the debtor. *In re Brock,* 166 A. 778. The contract of a surety involves a direct promise to perform the obligation of the principal in the event the principal fails to perform; a contract of indemnity obligates the indemnitor to reimburse his indemnitee for loss suffered or to save him harmless from liability, but never directly to perform the obligation indemnified. *Gill v. Johnson,* 69 P. 2d 1016; *Mahana v. Alexander,* 263 P. 260.

A contract of suretyship requires three parties: the principal, the surety, and the promisee or obligee; while indemnity requires only two: the indemnitor and the indemnitee. *Moore v. Bank,* 264 N.W. 288; 42 C.J.S. 567.

The promise of an indemnitor is original. The promise of a surety is superadded to that of the principal; the first is direct, the second is collateral. *Dozier v. Wood,* 208 N.C. 414, 181 S.E. 336; *Moore v. Bank, supra; Trust Co. v. Cattle Co.,* 286 N.W. 766; 42 C.J.S. 564.

Ordinarily, it is true, a contract of indemnity refers to and is founded on another contract, either existing or anticipated, between the indemnitee and a third party, and the indemnitor covenants to protect the indemnitee from any loss he may incur as a party to such other contract. Yet it is not a contract to answer for the contractual debt, default, or miscarriage of one other than the promisee, but a contract to make good the loss resulting from such debt, default, or miscarriage. *Blades v. Dewey,* 136 N.C. 176; *Howell v. Com'r. of Int. Rev.,* 69 F. 2d 447; *Peterson v. Nelson,* 252 P. 368; *Land Co. v. Handle,* 171 A. 520.

A policy of fidelity insurance insuring an employer against loss on account of the peculations of an employee, or a political agency against the defalcation of an officer is a contract of indemnity. The promisor contracts to make good the loss occasioned by the breach of faith by another. Yet no one would seriously contend that the promisor is a surety and not a principal.

It follows that the contract sued upon is an original agreement executed on an independent consideration and the defendant promisor is a principal. The ten year statute of limitations, G.S. 1-47 (2), is controlling. *Crane Co. v. Longest & Tessier Co.,* 177 N.C. 346, 99 S.E. 8; *Chappell v. Surety Co.,* 191 N.C. 703, 133 S.E. 21; *Garren v. Youngblood,* 207 N.C. 86, 176 S.E. 252; *Coleman v. Fuller,* 105 N.C. 328; *U. S. v. Mitchell,* 74 F. 2d 571.

We do not mean to say that the maker of a contract of indemnity is in all events a principal; that under no condition is he a surety. When, however, the promisor has a personal, immediate, and pecuniary interest in the transaction in which the third party is the original obligor, the

courts will always give effect to the promise as an original and direct promise to pay.

Here, the defendant was not only a stockholder of the Construction Co. having a direct and immediate pecuniary interest in its contract with West Virginia, he was also a silent partner of the Construction Company in making that contract. It is so stipulated in his indemnity agreement. As such he was and is originally, directly, and primarily liable for the payment of the debts of the partnership. Such interest and liability on his part was a substantial consideration for the execution by him of the contract sued upon.

The judgment below is

Reversed.

ELIZABETH PAGE ERICKSON ET AL. v. H. C. STARLING ET AL.

(Filed 2 May, 1951.)

1. Pleadings § 19b—

Where there is a misjoinder of parties and causes the court is without authority to order a severance but must sustain defendants' demurrer. G.S. 1-132.

2. Trusts § 24—

Trustees may not profit individually from a trust estate to the detriment of the *cestuis*, and are required to exercise their control of the trust corporation and subsidiaries controlled by it for the benefit of the *cestuis* and not for their personal profit.

3. Same: Pleadings § 19b—Cestuis may join in one action trustees and all parties knowingly participating in alleged maladministration of trust.

Plaintiffs alleged that they were beneficiaries in a trust consisting of the controlling stock in a corporation, which corporation owned or controlled two subsidiary corporations. Plaintiffs instituted this action to remove the trustees and for an accounting, alleging dereliction of the trustees and maladministration of the trust, including the transfer to one of the trustees personally for an inadequate consideration stock in one of the subsidiaries, so that control of the subsidiary passed from the trustees in their fiduciary capacity. *Held:* Plaintiffs are entitled to investigate in a single action the entire ramifications of the alleged maladministration and maintain the action against the trustees and their confederates, corporate and individual, with a view to an accounting from all who knowingly participated in the derelictions and maladministration or profited therefrom, and defendants' demurrer thereto on the ground of misjoinder of parties and causes was correctly overruled. G.S. 1-123.

4. Equity § 1—

Equity regards the substance and not the form.

ERICKSON *v.* STARLING.

APPEAL by defendants from *Bone, J.*, March Term, 1951, of WAKE.

Suit in equity to remove trustees, for an accounting, and to fix liability and losses for alleged derelictions and maladministration.

The complaint alleges that on 18 June, 1942, B. F. Page, then the owner of 400 shares of the common stock of W. H. King Drug Company, represented by two certificates of 200 shares each, transferred the same to three named trustees in trust for the benefit of his two daughters, plaintiffs herein, and their distributees, upon the trusts therein set out, for a period of twenty-five years, or "Until the 18 day of June 1967," and charged the trustees with certain specific duties and obligations in respect of handling the trust properties and distributing the dividends derived therefrom.

These 400 trust shares constitute the controlling interest or 61% of the outstanding stock of the W. H. King Drug Company.

At the time of the creation of the trust, the Peabody Drug Company was, and still is, a wholly owned subsidiary of W. H. King Drug Company, which parent company also owned 53% of the capital stock of Carolina Surgical Supply Company until 31 December 1947, when the defendant trustees permitted a transfer of 100 shares of this company's stock, 50 shares being transferred to trustee H. C. Starling personally. It is alleged that this sale of 50 shares of stock to H. C. Starling in the Carolina Surgical Supply Company at a wholly inadequate price was wrongfully and fraudulently allowed and ostensibly permitted the control of the corporation to pass from the trustees to others but in reality to the trustees individually.

It is further alleged that huge profits have been made by all three of the named corporations; that the trustees, individually, have profited therefrom in the form of "salaries" and "bonuses" as directors and officers, and that the plaintiffs have been paid a mere pittance in the form of dividends on their stock in the W. H. King Drug Company.

Wherefore they ask for the removal of the trustees, for an accounting, and for judgment fixing the liability of the defendants.

Demurrers interposed by each of the defendants on the dual grounds of misjoinder of parties and causes of action. From judgment overruling the demurrers, the defendants appeal, assigning errors.

Lassiter, Leager & Walker for plaintiffs, appellees.

Smith, Leach & Anderson and James K. Dorsett, Jr., for defendants, appellants.

STACY, C. J. While the complaint in this action contains 80 separate allegations and covers 22 pages of the record, in its final analysis the case

comes to a very narrow compass. Is there a misjoinder of parties and causes of action? The trial court thought not, and we approve.

It is readily conceded that a misjoinder of parties and causes of action in the same complaint is demurrable, and the court is without authority, in such case, to order a severance of the causes of action for trial under the provisions of G.S. 1-132. *Teague v. Oil Co.*, 232 N.C. 65, 59 S.E. 2d 2; *Rose v. Warehouse Co.*, 182 N.C. 107, 108 S.E. 389.

All the plaintiffs are trying to do here, however, is to follow the 400 shares of stock placed in trust by their father for their use and benefit. It constitutes the controlling interest in the W. H. King Drug Company.

The trustees are charged with its use and management. Undoubtedly it reaches into the wholly-owned subsidiary Peabody Drug Company, and under the allegations of the complaint it would seem that the Carolina Surgical Supply Company is a proper, if not a necessary, party to the proceeding. *Farmers L. & T. Co. v. Pierson*, 222 N.Y.S. 532; *Rossi v. Davis*, 345 Mo. 362, 133 S.W. 2d 362, 25 A.L.R. 1111. There is much more in the complaint, but this is the heart of the matter.

The case is not unlike *Jarrett v. Green*, 230 N.C. 104, 52 S.E. 2d 223, where plaintiff's counsel aptly said: "We are entitled to pursue the hunt so long as we can track the fox; and not until we lose the trail are we obliged to abandon the chase, call our dogs and go home."

Trustees are not permitted to profit individually from the trust estate to the detriment of the *cestuis*. This is the gist of the allegations in the instant case. Having been given the controlling interest in the W. H. King Drug Company in trust for the benefit of the plaintiffs, it was and is the duty of the trustees to use such control of the parent company and also of the companies controlled by it, not for their personal profit, but for the use and benefit of the plaintiffs. The complaint seeks to bring in the trustees and their confederates, corporate and individual, with a view to an accounting from all who have participated in the derelictions and maladministration of the trustees or profited therefrom. This would seem to result in no misjoinder of parties and causes of action in excess of the permissible provisions of G.S. 1-123 or in opposition to the pertinent decisions on the subject. *Leach v. Page*, 211 N.C. 622, 191 S.E. 349; *Daniels v. Baxter*, 120 N.C. 14, 26 S.E. 634; *Va.-N.C. Chemical Co. v. Floyd*, 158 N.C. 455, 74 S.E. 465; *Bundy v. Marsh*, 205 N.C. 768, 172 S.E. 353. Trustees may not cover up their machinations by the use of corporate forms or camouflage of any kind. The arm of equity is neither short nor palsied when it comes to dealing with fraud; nor is judicial process or privilege intended to be used as a shield against ferreting it out or to stay the day of reckoning and judgment, but rather to be employed, as contemplated, in a single action for investigation of the whole scheme and the unravelling of its ramifications. Equity regards substance not

form, and corporate identity offers no bar to its pursuit of the "plumb-line" of right dealing and fair accounting. Amos. 7:8; *Mills v. Mutual B. & L. Assoc.*, 216 N.C. 664, 6 S.E. 2d 549; *Unemployment Compensation Com. v. Coal Co.*, 216 N.C. 6, 3 S.E. 2d 290; *Fisher, Et Al. v. So. Loan & Trust Co.*, 138 N.C. 224, 50 S.E. 659.

Up to now, the case rests only in allegation. The defendants have not yet answered. They may have a different story to tell. The question presently presented is the propriety of joining all the matters set out in a single complaint. The trustees are charged with maladministration of the trust estate, and the plaintiffs are seeking to follow the estate and to hold the trustees responsible and those who have knowingly participated in and profited from such maladministration, which would seem to be their right. *Branch Banking & Trust Co. v. Peirce,* 195 N.C. 717, 143 S.E. 524.

In *Young v. Young,* 81 N.C. 92, it was held (as stated in the first headnote): "Where a general right is claimed arising out of a series of transactions tending to one end, the plaintiff may join several causes of action against defendants who have distinct and separate interests, in order to a conclusion of the whole matter in one suit." And it has been held that in such case the share of each, in causing the total loss, may be separately measured and assessed in one action. *Long v. Swindell,* 77 N.C. 176.

The rulings on the demurrers will be upheld.

Affirmed.

STATE v. FLAKE MULLIS.

(Filed 2 May, 1951.)

1. Criminal Law § 41e—

The demeanor of a witness on the stand is always in evidence.

2. Criminal Law § 50f—

The solicitor has the right, within reasonable limits, to draw relevant inferences from and comment on the demeanor of a witness.

3. Criminal Law § 53k—

The trial court may properly give the contentions of the State upon relevant inferences reasonably deducible from the demeanor of a witness.

4. Criminal Law § 81b—

Where the record does not show to the contrary, it will be presumed that the procedure in the lower court was regular and free from error.

5. Criminal Law § 78e (2)—

Objection to the statement in the charge of a legitimate contention of the State cannot be raised for the first time on appeal, it being incumbent upon defendant in apt time to have challenged the contention or requested a counter contention on his own behalf.

6. Rape § 25—

Evidence *held* sufficient to support conviction of assault on a female with intent to commit rape.

APPEAL by defendant from *Phillips, J.*, and a jury, at January Term, 1951, of IREDELL.

Criminal prosecution tried upon an indictment charging the defendant with rape of one Mary Emily Mullis. When the case was called, the Solicitor announced in open court that the State would not ask for a verdict of guilty of rape but would ask for a verdict of guilty of an assault with intent to commit rape or guilty of an assault on a female.

The State's evidence discloses that at the time of the events which led to the indictment the prosecuting witness, Mary Emily Mullis, age thirty-three, was living with and keeping house for her father, Richard Mullis, at his home out in the country from Statesville. On Saturday afternoon, 5 November, 1949, at about 5 :30 or 6 :00 o'clock, the defendant went to the home of the prosecuting witness and her father. The defendant invited the father to go with him to get some beer. They left together and returned about an hour later. Both were drinking, and the defendant had a bottle of liquor, from which both continued to drink,—the father more freely than the defendant. Finally the father became highly intoxicated and was put to bed by the defendant. When the defendant returned to the living room he cut the light off, caught hold of the prosecuting witness, and threw her on a couch. He then, in spite of her protests and physical resistance, "half dragged and half carried" her to the bed and, as she put it, "He held me and took off my pants and got on top of me. I tried to pull his hands off me and let me alone, but he would not do it." The evidence further tends to show that the defendant partially penetrated the female organs of the prosecuting witness, but when she exclaimed that she was in great pain he desisted and did not complete the sexual act. She was carried to the hospital the next afternoon. She discharged blood from her female organs for a day and a half. Dr. F. L. Carpenter, who examined her at the hospital, testified that "she had a tear in the vaginal mucous membrane around the opening of the vagina, and the hymen was torn. It was a recent tear and was bleeding slightly. . . . The hymen is a membrane that goes across the opening of the vagina, and is usually torn at the first intercourse." The prosecuting witness told her brother and sister of the occurrence when they came to

the house the next afternoon. It was then that she was taken to the hospital.

The defendant went upon the witness stand and denied assaulting the prosecuting witness. He said that his intimacies with her resulted solely from her own advances and solicitation; that she first embraced him and then freely went to bed with him; that they remained in bed together until about 1:30 o'clock a.m.; that the reason he did not have intercourse with her was because he was too drunk; that other families lived nearby, —one within one hundred and fifty yards, and she made no outcry.

Verdict: Guilty of an assault on a female with intent to commit rape.

Judgment: Imprisonment in the State's prison for a term of not less than two and one-half years nor more than five years.

The defendant appeals, assigning errors.

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

J. G. Lewis and R. A. Hedrick for defendant, appellant.

JOHNSON, J. The defendant places chief emphasis on a group of exceptions to the charge of the court,—all relating to the action of the court in giving, and in repeating, the State's contention that the prosecuting witness, Mary Emily Mullis, was a woman of subnormal mind. The defendant made no objection in the court below. The challenge comes for the first time on appeal. The defendant takes the position that the contention as given may be held for error notwithstanding the absence of objection in the court below, for that: (1) the contention is unsupported by testimony; and (2) it relates to a matter material to the issue. He cites and relies upon the decisions in *S. v. Buchanan*, 216 N.C. 34, 3 S.E. 2d 273, and *S. v. Wyont*, 218 N.C. 505, 11 S.E. 2d 473. The exceptions are without merit, and the authorities cited by the defendant are distinguishable.

An examination of the charge indicates that the court did not rest the challenged contention on any assumption that it was supported by testimony. The contention as given was expressly based upon the demeanor and appearance of the witness while upon the witness stand and in court. That this is so is made clear by the following preliminary statement of the trial judge: "The State insists and contends . . . that from her demeanor, her actions, appearance, and the way and manner in which she testified, that you should find that she was a woman not of normal mental faculties but had a backward and subnormal mind;" . . .

Here, the demeanor of the witness, as is always the case, was in evidence. Wigmore on Evidence, 3d Ed., Vol. III, Sec. 946, p. 498. See also *Herndon v. R. R.*, 162 N.C. 317, bot. p. 318, 78 S.E. 287; *Ferebee v.*

R. R., 167 N.C. 290, top p. 296, 83 S.E. 360. Accordingly, the Solicitor had the right, within reasonable limits, to draw inferences from and comment on the demeanor of the prosecuting witness, Mary Emily Mullis. *Lamborn v. Hollingsworth,* 195 N.C. 350, p. 352, 142 S.E. 19. And this being so, it was within the province of the trial court to embody in its summation of contentions such relevant inferences as were reasonably deducible from the demeanor of the witness.

A study of the charge as a whole indicates that the contention of the State as to the mental condition of the prosecuting witness was submitted to the jury, not as a controlling, material phase of the case, but rather as subordinate, explanatory features: (1) as tending to show why the prosecuting witness did not make outcry; (2) as tending to corroborate her version of the assault, the contention being that, while she had mind and memory enough to relate the details of the assault as it occurred, she was without the necessary capacity and cunning to have fabricated a series of events as narrated by her; and (3) as tending to support the State's theory that the defendant, knowing of the weak mental condition of the prosecuting witness and believing that by reason thereof he could more easily overcome her will, went to her home with the fixed purpose of getting her father drunk and then having carnal knowledge of her.

There is nothing in the record indicating that the demeanor of the witness did not tend to support the contention as given. The record is silent on this point, and silence supports the presumption that the procedure in the court below was regular and free of error. *Claypoole v. McIntosh,* 182 N.C. 109, 108 S.E. 433; *Indemnity Co. v. Tanning Co.,* 187 N.C. 190, 121 S.E. 468. It was the defendant's right to have challenged the contention (*S. v. Baldwin,* 184 N.C. 789, 114 S.E. 837) and requested a counter contention on his behalf. *S. v. Sinodis,* 189 N.C. 565, 127 S.E. 601. His exceptions, first raised on appeal, may not be sustained. *S. v. Britt,* 225 N.C. 364, 34 S.E. 2d 408; *S. v. Wells,* 221 N.C. 144, 19 S.E. 2d 243.

We have examined the rest of the defendant's exceptions, including the challenge to the refusal of the court to dismiss the case as of nonsuit, and find them without merit. The evidence was sufficient to take the case to the jury.

In the trial below we find

No error.

SMITH LEE v. LEWIS C. POSTON, C. P. DETTER, A. W. DRUM AND J. B. DRUM, INDIVIDUALLY AND AS AGENTS ONE FOR ANOTHER AND AS TRUSTEES OF WHAT IS KNOWN AS BALL'S CREEK CAMP GROUND.

(Filed 2 May, 1951.)

1. Municipal Corporations § 1—

A municipal corporation is a subordinate agency created by the State to assist in the civil government of the territory and people embraced within its limits.

2. Religious Societies § 1—

A religious corporation is a corporation whose purposes are directly ancillary to divine worship or religious teaching.

3. Same—

A corporation for the purpose of maintaining a particular church and camp ground is a religious corporation.

4. Same: Constitutional Law § 8c: Municipal Corporations § 1—

A corporation organized to maintain a particular church and camp ground may not be delegated authority by the General Assembly to enact ordinances for the good government and protection of the camp ground "while occupied for worship" or to appoint special police to keep the peace and execute process "while occupied for divine worship" since such corporation is a religious corporation, and the attempted delegation of governmental powers to it is ineffectual.

5. Venue § 1c—

Defendant corporation *held* not a municipality and therefore was not entitled to have an action instituted against it in the county of plaintiff's residence (G.S. 1-82) removed to the county in which the cause of action arose. G.S. 1-77.

APPEAL by defendants from *Bennett, Special Judge,* at March Term, 1951, of MECKLENBURG.

Demand for a change of venue on ground that action is not brought in the proper county as prescribed by statute.

The plaintiff, a resident of Mecklenburg County, North Carolina, sued the defendants, residents of Catawba County, North Carolina, in the Superior Court of Mecklenburg County for the recovery of damages allegedly resulting to plaintiff from a previous unsuccessful criminal proceeding in courts of Catawba County, which was prosecuted against plaintiff by defendants without probable cause and with malice while the defendants were acting individually and as trustees of the Ball's Creek Methodist Church and Camp Ground.

Before the time for answering expired, the defendants made demand for a change of venue to Catawba County as a matter of right on the

ground that the cause of action arose in Catawba County and is based on official acts done by defendants as officers and agents of a municipality of Catawba County, to wit, the Trustees of Ball's Creek Methodist Church and Camp Ground.

The Clerk of the Superior Court denied the demand for the change of venue, and the defendants appealed to the judge, who made a like ruling. The defendants thereupon appealed to the Supreme Court, assigning the decision of the judge as error.

Henry L. Strickland and Kenneth D. Thomas for plaintiff, appellee.
Russell W. Whitener and Eddy S. Merritt for defendants, appellants.

ERVIN, J. The appeal presents a question of venue. The plaintiff asserts that the general statutory provision set forth in G.S. 1-82 allows him to bring the action in Mecklenburg County, where he resides, whereas the defendants contend that the special statutory provision embodied in G.S. 1-77 localizes the action in Catawba County, where it arose.

Under G.S. 1-77, an action "against a public officer . . . for an act done by him by virtue of his office . . . must be tried in the county where the cause, or some part thereof arose, subject to the power of the court to change the place of trial in the cases provided by law." This statute governs the venue of actions against municipal corporations because such actions are essentially actions against public officers for official acts. *Godfrey v. Power Co.*, 224 N.C. 657, 32 S.E. 2d 27; *Murphy v. High Point*, 218 N.C. 597, 12 S.E. 2d 1.

The defendants predicate their demand for a change of venue from Mecklenburg County to Catawba County on these arguments: The plaintiff's cause of action arose in Catawba County. He prosecutes it against the defendants in their capacities as trustees of the Ball's Creek Methodist Church and Camp Ground. As such trustees, the defendants constitute a municipal corporation. Consequently, the action is against a municipal corporation, and G.S. 1-77 fixes its venue in Catawba County, where it arose.

The plaintiff's cause of action undoubtedly arose in Catawba County. Nevertheless, G.S. 1-77 does not make Catawba County the proper place for its trial. This is so for the very simple reason that the trustees of Ball's Creek Methodist Church and Camp Ground constitute a religious corporation and not a municipal corporation. This conclusion becomes indisputable when recourse is had to the characteristics of such corporations, and the incorporating act, *i.e.*, Chapter 47 of the Private Laws of 1879. It is observed, in passing, that this act was adopted more than a third of a century before Article VIII, Section 1, of the North Carolina

Constitution was rephrased so as to deprive the General Assembly of unrestricted power to create corporations by special acts.

A municipal corporation may be defined with terseness as a subordinate agency created by the State to assist in the civil government of the territory and people embraced within its limits. *Brooks v. City of Wichita,* 52 C.C.A. 209, 114 F. 297. See, also, in this connection: *Southern Assembly v. Palmer,* 166 N.C. 75, 82 S.E. 18. A religious corporation is a corporation whose purposes are directly ancillary to divine worship or religious teaching. 54 C.J., Religious Societies, section 3.

Chapter 47 of the Private Laws of 1879 creates a self-perpetuating body of trustees for "Ball's Creek Methodist Church and Camp Ground in the County of Catawba," and declares such trustees to be "a body politic and corporate in deed and in law." When the act is read aright, it shows that the trustees are incorporated for the single purpose of maintaining a particular church and camp ground, namely, the Ball's Creek Methodist Church and Camp Ground in Catawba County, as a place for holding camp meetings under the auspices of a particular denomination, to wit, the Methodist Church. This sole corporate object is religious in nature, for a camp meeting is a temporary encampment of worshipers held for the purpose of conducting a series of religious services. *Portage Township v. Full Salvation Union,* 318 Mich. 693, 29 N.W. 2d 297; *Thomas v. Smith,* 75 Hun. 573, 27 N.Y.S. 589; *State v. Read,* 12 R.I. 135; *State v. Hall,* 18 S.C.L. 151; *Johnson v. Jones,* 86 Vt. 167, 83 A. 1085.

To be sure, sections 8, 9 and 10 of the incorporating act undertake to confer upon the trustees power to "enact all ordinances for the good government and protection of the church and camp ground and the people there assembled *while occupied for worship,*" and to appoint special police to keep the peace and to execute process "in the limits of this incorporation *while occupied for divine worship.*" These statutory provisions do not evince a legislative intent to set up the trustees of Ball's Creek Methodist Church and Camp Ground as a subordinate agency of the State to assist in the civil government of the area embraced within the camp ground. They are merely auxiliary to the corporate purpose of maintaining a place for holding religious camp meetings. As a consequence, they constitute an ineffectual attempt on the part of the Legislature to delegate governmental powers to a nongovernmental body, to wit, a religious corporation. *S. v. Curtis,* 230 N.C. 169, 52 S.E. 2d 364.

The question of the liability of religious corporations in tort does not arise, and is not considered on this appeal.

Since the Ball's Creek Methodist Church and Camp Ground is the Lord's rather than Caesar's, the order denying the change of venue is

Affirmed.

EMMIE S. PIPPIN v. JOHN H. BARKER AND WIFE, ESTELLA BARKER.

(Filed 2 May, 1951.)

1. Trusts § 20a—

Where land is conveyed to a person as trustee for his daughter with power in the trustee to sell upon such terms as may seem reasonable and fit and hold the proceeds in the manner as may seem fit and reasonable to him, all for the care and well being of the *cestui*, with further provision that the exercise of such power should be solely within the discretion of the named trustee, *held* the power of the trustee to sell was a special personal discretionary power and the death of the trustee without having exercised the power extinguishes it.

2. Trusts § 13—

Where the trustee is made solely a depositary of title for the benefit of the *cestui* with a personal discretionary power to sell and hold the proceeds for her benefit, the extinguishment of the personal discretionary power of sale by the death of the trustee transforms the trust into a passive one, and by operation of our Statute of Uses the legal as well as the equitable estate becomes vested solely in the *cestui*. G.S. 41-7.

APPEAL by defendants from *Armstrong, J.*, January Term, 1951, of HENDERSON.

Suit for specific performance submitted to the trial judge on an agreed statement of facts and waiver of jury trial.

Plaintiff, being under contract to convey to the defendants a tract of land in Henderson County, tendered deed sufficient in form to vest in defendants fee-simple title to the property. The defendants refused tender, alleging the title offered to be defective.

Decision below was made to turn on the construction of the deed, under which the plaintiff claims title, from Chester R. Glenn to D. Sams, Trustee for Emmie C. Sams (who is the plaintiff), dated 19 June, 1925, and registered in the Public Registry of Henderson County in Deed Book No. 137, page 73 *et seq.*

It was stipulated below that the deed "is legal in form," with the following power appearing in the deed after the covenants of seizin and warranty:

"The trustee herein named shall have the right and power at any time during the lifetime of the said Emmie C. Sams to sell the property herein described by private or public sale, upon such terms as may to him seem fit and reasonable with power to make a good and sufficient deed in fee simple therefor upon the trust to hold or invest or otherwise use all or part of the proceeds from such sale in the manner that may seem to him most fit and reasonable for the care and well-being of the said Emmie C.

Sams. His exercise of such power to be solely within the discretion of the said Trustee named herein."

It was further stipulated that D. Sams, the trustee named in the deed, is dead; that he left a will, which has been duly probated, providing in effect that all of his property of every kind, including all property held by him "as trustee and/or agent," shall pass to his executors in trust, with direction that the executors, as trustees, shall collect the rents and profits and apply them to the use of his daughter, the plaintiff, Emmie Sams Pippin, and her children, during her lifetime.

On the facts agreed, the court, being of the opinion that the deed tendered was sufficient to convey a good title, entered judgment for the plaintiff, from which the defendants appeal, assigning error.

Charlton E. Huntley and L. B. Prince for plaintiff, appellee.
O. B. Crowell for defendant, appellant.

JOHNSON, J. Decision here turns on whether the discretionary power of sale vested in D. Sams expired at his death, or survived and was transmitted to his executors. If the power expired, plaintiff's title is good and she prevails; if the power survives, her title is thereby encumbered and she may not prevail. The court below ruled with the plaintiff,—that the power expired,—and we approve.

The controlling principle is stated in 41 Am. Jur., Powers, Sec. 31, p. 826: "It may be said to be the general rule that where a power is coupled with a personal confidence or discretion the donee cannot delegate its execution to another. This rule has been applied to powers, such as powers of sale, given to an agent, executor, or trustee. Where, however, no discretion is involved, the power may be delegated," . . .

The decisions of this Court are in harmony with the foregoing rule. *Haslen v. Kean,* 4 N.C. 700, pp. 715 and 717; *Young v. Young,* 97 N.C. 132, 2 S.E. 78; *Welch v. Trust Co.,* 226 N.C. 357, 38 S.E. 2d 197. The leading text-writers also are in accord: Thompson on Real Property, Permanent Ed., Vol. 4, Sections 2281 and 2289, pp. 825 and 837; Tiffany, Law of Real Property, 3d Ed., Vol. 3, Sec. 693, p. 35 *et seq.*

In *Welch v. Trust Co., supra* (226 N.C. 357), *Winborne, J.,* speaking for the Court, said: "And it is a general rule of law that purely personal and discretionary powers of an executor or trustee cannot be exercised by a substitute or successor, nor can a court appoint another in the event of the death, incompetency, or other failure of the designated person."

The deed under which the plaintiff claims title conferred upon the trustee, D. Sams, the power to sell the property at any time during plaintiff's lifetime. However, the language of the paragraph creating the power, by necessary implication if not by express provision, seems to

limit the exercise of the power to the sole discretion of the trustee, D. Sams: twice the reference is to "the trustee herein named," with what appears to be an express limitation on its exercise to "the discretion of the trustee named herein." Here, the power to sell seems to have been conferred under special personal confidence reposed in D. Sams, coupled with a clear intent on the part of the grantor that the power should be exercised solely in the discretion of D. Sams. This being so, the power, not having been exercised by D. Sams during his lifetime, was extinguished by his death. Thompson on Real Property, Permanent Ed., Vol. 4, Sec. 2304, p. 859; Tiffany, Law of Real Property, 3d Ed., Vol. 3, Sec. 707, top p. 79; *Welch v. Trust Co., supra* (226 N.C. 357).

With the discretionary power of sale thus eliminated from the deed, there remains for our further interpretation nothing more than a regular form deed made to "D. Sams, Trustee for Emmie C. Sams" (now the plaintiff). This deed prescribes no duties of any kind to be performed by the trustee. He is made a depositary only of title. Where this is the case, the trust is passive (*Akin v. Bank,* 227 N.C. 453, 42 S.E. 2d 518), as distinguished from active (*Fisher v. Fisher,* 218 N.C. 42, 9 S.E. 2d 493). Therefore, by operation of our Statute of Uses, G.S. 41-7, the legal, as well as the equitable, estate in the land passed to and became vested solely in the plaintiff. *Patrick v. Beatty,* 202 N.C. 454, 163 S.E. 572; *Deal v. Trust Co.,* 218 N.C. 483, 11 S.E. 2d 464.

It is not necessary for us to discuss the question of when the Statute of Uses executed the use in this particular case, that is, (1) whether execution occurred when the deed was made, thus creating at that time a defeasible fee, subject to be defeated by the exercise of the discretionary power of sale or made absolute by the extinguishment of the power of sale (*Henderson v. Power Co.,* 200 N.C. 443, p. 446, 157 S.E. 425), or (2) whether the merger of the legal and equitable estates was delayed until the power of sale expired with the death of D. Sams. This question being moot, we refrain from discussing it.

The judgment below is

Affirmed.

ELLA L. DILLARD v. J. B. BROWN AND WIFE, COLA BROWN.

(Filed 2 May, 1951.)

1. Appeal and Error § 31d—

Where one appellant fails to file brief, such failure works an abandonment of his assignments of error except those appearing upon the face of the record which are cognizable *ex mero motu,* and where no such error

appears and his counsel expressly states that he has abandoned his appeal, his appeal will be dismissed.

2. Trial § 36—

Defendants are husband and wife. Defendants' answer raised the issue as to the *feme* defendant's individual liability, if any, separate and apart from that of her husband, and there was evidence tending to support such issue. *Held:* The submission of an issue as to the indebtedness of defendants to plaintiff and the refusal to submit an issue directed to the separate liability of defendants must be held for error upon the *feme* defendant's appeal in failing to afford her opportunity to present her contention of nonliability.

3. Trial § 31b—

Appellant's assignment of error for the failure of the court to declare and explain the law arising upon her evidence sustained upon authority of *Collingwood v. R. R.*, 232 N.C. 724.

APPEAL by defendants from *Bennett, Special Judge*, at October-November Civil Term, 1950, of GASTON.

For cause of action plaintiff alleges in her complaint, as amended, substantially the following: That defendant J. B. Brown is her nephew; that she is the mother of Charles D. Dillard, deceased, and was beneficiary under certain policies of insurance on his life; that on given dates there were issued to her (1) by insurance companies three certain checks in the sums of $1,000.00, $1,000.00 and $1,008.30, and another (2) by the Treasurer of the United States in the sum of $195.30, each of which was "fraudulently, wrongfully and illegally endorsed by the defendant J. B. Brown and cashed by said defendant"; that on a given date there was issued to her by an insurance company another check in the sum of $1,001.41 which was "fraudulently, wrongfully and illegally endorsed by the defendants J. B. Brown and Cola Brown and cashed by them"; that "said J. B. Brown and wife, Cola Brown, wrongfully, fraudulently and illegally procured the sum of $4,205.01 from plaintiff by signing or causing her name to be signed by making her mark on the checks referred to . . . herein"; and that as she is informed and believes defendants paid $800.00 for the funeral expenses of Charles D. Dillard, and are justly indebted to her in the sum of $3,405.01 with interest on certain amounts from certain dates, after demand and payment refused,—for which judgment "against the defendants" is prayed.

Defendants, in their answer to the several allegations of the complaint, say that "except as herein admitted" each is untrue and is denied. The admissions in respect to checks are substantially these:

(1) As to the first $1,000 check: That at the request of plaintiff who was living with them at the time, "defendants helped plaintiff in endorse-

ment of" it; (2) As to second $1,000 check: "The plaintiff procured these defendants to effect such signatures upon an insurance check . . . that same . . . be collected; (3) As to the check for $1,008.30: "That . . . plaintiff procured the defendants to effect such signatures upon an insurance check . . . as enabled the defendant J. B. Brown to collect the amount thereof"; (4) As to the check for $195.30: "That the plaintiff procured the defendants to effect such signatures to an insurance check . . . that same could be cashed"; (5) As to the check for $1,001.41: "That at the request of Mrs. Dillard the defendants made such signature to an insurance check payable to plaintiff . . . that same . . . be cashed"; (6) As to each of said checks, substantially, that defendant J. B. Brown collected or procured cash on the checks and "handled same" in accordance with the directions or instructions of plaintiff; and (7) that the check for $195.30 was loaned by plaintiff to defendants.

And by way of further answer and defense, defendants allege: (1) That during the latter part of 1946 or early 1947 plaintiff, who had been living with her daughter, came to home of defendants, and was cared for for a period of about three weeks; (2) that after the death of Charles D. Dillard on 31 July, 1947, plaintiff moved into the home of defendants as a member of the family, and so remained until 12 February, 1950; that she advised defendants to build a home, and "they furnish her housing, board, sustenance and other reasonable necessities of life during the remainder of her life in consideration of the payment therefor out of such moneys realized upon any and all checks that the defendants, or either of them, had endorsed or received the cash thereon, to which agreement they agreed and carried same out until she left as aforesaid, and the defendants are now ready, able and willing to carry out said contract for her comfortable and reasonable support and maintenance during the remainder of her life." And thereupon defendants pray that plaintiff have and recover nothing of "the defendants or either of them except right of housing and support from the defendant J. B. Brown," and "for such other and further relief as either defendant may show himself or herself entitled to under the law and facts of the case."

And defendants, by permission of the court, amended their answer by averring "that during the period that Mrs. Dillard lived in the home with them they rendered services to her of the value of $2,500.00."

And upon the trial both plaintiff and defendants offered evidence,—the *feme* defendant Cola Brown testifying that while she witnessed one of the checks, "she never got any of the checks, rather money out of same."

Defendants tendered these issues:

"1. Did the plaintiff contract with the defendants, or either of them, paying money that she alleges to have been received by the defendants for support and maintenance?

"2. If so, are the defendants, or either of them, ready, able and willing to carry out the contract?

"3. If not, in what amount, if any, are the defendants or either of them indebted to the plaintiff, and which one?"

The court submitted the case to the jury upon these issues which were answered as shown:

"1. Did the plaintiff agree with the defendants that the defendants should be paid for the furnishing of housing, board, sustenance, and other reasonable necessities of life, during the remainder of her said life, out of the moneys realized upon the said checks by the defendants, as alleged in the answer? Answer: No.

"2. In what amount, if any, are the defendants indebted to the plaintiff? Answer: $1,766.00."

And from judgment for plaintiff on the verdict, defendants appeal to Supreme Court, but the *feme* defendant only files brief in Supreme Court, assigning error.

Ernest R. Warren for plaintiff, appellee.

J. L. Hamme for defendant Cola Brown, appellant.

WINBORNE, J. The record and case on appeal as to both defendants has been duly docketed in this Court. But defendant J. B. Brown has failed to file brief as required by Rule 27 of Rules of Practice in the Supreme Court, 221 N.C. 544, at page 562. Such failure works an abandonment of his assignments of error, except those appearing upon the face of the record, which are cognizable *ex mero motu*. See *S. v. Robinson*, 214 N.C. 365, 199 S.E. 270, where authorities are assembled. However, as to defendant J. B. Brown, error does not appear upon the face of the record. Indeed, his counsel expressly states that he has abandoned his appeal. Hence it must be dismissed.

Nevertheless, as to the appeal by defendant Cola Brown, a different situation is presented. The pleadings raise an issue as to her individual liability, if any, separate and apart from that of her husband, the defendant J. B. Brown, and there is evidence tending to support such issue. The third issue tendered by defendant, and refused by the court, while not aptly phrased, is sufficient to present the question of her separate liability, if any. And it is apparent that the second issue submitted to the jury is not determinative of the case. It did not afford her opportunity to present her contention of nonliability based upon the evidence offered.

"It is essential in the trial of a civil action by jury," as recently stated by *Devin, J.*, in *Turnage v. McLawhon*, 232 N.C. 515, 61 S.E. 2d 336, "that the issues submitted shall embrace all material questions in contro-

versy, and that each party have opportunity to present fairly and fully his contentions of law and fact," citing cases.

Moreover, the assignment of error based upon exception taken to the failure of the court, in charging the jury, to declare and explain the law arising upon her 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, is well taken. See *Collingwood v. R. R.*, 232 N.C. 724, 62 S.E. 2d 87.

For reasons stated there must be a new trial as to defendant Cola Brown.

Hence, as to defendant J. B. Brown:

Appeal dismissed.

As to defendant Cola Brown:

New trial.

CAROLINA SCENIC STAGES v. J. WESLEY LOWTHER.

(Filed 2 May, 1951.)

1. Appeal and Error § 39a—

A judgment will not be disturbed for error which is too attenuate to have affected the outcome of the trial.

2. Appeal and Error § 29—

Exceptions not discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

3. Negligence § 11—

Contributory negligence need not be the sole proximate cause of the injury in order to bar recovery, it being sufficient for this purpose if it be a proximate cause or one of them.

4. Appeal and Error § 39b—

Appellant may not complain of error relating to an issue answered in his favor.

5. Negligence § 20—

The jury answered the issues of negligence and contributory negligence in the affirmative. *Held:* An instruction that defendant's negligence must be "the proximate cause" of the accident to justify an affirmative finding on the issue of negligence, whereas plaintiff's negligence need be only "one of the proximate causes" thereof to warrant an affirmative finding on the issue of contributory negligence, cannot be held for prejudicial error on plaintiff's appeal, since the charge on the issue of contributory negligence is without error and plaintiff cannot complain of alleged error relating to the issue answered in its favor.

SCENIC STAGES *v.* LOWTHER.

APPEAL by plaintiff from *Patton, Special Judge,* Extra Civil Term, September, 1950, of MECKLENBURG.

Civil action to recover damages arising from a bus-truck collision in York County, South Carolina.

The record discloses that on 29 November, 1946, the defendant was operating a 1946 Ford truck on Highway No. 21, between Fort Mills and Rock Hill, South Carolina. The plaintiff's bus, traveling in the same direction, was following the defendant's truck, and when they reached the outskirts of Rock Hill, the bus driver attempted to pass the defendant's truck just as the truck driver started to turn left into a side road or drive, and the right front corner of the bus collided with the left side of the truck at the cab.

Each charged the other with negligence and responsibility for the collision, the plaintiff asking damages and the defendant setting up a counterclaim. Both vehicles were damaged.

The jury returned the following verdict:

"1. Was the bus of the plaintiff damaged by reason of the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff by its own negligence contribute to the damages to its bus, as alleged in the answer? Answer: Yes."

From judgment on the verdict denying recovery to both, the plaintiff appeals, assigning errors.

Covington & Lobdell for plaintiff, appellant.

Helms & Mulliss and James B. McMillan for defendant, appellee.

STACY, C. J. On sharply conflicting evidence, the jury has found both drivers responsible for the collision in suit. Hence, they never reached the issue of damages, either for the plaintiff or for the defendant on his counterclaim. Neither was allowed to recover and the plaintiff was taxed with the costs.

The evidentiary exceptions are not of sufficient moment to require any discussion or elaboration. They are too attenuate to have affected the outcome of the trial. It would be a work of supererogation and repetition to discuss them *seriatim.* Indeed, they seem to have been abandoned as they are not discussed in plaintiff's brief.

The plaintiff also objected and excepted to the submission of the issue of contributory negligence, but as this exception is not discussed on brief, it is regarded as feckless and deemed abandoned. *Weaver v. Morgan,* 232 N.C. 642, 61 S.E. 2d 916; Rule 28, 221 N.C. 562.

The exceptions to the charge are likewise too unsubstantial to require any extended discussion. The first discussed on brief and regarded as the most important perhaps will suffice to show their attenuateness: The

jury was told the defendant's negligence must be "the proximate cause" of the collision to warrant the jury in answering the first issue for the plaintiff; whereas, the plaintiff's negligence need be only "one of the proximate causes" to justify an affirmative answer to the second issue, *i.e.*, the issue of contributory negligence. The difference in these instructions on the two issues submitted is now urged as constituting reversible error.

The plaintiff is in no position to take advantage of any error committed on the first issue as this issue was answered in its favor. *DeWeese v. Belk's Department Store, ante,* 281, 63 S.E. 2d 538. So we pass to the instruction on the second issue. We have consistently held that in actions like the present the plaintiff's contributory negligence, in order to bar recovery, need not be the sole proximate cause of the injury as this would exclude any idea of negligence on the part of the defendant. *Godwin v. R. R.,* 220 N.C. 281, 17 S.E. 2d 137; *Absher v. Raleigh,* 211 N.C. 567, 190 S.E. 897. It is enough if it contributes to the injury as a proximate cause, or one of them. *McKinnon v. Motor Lines,* 228 N.C. 132, 44 S.E. 2d 735; *Wright v. Grocery Co.,* 210 N.C. 462, 187 S.E. 564. The very term "contributory negligence" *ex vi termini* implies or presupposes negligence on the part of the defendant. *Gold v. Kiker,* 218 N.C. 204, 10 S.E. 2d 650; *Fulcher v. Lumber Co.,* 191 N.C. 408, 132 S.E. 9. The plaintiff is barred from recovery, in an action like the present, when his negligence concurs and co-operates with the negligence of the defendant in proximately producing the injury. *Gordon v. Sprott,* 231 N.C. 472, 57 S.E. 2d 785; *Moore v. Boone,* 231 N.C. 494, 57 S.E. 2d 783. The exception to the instruction on the second issue is without merit and is not sustained. Nor is there any contradiction or confusion in the instructions on the two issues. But even if there were, the plaintiff could complain only of erroneous instructions hurtful to it. *Mott v. Tel. Co.,* 142 N.C. 532, 55 S.E. 363.

The remaining exceptions to the charge, 18 in number, are of similar criticisms to sentences or expressions which may be readily upheld as correct or nonprejudicial under the rule of contextual construction.

On the record as presented, no error has been discovered which would seem to call for a disturbance of the result below. The verdict and judgment will be upheld.

No error.

STATE v. HAROLD D. ROY
and
STATE v. JAMES D. SLATE.

(Filed 2 May, 1951.)

1. Criminal Law § 44—

The refusal of a motion for continuance will not be held for error when defendants do not give the name of the alleged essential witness who was out of the State or make it appear that any effort was made to secure the witness' presence at the trial, and further there is no affidavit that defendants had not had time to prepare for trial.

2. Rape § 26: Criminal Law § 52a (6)—

After announcement by the solicitor that he would not seek a conviction of rape, defendant was convicted of assault on a female with intent to commit rape. *Held:* Defendant's contention that his motion to nonsuit should be allowed because all the evidence tended to show the commission of the crime of rape rather than the less degree of the crime of which he was convicted, is untenable, since the indictment included the lesser offense and the conviction thereof was favorable to defendant. G.S. 15-169.

3. Criminal Law § 6c: Army and Navy § 3—

The duty of a soldier to obey the orders of his superior officer refers only to lawful commands relating to military duty, and therefore a defendant soldier's contention that in committing an assault upon a female he was acting under the orders of his sergeant is feckless, since it could not constitute a defense.

4. Criminal Law § 52a (2)—

The incredibility of the State's testimony cannot justify nonsuit, since the credibility of the witnesses is for the jury and not for the court.

APPEAL by defendants from *Nimocks, J.*, January Term, 1951, of HARNETT.

Criminal prosecution upon indictments charging the defendants with the crime of rape of a certain named female person.

The cases were consolidated for the purpose of trial. Whereupon, the Solicitor announced that he would not seek a verdict of rape, but would seek a verdict of guilty of assault on a female with intent to commit rape.

The defendants entered pleas of not guilty.

Verdicts: The jury found the defendant Harold D. Roy guilty of assault on a female with intent to commit rape, and returned a verdict against James D. Slate of guilty of an assault on a female. From sentences imposed on the respective verdicts, both defendants appealed to the Supreme Court, assigning error.

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

H. F. Seawell, Jr., for Harold D. Roy.

Charles Ross and McNeill McK. Ross for James D. Slate.

DENNY, J. The defendants except to and assign as error the failure of the court to grant their motion for a continuance. The motion was made on the ground that a witness, most vital to their defense, was out of the State.

It will be noted the name of the witness was not given nor does it appear that any effort was made to secure his presence at the trial. The alleged crime was committed on 29 November, 1950, and an investigation of the alleged facts was made shortly thereafter. A true bill was found against both defendants on 8 January, 1951, and the cases were called for trial on 11 January, 1951. However, there was no affidavit by defense counsel that they had not had time to prepare for trial. *S. v. Creech,* 229 N.C. 662, 51 S.E. 2d 348; *S. v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520. This assignment of error will not be upheld.

The defendant Roy contends that since all the evidence pointed toward the crime of rape, and the State not having asked for a conviction of that crime, that his motion for nonsuit on the charge of assault with intent to commit rape should have been allowed. The contention is without merit. For, it is well settled that an indictment for an offense includes all the lesser degrees of the same crime. *S. v. Moore,* 227 N.C. 326, 42 S.E. 2d 84; *S. v. Gay,* 224 N.C. 141, 29 S.E. 2d 458; *S. v. Jones,* 222 N.C. 37, 21 S.E. 2d 812; *S. v. High,* 215 N.C. 244, 1 S.E. 2d 563; *S. v. Williams,* 185 N.C. 685, 116 S.E. 736; *S. v. Hill,* 181 N.C. 558, 107 S.E. 140. And although all the evidence may point to the commission of the graver crime charged in a bill of indictment, the jury's verdict for an offense of a lesser degree will not be disturbed, since it is favorable to the defendant. G.S. 15-169; *S. v. Bentley,* 223 N.C. 563, 27 S.E. 2d 738; *S. v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472; *S. v. Matthews,* 231 N.C. 617, 58 S.E. 2d 625.

The defendant Slate, who is a private in the United States Army and stationed at Fort Bragg, contends that at the times referred to in the State's evidence, he was acting under the command of his sergeant, a non-commissioned officer, to wit, Sergeant Roy, and did only what he was directed to do, and is, therefore, not liable for his conduct in connection with this alleged offense. The contention has no merit. The duty of a subordinate to obey a superior officer, while one is subject to military law, has reference only to lawful commands of such superior officer, in matters relating to military duty. And there is certainly nothing on this record to indicate that either of these defendants were engaged in any activity

relating to military duties on the night in question. Title 10, U.S.C.A, Section 1536.

The evidence adduced in the trial below was ample to support the verdicts rendered, and need not be detailed herein. Counsel for the defendant Roy admits his chief complaint is against the jury. He contends the State's evidence was not worthy of belief and we should either grant the defendant Roy a new trial or a nonsuit. The court does not pass upon the credibility of the witnesses for the prosecution upon a motion to nonsuit. The weight to be given such evidence is for the jury to decide. *S. v. Bowman,* 232 N.C. 374, 61 S.E. 2d 107. The defendants offered no evidence except the certificate of the physician who examined the prosecuting witness on the day after the alleged crime. They simply elected to rely upon the weakness of the State's evidence and lost.

We have carefully examined all the exceptions and assignments of error and in the trial below we find

No error.

B. E. SELLERS v. HARVEY MORRIS AND IRIS M. MORRIS, TRADING AS MORRIS LIVE STOCK COMPANY.

(Filed 2 May, 1951.)

Animals § 2—

In order for the owner or keeper of a mule to be liable for an injury inflicted by the animal it must be alleged and proved that the animal possessed a vicious propensity and that the owner or keeper knew or should have known thereof, and where the complaint contains no such allegations it is demurrable notwithstanding other allegations that the area selected by the keeper for auction of the animal was congested due to overcrowding so that plaintiff could not move out of the way.

APPEAL by defendants from *Bennett, Special Judge,* January Special Term, 1951, MECKLENBURG. Reversed.

Civil action to recover damages for personal injuries caused by the kick of a mule.

Defendants are engaged in the business of selling livestock both at private sale and public auctions. On 24 February 1950, they conducted an auction sale at their stables or barns. The sale was held in the passageway approximately 20 by 20 feet in size. The auctioneer stood on a box-like platform, and a small space in front of him was reserved for showing the mule being offered for sale. Prospective purchasers and spectators crowded into the passageway. Plaintiff, a prospective purchaser, was

crowded against the wall near where the mules were brought from the enclosure where they were kept until sold.

During the sale a mule was brought out. The man having him in charge could not get the mule up to the auction block because of the crowd and the restricted space. He stopped near where plaintiff was standing waiting to make his bid. The mule "viciously and suddenly" kicked plaintiff on the left leg, inflicting certain personal injuries. Plaintiff sues to recover compensation therefor.

The defendants demurred to the complaint for that it fails to state a cause of action in that it is not alleged (1) that the mule was the property of the defendants, or (2) that the mule was a vicious animal, or (3) that the defendants had any knowledge of the vicious propensities, if any, of the mule. Other alleged defects are enumerated. The demurrer was overruled and defendants appealed.

Helms & Mulliss and James B. McMillan for defendant appellants.
No counsel contra.

BARNHILL, J. "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned . . . but the owner of the ox shall be quit. But if the ox were wont to push with his horn in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman . . . his owner also shall be put to death." Exodus 21:28, 29.

The philosophy of liability of an owner for damages inflicted by a domestic animal underlying this law of Moses is so sound and just in principle that it has survived the ages.

To entitle plaintiff to recover for injuries, he must allege and prove (1) that the animal was dangerous, vicious, mischievous, or ferocious, or one termed in law as possessing a vicious propensity; and (2) that the owner or keeper knew or should have known of the animal's vicious propensity, character, and habits. *Plumidies v. Smith,* 222 N.C. 326, 22 S.E. 2d 713, and cases cited; *Hobson v. Holt, ante,* 81. Such allegations are not contained in plaintiff's complaint. For that reason it is fatally defective.

Plaintiff does make allegations respecting the limited area and the congested conditions due to overcrowding, his inability, by reason thereof, to move out of the way, want of notice, and the like. But these allegations are not sufficient to state a cause of action. They are pertinent only as they relate to the one basis of liability, if any,—the injuries inflicted by the mule.

The plaintiff had eyes to see and he was as aware of the conditions about which he complains as anyone else at the sale. Yet he was in the

vanguard of the crowd. *Pridgen v. Kress & Co.*, 213 N.C. 541, 196 S.E. 821; *McComas v. Sanders*, 109 P. 2d 482; *Alexander v. Crotchett*, 124 S.W. 2d 534.

The demurrer was well advised. The judgment overruling the same must be

Reversed.

JOE EVANS, JR., v. CREED C. MORROW AND CREED C. MORROW, ADMINISTRATOR.

(Filed 2 May, 1951.)

1. Venue § 1b—

The statutory requirement that an action against an administrator in his official capacity must be instituted in the county in which the administrator qualified, G.S. 1-78, does not preclude an administrator from being joined as an additional defendant in an action pending in a county other than the one of his qualification upon a finding that the administrator is a necessary party to the action. G.S. 1-78 provides that such actions "must be instituted" in the county of qualification, whereas G.S. 1-76, dealing with venue, uses the phrase "must be tried."

2. Venue § 3—

Venue is not jurisdictional.

APPEAL by defendant individually and as administrator from *Patton, Special Judge*, October Special Term, 1950, of MECKLENBURG.

Civil action to recover damages arising from alleged negligent tractor-trailer-automobile collision.

Plaintiff, a resident of Mecklenburg County, instituted suit 9 March, 1950, against Creed C. Morrow, a resident of Rowan County, alleging that the defendant was the owner of a 1948 Studebaker Sedan which he maintained for the use and convenience of himself and other members of his family, including his son, Creed C. Morrow, Jr.; that on 11 February, 1950, the defendant's son, Creed C. Morrow, Jr., was driving, operating and using the defendant's Studebaker Sedan with his consent, permission and knowledge, as his agent and in furtherance of his business; that on said date plaintiff's G.M.C. tractor-trailer, loaded with merchandise, was being driven on Highway No. 521 near Lancaster, S. C.; that the two vehicles collided as a result of the negligence of Creed C. Morrow, Jr., driver of defendant's automobile, causing damage to plaintiff's tractor and trailer and the cargo of merchandise.

The defendant filed answer, denied that he was the owner of the Studebaker Sedan or that he maintained it as a family car, as alleged, also

denied that Creed C. Morrow, Jr., was his agent or about his business on the occasion in question.

The defendant, on being examined adversely by the plaintiff, revealed that the Studebaker Sedan was purchased by his son, Creed C. Morrow, Jr., and that he signed the title-retained contract because his son was a minor at the time. It is alleged by the plaintiff, however, that the title of the car is in the name of the defendant, the license plates also being issued in his name, thus raising a question as to the ownership of the automobile at the time of the collision. Creed C. Morrow, Jr., was killed in the accident and the defendant has qualified as his administrator in Rowan County; wherefore, plaintiff asked that the defendant as administrator of his son's estate be made a party defendant in this action so that the whole controversy may be determined in a single action.

The court found as a fact that the administrator of Creed C. Morrow, Jr., was a necessary party and ordered that he be brought in by summons, etc., and allowed time to answer.

The defendant, Creed C. Morrow, individually, and as administrator of his son's estate, appearing specially in the latter capacity, excepts and appeals, assigning error.

Smathers & Carpenter for plaintiff, appellee.
Frank H. Kennedy and P. D. Kennedy, Jr., for defendant, appellant.

STACY, C. J. The appellant says that as actions against administrators in their official capacity, or upon their official bonds, may be instituted only in the county of their qualification, G.S. 1-78, the court was without authority to order Creed C. Morrow as administrator of his son's estate be made a party in this suit pending in Mecklenburg County, the county of his qualification as administrator being Rowan, citing as authority for the position the above statute and *Stanley v. Mason, Admr.*, 69 N.C. 1.

The point raised is controlled by what was said in *Latham v. Latham*, 178 N.C. 12, 100 S.E. 131. The statute applies to original actions "instituted," *i.e.*, originally commenced against personal representatives, and not to actions already pending in which it may be proper or necessary to make them parties. In the cited case, an executrix qualified in Craven County, was made a party defendant to an action pending in Beaufort County. The executrix appeared and asked for a removal of the action to Craven County as a matter of right. The motion was denied, and on appeal the ruling was affirmed, the Court pointing out that nothing is said in the statute about the place of trial, only that such original actions "must be instituted" in the county of qualification, whereas in G.S. 1-76, dealing with venue, the language is "must be tried," etc., the difference in phraseology being regarded as significant.

The question is not jurisdictional, but one of venue. *Wiggins v. Finch*, 232 N.C. 391, 61 S.E. 2d 72, and cases there cited.

Affirmed.

MRS. ANN EWING v. MAYNARD K. THOMPSON AND MRS. DOROTHY THOMPSON.

(Filed 9 May, 1951.)

1. Process § 10—

A resident of Canada who operates a motor vehicle upon the public highways of this State is subject to service of process under the provisions of G.S. 1-105, since he is a "non-resident" within the meaning of the statute.

2. Same: Appeal and Error § 40d—

A finding by the trial court that at the time in question the son was operating the parent's car in this State within the purview of the "family-purpose doctrine" so as to render the nonresident parent subject to service under G.S. 1-105, is conclusive when supported by evidence.

3. Automobiles § 25—

The "family-purpose doctrine" obtains in this State.

4. Process § 10—

A resident of Canada who owns a car for the convenience and pleasure of the family may be served with process under G.S. 1-105 in an action involving a collision while the car was being driven in this State by the nonresident's son with her consent and approval, notwithstanding that she was not within the State at the time in question. 14th Amendment to the Federal Constitution.

APPEAL by defendants from *Bennett, Special Judge,* at 5 February, 1951, Extra Term of MECKLENBURG.

Civil action to recover for personal injury and property damage allegedly resulting from actionable negligence of defendants, heard upon motions made on special appearance to dismiss the action for lack of jurisdiction.

Plaintiff alleges, in her verified complaint, in pertinent part, the following:

"1. That the defendants are non-residents of the State of North Carolina and that, as the plaintiff is informed and believes, the mailing address of each of the defendants is 42 Finchley Road, Montreal 29, Canada.

"2. That this action grows out of a collision in which the defendant Maynard K. Thompson was involved by reason of the operation by him of a motor vehicle on a public highway in the State of North Carolina,

and the plaintiff is informed and believes that at the time the said defendant was acting as agent for his mother, the co-defendant, Mrs. Dorothy Thompson, by reason of the family-purpose doctrine and that each of the defendants is subject to the service of process in this action under the provisions of G.S. 1-105.

"3. That on May 16, 1950 . . . there was a collision on U. S. Highway No. 21, a short distance south of the city limits of the city of Charlotte, N. C., between a Chevrolet sedan operated by the plaintiff, and a Pontiac coach automobile operated by the defendant Maynard K. Thompson.

"4. That plaintiff is informed and believes that the Pontiac coach automobile referred to in the preceding paragraph hereof was owned by the defendant, Mrs. Dorothy Thompson.

"5. That the plaintiff alleges, upon information and belief, that the defendant Maynard K. Thompson is a son of the defendant, Mrs. Dorothy Thompson, and that, at the time hereinbefore alleged, the said Maynard K. Thompson was a member of her household; that the automobile which he was driving was maintained by the defendant Mrs. Dorothy Thompson for the pleasure and convenience of members of her household, including Maynard K. Thompson; that said automobile was being operated at the time hereinbefore alleged for the purpose for which the same was maintained and kept by the said Mrs. Dorothy Thompson with her knowledge and consent, and that she is legally responsible for the operation of said automobile by her son, the defendant Maynard K. Thompson, on the occasion hereinbefore alleged."

And the plaintiff further sets out and alleges (1) her version of how the collision occurred, and (2) that the collision, and the injuries to plaintiff, and damage to her automobile, in the manner and to the extent specified, "were all proximately caused by the negligence of the defendant Maynard K. Thompson for which the defendants are jointly liable" in the respects specifically detailed. Whereupon plaintiff prays judgment in specific amounts, "and such other and further relief to which she may be entitled," including service of summons in accordance with G.S. 1-105.

The parties plaintiff and the defendants stipulated that service of process was had upon both defendants under the provisions of G.S. 1-105, for substitute service upon nonresidents; and that subsequent to the filing of special appearance by the defendants as hereinafter set forth, the plaintiff filed an affidavit of compliance with the provisions of said statute G.S. 1-105.

In the meantime, defendant Maynard K. Thompson, through his attorneys, entered a special appearance for the purpose of dismissing the action, and to that end he shows to the court, in pertinent part, that he, as shown on the face of the complaint, is a nonresident of North Carolina

and of the United States of America, is a resident of the Province of Quebec, Canada, and is therefore an alien: Wherefore, he moves that the action be dismissed as to him, for that: (a) As an alien he is not subject to service of process in the manner attempted herein; (b) the service of process upon him as attempted here is defective in jurisdictional respects; (c) this court has obtained no jurisdiction of the person of him; and (d) further procedure herein as to him would violate the 14th Amendment to the Constitution of the United States.

The defendant Mrs. Dorothy Thompson, through her attorneys, also entered a special appearance for the purpose only of dismissing the action, and to that end shows to the court in pertinent part: That she, too, as shown upon the face of the complaint, is a nonresident of North Carolina and of the United States of America, is a resident of the Province of Quebec, Canada, and is therefore an alien; that at the time complained of she was not in the State of North Carolina, was not operating an automobile on the public highways of North Carolina, and was not, expressly or impliedly, exercising any control or direction over an automobile in the State of North Carolina; and that at the time complained of, no agent, express or implied, of her was operating an automobile on the public highways of North Carolina: Wherefore, she moves that the action be dismissed as to her, for the like reasons to those set forth in the motion of Maynard K. Thompson, as above set forth, and for this additional reason: "If otherwise subject to service, she has done no act bringing her within the purview of the law creating and prescribing such method of service."

Neither of the motions filed by defendants was verified, and defendants filed no affidavits or other proof in support thereof.

Plaintiff, in her affidavit of compliance with provisions of G.S. 1-105 with respect to service of summons, stated, among other things, "that at the time of the collision referred to in the complaint, the defendant Maynard K. Thompson gave to the plaintiff, as the address of the said defendant and of his mother, Mrs. Dorothy Thompson, No. 42 Finchley Road, Montreal 29, Canada"; and that "he advised the investigating police officers that the automobile which he was driving was owned by his mother."

When the cause came on for hearing on the special appearances and motions of defendants, as above set forth, the judge of Superior Court, before whom the hearing was had, entered an order in pertinent part as follows: "It appearing to the court that, subsequent to the filing of said motions, the plaintiff has filed an affidavit of compliance with the provisions of G.S. 1-105; and the defendants, in open court, having waived any defects in the plaintiff's compliance with the procedural provisions of the statute; and the court, having considered the record including the

verified complaint and plaintiff's affidavit of compliance with G.S. 1-105, and motions of the defendants, and having heard the argument of counsel, makes specific jurisdictional findings of fact for the purposes of this order only: Substantially in accordance with the allegations in the verified complaint, and affidavit of plaintiff; and

"4. That the defendant, Mrs. Dorothy Thompson, was not in the automobile driven by the defendant Maynard K. Thompson at the time alleged in the complaint, and was not in the State of North Carolina."

Upon the . . . findings of fact, so made, and upon the record, the court being of the opinion "that the defendant Maynard K. Thompson is a non-resident subject to service of process under G.S. 1-105, by reason of his operation in person of a motor vehicle on the public highways of this State, and that the defendant Mrs. Dorothy Thompson is a non-resident subject to service under said statute by reason of the operation of said automobile by Maynard K. Thompson for her and under her control or direction within the meaning of the statute, in the light of the family purpose doctrine, obtaining in this State, and that proceedings against the defendants, based upon service obtained under said statute will not violate the constitutional provision referred to in the motions to dismiss, . . . thereupon Ordered and Adjudged that the motion of each of the defendants to dismiss this action is denied, and the defendants, and each of them, are allowed thirty days from the date of this order to answer or otherwise plead to the complaint."

The court refused to sign an order tendered by defendants granting their motions to dismiss the action, and they excepted.

And defendants further except to specific findings of fact, and conclusions of law made by the court, and to the order denying their motions, and appeal to Supreme Court, assigning error.

Guy T. Carswell, Robinson & Jones, Louis Geffen, and John M. Robinson, Jr., for plaintiff, appellee.

Jones & Small for defendants, appellants.

WINBORNE, J. The statute, G.S. 1-105, under which plaintiff has attempted to bring the defendants, residents of Canada, into court in this action, provides in pertinent part that "The acceptance by a non-resident of the rights and privileges conferred by law now or hereafter in force in this State permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such non-resident on the public highways of this State . . . shall be deemed equivalent to the appointment by such non-resident of the Commissioner of Motor Vehicles, or of his successor in office, to be his true and lawful attorney upon whom may be served all

summonses or other lawful process in any action or proceeding against him, growing out of any accident or collision in which said non-resident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on such public highway of this State, and said acceptance or operation shall be a signification of his agreement that any such process against him shall be of the same legal force and validity as if served on him personally . . ."

This statute is modeled after and is almost identical with Chapter 90 of General Laws of Massachusetts, as amended by statute 1923, Ch. 431, Sec. 2,—the constitutionality of which was sustained by the Massachusetts Supreme Judicial Court in *Pawloski v. Hess* (Mass.), 144 N.E. 760, 35 A.L.R. 945, and on a writ of error by Supreme Court of the United States in *Hess v. Pawloski,* 274 U.S. 352, 47 S. Ct. 632, 71 L. Ed. 1091. The Supreme Court of the United States dealt expressly with the question "whether the Massachusetts enactment controvenes the due process clause of the 14th Amendment."

The constitutionality of the North Carolina Act, Public Laws 1929, Chapter 75, as amended, now G.S. 1-105, was upheld in *Ashley v. Brown,* 198 N.C. 369, 151 S.E. 725, which has been referred to, or cited with approval in these cases: *Bigham v. Foor,* 201 N.C. 14, 158 S.E. 548; *Smith v. Haughton,* 206 N.C. 587, 174 S.E. 506; *Dowling v. Winters,* 208 N.C. 521, 181 S.E. 751; *Wynn v. Robinson,* 216 N.C. 347, 4 S.E. 2d 884; *Alberts v. Alberts,* 217 N.C. 443, 8 S.E. 2d 523; *Propst v. Trucking Co.,* 223 N.C. 490, 27 S.E. 2d 152; *Davis v. Martini, ante,* 351, 64 S.E. 2d 1.

Moreover, appellants, in their brief filed on this appeal, call attention to the fact that there is no treaty between the United States and Canada relating to this subject.

Therefore, the questions here are these:

1. Is a resident of Canada, operator of an automobile involved in an accident on a public highway in this State, a "non-resident" within the purview of G.S. 1-105? and

2. Is a family-purpose automobile, owned by a resident of Canada, and operated by her son on a public highway in this State, operated for the owner, or under her control or direction, express or implied, within the purview of G.S. 1-105?

While neither of these questions had been presented heretofore to this Court, we are of opinion and hold that each merits an affirmative answer.

As to the operator: The word "non-resident," as used in the Motor Vehicle Act, Chapter 20 of General Statutes, is defined by the General Assembly, as "every person who is not a resident of this State." The trend of decision in this Court in matters pertaining to attachment proceedings is of like tenor. See *Carden v. Carden,* 107 N.C. 214, 12 S.E.

197; *Brann v. Hanes,* 194 N.C. 571, 140 S.E. 292; *Voehringer v. Pollock,* 224 N.C. 409, 30 S.E. 2d 374; see also *Bigham v. Foor, supra,* on facts found.

Admittedly the operator of the automobile in the present action is not a resident of the State of North Carolina, and no sufficient reason is made to appear to entitle him to preferred consideration over any other nonresident of this State, upon whom substituted service has been effected under like circumstances. *Bigham v. Foor, supra; Wynn v. Robinson, supra; Alberts v. Alberts, supra; Davis v. Martini, supra.* In so holding, support is found in the cases of *Lulevitch v. Hill* (1949), 82 Fed. Sup. 612, and *Silver Swan Liquor Corp. v. Adams* (1941) (Cal.), 110 Pac. 2d 1097, etc.

In the *Lulevitch case,* the defendant is a resident of Ontario, Canada, and Judge of the United States District Court of the Eastern District of Pennsylvania was construing the Pennsylvania statute providing for substitute service upon nonresident motorists, 75 P.S. 1201, *et seq.,* which is similar to the North Carolina statute G.S. 1-105. The plaintiff contended that the act applies to any nonresident,—not merely those who are citizens of another State in the United States. There were no Pennsylvania decisions on the point. The holding of the Court is epitomized in this headnote: "Citizen and resident of Dominion of Canada was 'nonresident' subject to substituted service under the Pennsylvania statute providing for substitute service on non-resident motorists in civil suits arising out of accident or collision within the Commonwealth."

And in *Silver Swan Liquor Corp. v. Adams,* the Court, considering the case of a nonresident minor motorist, on whom personal service was made in Canada by duly qualified officer, held the process was properly served under provision in Vehicle Code of California relating to service of process on nonresident motorist. Vehicle Code, 404, St. 1935, p. 154. Civ. Code, Sec. 33.

Now, as to the owner: While appellants object and except to the finding of fact made by the Superior Court judge that the automobile operated by the son of the owner at the time of, and involved in the accident out of which this action grows, was a family-purpose automobile, the finding appears to be based upon sufficient evidence. In fact, no evidence to the contrary appears in the record. Such finding of fact by the judge is conclusive on appeal. *Bigham v. Foor, supra; Crabtree v. Sales Co.,* 217 N.C. 587, 9 S.E. 2d 23; *Davis v. Martini, supra; In re Blalock, ante,* 493.

The "family-purpose doctrine" with respect to automobiles has been adopted as the law of this jurisdiction, and applied in numerous cases,—among which are these: *Robertson v. Aldridge,* 185 N.C. 292, 116 S.E. 742; *Allen v. Garibaldi,* 187 N.C. 798, 123 S.E. 66; *Watts v. Lefler,* 190

N.C. 722, 130 S.E. 630; *Grier v. Woodside,* 200 N.C. 759, 158 S.E. 491; *Lyon v. Lyon,* 205 N.C. 326, 171 S.E. 356; *McNabb v. Murphy,* 207 N.C. 853, 175 S.E. 718; *Matthews v. Cheatham,* 210 N.C. 592, 188 S.E. 87; *Vaughn v. Booker,* 217 N.C. 479, 8 S.E. 2d 603.

In *Robertson v. Aldridge, supra, Hoke, J.,* writing for the Court, enunciated the principle in these words: "But it is also held in our opinions by the great weight of authority that where a parent owns a car for the convenience and pleasure of the family, a minor child who is a member of the family, though using the car at the time for his own purposes with the parents' consent and approval, will be regarded as representing the parent in such use, and the question of liability for negligent injury may be considered and determined in that aspect," that is, under the principle of *respondeat superior,* citing *Clark v. Sweaney,* 176 N.C. 529, 97 S.E. 474; *S. c.,* 175 N.C. 280, 95 S.E. 568, and several cases from other jurisdictions. And in *Watts v. Lefler, supra,* the principle was declared in a case involving the operation of a family-purpose car by an adult son, living with his parent.

In the light of this principle, applied to facts as found by the judge below, for the purpose in hand, the son of the owner of the family-purpose automobile will be regarded as representing the parent in such use, and hence, the operation by the son would be for the owner, and within the purview of G.S. 1-105.

Therefore, after careful consideration of all assignments of error presented, and contentions made, and argument advanced by appellants, we are of opinion that the rulings of the judge of Superior Court are proper, and should be upheld.

Affirmed.

IN RE WILL AND ESTATE OF CURTIS B. JOHNSON, DECEASED.

(Filed 9 May, 1951.)

1. Wills § 31—

The intention of testator as gathered from the entire instrument considered with regard to its general purpose, giving significance to its various expressions considered in the light of such intent, is the will, and to this end the court should place itself as nearly as practical in the position of testator, having regard to the kind, character and extent of his properties, the need for business experience in their management, and the difficulties likely to be encountered in the settlement of the estate.

2. Executors and Administrators § 1—

The rule that a will must be construed to effectuate the intent of testator applies to the appointment of an executor therein.

3. Executors and Administrators §§ 1, 2b—

The will in suit, which disposed of a large estate, directed the payment of specified sums to the beneficiaries from the assets, when, as and if conveniently available as determined by testator's widow "who is hereby appointed my executor" and a trust company "hereby appointed trustee of my estate." The widow renounced her right to qualify as executrix. *Held:* The trust company named is entitled to administer the estate either as executor or as administrator *c. t. a.* in accordance with the tenor of the instrument, G.S. 28-22, and therefore judgment of the lower court that the clerk should issue letters testamentary to the trust company rather than to another nominated by the beneficiaries, will not be disturbed on appeal.

4. Appeal and Error § 38—

The presumption is in favor of the correctness of the judgment of the lower court, and appellant has the burden of showing prejudicial error.

5. Appeal and Error § 39a—

Appellant must make prejudicial error plainly appear and it is insufficient merely to cast doubt upon the accuracy of the judgment of the lower court.

APPEAL by Union National Bank, respondent, and Ida J. Lee, George Lee, Harry Lee and S. M. Lee, Jr., interveners, from *Phillips, J.*, at November, 1950, Regular Civil Term of MECKLENBURG, by consent, judgment signed at Rockingham, 11 December, 1950.

Application and petition of American Trust Company for appointment as executor or administrator with will annexed of the estate of Curtis B. Johnson, deceased.

The record discloses that Curtis B. Johnson, a resident of Mecklenburg County, this State, died 6 October, 1950, leaving him surviving his widow, Irving H. Johnson, one sister, Ida Johnson Lee, and three nephews, George Lee, S. M. Lee, Jr., and Harry Lee, the sister and two of the nephews being residents of California, and one nephew a resident of Michigan.

On 16 October, 1950, the surviving widow appeared before the Clerk and notified him that, after a diligent search, she had been unable to find her husband's will, if any he left, and asked that she and the Union National Bank be appointed co-administrators of his estate, which was done, and they immediately entered upon their duties.

A re-examination of the books and papers of the deceased by the administrators brought forth the discovery that he had left a will in his own handwriting, duly witnessed, and this was presented to the Clerk and admitted to probate 24 October, 1950.

The following provisions of the will are regarded as pertinent for present purposes:

"I give, devise and bequeath to my sister, Ida J. Lee, of Beverly Hills California during her lifetime the home she is now living in at above

location including any interest I may have in the household furniture contained therein. I also direct that she be paid out of my estate the sum of $750.00 per month during her lifetime. After her death this property she is living in to pass into the ownership of my three nephews (naming them). . . .

"In addition to the above gift to the aforesaid nephews, I direct that each of them shall be paid ($25,000) Twenty Five Thousand Dollars from the assets of my estate as if and when the funds are conveniently available as determined by my wife Irving Harding Johnson who is hereby appointed my executor and the American Trust Co. of Charlotte, hereby appointed Trustee of my estate. (Then follows a large number of gifts to executives and employees of *The Charlotte Observer,* personal friends and servants). . . . Payment of all gifts to be made at time payment is made to my three nephews. To my wife I leave the residue of my estate (after payment of funeral expenses, debts and inheritance taxes which he realized would be quite heavy but thought the assets of the Semagraph Company, owned by him, would more than suffice to take care of all obligations without disturbing or in any way encumbering his controlling interest (57½%) in The Observer Co.). . . .

"The 'residue' interest referred to on page 3 of this document is willed to my wife, Irving H. Johnson, for her use and benefit during her life and at her death the (57½%) fifty seven and one half stock interest in The Observer is to pass to my nephews in equal amounts, etc. . . .

"I will that my wife shall become the president of The Curtis B. Johnson Benevolent Association and shall have full and complete control of its operations."

On 4 November, 1950, Mrs. Irving H. Johnson renounced her right to qualify as executrix of her husband's will and filed her dissent therefrom. The Clerk thereupon vacated her previous appointment as co-administratrix of her husband's estate.

Then on 6 November, 1950, the Union National Bank applied to the Clerk for letters of administration *c. t. a.,* accompanying its request with petitions signed by the individual resident legatees under the will, renouncing their rights to qualify as administrators *c. t. a.* and nominating the Union National Bank for such appointment. The nonresident legatees also joined the individual resident legatees by intervention and asked for the same appointment. These petitions, including the intervention of the nonresident legatees, are all dated 24 October, 1950. The petition was allowed on the day of its filing and the appointment was made on the same day.

Two days later, 8 November, 1950, the American Trust Company, corporate trustee-legatee under the will, and the institution with which

the testator did his banking business, filed its application and petition with the Clerk for appointment as executor of the estate, or alternately as administrator *c. t. a.* There is no question as to the fitness and competency of the petitioner to administer the estate and it has at no time renounced or waived any of its rights under the will. Its petition, however, was denied and the appointment of the Union National Bank as administrator *c. t. a.* was confirmed on 20 November, 1950.

From the Clerk's judgment, the American Trust Company appealed to the judge of the Superior Court who reversed the judgment of the Clerk and remanded the proceeding with instructions that the grant of letters of administration *c. t. a.* to the Union National Bank be recalled, and that letters testamentary be issued to the American Trust Company as sole remaining executor under the will of the deceased.

The court therefore deemed it unnecessary to pass upon the alternative application for letters of administration *c. t. a.* and made no ruling in connection therewith.

However, it was suggested in the judgment that, in the event of an appeal, the Clerk appoint "some other discreet person" as collector to preserve the property of the deceased pending appeal.

By consent, the judgment was signed out of term and out of the district at Rockingham, 11 December, 1950.

From this judgment, the Union National Bank and the nonresident legatees, interveners, appeal, assigning errors.

Tillett, Campbell, Craighill & Rendleman for appellant, Union National Bank.

Covington & Lobdell for appellants, Ida J. Lee, et al.

Helms & Mulliss and John W. Johnston for appellee, American Trust Co.

STACY, C. J., after stating the facts as above: The question for decision is whether the testator intended to name, and did name, the American Trust Company as one of the executors of his estate by the tenor of his will or by conferring upon it executorial powers and duties in connection with the administration thereof. The trial court answered in the affirmative, and the parties have filed elaborate briefs with all the North Carolina decisions and many foreign authorities collected on the subject, *e.g.*, on the one side is cited *In re Leonard,* 218 N.C. 738, 12 S.E. 2d 222 (no executor named in the will); and on the other, *Dulin v. Dulin,* 197 N.C. 215, 148 S.E. 175 (held executor appointed by the tenor of the will). 1 Williams Executors (7th Ed.) 281. Upon this line of demarcation the authorities are divided, and each side here seems equally confident that its

position is supported by the record and the pertinent decisions or the clear weight of authority.

The sentence of the will presently in focus is this: "In addition to the above gift to the aforesaid nephews, I direct that each of them shall be paid ($25,000) Twenty Five Thousand Dollars from the assets of my estate as if and when the funds are conveniently available as determined by my wife Irving Harding Johnson who is hereby appointed my executor and the American Trust Co. of Charlotte, hereby appointed trustee of my estate."

The appellants say this sentence is too clear and unambiguous to require any interpretation; that it expresses plainly the intent of the testator and makes known his choice of a testatrix and a trustee of his estate; that the designation "executor" applies equally to a man or a woman; that the testator was a publisher, highly intelligent, fully cognizant of the difference between an executor and a trustee; that he had complete confidence in his wife's business acumen as he also nominated her president-manager of his Benevolent Association; that it is his will that is to be done, *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17, and that the language used should be given its plain and obvious meaning. *Krites v. Plott,* 222 N.C. 679, *loc. cit.* 683, 24 S.E. 2d 531. The appellants stake their case on the letter of the will which they say is clear beyond cavil and capable of but a single meaning.

The appellee, on the other hand, says the conclusion of the appellants is too facile for the language employed; that joint executorial powers and duties are conferred on the widow and the American Trust Company; that they together are required to determine "if as and when" the legacies can conveniently be paid—an obligation properly belonging to those who are charged with the management of the estate; that the trust company is named trustee of "my estate," not simply of the trust properties, and that significantly the testator used the word "executor," applicable alike to both, rather than the more accurate denomination "executrix," if he had intended his widow alone to administer his estate. The appellee relies on the tenor of the will which it says reveals the appointment of the American Trust Company trustee of the estate *ipsissimis verbis* and coexecutor by the tenor.

The solution of the problem is to be found in the expressed purpose of the testator. His intention is his will. This intention is to be gathered from the general purpose of the will and the significance of the various expressions, enlarged or restricted according to their real intent. A thing within the intention is regarded within the will though not within the letter. A thing within the letter is not within the will if not also within the intention. This applies to the appointment of an executor as well as to any other provision in the will. *Cannon v. Cannon, supra; Bank v.*

Corl, 225 N.C. 96, 33 S.E. 2d 613; *Trust Co. v. Miller,* 223 N.C. 1, 25 S.E. 2d 177; *Williams v. Rand,* 223 N.C. 734, 28 S.E. 2d 247; *Harper v. Harper,* 148 N.C. 453, 62 S.E. 553; 23 C.J. 1020; 21 Am. Jur. 405.

In searching for the intent or purpose of the testator in naming one or more personal representatives of his estate it is competent to consider the kind and character and extent of his properties; the need of business experience in their management, and the difficulties likely to be encountered in the settlement of the estate. Consequently the court should place itself as nearly as practicable in the position of the testator, so as to appreciate and understand his viewpoint and purpose at the time of the execution of the will. *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356; *Herring v. Williams,* 153 N.C. 231, 69 S.E. 140.

We find ourselves in disagreement on the question presented, but we are of opinion that the American Trust Company is entitled to administer the estate either as executor or as administrator with the will annexed. G.S. 28-22. Hence, rather than prolong the litigation with further debate or extended discussions, we have concluded to affirm the judgment without lengthy opinions, which the briefs would seem to invite, holding that the appellants have failed to overcome the presumption of regularity or correctness or to show harmful error in the judgment on their appeal. *Call v. Stroud,* 232 N.C. 478, 61 S.E. 2d 342.

To prevail here, the party alleging error has the laboring oar, which he must successfully handle, and that against the tide. *Gibson v. Dudley, ante,* 255, 63 S.E. 2d 630; *Cole v. R. R.,* 211 N.C. 591, 191 S.E. 353. Nor is it sufficient merely to cast doubt on the accuracy of the judgment. *In re Ross,* 182 N.C. 477, 109 S.E. 365. Prejudicial error is required to be shown, and it must be made to appear plainly, as the presumption is the other way. The appellant has the burden of showing error. *Nichols v. Trust Co.,* 231 N.C. 158, 56 S.E. 2d 429; *S. v. Shepherd,* 230 N.C. 605, 55 S.E. 2d 79.

The intention of the testator in respect of the appointment of the institution with which he did his banking business, the American Trust Company, as an executor of his estate, also "appointed trustee of my estate" in the same sentence, is not so wanting in clarity, equivocal or doubtful as to call for a reversal of the judgment below. It is certain he never had a business stranger like the Union National Bank in mind; it is nowhere mentioned in the will.

Affirmed.

IN RE WILL AND ESTATE OF CURTIS B. JOHNSON, DECEASED.

(Filed 9 May, 1951.)

Appeal and Error § 31e—

Where the questions sought to be presented become moot as of the time for decision, the appeal will be dismissed.

APPEAL by the Union National Bank, respondent, and Ida J. Lee, George L. Lee, Harry J. Lee and S. M. Lee, Jr., interveners, from judgment of *Sink, J.*, at March Term, 1951, Regular Civil Term of MECKLENBURG.

Petition in the cause to determine collectorship of estate pending appeal *in re* letters to personal representative.

Following the judgment of Phillips, J., entered in this matter on 11 December, 1950, suggesting that in the event of an appeal from his judgment, the Clerk appoint "some other discreet person" as collector to preserve the estate pending the appeal, the Clerk did, on 22 January, 1951, enter an order appointing the Union National Bank of Charlotte as such collector, to which order the American Trust Company objected and appealed to the judge of the Superior Court who reversed the Clerk's order and directed that he appoint "some discreet person other than Union National Bank of Charlotte or American Trust Company, pending final determination" of the appeal from the judgment of Phillips, J., as aforesaid, and from this judgment the Union National Bank, the sister and nephews of the deceased, objected and appealed, assigning errors.

Tillett, Campbell, Craighill & Rendleman for respondent, Union National Bank, appellant.

Covington & Lobdell for interveners, Ida J. Lee, et al., appellants.

Helms & Mulliss and John W. Johnston for American Trust Co., appellee.

STACY, C. J. This is the second appeal from orders entered in the same matter. As the order here appealed from affects only the collectorship of the estate pending the original appeal, decided this day, it is apparent that the questions presently sought to be presented are now moot or academic as the pendency of the appeal comes to an end simultaneously herewith. Hence this second appeal will be dismissed and the appellants taxed with the costs.

Appeal dismissed.

STATE v. ROBERT L. BRIDGERS.

(Filed 9 May, 1951.)

1. Criminal Law § 42d—

Evidence of good character of witnesses for the State is not substantive evidence but is competent only as bearing upon their credibility.

2. Criminal Law §§ 40b, 40c—

Where defendant testifies and then offers evidence of his good character, he is entitled to have the jury consider his character evidence both as bearing upon his credibility and as substantive evidence bearing directly upon the issue of his guilt or innocence.

3. Criminal Law § 53i—

Where the court undertakes to charge upon the character evidence of the State's witnesses and of defendant, who had testified at the trial, a charge to the effect that the character evidence of both sides was direct testimony and should be taken into consideration in finding the facts in the case, must be held for reversible error, defendant being entitled to an instruction, if the matter is adverted to, that evidence of his good character should be taken into consideration both on the question of his credibility and as substantive evidence upon the question of his guilt or innocence.

4. Criminal Law § 53b—

An instruction to the effect that evidence of an alibi need raise only a reasonable doubt of defendant's guilt to entitle him to an acquittal will not be held for reversible error when construed contextually with other portions of the charge categorically instructing the jury that an alibi is not a defense and that the burden of proof thereon does not rest upon defendant, but that the burden rests upon the State to show beyond a reasonable doubt all elements of the crime, including defendant's presence at the scene when necessary to the offense. Such instruction is not approved and the correct form of a charge upon the question is given.

APPEAL by defendant from *Hatch, Special Judge,* and a jury, at December Criminal Term, 1950, of WAKE.

Criminal prosecution tried upon a bill of indictment charging the defendant with the perpetration of the following offenses: (1) breaking and entering a dwelling house occupied by Frances Hall and Mary Ellen Hall, with intent to commit larceny therein; and (2) larceny of a billfold and three dollars in money, the property of Frances Hall.

Verdict: Guilty of breaking and entering and larceny as charged in the bill of indictment.

Judgment: Imprisonment in the State's Prison for a term of not less than two nor more than five years.

The defendant appeals, assigning errors.

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

Brassfield & Maupin and Butler Thompson for defendant, appellant.

JOHNSON, J. The defendant's chief assignment of error relates to the charge of the court bearing on the character evidence offered below by both sides. The State offered testimony as to the good character of its witnesses, Frances and Mary Ellen Hall. The defendant, after taking the stand as a witness in his own behalf, offered five witnesses who testified to his good character. The trial court's single reference to the character evidence is embodied in the following instruction, to which the defendant excepted:

"I charge you further, gentlemen of the jury, that character testimony is direct testimony and you are to take the character testimony into consideration in finding the facts in this case. Character testimony was offered by the two Hall girls as well as character testimony of the defendant in this case was offered by the defendant."

By this instruction the jury, we think, was inadvertently led to believe that the character evidence offered both by the State and by the defendant should be weighed and considered alike, whereas the evidence of the defendant's good character is controlled by a rule different from that applicable to the evidence regarding the character of the two State's witnesses. The testimony as to the character of the witnesses for the State was not substantive evidence; it was relevant and material only as bearing upon the credibility of their testimony. *S. v. Jeffreys,* 192 N.C. 318, 135 S.E. 32; and *In re McKay,* 183 N.C. 226, 111 S.E. 5.

On the other hand, it is observed that the defendant went upon the witness stand. Then, when he offered evidence of his good character, he thereby placed his character directly in issue. Consequently, he was entitled to have the jury consider the evidence of his good character in a dual aspect: (1) as bearing upon his credibility as a witness in his own behalf,—his veracity and worthiness of belief; and (2) as substantive evidence, bearing directly upon the issue of his guilt or innocence of the crime charged, upon the theory that a man of good character, who has pursued an honest and upright course of conduct, is unlikely to deviate therefrom and do a dishonest act inconsistent with the record of his past life. *S. v. Colson,* 193 N.C. 236, 136 S.E. 730; *S. v. Nance,* 195 N.C. 47, 141 S.E. 468. See also Stansbury, North Carolina Evidence, Sec. 108, pp. 204 and 205.

True, our decisions hold that, as a general rule, prejudicial error may not be predicated upon failure of the trial judge to charge the jury that evidence of good character of the defendant should be considered as substantive evidence, in the absence of a request for such instruction (*S. v.*

Scoggins, 225 N.C. 71, 33 S.E. 2d 473), the reason being that such evidence, when related to the charge of the court, is ordinarily treated as a subordinate phase of the case. *S. v. Sims,* 213 N.C. 590, p. 594, 197 S.E. 176. But be that as it may, when the trial court undertakes to instruct upon character evidence, it then becomes his duty, without special request, to expound and explain correctly the law applicable to its different phases. See *S. v. Austin,* 79 N.C. 624 (second headnote), and *Jarrett v. Trunk Co.,* 144 N.C. 299, p. 301, 56 S.E. 937. And where, as in the instant case, the defendant has placed his character in issue by offering testimony as to his good character, it would seem to be prejudicial error for the court to give a limited charge to the jury, directing attention to the fact that the State as well as the defendant has offered character evidence, with instruction that the jury shall consider the evidence of both sides merely as direct evidence, without going further and explaining to the jury that they should consider in its dual aspect the defendant's evidence of good character. *S. v. Davis,* 231 N.C. 664, 58 S.E. 2d 355; *S. v. Moore,* 185 N.C. 637, 116 S.E. 161.

Error is also assigned in a portion of the charge relating to the defendant's evidence of alibi. He offered evidence tending to show that at the time charged he was in bed at his rooming house some eight blocks distant from the scene of the alleged crime. On this phase of the case, the trial judge charged the jury in part as follows (with the defendant's exception relating only to the last sentence, shown in parenthesis):

"the defendant in this case relies in part on what is known as an 'alibi'; 'alibi' means 'elsewhere'; it is not, properly speaking, a defense within any accurate meaning of the word 'defense' but is a mere fact which may be used to call in question the identity of the person charged, or the entire basis of the prosecution; the burden of proving an alibi, however, does not rest upon the defendant; the burden of proof never rests upon the accused to show his innocence or to disprove the facts necessary to establish the crime with which he is charged. The defendant's presence and his participation in the crime charged are affirmative, material facts which the prosecution, that is, the State of North Carolina, must show beyond a reasonable doubt to sustain a conviction. For the defendant to say he was not there is not an affirmative proposition; it is a denial of the existence of a material fact in the case. (It is only necessary for the defendant in his defense to produce such an amount of testimony, whether by evidence tending to show an alibi or otherwise, as to produce in the minds of the jury a reasonable doubt of his guilt.)"

The foregoing portion of the charge to which exception is taken by the defendant, if lifted out of context and considered separate and apart from the rest of the charge, would seem to be susceptible, as suggested by

the defendant, of being interpreted as placing on the defendant the burden of producing evidence sufficient to raise a reasonable doubt as to his guilt, contrary to our decisions holding that an accused person may not be burdened with establishing his innocence. *S. v. Josey,* 64 N.C. 56; *S. v. Reitz,* 83 N.C. 634.

However, it is observed that in the instant case the charge as to alibi, including the challenged portion thereof, appears to follow almost *verbatim* the instructions which were reviewed by this Court in *S. v. Jaynes,* 78 N.C. 504 (p. 506), and *S. v. Sheffield,* 206 N.C. 374 (pp. 384 and 385), 174 S.E. 105, where under application of the doctrine of contextual construction the charges were upheld, as were similar inexact charges in *S. v. Starnes,* 94 N.C. 973; *S. v. Freeman,* 100 N.C. 429, 5 S.E. 921; and *S. v. Rochelle,* 156 N.C. 641, 72 S.E. 481.

Therefore, in the instant case, upon a contextual interpretation of the charge as a whole, the challenged portion may not be held prejudicial. *S. v. Jaynes, supra* (78 N.C. 504), and *S. v. Sheffield, supra* (206 N.C. 374).

Nevertheless, we deem it appropriate to suggest that the form of the charge as given in the instant case may be brought more nearly into accord with the tenor of our better reasoned decisions by substituting for the challenged portion of the instruction a statement in substance as follows:

"Therefore, the defendant's evidence of alibi is to be considered by you like any other evidence tending to refute or disprove the evidence of the State. And if upon consideration of all the evidence in the case, including the defendant's evidence in respect to alibi, there arises in your minds a reasonable doubt as to the defendant's guilt, he should be acquitted."

This is also in conformity with the weight of authority in other jurisdictions, sustaining the rule that by offering evidence tending to prove an alibi, an accused person is not thereby saddled with an independent burden of proving the alibi as an affirmative defense. The proper rule to be followed by the jury in weighing and considering evidence of an alibi is concisely stated in the annotation appearing in 29 A.L.R., p. 1127:

"The offering of evidence to prove an alibi should not be regarded as in any sense an attempt to prove an independent, affirmative defense. The prosecution must prove the defendant's presence (in those cases where presence is essential to the commission of the crime charged) beyond a reasonable doubt, and the defendant may, by any legitimate evidence, rebut or disprove this essential factor in the case for the prosecution. One means of disproving presence at the scene of the alleged crime at the time of its commission is obviously by proof of presence elsewhere. And this is the sole purpose of evidence to prove an alibi,—

to negative this essential factor in the State's case, the same as any other evidence tending to rebut or disprove the commission of a crime by the defendant. And it is apparently an erroneous view of the matter to regard an alibi as an independent defense at all, and to introduce the question of burden of proof into that issue." See also Annotations: 67 A.L.R. 138, and 124 A.L.R. 471.

As the exceptions presented by the other exceptive assignments of error may not arise again, we refrain from discussing them.

New trial.

STATE v. WILLIAM C. CARTER.

(Filed 9 May, 1951.)

1. Criminal Law § 79—

Exceptions not set out and not discussed in the brief are deemed abandoned.

2. Criminal Law § 50a: Constitutional Law § 34a—

Every person charged with crime is entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm.

3. Criminal Law § 50d—

The trial court must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. G.S. 1-180.

4. Same—

Remarks of the trial judge will not be held for prejudicial error unless they deprive defendant of his right to a fair trial, considering the remarks in the light of the circumstances under which they were made, and a bare possibility that defendant may have suffered prejudice is not sufficient to overthrow an adverse verdict.

5. Same: Criminal Law § 51—

The trial judge has discretionary authority to prevent the repetition of questions already answered, and remarks of the court to accelerate the proceedings that the witness had already "answered that question" and later, to "ask the witness something else," will not be held for reversible error as prejudicing defendant.

6. Criminal Law § 50d—

In reply to a question as to his manner of driving on the occasion in question, defendant testified that he never drove or allowed his car to be driven at a high rate of speed. The court, upon objection by the solicitor for irrelevancy, directed defendant to "leave past history out." *Held:* The court's remark merely cautioned defendant to omit irrelevant matter, and cannot be held prejudicial.

7. Same—

Defendant's counsel asked him whether he was as normal at the time in question as he then was. The court's remark "let him say what his condition was" simply cautioned counsel to propound a correct interrogation in lieu of the leading question, and cannot be held prejudicial.

8. Same—

Where at the time of the question no evidence had been introduced that defendant was suffering from asthma on the occasion in question, his counsel's direction that defendant tell "how asthma affected you on this occasion" is objectionable as assuming the existence of a fact not shown by the testimony, and the court's interjection "if it affected him at all" will not be held prejudicial as disparaging defendant's testimony, since it merely advised counsel that the inquiry was not proper.

9. Same—

An order of the trial judge requiring defendant to reply to an unanswered question twice put to him by his counsel cannot be held prejudicial.

APPEAL by defendant from *Sink, J.*, and a jury, at the October Term, 1950, of RICHMOND.

Criminal prosecution for driving a motor vehicle upon a public highway while under the influence of intoxicating liquor. G.S. 20-138.

The cause was tried *de novo* in the Superior Court on the appeal of the defendant from the Richmond County Special Court.

The evidence for the prosecution made out this case: On 9 April, 1950, its witnesses, W. A. Allison and C. F. Watkins, State Highway Patrolmen, observed the defendant, William C. Carter, driving an automobile at a speed of 60 miles an hour and in a zigzag course along Route 74, a public highway in Richmond County. The Patrolmen forthwith apprehended the defendant, and discovered that he was intoxicated as the apparent consequence of drinking intoxicating liquor from a flask which he had on his person.

The defendant took the witness stand in his own behalf. He testified with positiveness that he was sober and did not possess any flask containing intoxicating liquor at the time of his arrest. He stated that he was then suffering from asthma.

The jury found the defendant guilty of the crime charged, and the trial judge sentenced him to imprisonment as a misdemeanant for six months. The defendant excepted and appealed, assigning errors.

Attorney-General McMullan, Assistant Attorney-General Moody, and Charles G. Powell, Jr., Member of Staff, for the State.

Hugh A. Lee and Pittman & Webb for the defendant, appellant.

ERVIN, J. The rules regulating practice in the Supreme Court prescribe that "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. The defendant has thus relinquished all of his exceptions save those numbered 6, 7, 10, 11, 12, and 13.

These particular exceptions are addressed to comments or remarks made by the presiding judge in the presence of the jury during the progress of the trial. The defendant asserts with much earnestness that the language of the judge disparaged his defense, created prejudice toward him in the minds of the jury, and deprived him of his right to a fair trial.

Every person charged with crime has an absolute right to a fair trial. By this it is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. See: *State v. Gossett,* 117 S.C. 76, 108 S.E. 290, 16 A.L.R. 1299.

The responsibility for enforcing this right necessarily rests upon the trial judge. He should conduct himself with the utmost caution in order that the right of the accused to a fair trial may not be nullified by any act of his.

The trial judge occupies an exalted station. Jurors entertain great respect for his opinion, and are easily influenced by any suggestion coming from him. As a consequence, he must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. G.S. 1-180; *S. v. Simpson, ante,* 438, 64 S.E. 2d 568; *S. v. Bryant,* 189 N.C. 112, 126 S.E. 107.

The bare possibility, however, that an accused may have suffered prejudice from the conduct or language of the judge is not sufficient to overthrow an adverse verdict. *S. v. Jones,* 67 N.C. 285. The criterion for determining whether or not the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect of the language upon the jury. *S. v. Ownby,* 146 N.C. 677, 61 S.E. 630. In applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made. This is so because "a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner,* 245 U.S. 418, 38 S. Ct. 158, 62 L. Ed. 372.

When the comments and remarks of the trial judge in the instant case are tested in this way, they do not merit the criticism which has been visited upon them.

Exceptions 6 and 7 relate to remarks made by the judge while counsel for the defense was cross-examining the State's witness, C. F. Watkins.

When counsel asked the witness whether the defendant's automobile passed the patrol car at a place "where a man had a right to pass," the judge informed counsel that the witness had already "answered that question"; and when counsel asked the witness whether he had an opinion as to the defendant's condition at the time of his arrest, the judge suggested to counsel that he "ask the witness something else." Counsel had previously cross-examined the witness as to the matters covered by these questions, and the remarks under scrutiny merely manifested to counsel the desire of the judge that counsel should forego unnecessary repetitions. The judge presiding at a trial has discretionary authority to prevent the repetition of questions already answered. *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *S. v. Stone,* 226 N.C. 97, 36 S.E. 2d 704; *S. v. Mansell,* 192 N.C. 20, 133 S.E. 190; *S. v. Robertson,* 86 N.C. 628. "The judge is charged with the duty of having the trial properly conducted. He should take care that the time of the court is not wasted. Courts are very expensive. While a judge should see that matters are not so hurried that any litigant is abridged of his rights, he should also see that the public time is not uselessly consumed. He is not a mere moderator, but the court itself, and owes duties to the public as well as to litigants." *McPhail v. Johnson,* 115 N.C. 298, 20 S.E. 373.

Exception 10 covers a comment made by the judge during the direct examination of the defendant. When counsel for the defense instructed his client to describe the manner in which he drove his automobile at the time named in the warrant, the defendant stated: "I drove my car like I always do. I never drive at a high rate of speed. I do not allow my car to be driven at a high rate of speed." The Solicitor objected to the response for irrelevancy, and the judge directed the defendant to "leave past history out." While the judge might well have couched his ruling in language more formal and tactful, this remark did not abridge any right of the defendant. It merely undertook to admonish him to omit irrelevant matter, *i.e.,* testimony as to the way in which he drove his automobile on occasions other than that specified in the warrant. *Curtis v. State,* 48 Ga. App. 135, 172 S.E. 99.

Exceptions 11 and 12 challenge utterances made by the judge during the re-direct examination of the accused. Counsel for the defense asked his client this question: "Were you as normal as you are now?" The inquiry was clearly objectionable as leading, and the judge made this remark to counsel: "Let him say what his condition was." While the case on appeal is not altogether clear on the point, it intimates that this statement was evoked by an objection interposed by the Solicitor. Be that as it may, the remark was certainly not prejudicial to defendant, for it simply cautioned his counsel to propound to him an interrogation correct in form in lieu of the incompetent inquiry. The defendant was

then directed by his counsel to "tell his Honor and the jury how asthma affected you on this occasion," and the judge interjected this utterance: "If it affected him at all." This remark is not reasonably susceptible of the construction which the defendant undertakes to put upon it, *i.e.*, that it disparaged the testimony of the defendant as to how he was affected by asthma on the occasion named in the warrant. No such evidence had been given by the defendant or any other witness at the time the inquiry was propounded and the statement was made. For this reason, the question was plainly objectionable in that it assumed the existence of a fact not shown by testimony, and the remark of the judge merely advised counsel for the defendant that the inquiry was improper in that respect. *Carson v. Insurance Co.*, 171 N.C. 135, 88 S.E. 145; *Nelson v. Hunter*, 140 N.C. 598, 53 S.E. 439.

Exception 13 is palpably untenable. It is addressed to an order of the judge requiring the defendant to reply to an unanswered question twice put to him by his own counsel.

For the reasons given, there is in law

No error.

RAYMOND L. JOYCE AND WALLACE H. BIGGERS v. WILLIAM J. BRYAN SELL, TRADING AND DOING BUSINESS AS DAVIE FURNITURE COMPANY.

(Filed 9 May, 1951.)

1. Trial § 22a—

On motion to nonsuit, the evidence must be considered in the light most favorable to plaintiffs.

2. Payment § 9—

The burden of proving the defense of payment in whole or in part is upon defendant.

3. Evidence § 8—

Where the facts constituting a defense are within defendant's own peculiar knowledge it is incumbent upon him to prove them.

4. Sales § 20—

By alleging and offering evidence tending to show sale and delivery of goods at a certain price and the nonpayment of a portion of the purchase price, the seller makes out a *prima facie* case entitling him to go to the jury, and it is error to grant the purchaser's motion to nonsuit upon the purchaser's evidence tending to show a subsequent agreement under which the purchaser was to pay the remainder of the purchase price only in the event he was able to resell the goods for more than the amount paid, and if not, the amount paid should discharge the debt, since the burden is

upon the purchaser to prove the defense under the subsequent agreement that he was unable to resell the goods for more than the amount paid.

5. Trial § 24a—

Ordinarily, nonsuit will not be allowed in favor of the party upon whom rests the burden of proof except upon the issue of contributory negligence when plaintiff by his own evidence proves himself out of court.

6. Trial § 23b—

Where plaintiff establishes a *prima facie* case he is entitled to go to the jury notwithstanding defendant's evidence tending to establish an affirmative defense.

APPEAL by plaintiffs from *Clement, J.*, February Term, 1951, of STANLY. Reversed.

This was an action to recover the balance alleged to be due on the sale of stock of merchandise. At the close of all the evidence defendant's renewed motion for nonsuit was allowed, and plaintiffs appealed.

Morton & Williams for plaintiffs, appellants.
Robert S. McNeill for defendant, appellee.

DEVIN, J. The allowance of defendant's motion for judgment of involuntary nonsuit requires consideration of plaintiffs' evidence in the light most favorable for them. *Ervin v. Mills Co., ante,* 415.

Plaintiffs' evidence tended to show that desiring to close their mercantile business in Mt. Airy, North Carolina, they contracted to sell and the defendant contracted to purchase their entire stock of hardware, and automotive and electrical appliances at one-half the manufacturer's cost price, amounting to $3,151.70. This was 16 June, 1948. The goods were promptly delivered to the defendant at his place of business in Mocksville. However, some question having arisen as to the condition of the goods on arrival, defendant paid $2,600 in cash on account, and the following agreement was entered into, reduced to writing and signed by plaintiffs: "Received $2600.00 on account of $3150.70. If all merchandise when sold does not bring $2600.00 this account is paid in full. However if merchandise brings over $2600.00 up to $3150.70 will be turned over to Joyce & Biggers. Copies of all transactions on this merchandise are to be mailed to Joyce & Biggers. W. H. Biggers, R. L. Joyce."

The defendant incorporated this written agreement in his answer, and offered it in evidence at the trial.

Defendant's contention was that the $2,600 settled the debt in full, and that in accordance with the terms of this agreement he had collected from the sale of those goods only $385, and hence was not liable for any balance over the amount paid. Defendant Sell, however, testified: "If either of

them (plaintiffs) had come to my place I would have paid them the $500 I owed rather than come into court. . . . If they would have come in and discussed the matter before I came into court I believe I would have paid them the $500."

The plaintiffs contend the language of the written agreement relied on by the defendant "received $2600 on account of $3150.70" constitutes an acknowledgment of a balance due, and that this agreement was offered by the defendant in support of a plea of payment. Furthermore plaintiff Joyce testified that he and his partner agreed to this "provided Mr. Sell furnish us with an itemized list of every transaction that was made in selling this merchandise," and that no report of sales has ever been made to them except one item of $122.

Considering only the plaintiffs' evidence and such of the defendant's evidence as is favorable to the plaintiffs, it appears that plaintiffs have sued to recover the balance due on a debt for goods sold and delivered, and have offered evidence in support of their allegations. The defendant admits that he purchased the goods at the invoice price to him of $3,151.70, but says that the $2,600 paid by him settled the entire debt. He testified he agreed if the goods "brought up to $3100 I would pay the difference." In other words, the defense he has set up was he was not to pay the balance, or any more than the $2,600, unless he sold these goods for more than that amount. The plaintiffs reply that the agreement on their part was signed on condition that records of sales be furnished them, which was not done, though more than two years have elapsed. Hence, plaintiffs contend defendant has not shown payment, or avoidance, of the balance of the debt of $550.70, or brought himself within the terms of the subsequent agreement relied on by him.

It is a general rule that where the defendant sued for debt admits the debt was originally owed, and pleads payment in whole or in part, it is incumbent upon him to prove such payment. *MacClure v. Casualty Co.*, 229 N.C. 305, 49 S.E. 2d 742; *Ellison v. Rix,* 85 N.C. 77; *Cook v. Guirkin,* 119 N.C. 13, 25 S.E. 715; *Speas v. Bank,* 188 N.C. 524, 125 S.E. 398; *Hunt v. Eure,* 189 N.C. 482, 127 S.E. 593; McIntosh, Practice & Procedure, 608. There is also a well recognized principle that where the facts constituting a defense are within the defendant's own peculiar knowledge it is incumbent upon him to prove them. *Cook v. Guirkin, supra.*

The plaintiffs having alleged and offered evidence to show sale and delivery of goods to defendant at a certain price and the nonpayment of a portion of the purchase price have made out a *prima facie* case, and the defendant having admitted the contract and receipt of the goods and payment of a part of the price, it was incumbent upon him to go forward with evidence to show that in consequence of an agreement with plaintiffs

he was to pay the remainder of the purchase price only in the event he was able to sell the goods in his store for more than the amount he had paid, and that he has been unable to do so.

In that situation, though defendant has offered evidence to support his defense, it was error to sustain defendant's motion for judgment of nonsuit. Ordinarily nonsuit will not be allowed in favor of the party on whom rests the burden of proof (*Barrett v. Williams,* 217 N.C. 175, 7 S.E. 2d 383; *Hedgecock v. Ins. Co.,* 212 N.C. 638, 194 S.E. 86; *Barnes v. Trust Co.,* 229 N.C. 409, 50 S.E. 2d 2), except when on the issue of contributory negligence the plaintiff by his own evidence proves himself out of court. *Hampton v. Hawkins,* 219 N.C. 205, 13 S.E. 2d 227; *Hayes v. Tel. Co.,* 211 N.C. 192, 189 S.E. 499. As against a *prima facie* case for the plaintiffs, the evidence relied on as a defense should have been submitted to the jury for their determination of the facts. *Bennett v. R. R.,* 232 N.C. 144, 59 S.E. 2d 598; *MacClure v. Casualty Co.,* 229 N.C. 305, 49 S.E. 2d 742; *Speas v. Bank,* 188 N.C. 524, 125 S.E. 398; *Moore v. Miller,* 179 N.C. 396 (399), 102 S.E. 627.

For the reasons stated, we think there was error in allowing the motion for judgment of nonsuit.

Reversed.

STATE OF NORTH CAROLINA EX REL. NORTH CAROLINA UTILITIES COMMISSION v. THOMAS E. JOHNSON, B. H. BRIGMAN, W. D. BULLARD, H. L. DUNCAN AND J. W. MELTON.

(Filed 9 May, 1951.)

Pleadings §§ 2, 19b—

An action against separate defendants to enjoin them from committing separate and unconnected proscribed acts is properly dismissed upon demurrer for misjoinder of parties and causes, since there is no joint or common liability and no privity or community of interest among the separate defendants, G.S. 1-123. In the present case five taxicab operators were sued to enjoin the individual violation by them of G.S. 62-121.47, G.S. 62-121.72 (2).

APPEAL by defendants from *Crisp, Special Judge,* February Term, 1951, of RICHMOND. Reversed.

This was an action instituted by the North Carolina Utilities Commission against the above named individual defendants, taxicab operators, to restrain alleged violation by each of them of G.S. 62-121.47.

This statute exempts from regulation by the Utilities Commission persons and vehicles engaged in "transportation of passengers by taxicabs

or other motor vehicles performing *bona fide* taxicab service and carrying not more than six passengers in a single vehicle at the same time and not operated on a regular route or between fixed termini; provided, no taxicab while operating over the regular route of a common carrier outside of a town or municipality . . . shall solicit passengers along such route, but nothing herein shall be construed to prohibit a taxicab operator from picking up passengers along such route upon call, sign or signal from prospective passengers." G.S. 62-121.47. The Utilities Commission is authorized by G.S. 62-121.72 (2) to apply to the court for an order restraining violation of this Act.

Pursuant to this authority the Utilities Commission instituted this single action against the five defendants alleging that each of them had solicited passengers, operated on schedule, and hauled more passengers than permitted under the Act.

Each of the defendants demurred for misjoinder of parties and causes of action. Each of the demurrers was overruled, and defendants appealed.

Attorney-General McMullan, Assistant Attorney-General Paylor, and R. Mayne Albright for State of North Carolina ex rel. North Carolina Utilities Commission, appellee.

Pittman & Webb and Jones & Jones for defendants, appellants.

DEVIN, J. It is apparent that the plaintiff has improperly sought to unite in the same complaint separate and distinct causes of action against five different persons among whom there is no joint or common liability and no privity or community of interest. Suit against one of the defendants for the causes alleged in nowise affects the other four, and hence joinder may not be permitted under G.S. 1-123 which requires that the causes of action set out in the complaint "must affect all the parties to 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." *Snotherly v. Jenrette,* 232 N.C. 605, 61 S.E. 2d 708; *Foote v. Davis & Co.,* 230 N.C. 422, 53 S.E. 2d 311; *Davis v. Whitehurst,* 229 N.C. 226, 49 S.E. 2d 394; *Southern Mills v. Yarn Co.,* 223 N.C. 479, 27 S.E. 2d 289; *Wingler v. Miller,* 221 N.C. 137, 19 S.E. 2d 247; *Smith v. Land Bank,* 213 N.C. 343, 196 S.E. 481; *Wilkesboro v. Jordan,* 212 N.C. 197, 193 S.E. 155; *Bank v. Angelo,* 193 N.C. 576, 137 S.E. 705.

The demurrers should have been sustained and the action dismissed.

Reversed.

HIRAM THOMAS SELLERS v. MOTORS INSURANCE CORPORATION; YELLOW MANUFACTURERS ACCEPTANCE CORPORATION; AND L. H. KNIGHT, SR., AND L. H. KNIGHT, JR., TRADING AND DOING BUSINESS AS MOTOR TRUCK SALES & SERVICE.

(Filed 9 May, 1951.)

Pleadings §§ 2, 19b—

Where one of the causes alleged in favor of plaintiff is solely against one of several defendants, demurrer for misjoinder of parties and causes must be sustained and the action dismissed. G.S. 1-69, G.S. 1-71, G.S. 1-123 (1); G.S. 1-132.

APPEAL by defendants, Motor Insurance Corporation, and L. H. Knight, Sr., and L. H. Knight, Jr., Trading and Doing Business as Motor Truck Sales & Service, from *Burney, J.*, resident judge of the Eighth Judicial District, at Chambers, by consent, 10 March, 1951, of BRUNSWICK.

Civil action to recover various amounts in accordance with allegations of the complaint in respect to matters growing out of the purchase, the financing and the insuring of a motor truck, on 23 August, 1948, which plaintiff alleged was destroyed by fire on 16 November, 1948.

And in eleventh paragraph of the complaint it is alleged "that in addition to the above amounts the defendant Motors Insurance Corporation is indebted to the plaintiff in the sum of $103.38, representing the return premium on a previous policy of insurance which the plaintiff had on another truck with the same defendant, Motors Insurance Corporation, and which said defendant has failed and refused to pay to this plaintiff."

Judgment as to this $103.38 is only sought against Motors Insurance Corporation.

The defendants, Motors Insurance Corporation, and L. H. Knight, Sr., and L. H. Knight, Jr., Trading and Doing Business as Motor Truck Sales & Service, filed separate demurrers to the complaint on the ground of misjoinder of parties and causes of action in respect to the $103.38 and in other respects. The demurrers were overruled, and they appeal to Supreme Court and assign error.

John D. Bellamy & Sons and Frink & Herring for plaintiff, appellee.

Murray G. James and Frank H. Kennedy for defendant, Motors Insurance Company, appellant.

John M. Walker for defendants, L. H. Knight, Sr., and L. H. Knight, Jr., Trading and Doing Business as Motor Truck Sales & Service.

WINBORNE, J. "All persons may be made defendants, jointly, severally, or in the alternative, who have, or claim, an interest in the contro-

versy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved." G.S. 1-69.

Also "persons severally liable upon the same obligation . . . may all or any of them be included in the same action at the option of the plaintiff." G.S. 1-71.

Moreover, the plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of the same transaction, or transaction connected with the same subject of action. G.S. 1-123 (1).

In the light of these statutes a demurrer should be sustained where there is a misjoinder of both 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," in the language of *Denny, J.*, in *Teague v. Oil Co.*, 232 N.C. 65, 59 S.E. 2d 2, citing in support thereof numerous cases.

In the present action the plaintiff and defendant Motors Insurance Corporation are the only parties to the controversy as to the item of $103.38. No allegation in respect thereto is made against the other defendants. Manifestly, therefore, as to this item there is a misjoinder of parties and of causes of action. See *Utilities Comm. v. Johnson, ante,* 588.

And since the demurrer must be sustained and the action dismissed, it is unnecessary that other grounds on which the demurrers are based be considered.

Therefore, for the reasons stated, the order from which appeal is taken is

Reversed.

C. FRANK JAMES v. ATLANTIC & EAST CAROLINA RAILROAD COMPANY, A CORPORATION; AND ATLANTIC & NORTH CAROLINA RAILROAD COMPANY, A CORPORATION.

(Filed 23 May, 1951.)

1. Automobiles § 20b—

What is a joint enterprise is a question of law, and therefore is for the determination of the court when the facts are not in dispute, it being an issue for the jury only upon disputed facts.

2. Same—

Where the driver and passenger are engaged in a joint enterprise, negligence on the part of the driver will be imputed to the passenger and will bar the passenger's right to recover against a third person.

3. Same—

It is not sufficient that the driver and passenger be engaged in a common enterprise in order for the doctrine of joint enterprise to obtain, but it is also required that each have such control over the car as to be substantially in the joint possession of it.

4. Municipal Corporations § 11½b—

A police officer has only such powers as are given him by the Legislature, expressly or derivatively.

5. Automobiles § 20b—

Evidence that two police officers of equal rank were engaged in patroling the streets of the municipality in an automobile furnished them by the city for their joint use in performing such duty, is sufficient to support a finding that they were engaged in a joint enterprise, since each had an equal right to direct and govern the movements and conduct of the car.

6. Railroads § 4—

Evidence of negligence on part of driver of car in failing to keep a proper lookout and in failing to exercise due care for his own safety in driving upon a grade crossing in front of a slow-moving shifting engine *held* to require the submission of the issue to the jury.

7. Same: Automobiles § 20a—

Evidence of negligence on part of passenger in car engaged in joint enterprise with driver in failing to warn driver of approach of engine to grade crossing which passenger saw or should have seen in exercise of due care, *held* to require submission of the issue to the jury.

8. Negligence § 17—

Contributory negligence is an affirmative defense upon which defendant has the burden of proof when relied on by him. G.S. 1-139.

9. Negligence § 20: Appeal and Error § 39h—

Where the issues of negligence and contributory negligence are raised by the pleadings and evidence, an instruction that no burden of proof rested on defendant, but that plaintiff had the burden of satisfying the jury by the greater weight of the evidence before plaintiff would be entitled to recover, must be held for reversible error, since the burden of proof on the issue of contributory negligence rested on defendant.

10. Appeal and Error § 39c—

The contention of defendant that the judgment of the lower court in its favor should be sustained notwithstanding error because in any event defendant would be entitled to nonsuit on the issue of contributory negligence, cannot be sustained when the question of nonsuit is not presented on the appeal.

APPEAL by plaintiff from *Halstead, Special Judge,* at January-February 1951 Civil Term, of WAYNE.

JAMES *v.* R. R.

Civil action to recover damages for personal injury sustained by plaintiff in a collision between an automobile in which he was riding and a shifting engine of defendant, Atlantic & East Carolina Railroad Company, at railroad crossing over North John Street in the town of Goldsboro, N. C., allegedly resulting from actionable negligence of the above named defendant—as lessee of its co-defendant.

These facts seem to be uncontroverted: John Street, which runs in north-south direction, intersects with Atlantic Street, which runs in east-west direction. The portion of John Street north of this intersection is called North John Street. Just north of this intersection three tracks of defendant's railroad cross North John Street,—the main line track being the most southern, then a spur track, and then a pass track or siding, in the order named going from south to north.

The collision occurred about the hour of 4:40 or 4:50 a.m., and well before sunrise on 5 February, 1949. At the time, plaintiff was about his business as a police officer of the city of Goldsboro, riding in a patrol car of the city, then being driven by R. L. Morse, another police officer of the city, who was assigned to duty with plaintiff; and the patrol car was traveling southward along North John Street, and the shifting engine and cars were moving eastwardly on the main line track.

Plaintiff, in his complaint, alleges, as acts of negligence on the part of defendant Atlantic & East Carolina Railroad Company, proximately causing the injuries of which he complains, that as its Diesel shifting engine and train of cars approached the crossing over North John Street, the headlights of the engine were not burning, and no signal of any kind, by whistle, bell or otherwise, was given nor was there a flagman or signalman at the crossing to warn of the approach of the engine and train.

Defendant Atlantic & East Carolina Railroad Company, in its answer, which is adopted by its co-defendant, denies these allegations of negligence set forth against it in the complaint, and denies liability to plaintiff for injuries he sustained,—and avers that at the time in question the engine had its lights burning, that a flagman was on the pilot of the engine, and that signals of the presence of the locomotive were given by blowing of whistle and ringing of bell.

And on the trial in Superior Court, plaintiff and defendant offered testimony tending to support their respective contentions in this respect.

On the other hand, defendant Atlantic & East Carolina Railroad Company, in its further answer, and in bar of plaintiff's right to recover herein, makes these averments: That at the time in question R. L. Morse, driver of the automobile in which plaintiff was riding, and plaintiff were engaged in a joint enterprise in that they were both upon a mission in the performance of their duties as police officers of the city of Goldsboro and were operating a patrol car belonging to the city which was furnished

to them for their joint use, and over which they had joint control, in carrying out the joint enterprise, and that the plaintiff and the said R. L. Morse were guilty of negligence and carelessness which was the sole and proximate cause of the injury to the plaintiff in the following particulars, briefly stated: That the driver of the automobile (1) was operating it at an excessive rate of speed, (2) failed to stop, look and listen for the approach of trains before entering into and upon the crossing as required by statute, (3) was not keeping a proper lookout ahead, and (4) upon observing the locomotive, attempted to run around in front of same after it had passed over the center of the crossing; and that the carelessness and negligence of the driver was consented to, approved and acquiesced in by, and is imputed to plaintiff, and constitutes contributory negligence on his part, and is pleaded in bar of his right to recover against the defendant in this action.

Then defendant further avers that plaintiff, by his own negligence and carelessness proximately contributed to his injury in that (1) he saw, or by the exercise of due care, should have seen the defendant's locomotive in time to have given warning to the driver of the automobile, (2) he failed to give the driver of the automobile warning of the presence of the locomotive, and (3) he was aware, or should have been aware, that the driver was operating the automobile in careless and negligent manner, and without keeping a proper lookout for the approach of defendant's locomotive at and upon the crossing, and failed to remonstrate with the driver and to caution him of the danger of such careless and negligent driving, all of which is pleaded in bar of plaintiff's right to recover in this action.

And upon the trial in Superior Court, plaintiff, on direct examination, relating to defendant's averment of joint enterprise, testified: "Mr. Morse was driving . . . and he had control of the automobile. I did not have any control of that automobile." But on cross-examination in respect thereto, he testified: "At least two years prior to this accident Mr. Morse and I have been working together as police officers . . . We were on the night shift . . . On the night of the accident we went to work at 12 o'clock, and we were working together. We worked by automobile travel. We had one patrol car and we were operating that. We ride all over Goldsboro and check store fronts and business places . . . That's what we were doing together . . . We exchange drivers. He drives some and I drive some . . . The first one gets under the wheel does the driving, when out on police activities. He was out to do the same identical thing I was to do. The car was delivered to us for our joint use in carrying on our police activities . . . It was delivered on this occasion to Mr. Morse and me for our use in doing our police activities that night." Further, on re-direct examination, plaintiff testified: "I drive the automobile

sometimes and Mr. Morse drives it sometimes, the first one to get to the car. In answer to your question, 'State whether or not the man who drives the automobile has the sole and exclusive duty of driving the automobile?', I will say 'Yes, sir.' In answer to your question, 'The man who rides with him has nothing to do with that?', I will say, 'That's right.' That was the situation with reference to the operation of that automobile at the time I was injured. Mr. Morse was driving the car . . ."

Also, R. L. Morse, as witness for plaintiff, testified on cross-examination, in pertinent part: "Mr. James and I have worked together prior to the time of the accident . . . patrolling in an automobile . . . two or three years. It was not any particular one's job to drive the patrol car . . . either I or Mr. James drove this particular car . . . we were supposed to police over the city of Goldsboro . . . check . . . warehouses and stores . . . Those were our duties together, patrolling."

Then on re-direct examination this witness continued: "That car had one clutch pedal, one brake pedal, one emergency brake and one steering wheel and I had control of all these. At the time the accident occurred I was in complete control of that car. At the time this collision occurred, immediately preceding, sometime preceding it and at the time of this accident, Mr. James' duties were to look out for drunks and to inspect doors, etc. . . . Mr. James used the spotlight and flashlight checking from his window in the car. . . . That was to his right."

And on re-cross-examination the witness testified: "In answer to your question 'Mr. Morse, during your patrol duties that night did Mr. James observe the same conditions on the street, for example, a person appearing to be drunk and if he were to call your attention to stop, would you stop?', I will say, 'Yes, sir.' "

Also upon the trial in Superior Court, both plaintiff and R. L. Morse testified that they were familiar with the railroad crossing of John Street, the layout of tracks, and the operation of the shifting engine on the tracks of defendant,—Morse saying: "I am familiar with that intersection . . . I have crossed it numerous times. I am familiar with the operation of the trains along those tracks, and switch engine . . . have seen them out there on numerous occasions before then. I have observed them operating early in the morning about the same time . . . between four and five o'clock."

And plaintiff, describing the scene of and referring to events immediately preceding the collision, testified: "Mr. Morse and I were . . . in the discharge of our duties as police officers at the point where North John Street crosses the railroad tracks . . . that street light was there . . . in the intersection . . . around 60 feet from the point at which the automobile . . . was struck. The street light is about 20 feet high. The

light was burning at the time but it wasn't giving but very little light in the intersection where the railroad was . . . We had crossed two tracks before we got to the track that the train hit us on . . . the weather was clear. It was dark . . . we . . . checked stores and fronts and come to the Goldsboro Iron & Metal Company. We stopped and shined our lights on the front of the building on the doors, which is, I would say, 80 or 90 feet from the railroad, pulled off from there at a slow rate of speed, and we got to this third track . . . I looked both ways . . . I looked and saw the front of the engine 6 or 8 feet from the car. I said, 'Look out, Dick,' and by that time they hit us in the side . . . The lights of our automobile were burning at that time and they were burning all the way as we proceeded across that crossing . . . No, I wouldn't say we stopped. We only had about 20 steps to travel before we hit the railroad . . . We did look . . . There was nothing to obscure our vision to the left . . . I did not say anything to Mr. Morse about stopping and looking and listening . . . The street light was burning . . . but it don't throw no light down the track . . . We were going across—swinging to the west side of the street as we came across. I would say we were going 2 or 3 miles an hour."

And R. L. Morse testified: "I could not say whether either of us got out in this section of town immediately prior to the collision . . . slowed down almost to a complete stop."

Defendant, on the other hand, offered testimony of members of the train crew tending to show that a brakeman was on the front of the engine as it came up to the crossing; that there was a light on the front of the engine; that the light was burning at the time; that the bell was ringing; that the engine was moving about four miles an hour; and that when the engine was about two-thirds across the crossing the car hit the north side of the Diesel at the front step.

The case was submitted to the jury, over objection and exception by plaintiff, upon these issues:

"1. Was the plaintiff injured and damaged by the negligence of the defendant as alleged in the complaint?

"2. If so, did the plaintiff contribute to his injury and damage by his own negligence as alleged in the answer?

"3. Were the plaintiff and the driver of the automobile in which the plaintiff was riding engaged in a joint enterprise at the time of the collision as alleged in the answer?

"4. Did the driver of the automobile in which the plaintiff was riding contribute to the injury and damage of the plaintiff by his negligence as alleged in the answer?

"5. What amount, if any, is the plaintiff entitled to recover of the defendant?"

The jury answered each of the first two issues "Yes," and did not answer either of the remaining issues.

In apt time plaintiff tendered three issues, first as to negligence of defendant, Atlantic & East Carolina Railroad Company, second as to damage, and third as to liability of Atlantic & North Carolina Railroad Company as lessor.

To the refusal of these issues plaintiff excepted.

From judgment in favor of defendant on verdict rendered plaintiff appeals to Supreme Court and assigns error.

Scott B. Berkeley for plaintiff, appellant.

Matt H. Allen and Dees & Dees for Atlantic & E. C. R. R. Co., defendant, appellee.

R. Mayne Albright for Atlantic & N. C. R. R. Co., defendant, appellee.

WINBORNE, J. The questions, decisive of this appeal, are these: (1) Is there sufficient evidence as shown in the record to require the submission of an issue as to contributory negligence? (2) If so, is there error in the charge in respect to the burden of proof as it relates to the issue of contributory negligence? Both questions deserve an affirmative answer.

In considering the first question it must be borne in mind that the defendants base their plea of contributory negligence on two theories: (1) That the plaintiff and Morse, the driver of the patrol car in which plaintiff was riding at the time of the collision, were engaged in a joint enterprise, and that Morse was negligent in the respects averred in the further answer of defendants, and that his negligence is imputable to plaintiff; and (2) that plaintiff, by his own negligence, contributed to his injuries.

What is a joint enterprise is a question of law for the court. Whether a joint enterprise exists has to be determined to a great extent from the facts in the particular case. *Jernigan v. Jernigan,* 207 N.C. 831, 178 S.E. 587. If the facts be in dispute, the issue is for the jury. But if the facts be not in dispute, the whole resolves itself into a question of law. For the rule in similar question, see *Miller v. Johnston,* 173 N.C. 62, 91 S.E. 593; *Brown v. Hodges,* 232 N.C. 537, 61 S.E. 2d 603.

The annotators say that the authorities are generally agreed that if two or more persons are engaged in a joint enterprise involving the operation of an automobile, and one of them is injured by the negligence of a third party and the concurring negligence of the other party to the joint enterprise, the latter's negligence is imputed to the one injured, and will bar a recovery against the third person. Annotations 62 A.L.R. 440, 85 A.L.R. 630.

This doctrine of joint enterprise is recognized in North Carolina in numerous cases. Much has been written by this Court on what is not, rather than what is, a joint enterprise. However, the principle is clearly stated in *Albritton v. Hill,* 190 N.C. 429, 130 S.E. 5, in this quotation: ". . . 'The circumstances must be such as to show that the occupant and the driver together had such control and direction over the automobile as to be practically in the joint or common possession of it. Parties cannot be said to be engaged in a joint enterprise unless there is a community of interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movement of each other with respect thereto. Each must have some voice and right to be heard in its control and management.' Huddy on The Law of Automobiles, 893." See *Pusey v. R. R.,* 181 N.C. 137, 106 S.E. 452; *Williams v. R. R.* (concurring opinion with citations), 187 N.C. 348, 121 S.E. 608; *Charnock v. Refrigerating Co.,* 202 N.C. 105, 161 S.E. 707; *Newman v. Coach Co.,* 205 N.C. 26, 169 S.E. 808; *Johnson v. R. R.,* 205 N.C. 127, 170 S.E. 120. See also citations in *Haney v. Lincolnton,* 207 N.C. 282, 176 S.E. 573; also Annotation 80 A.L.R. 312.

In *Charnock v. Refrigerating Co., supra,* it is said: "A common enterprise in riding is not enough; the circumstances must be such as to show that plaintiff and the driver had such control over the car as to be substantially in the joint possession of it," citing *Albritton v. Hill, supra.*

Moreover, Blashfield, treating the subject, says: "An essential, and perhaps the central, element which must be shown in order to establish a joint enterprise is the existence of joint control over the management and operation of the vehicle and the course and conduct of the trip. There must . . . in order that two persons riding in an automobile, one of them driving, may be deemed engaged in a joint enterprise for the purpose of imputing the negligence of the driver to the other, exist concurrently two fundamental and primary requisites, to wit, a community of interest in the object and purpose of the undertaking in which the automobile is being driven and an equal right to direct and govern the movements and conduct of each other in respect thereto. The mere fact that the occupant has no opportunity to exercise physical control is immaterial." Cyclopedia of Automobile Law and Practice. Blashfield 4, Sec. 2372.

"The control required is the legal right to exercise control. It does not necessarily require that there be actual physical control." *Murphy v. Keating,* 204 Minn. 269, 283 N.W. 389. To like effect are *Howard v. Zimmerman,* 120 Kan. 77, 242 P. 131; *Crescent Motor Co. v. Stone,* 211 Ala. 516, 101 So. 49.

It may be noted also that a police officer, unknown to common law, is a creature of statute, and as such has, and can only exercise such powers as are given to him by the Legislature, expressly or derivatively. *S. v.*

Freeman, 86 N.C. 683; *Martin v. Houck,* 141 N.C. 317, 54 S.E. 29; *Wilson v. Mooresville,* 222 N.C. 283, 22 S.E. 2d 907. The law applies alike to plaintiff and to R. L. Morse, as policemen. Thus when they became policemen of the city of Goldsboro, the existing laws pertaining to the position, entered alike into, and became a part of the relationship thus established as to each of them. In law, as officers, they attained equal rank. And their testimony, shown in the record on this appeal, indicates that the automobile was furnished by the city for their joint use in performing in common the activities of patrolling, in which they were engaged, and that each had an equal right to direct and govern the movements and conduct of the other in respect thereto. The mere fact that only one of them, at a time, could actually physically control the car, is immaterial.

Therefore, in the light of these principles applied to the evidence shown in the record on appeal, there is evidence to support a finding that plaintiff and R. L. Morse, at the time and place of the collision, were engaged in a joint enterprise. Likewise there is evidence tending to support the averment made by defendants as to negligence of R. L. Morse in the operation of the patrol car at the time and place of the collision.

Moreover, there is evidence tending to support the averments made by defendants as to negligence on the part of plaintiff.

Now, as to the second question: Plaintiff's Exception No. 19 is directed to this portion of the charge: "Gentlemen of the jury, another cardinal principle the court will ask you to bear in mind throughout the entire deliberation and discussion of this testimony in arriving at your verdict and that is, that the laboring oar, the burden, is upon the plaintiff in this case to satisfy you by the greater weight of the evidence before he can recover in this action." And plaintiff's Exception No. 24 is directed to this portion of the charge: "The defendant does not have to prove to you anything to your satisfaction; there is no burden upon this defendant with respect to the degree of proof that it will show to you, or has shown to you, but the burden is upon the plaintiff to satisfy you by the evidence and by its greater weight that he is entitled to recover." Both of these exceptions are well taken. While the burden of proof as to the first issue, that is, as to the negligence of defendant, rests upon the plaintiff, the burden of proof as to affirmative defenses is upon the defendant. *Pittman v. Downing,* 209 N.C. 219, 183 S.E. 362. The plea of contributory negligence is an affirmative defense, and when relied upon by defendant, the statute, G.S. 1-139, puts the burden of proving it on the defendant. Among cases so holding are these: *Wallace v. R. R.,* 104 N.C. 442, 10 S.E. 552; *Cox v. R. R.,* 123 N.C. 604, 31 S.E. 848; *Tyree v. Tudor,* 183 N.C. 340, 111 S.E. 714; *Cherry v. R. R.,* 185 N.C. 90, 116 S.E. 192;

Ramsey v. Furniture Co., 209 N.C. 165, 183 S.E. 536; *Pittman v. Downing, supra; Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307.

Defendants, however, urge that even if it be conceded that the court erred in the charge, such error should not entitle plaintiff to a new trial,—*Munday v. Bank*, 211 N.C. 276, 189 S.E. 779,—earnestly contending that they were entitled as a matter of law to a nonsuit on either the issue of contributory negligence or on the issue of the negligence of the driver while engaged in a joint enterprise. Hence a new trial would be a useless procedure. As to this contention, it is sufficient to say that the question of nonsuit is not presented on this appeal, and may not be considered.

Other assignments of error are not treated, since they may not recur upon another trial.

For error indicated above, a new trial is ordered.

New trial.

MARY ESSICK, ADMINISTRATRIX OF HARVEY ESSICK, v. CITY OF LEXINGTON AND LEXINGTON UTILITY COMMISSION.

(Filed 23 May, 1951.)

1. **Electricity § 7—**

Evidence tending to show that a municipal utility maintained uninsulated wires carrying a lethal voltage only about four feet above a tramway being constructed over a street with the city's knowledge and permission (G.S. 143-136), and that a workman on the tramway, who was not warned that the wires carried a dangerously powerful current, was electrocuted when a strip of metal he was using to cap the top of the roof of the tramway came in contact with the uninsulated wires, *is held* sufficient to be submitted to the jury on the issue of negligence of the city and its utility commission.

2. **Electricity § 10—**

Evidence tending to show that a carpenter while working on the roof of a tramway over a street was electrocuted when a strip of metal he was handling came in contact with uninsulated high voltage wires maintained only about four feet above the roof of the tramway, and that he had not been warned that the wires carried a dangerously powerful current, *is held* not to establish contributory negligence as a matter of law on the part of the workman.

3. **Negligence § 19c—**

Nonsuit on the ground of contributory negligence can be rendered only when but one reasonable inference leading to that conclusion can be drawn from the evidence.

4. Electricity § 11: Negligence § 19d—

The evidence disclosed that intestate was electrocuted when a metal strip he was holding in the performance of his work in roofing a tramway over a street came into contact with uninsulated wires maintained about four feet above the roof. The failure of intestate's employer to warn him of the dangerously powerful current carried by the wires in close proximity to the place at which he was directed to work cannot be held as a matter of law to establish negligence on the part of the employer constituting the sole proximate cause of the accident or that the employer's negligence insulated the negligence of the utility so maintaining the wires.

5. Appeal and Error § 3—

Ordinarily, persons who are dismissed as additional parties defendant and therefore do not participate in the trial and are not parties thereto, may not appeal from the judgment upon exception to the issues submitted.

6. Negligence §§ 7, 11, 21: Trial § 39—

A finding by the jury on the issue of negligence which establishes that the alleged negligence of a third party was not the sole proximate cause of the injury and did not insulate the negligence of defendants is not inconsistent with a finding by the jury upon a subsequent issue that such third party was guilty of negligence contributing to the injury, since negligence of the third party may contribute to the injury without being either the sole proximate cause thereof or a new and independent cause insulating defendants' negligence.

7. Master and Servant § 41—

In an action by the personal representative of a deceased employee against the third person tort-feasor, it is proper for the court to submit, upon supporting evidence, an issue as to the contributing negligence of the employer and, upon an affirmative finding thereto by the jury, to preclude the employer and its insurance carrier from reimbursement for the amount of compensation paid under the provisions of the Workmen's Compensation Act. G.S. 97-10. In the absence of such finding they would be entitled to such reimbursement upon their certificate of interest even though they were not parties to the action.

BARNHILL, J., dissents to the decision on the appeal of City of Lexington and Lexington Utility Commission.

APPEAL by defendants from *Moore, J.*, February Term, 1951, of DAVIDSON. No error.

This case was here at Spring Term, 1950, and is reported in 232 N.C. 200.

The action was instituted to recover damages for the wrongful death of plaintiff's intestate alleged to have been caused by the negligence of the defendants. The defendants denied the allegations of negligence and pleaded contributory negligence on the part of plaintiff's intestate.

The defendants also alleged that plaintiff's intestate at the time of his injury and death was in the employ of Dixie Furniture Company; that Dixie Furniture Company was negligent in respect thereto, and that its negligence was primary, and the sole proximate cause of the injury, or that its negligence insulated any negligence on the part of the City and its Utility Commission. Defendants further alleged that the Dixie Furniture Company, employer, and its insurance carrier, Travelers Insurance Company, had paid an award under the Workmen's Compensation Act for the injury and death of plaintiff's intestate, which plaintiff has received as compensation for the death of her intestate, but that by reason of the contributing negligence of the Dixie Furniture Company as alleged, it and its insurance carrier were barred from reimbursement of the amount so paid out of any amount the plaintiff might recover under the principle of subrogation.

On motion of these answering defendants the Dixie Furniture Company and two of its employees were made additional parties defendant. Both the plaintiff and the additional defendants excepted to the order making them parties.

In the opinion in the former appeal it was held that the demurrer to the complaint interposed by the original defendants should be overruled, that the two employees of Dixie Furniture Company were not proper parties, and that under the pleadings as then appeared the inclusion of Dixie Furniture Company was not justified. Pursuant to this opinion judgment was rendered in the Superior Court that Dixie Furniture Company and its two employees be dismissed as parties defendant, and should no longer be referred to as defendants. No pleadings were filed by Dixie Furniture Company though the insurance carrier filed an affidavit of interest.

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

"1. Was the plaintiff's intestate's death caused by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"2. If so, did plaintiff's intestate, by his own negligence, contribute to his said death, as alleged in the answer? Answer: No.

"3. Was the Dixie Furniture Company guilty of negligence contributing to the death of the plaintiff's intestate, as alleged in the answer? Answer: Yes.

"4. What amount of damages, if any, is the plaintiff entitled to recover of the defendants? Answer: $20,000.00."

From judgment on the verdict that plaintiff recover of the defendants the amount of the verdict less the amount heretofore received under the Workmen's Compensation Act ($6,010), to wit, $13,990, the defendants appealed.

The Dixie Furniture Company and its insurance carrier, Travelers Insurance Company, also excepted to the judgment and appealed.

S. A. DeLapp and Don A. Walser for plaintiff, appellee.
Jones & Small and P. V. Critcher for defendants, appellants.
Smith, Sapp, Moore & Smith for Dixie Furniture Company and Travelers Insurance Company, appellants.

DEVIN, J. The only assignment of error brought forward by the defendants City of Lexington and Lexington Utility Commission was the denial of their motion for judgment of nonsuit.

It was not controverted that the City of Lexington in its corporate capacity owned and operated electric light and power lines, and that the Utility Commission was an incorporated agency of the City charged with supervision and management thereof. The plaintiff's intestate was a carpenter in the employ of the Dixie Furniture Company and was engaged at the time of his injury in putting a metal cap on the top of the roof over an elevated tramway constructed by the Dixie Furniture Company, with the permission of the City, over a city street. The defendants had changed and relocated wires conveying 2,300 volts of electricity over this street and tramway in such way that uninsulated power wires were left only about four feet above the roof of the tramway. It was in evidence that while plaintiff's intestate was on the roof of the tramway handling strips of metal for capping one of these strips came in contact with the electric wire overhead and plaintiff's intestate was electrocuted.

The plaintiff's evidence, tending to show the improper placing of wires carrying so powerful an electric current at less than the height prescribed by the North Carolina Building Code regulations (G.S. 143-136) above construction work then being carried on with the knowledge and permission of the defendants, and that it could reasonably have been foreseen that those engaged in this work, who were unwarned that the uninsulated wires carried a dangerously powerful current, were likely to come in contact therewith, when considered in the light most favorable for the plaintiff, was sufficient to justify the imputation of negligence proximately causing the injury and death complained of. But defendants present the view also that the evidence offered by plaintiff makes out a conclusive case of contributory negligence on the part of plaintiff's intestate, and that their motion for judgment of nonsuit should have been sustained on that ground. However, it appears that plaintiff's intestate was a carpenter presumably unfamiliar with electric wiring and electric current, and was without knowledge or warning that the wires carried so powerful a current of electricity, or that wires placed so close to work then being carried on with the knowledge of the defendants were uninsulated. With-

out undertaking to state the evidence at length, we reach the conclusion that it does not establish as a matter of law that plaintiff's intestate was guilty of such contributory negligence as would bar recovery. The rule is that a judgment of nonsuit on this ground can be rendered only when but one reasonable inference leading to that conclusion can be drawn from the evidence. *Hampton v. Hawkins,* 219 N.C. 205, 13 S.E. 2d 227; *Daughtry v. Cline,* 224 N.C. 381, 30 S.E. 2d 322; *Barlow v. Bus Lines,* 229 N.C. 382, 49 S.E. 2d 793. Nor do we think the evidence was such as to justify nonsuit on the ground that negligence on the part of the plaintiff's intestate's employer Dixie Furniture Company was either the sole proximate cause of the injury or that it insulated the negligence of the defendants.

The case was properly submitted to the jury.

On the appeal of defendants City of Lexington and Lexington Utilities Commission there is

No error.

APPEAL of Dixie Furniture Company and Travelers Insurance Company.

The Dixie Furniture Company and the Travelers Insurance Company, though not parties to the action, noted exception to the judgment and to the submission of the 3rd issue, and have brought their appeal to this Court.

The defendants City of Lexington and Lexington Utility Commission contend that these appellants have no standing in court, as they were not parties to the action; that the Dixie Furniture Company was dismissed as additional party defendant upon objection by plaintiff and Dixie Furniture Company, and did not participate in the trial, and hence should not now be heard to except to the rulings of the trial judge or to issues which were submitted without objection.

This position would seem to be in accord with appropriate appellate procedure, but we will nevertheless consider the two points raised: (1) That the judge in his charge to the jury on the 1st issue submitted to the jury, in connection therewith, the question of intervening negligence on the part of the Dixie Furniture Company, and that the answer to that issue should have been held determinative of the 3rd issue. This position cannot be upheld as the finding that negligence on the part of Dixie Furniture Company did not insulate and render harmless the negligence of the City of Lexington and its Utility Commission is not necessarily inconsistent with finding also that Dixie Furniture Company was negligent, and that its negligence contributed to the injury complained of.

Plaintiff's allegation of negligence on the part of the City and its Utility Commission, in substance, was that these defendants had negli-

gently placed and continued to maintain high tension uninsulated electric wires carrying a powerful current along a city street and immediately over an elevated tramway which they knew had been planned and was being constructed, and in such close proximity to the structure that in the exercise of due care it could have been foreseen that those engaged in this construction would likely come in contact with these power wires to their injury, and that this negligent placing of the wires was done and allowed to remain without warning of the dangerous nature of the current to those engaged in this construction.

The answer of the defendants City of Lexington and Lexington Utility Commission alleged negligence on the part of the Dixie Furniture Company in that it directed plaintiff's intestate to work in close proximity to these high tension electric wires without instruction or warning as to the dangerous nature of the electric current being carried by these wires. As a defense to the plaintiff's action it was alleged that this negligence on the part of the Dixie Furniture Company was primary, or was the sole proximate cause of the intestate's death, or that it was a new and intervening cause which insulated and rendered ineffective and harmless any negligence on the part of the defendants.

Upon the evidence offered in support of these allegations the jury's answer to the 1st issue apparently negatived each of these three defenses, but it did not necessarily acquit the Dixie Furniture Company of fault or decide that its negligence was not in some degree a contributing cause of Essick's death. The finding on the 1st issue disposed of the defendants' defense that the negligence of Dixie Furniture Company in the respects alleged in the answer was a new and intervening cause breaking the chain of causation and interrupting the sequence between the defendants' negligence and the injury complained of, but it did not thereby absolve the Dixie Furniture Company entirely of the imputation of negligence constituting a contributing cause of the injury.

Insulating negligence as that term is defined and applied in *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761; *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808; *Shaw v. Barnard,* 229 N.C. 713, 51 S.E. 2d 295, means something more than a concurrent and contributing cause, and is not to be invoked as determinative merely upon proof of negligent conduct on the part of each of two persons acting independently but whose acts unite to cause a single injury. *Evans v. Johnson,* 225 N.C. 238, 34 S.E. 2d 73; *Bost v. Metcalfe,* 219 N.C. 607, 14 S.E. 2d 648. Contributing negligence signifies contribution rather than independent or sole proximate cause. *Noah v. R. R.,* 229 N.C. 176, 47 S.E. 2d 844.

2. The Dixie Furniture Company and the Travelers Insurance Company insist that the 3rd issue was improperly submitted, and the court

should not have held that the finding on this 3rd issue that the employer was guilty of negligence contributing to the death of plaintiff's intestate should preclude them from reimbursement out of the plaintiff's recovery for the amount they had paid and the plaintiff had received on account of the death of her intestate under the Workmen's Compensation Act. But this statute (G.S. 97-10) has been repeatedly interpreted by this Court, both the original statute and the amendments thereto, and it has been uniformly held that the third party tort-feasor when sued for damages for an injury to an employee which is compensable under the Workmen's Compensation Act, is entitled to plead contributory negligence on the part of the employer as a bar to reimbursement *pro tanto* for the award paid. *Brown v. R. R.*, 202 N.C. 256, 162 S.E. 613; *Brown v. R. R.*, 204 N.C. 668, 189 S.E. 419; *Whitehead & Anderson, Inc., v. Branch*, 220 N.C. 507, 17 S.E. 2d 637; *Eledge v. Light Co.*, 230 N.C. 584, 55 S.E. 2d 179. In this case on the former appeal (232 N.C. 200) *Justice Seawell* restated the rule as follows: "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." It was pointed out by *Justice Connor* in *Brown v. R. R.*, 202 N.C. 256, 162 S.E. 613, that the reason supporting this rule is that one should not be allowed to profit by his own wrong. *Davis v. R. R.*, 136 N.C. 115, 48 S.E. 591.

It may be noted that the statute G.S. 97-10 provides that the right to bring the action against the third party tort-feasor when compensation has been paid or assumed shall for the period of six months following the injury belong to the employer or his insurance carrier and thereafter to the injured employee or his personal representative, though when the action is for wrongful death the action must in any event be brought in the name of the personal representative. Here the suit was instituted by the personal representative of the deceased, and the employer and its insurance carrier have taken no action except to file an affidavit of interest. However, this would not have prevented them from being reimbursed from the recovery except for the finding of the jury on the 3rd issue.

We conclude that the rulings of the trial court in respect to the questions raised by the appeal of the Dixie Furniture Company and the Travelers Insurance Company should be affirmed, and it is so ordered.

Judgment affirmed.

BARNHILL, J., dissents to the decision on the appeal of City of Lexington and Lexington Utility Commission.

MARY LOU MINTZ v. ATLANTIC COAST LINE RAILROAD CO.

(Filed 23 May, 1951.)

1. Master and Servant § 15a—

Evidence tending to show that three inches of the tread of the steps of a steel spiral stairway used by plaintiff employee in the performance of her work had been worn smooth and that the steps were thereby rendered extremely slick, and that the employee fell on the steps to her injury, *is held* sufficient to be submitted to the jury on the question of negligence of the employer in failing to exercise ordinary care to provide the employee a reasonably safe place in which to work.

2. Damages § 1a—

The living expenses of plaintiff are not an element of compensatory damage recoverable for negligent injury unless the injury augments them by necessitating convalescent care or recuperative attention, etc., in which case the amount expended over and above plaintiff's normal living expenses may be recovered.

3. Same—

Where plaintiff seeks to recover compensatory damages only and there is no evidence that her living expenses were materially increased by reason of the negligent injury sued on, testimony of plaintiff, over objection, that since her injury she had been supported by her father and her brothers and sisters, must be *held* for prejudicial error as calculated to mislead the jury on the issue of damages and augment the recovery.

4. Same—

Damages recoverable for a personal injury are all damages, past, present and prospective, sustained as a consequence thereof, embracing loss of past earnings, without interest, and the present cash value of prospective earnings, considering plaintiff's age, occupation and amount of income, and also indemnity for actual nursing and medical expenses and a reasonable satisfaction for actual suffering, physical and mental, which are the immediate and necessary consequences of the injury.

5. Master and Servant § 15a—

It is not the absolute duty of the employer to furnish his employee a reasonably safe place to work, but only to exercise due care to provide such place.

6. Trial § 49½—

Whether a verdict should be set aside for excessiveness is ordinarily addressed to the sound discretion of the trial court.

APPEAL by defendant from *Williams, J.*, September Term, 1950, of BRUNSWICK.

Civil action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant.

The plaintiff was employed by the defendant as a clerk in the office of Auditor of Freight Receipts, which is on the third floor of Coast Line Building "A," City of Wilmington. The file room, where statement forms are kept, is on the fourth floor of the same building, sometimes called the attic. These two floors are connected by an iron spiral stairway of 22 steps. The steps are fastened to a center post and to each other by a spindle in the handrailing on the outer edge of the steps.

The allegations of negligence are that the steel spiral stairway was insufficiently lighted; that the treads on the stairway were smooth and slippery; that the handrail was loose and insecure, and that both the handrail and the stairway were in an unsafe and dangerous condition. From this she concludes the defendant negligently omitted to provide her a reasonably safe place to work.

The plaintiff's evidence is to the effect that on 10 April, 1947, she went to the fourth floor to get some statement forms or blanks, and as she descended the steps on her way back she slipped on the 10th or 11th step, "fell four or five steps, landing on the lower end of my back." She further testified that her lower spine was seriously injured by the fall and that her condition is permanent.

There is also evidence on behalf of the plaintiff tending to show that the corners of the corrugated steps were "worn slick . . . the outer edge that you step on is worn slick as glass. . . . The tread has a triangular shape; about three inches of it is worn smooth and slick . . . extremely smooth, like a worn piece of steel; . . . that the steps and railing were shaky."

The plaintiff offered two physicians who testified that her injuries were both serious and permanent. And she was allowed to testify, over objection, that since her injury she had been supported by her father and her brothers and sisters.

On 13 May, 1947, the plaintiff signed a statement saying that she stepped on a nail which caused her to fall and that someone caught her as she was falling and prevented her head from striking the steps. On the stand, she repudiated this statement and denounced it as spurious.

The defendant denied the allegations of negligence, pleaded contributory negligence, and offered evidence tending to show that the stairway in question "is a standard, spiral stairway in general use"; that it was well lighted; that the treads on the steps were neither smooth nor slick; that "the wearing of feet on steps makes them bright, but the diamond

safety tread is still there; . . . the nosing is slick, and it is supposed to be slick"; that the slight rattling of the rods in the handrail in no way affected the safety of the steps.

Defendant's evidence also tends to show that much nearer to plaintiff's desk was an elevator in general and constant use which she could have taken to the file room. Some employees used the elevator; some the stairway; both were in general and constant use.

J. F. Surles, Jr., a witness for the defendant, testified that he was ascending the stairway at the time the plaintiff was descending it and stepped to the outer edge of the 10th or 11th step to let her pass as she had her arms full of forms; that "when she got just about even with me she slipped; it looked like her feet went out from under her and she started slipping down, maybe going to sit down on the next step, and I caught her by her blouse, or her shoulders and blouse at the same time, and she sat there on the next step which was about the tenth. Mrs. Fowler who worked upstairs in the file room came down and assisted her to the rest-room. I caught her as she slipped."

(On rebuttal, the plaintiff said: "I don't remember seeing Mr. Surles. I deny that I passed him on the steps.")

The defendant offered two physicians, one of whom testified: "I don't believe that there is a permanent disability"; the other "that she is suffering from what is known as a conversion reaction (*i.e.*) a change from psychological symptom to a physical symptom."

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff, the jury assessing her damages at $33,500.00. Motion to set the verdict aside for excessiveness; overruled; exception. The plaintiff consented to a reduction in the award, and judgment was signed in her favor for $27,500.

The defendant appeals, assigning errors.

John D. Bellamy & Sons, Frink & Herring, Kirby E. Sullivan, and Lloyd S. Elkins, Jr., for plaintiff, appellee.

Poisson, Campbell & Marshall for defendant, appellant.

STACY, C. J. The defendant has pressed its motion for judgment of nonsuit with vigor and conviction. However, taking the plaintiff's evidence as true and in its most favorable light for her, the accepted position on a motion of this kind, it appears that about three inches of the treads on the stairway were "smooth and slippery, worn extremely smooth and slick, and the outer edge of the tread was worn slick as glass," rendering the stairway unsafe and dangerous. This would seem to carry the case to the jury, even if it be conceded that the remaining evidence of "shaky

steps and railing" is too feckless to have any bearing on the issue. *Batson v. Laundry,* 205 N.C. 93, 170 S.E. 136. It is true the stairway was examined immediately after the plaintiff's fall, and her evidence is disputed, still this was a matter for the jury and not the court. Indeed, the case seems to be one of contradictions in many respects.

A new trial must be awarded, however, for error in allowing the plaintiff to testify, over objection, that since her injury she has been supported by her father and her brothers and sisters. This was incompetent on the issue of damages, calculated to mislead the jury, and it undoubtedly augmented the recovery. *Robertson v. Conklin,* 153 N.C. 1, 68 S.E. 899, 138 Am. S. R. 635, 21 Ann. Cas. 930; *Journigan v. Ice Co., ante,* 180, 63 S.E. 2d 183; *McCoy v. R. R.,* 229 N.C. 57, 47 S.E. 2d 532; *Alley v. Foundry Co.,* 159 N.C. 327, 74 S.E. 885; *Wallace v. R. R.,* 104 N.C. 442, 10 S.E. 552.

There is nothing in the case to justify a consideration of the plaintiff's pecuniary condition in assessing the damages. The action is to recover for personal injuries arising from the defendant's negligent default and not from any willful or malicious conduct on its part. Compensatory damages alone are sought, and there is no suggestion that plaintiff's living expenses were materially increased by the injury. *Robertson v. Conklin, supra; Reeves v. Winn,* 97 N.C. 246, 1 S.E. 448.

The pertinent authorities are epitomized in 17 C.J. 801 as follows: "A plaintiff is not entitled to recover for his living expenses during the period of disability occasioned by the injury, where it does not appear that they were increased by the injury. But he is entitled to compensation for an increase in such expenses occasioned by the injury."

One of the authorities there cited is *Vedder v. Delaney,* 122 Iowa 583, 98 N.W. 373, in which it is said: "Plaintiff, like every other person, is expected to pay for his own board and keeping, and that obligation is not removed by his injury through the negligence of another. It is true that the injury renders him unable for the time being to earn his board, but, if he recovers at all, he recovers compensation for his loss of time, which is the equivalent of wages; and thus, so far as this item is concerned, he is made whole. It may well happen that, by reason of his injured and dependent condition, his expense for board is materially increased, and in such case, doubtless, the enhanced cost may be recovered."

In *Graeber v. Derwin,* 43 Cal. 495, a new trial was granted for the exact error committed here, and this was the only question considered in the opinion.

The case at bar is not like *Perkins v. Coal Co.,* 189 N.C. 602, 127 S.E. 677, where the plaintiff was allowed to state that his hospital, doctor, and drugstore bills, occasioned by his injury, were unpaid because of his

inability to pay them, and that he had promised to pay them, their reasonableness not being questioned. *Allen v. Traction Co.,* 144 N.C. 288, 56 S.E. 942. The plaintiff's living expenses as distinguished from those occasioned by her injury are not within the measure of damages for her loss. The defendant is required to pay for the loss occasioned by its negligence, not to support the plaintiff during her disability. *Blaine v. Lyle,* 213 N.C. 529, 196 S.E. 833. The measure of liability in such case is stated in *Ledford v. Lumber Co.,* 183 N.C. 614, 112 S.E. 421; *Helmstetler v. Power Co.,* 224 N.C. 821, 32 S.E. 2d 611; *Daughtry v. Cline,* 224 N.C. 381, 30 S.E. 2d 322, 154 A.L.R. 789; *Fox v. Army Store,* 216 N.C. 468, 5 S.E. 2d 436; *Shipp v. Stage Lines,* 192 N.C. 475, 135 S.E. 339; *Fry v. R. R.,* 159 N.C. 357, 74 S.E. 971; *Johnson v. R. R.,* 163 N.C. 431, 79 S.E. 690.

It is true, as already stated, the tort-feasor may be liable for any additional expenses reasonably entailed by the injury which perforce are in excess of the plaintiff's personal livelihood or normal support. For example, expenses necessarily incurred for hospital treatment, convalescent care, or recuperative attention. *Graeber v. Derwin,* 43 Cal. 495; 15 Am. Jur. 547. The challenged testimony in the instant case, however, was addressed to the plaintiff's personal livelihood or normal support. It was, therefore, incompetent and should have been excluded. *Tankersley v. Lincoln Traction Co.,* 104 Neb. 24, 175 N.W. 602, 10 A.L.R. 1510; 15 Am. Jur. 549.

In cases of personal injury resulting from defendant's negligence, the plaintiff is entitled to recover the present worth of all damages sustained in consequence of the defendant's tort. These are understood to embrace indemnity for actual nursing and medical expenses and for loss of time, or loss from inability to perform ordinary labor, or capacity to earn money. Plaintiff is to have a reasonable satisfaction for actual suffering, physical and mental, which are the immediate and necessary consequences of the injury. The age and occupation of the plaintiff, the nature and extent of his business or employment, the value of his services and the amount of his income at the time, whether from fixed wages, salary or professional fees, are matters properly to be considered by the jury. *Rushing v. R. R.,* 149 N.C. 158, 62 S.E. 890. The award is to be made on the basis of a cash settlement of the plaintiff's injuries, past, present and prospective. *Ledford v. Lumber Co., supra; Pascal v. Transit Co.,* 229 N.C. 435, 50 S.E. 2d 534; *Penny v. R. R.,* 161 N.C. 523, 77 S.E. 774; *Johnson v. R. R.,* 163 N.C. 431, 79 S.E. 690; *Fry v. R. R., supra.* In assessing prospective damages, only the present cash value or present worth of such damages is to be awarded as the plaintiff is to be paid in advance for future losses. *Helmstetler v. Power Co., supra; Murphy v. Lumber Co.,* 186 N.C. 746, 120 S.E. 342. No interest is to be allowed on

damages already sustained because amount not fixed or known prior to verdict, *i.e.*, unliquidated, and only the present cash value or present worth of future losses is to be included in the verdict. *Penny v. R. R., supra;* 15 Am. Jur. 579. See *Harper v. R. R.*, 161 N.C. 451, 77 S.E. 415, for a different rule in respect to interest when action is to recover for property damage.

As a matter of precaution and to guard against its repetition in the form presently couched, attention is directed to the following portion of the charge:

"The Court charges you, Gentlemen, that the defendant owed to the plaintiff under the circumstances in this case the duty of furnishing to the plaintiff a reasonably safe place in which to perform the duties of the work in which she was engaged at the time and to maintain the stairs in a reasonably safe condition."

It is not the absolute duty of the employer to provide a reasonably safe place for his employee to work—such would practically render him an insurer in every hazardous employment—but it is his duty to provide such place in the exercise of ordinary care. *Murray v. R. R.*, 218 N.C. 392, 11 S.E. 2d 326; *Owen v. Lumber Co.*, 185 N.C. 612, 117 S.E. 705; *Gaither v. Clement*, 183 N.C. 450, 111 S.E. 782; *Smith v. R. R.*, 182 N.C. 290, 109 S.E. 22. This limitation on the employer's duty is not a mere play on words, nor a distinction without a difference, since it constitutes a material fact or circumstance affecting the rights of the parties. *Murphy v. Lumber Co.*, 186 N.C. 746, 120 S.E. 342; *Tritt v. Lumber Co.*, 183 N.C. 830, 111 S.E. 872; *Murray v. R. R., supra,* and cases there cited. "It is the duty of the employer, in the exercise of ordinary care, to furnish an employee with a reasonably safe place to work." *Street v. Coal Co.*, 196 N.C. 178, 145 S.E. 11.

There are other exceptions of moment appearing on the record, which we do not reach, as they are not likely to arise on the further hearing.

Whether the verdict should be set aside for excessiveness is ordinarily addressed to the sound discretion of the trial court. *Edmunds v. Allen*, 229 N.C. 250, 49 S.E. 2d 416. See 15 Am. Jur. 649, *et seq.*

For the error as indicated, a new trial must be awarded. It is so ordered.

New trial.

STARMOUNT COMPANY v. GREENSBORO MEMORIAL PARK, INC.

(Filed 23 May, 1951.)

1. Deeds § 16b—

A grantor in a duly registered deed containing contractual restrictions upon the purposes for which the property may be used is entitled to enforce such agreement against a purchaser by *mesne* conveyances from the grantee when the restrictions are reasonable in character and duration and are not against public policy.

2. Same—

A restriction on the enjoyment of property must be created in express terms or by plain and unmistakable implication.

3. Same—

Contractual restrictions in a registered deed that the property should be used only for residential purposes and that it should not be used for business or commercial purposes except for truck farming or poultry raising, *held* to preclude a purchaser by *mesne* conveyances from the grantee from constructing and using a driveway across such property as an entrance to a commercial cemetery maintained on adjoining property, since use of the property as an incident to a forbidden business or enterprise would be tantamount to dedicating it to such proscribed use.

4. Same—

Contractual restrictions placed in a deed for the benefit and convenience of grantor are not impaired by the fact that the grantor reserves the right to unrestricted use of other property retained by him in the vicinity.

APPEAL by defendant from *Moore, J.*, at the April Term, 1951, of GUILFORD.

Civil action to enjoin the breach of a restrictive covenant limiting the free use of land.

The facts are not in dispute. They are summarized in the numbered paragraphs set forth below.

1. The plaintiff, Starmount Company, a domestic corporation, is now, and ever since 5 May, 1941, has been, engaged in developing Friendly Acres, a large tract of land abutting on Westridge Road and other public highways in Guilford County, North Carolina. Although it has conveyed various parts of the tract to sundry purchasers, the plaintiff still retains title to substantial portions of Friendly Acres, including those adjoining the lot mentioned in the next paragraph.

2. On 5 May, 1941, the plaintiff conveyed a part of Friendly Acres, to wit, a lot embracing 4.6 acres and having a frontage of 100 feet on Westridge Road, to Blanche Cox and Eva Cox by a deed, which was forthwith duly recorded in the office of the Register of Deeds of Guilford

County. For convenience of narration, this lot is hereafter called the four acre tract.

3. The deed by which the plaintiff conveyed the four acre tract to Blanche Cox and Eva Cox contained the following provisions pertinent to the present litigation: "But said property is conveyed . . . subject to certain restrictions as to the use thereof, running with said land by whomsoever owned until July 1, 1963, which restrictions are expressly assented to by the party of the second part by the acceptance of this deed and are as follows, to wit: . . . Said property shall be used only for residential purposes and for single family houses unless plans and specifications for houses other than single family houses are approved in writing by the Starmount Company, and said property shall not be used for business, manufacturing or commercial purposes: Provided, however, that this restriction shall not prohibit truck farming or poultry raising on said property. . . . The restrictions set out above shall apply only to said property, and nothing herein shall preclude the Starmount Company from altering the size or direction of frontage of any other property, or the location of any streets or roads other than such portions of such streets or roads as abut said property, or from establishing business districts, or from establishing or allowing to be established hospitals, schools, hotels, or other institutions which in its opinion will be for the benefit of the community in which said property is located."

4. Subsequent to the events enunciated above, the four acre tract passed by *mesne* conveyances from Blanche Cox and Eva Cox to J. W. Means, who also acquired title to 41.47 additional acres bordering the rear of the four acre tract. For convenience of narration, the 41.47 additional acres are hereafter designated as the forty acre tract. The forty acre tract does not lie within the limits of Friendly Acres, and is not restricted in any way as to use.

5. On 21 March, 1950, J. W. Means conveyed the four acre tract and the forty acre tract to the defendant, Greensboro Memorial Park, Inc., a domestic corporation, which is developing and using the forty acre tract as a commercial cemetery.

6. While it does not contemplate devoting any part of the four acre tract to burial purposes, the defendant is now constructing a driveway across the four acre tract to connect the forty acre tract with the Westridge Road, and will use such driveway when completed as passageway to its commercial cemetery situated on the forty acre tract unless it is enjoined by the court from so doing.

The complaint pleads the undisputed facts set forth above; concludes that the proposed use of the driveway runs counter to the restrictions contained in the deed from the plaintiff to Blanche Cox and Eva Cox, the predecessors in title of the defendant; and prays that the defendant

be enjoined from using the four acre tract "or any part thereof as an entrance to or exit from, or as a part of, or otherwise in connection with, a commercial cemetery, or for any other business or commercial purpose at any time prior to July 1, 1963." The answer admits all facts alleged in the complaint; asserts that the contemplated use of the driveway does not fall within the ban of the restrictions in question; and prays that the plaintiff be denied the relief sought by it.

When the cause was heard in the court below, the plaintiff moved for judgment on the pleadings. The presiding judge sustained such motion, and rendered a final judgment granting the plaintiff injunctive relief according to the prayer of the complaint. The defendant excepted and appealed, assigning the entry of the judgment as error.

Brooks, McLendon, Brim & Holderness for plaintiff, appellee.

Harry R. Stanley for the defendant, appellant.

ERVIN, J. This litigation does not involve the question whether the restrictions invoked by the plaintiff were inserted in the deed to the defendant's antecessors pursuant to a general plan for the development of Friendly Acres as a restricted community or neighborhood. *Higdon v. Jaffa,* 231 N.C. 242, 56 S.E. 2d 661; *Humphrey v. Beall,* 215 N.C. 15, 200 S.E. 918. The action is bottomed upon a quite different foundation. The plaintiff bases its prayer for relief upon individual and particular covenants constituting an express contract between it and the defendant's predecessors and appearing in the defendant's recorded chain of title.

The plaintiff's position is simply this: At the time of the original sale of the four acre tract, the plaintiff, as grantor, and the defendant's antecessors in title, as grantees, made an express contract imposing specific restrictions upon the use of the four acre tract for the benefit and convenience of the plaintiff in its disposition or use of the other portions of Friendly Acres retained by it. Such contract was embodied in covenants inserted in the deed conveying the four acre tract to the defendant's predecessors. Inasmuch as such deed constituted an essential link in the defendant's chain of title and appeared of record at the time it acquired the four acre tract, the defendant took the four acre tract with notice of the restrictive covenants. The restrictions are reasonable in character and duration, and do not clash with public policy. Since it took the four acre tract with notice of the restrictive stipulations, the defendant cannot equitably refuse to perform them. Notwithstanding this, the defendant is about to breach the restrictions by appropriating the four acre tract to prohibited purposes which will diminish the enjoyment and impair the value of the substantial portions of Friendly Acres which the plaintiff

still owns. As an original party to the restrictive covenants, the plaintiff is entitled to an injunction to restrain the threatened breach.

The plaintiff's position finds full support in authority and reason. *Thomas v. Rogers,* 191 N.C. 736, 133 S.E. 18; *Firth v. Marovich,* 160 Cal. 257, 116 P. 729, Ann. Cas. 1912 D, 1190; *Whitney v. Union Railway Co.,* 11 Gray (Mass.) 359, 71 Am. Dec. 715; *Sanford v. Keer,* 80 N. J. Eq. 240, 83 A. 225, 40 L.R.A. (N.S.) 1090.

This being true, the plaintiff is entitled to an injunction restraining the defendant from using the four acre tract as a means of access to the commercial cemetery on the unrestricted forty acre tract if the restrictions contained in the deed of 5 May, 1941, prohibit such use of the four acre tract.

The defendant contends with much earnestness and industry that the deed does not forbid its proposed use of the four acre tract. It asserts primarily that the instrument, properly construed, permits such use. It insists secondarily that the deed leaves the matter in doubt, and that the doubt must be resolved in its favor under the rule that restrictive covenants are to be strictly construed against the party seeking to enforce them. *Edney v. Powers,* 224 N.C. 441, 31 S.E. 2d 372.

We do not deem either of these alternative contentions to be valid. A restriction of the enjoyment of property must be created in express terms, or by plain and unmistakable implication. *Ivey v. Blythe,* 193 N.C. 705, 138 S.E. 2. When the deed under scrutiny is read aright, it does these two things in express terms: First, it limits the use of the four acre tract to residential purposes, truck farming, and poultry raising; and, second, it prohibits the use of the four acre tract for any "business, manufacturing, or commercial purposes" other than truck farming and poultry raising.

While these explicit provisions necessarily permit any use of the four acre tract reasonably consistent with its use for residential purposes, truck farming, or poultry raising, they plainly and unmistakably imply that the four acre tract is not to be put into service as an incident to a forbidden business or commercial enterprise, even though such enterprise is situated on adjacent unrestricted land. As a consequence, the defendant cannot use the four acre tract or any part of it as an entrance or driveway into the commercial cemetery located on the forty acre tract. Such use would violate the restrictions in question for it would be tantamount to dedicating the four acre tract to a prohibited business or commercial purpose. Our conclusion harmonizes with the decisions of the courts of other jurisdictions which have been confronted by the same problem. *Mellitz v. Sunfield Co.,* 103 Conn. 177, 129 A. 228; *Klapproth v. Grininger,* 162 Minn. 488, 203 N.W. 418, 39 A.L.R. 1080; *State ex rel. Stalzer*

v. Kennedy, 46 Ohio App. 1, 187 N.E. 640; *Laughlin v. Wagner,* 146 Tenn. 647, 244 S.W. 475.

Since the restrictions were imposed on the four acre tract for the benefit and convenience of the plaintiff in its disposition or use of the portions of Friendly Acres retained by it, their efficacy is not impaired in any degree by the stipulation that "nothing herein shall preclude the Starmount Company . . . from establishing business districts, or from establishing or allowing to be established hospitals, schools, hotels, or other institutions which in its opinion will be for the benefit of the community in which said property is located." *Town of Stamford v. Vuono,* 108 Conn. 359, 143 A. 245; *Kuhn v. Saum,* 316 Mo. 805, 291 S.W. 104; *Beetchonow v. Arter,* 45 R.I. 133, 119 A. 758.

Nevertheless, the injunction goes too far. It not only enjoins the defendant from using the four acre tract as an entrance or passageway to the cemetery, but it also restrains the defendant from using the four acre tract "for any other business or commercial purpose." The judgment is hereby modified so as to permit the defendant to use the four acre tract for truck farming and poultry raising. As thus modified, it is affirmed.

Modified and affirmed.

MABEL FLORENCE JONES BROWN AND TOM D. JONES AND CARRIE E. JONES v. C. G. HODGES AND WIFE, CARRIE HODGES, AND CHARLES M. HODGES.

(Filed 23 May, 1951.)

1. Appeal and Error § 51c—

An opinion of the Supreme Court must be considered with a view to the case in which it was delivered.

2. Boundaries § 3b—

A call to a natural boundary will control courses and distances as set out in the description in the deed.

3. Boundaries § 3d—

Where cotemporaneously with the execution of the deed, a line is run and marked and a corner made, such corner will control a call to a natural boundary or courses and distances set out in the deed.

4. Boundaries § 5h—

A call to the corner of an adjacent tract will control distance called for in the description in the deed provided such adjacent corner is sufficiently established.

5. Boundaries § 5a—

Parol evidence is not competent to alter the courses and distances as set out in the description in a deed when the deed contains no call to a natural boundary and there has been no cotemporaneous line run and marked and a corner made upon the land.

6. Boundaries § 3d—

The rule that a cotemporaneous survey made by the parties will control courses and distances as set out in the description in the deed does not apply unless the line is marked and a corner made upon the land, which requires the giving to the line a permanent location and to the corner a permanent position, and stakes for marking the line and fixing the corner, without more, are too lacking in stability and fixedness to serve as monuments for this purpose.

PETITION to this Court by plaintiffs, appellees, to rehear this case, reported in 232 N.C. 537, 61 S.E. 2d 603, and "upon such rehearing (a) to affirm the judgment of the Superior Court of Watauga County, or (b) at least correct the holdings contained in the opinion of the Court to the effect that parol evidence is not competent to establish a boundary line, and in holding that a boundary line actually surveyed upon the lands at the time the deeds were executed would not control as against the calls in the deed." The facts shown in the record on appeal are fully stated in the opinion to which the petition to rehear relates.

Burke & Burke and Trivette, Holshouser & Mitchell for plaintiffs, appellees.

Bowie & Bowie and Higgins & McMichael for defendants, appellants.

WINBORNE, J. "Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered,"—so declared *Chief Justice Marshall,* writing in 1807 in *U. S. v. Burr,* 4 Cranch 469, at 481. And the rule has been expressed in opinions in cases before this Court, among which are these: *Light Co. v. Moss,* 220 N.C. 200, 17 S.E. 2d 10; *S. v. Utley,* 223 N.C. 39, 25 S.E. 2d 195; *S. v. Boyd,* 223 N.C. 79, 25 S.E. 2d 456; *Byers v. Byers,* 223 N.C. 85, 25 S.E. 2d 466; *S. v. Crandall,* 225 N.C. 148, 33 S.E. 2d 861; *Bruton v. Smith,* 225 N.C. 584, 36 S.E. 2d 9; *In re Adoption of Doe,* 231 N.C. 1, 56 S.E. 2d 8.

However, since the opinion in the instant case is apparently misunderstood, and to avoid the possibility of further misunderstanding, it is deemed expedient to amplify and spell out the principles therein applied.

Long ago this Court, in *Cherry v. Slade,* 7 N.C. 82 (1819), in an opinion by *Taylor, C. J.,* set out rules which had then "grown out of the peculiar situation and circumstances of the country," and been "estab-

lished by decisions of the Court for settling questions relative to the boundary of land." These rules are:

"1. That whenever a natural boundary is called for in a patent or deed, the line is to determine at it, however wide of the course called for it may be, or however short or beyond the distance specified. The course and distance may be incorrect, from any one of the numerous causes likely to generate error on such a subject; but a natural boundary is fixed and permanent, and its being called for in the deed or patent, marks beyond controversy, the intention of the party to select that land from the unappropriated mass. . . .

"2. Whenever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the patent or deed, shall hold accordingly, notwithstanding a mistaken description of the land in the patent or deed. . . .

"3. Where lines or corners of an adjoining tract are called for in a deed or patent, the lines shall be extended to them, without regard to distance, provided those lines and corners be sufficiently established, and that no other departure be permitted from the words of the patent or deed, than such as necessity enforces, or a true construction renders necessary. . . .

"4. Where there are no natural boundaries called for, no marked trees or corners to be found, nor the places where they once stood can be ascertained and identified by evidence, or where no lines or corners of an adjacent tract are called for, in all such cases, we are, of necessity, confined to the courses and distances described in the patent or deed; for, however fallacious such guides may be, there are none others left for the location."

And this Court, in *Reed v. Schenck,* 13 N.C. 415 (1830), in opinion by *Henderson, C. J.,* referring to the principle as enunciated in the second of the rules set out in *Cherry v. Slade, supra,* held that parol evidence to control the description of land contained in a deed is in no case admissible, unless where monuments of boundary were erected at the execution of the deed; that where the boundaries of land never were marked, nothing can alter the course and distance of the deed; that, therefore, where a deed called for a front of six poles, and parol evidence was received to prove that six poles and six feet were intended, in the absence of proof that the line was run and marked, parol evidence was improperly received.

And the subject of parol evidence as to stake boundaries was treated by this Court in the second appeal in *Reed v. Schenck,* 14 N.C. 65 (1831), —all three members of the Court, *Henderson, C. J.,* and *Hall* and *Ruffin, JJ.,* writing. The opinion there is epitomized in the headnote as follows: "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. A stake is not such a monument, and the evidence of its erection when the land was surveyed is not admissible to control course and distance."

Moreover, *Henderson, C. J.*, wrote in part: "To permit parol evidence to show that a stake was put up, or was seen at or near the spot, is to permit proof in opposition to the intention of the parties. For if one was actually set up, it was designed for some temporary purpose, and not as a landmark whereby the boundaries should be established. For the parties designed a more certain description. The court should not have heard the evidence, or having heard it, should have instructed the jury that such evidence did not vary the description given by the course and distance in the deed. For it is the province of the court to declare what are the calls of a deed, and where there is more than one call, which is the controlling one."

And *Ruffin, J.*, concurring "with the senior members of the Court," stated his views as follows: "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 matter of law as what estate it conveys. I do not mean that the location of the *termini* is decided by the court, for that is to be learned only from witnesses. But *what* are the *termini*, wherever found by the jury, must be ruled by the court. Where a deed therefore is read, the court says, it covers the land only between such and such points. If any of the particular rules of construction, made necessary by our situation and adopted by our courts, are then resorted to, for the purpose of showing that it covers other and more land than by its words it would, the evidence offered to that point, except as to its veracity, is still addressed to the court. It must be so, else the construction is with the jury. If a stake is called for, it is not to be proved to the jury, that there was a stake, and they told that if they are satisfied it was set up for a boundary, and are also satisfied that the boundary thus designated was made upon actual survey, they may carry the deed to it, because in law an object thus perishable, and so easily destroyed or removed, is not sufficient to control the deed; and it would be just as reasonable to control it, upon mere proof of a survey to a particular spot, not at all designated by a call in the deed, nor marked by any erection whatever. The jury are not to hear this evidence as a ground of inference by them that particular land was actually surveyed, because if it was surveyed it was not conveyed by the deed. All matter is indeed subject to decay, but that portion of it which must by nature be decomposed in a very short time cannot be deemed a *landmark* sufficiently obvious and durable to alter the construction of a deed. It is going far enough to admit such an influence for objects longer lived than one or two generations of men. If then, after giving full credence to testimony, it does not establish a fact sufficient in law to alter the construction, the

court must pronounce it. In other words, the court must pass upon the sufficiency of the proof. There is no difficulty in understanding this, if we suppose the court, as regularly they might and perhaps ought to call on the counsel to state the purport of his evidence, when he offered the witness. If it did not establish a case for going off from the deed, no part of it could be heard. It would be irrelevant, because insufficient for the purpose designated.

"*Stakes* have never yet varied the construction. *Marked trees,* though *not called for,* have, where they were proved by the annual growth to have been marked for the particular tract. To relax the rule still further would be to let in an inundation of fraud, perjury and alteration of landmarks. Difficulties enough have been experienced in expounding and locating deeds under the established rules, and the safety of titles requires that the doctrine should stand at what it is."

The rules set out in *Cherry v. Slade, supra,* and the principles enunciated in the cases of *Reed v. Schenck, supra,* have been treated and applied in decisions of this Court throughout the subsequent years. The second rule is treated as an exception to the general rule that natural objects called for in deed will control course and distance.

For instance, in *Baxter v. Wilson,* 95 N.C. 137, it is held that as a general rule, natural objects called for in a deed will govern course and distance, but there are exceptions to the rule, one of which is, where it can be proved that a line was actually run and marked and a corner made, such line will be taken as the true one, although the deed calls for a natural object, not reached by such line. See also *Marsh v. Richardson,* 106 N.C. 539, 11 S.E. 522.

And in *Clarke v. Aldridge,* 162 N.C. 326, 78 S.E. 216, the Court, through *Hoke, J.,* declared that "it has long been held for law, in this State, that when parties, with the view of making a deed, go upon the land and make a physical survey of the same, giving it a boundary which is actually run and marked, and the deed is thereupon made, intending to convey the land which they have surveyed such land will pass, certainly as between the parties or voluntary claimants who hold in privity, though a different and erroneous description may appear on the face of the deed. This is regarded as an exception to the rule, otherwise universally prevailing, that in the cases of written deeds the land must pass according to the written description as it appears in the instrument (*Reed v. Schenck,* 13 N.C. 415); but it is an exception so long recognized with us that it must be accepted as an established principle in our law of boundary."

Then the writer, *Hoke, J.,* reviews pertinent authorities, and refers to, and quotes with approval the language of the second rule stated in

Cherry v. Slade, supra, and the principle declared in *Reed v. Schenck, supra,* that "parol evidence to control description of land contained in a deed is in no case admissible, unless where monuments of boundary were erected at the execution of the deed."

And in *Lumber Co. v. Lumber Co.,* 169 N.C. 80, 85 S.E. 438, this Court, in opinion by *Walker, J.,* referring to the principle of the second rule laid down in *Cherry v. Slade, supra,* had this to say: "But the insuperable obstacle of the application of this rule is that the line must have been 'marked and a corner made.' "

The expression "line marked and a corner made" means giving to a line a permanent location, and to a corner a permanent position. Webster defines the word "permanent," as "continuing or enduring in the same state, status, place, or the like, without fundamental or marked change; not subject to fluctuation or alteration; fixed or intended to be fixed; lasting; abiding; stable; not temporary or transient." Webster's New International Dictionary.

But stakes, without more, for the marking of a line or making a corner, are, as stated in the opinion here under challenge, too lacking in stability and fixedness as to serve as monuments for those purposes. Such is the thread of judicial decision on the subject in this State. *Reed v. Schenck, supra; Massey v. Belisle,* 24 N.C. 170; *Mann v. Taylor,* 49 N.C. 272; *Clark v. Moore,* 126 N.C. 1, 35 S.E. 137; *Tate v. Johnson,* 148 N.C. 267, 61 S.E. 741.

Therefore, in the light of these principles, adhered to in the opinion as reported in 232 N.C. 537, 61 S.E. 2d 603, applied to the facts of the case, the conclusion there reached is held to be correct after due consideration has been given to authorities cited by plaintiffs appellees, petitioners.

Hence the petition to rehear is dismissed.

Petition dismissed.

G. F. BRANCH, JOHN W. OXENDINE, N. C. STUBBS, L. G. SINGLETARY, J. B. POWELL AND J. M. POWELL, INDIVIDUALLY AND AS TAXPAYERS OF ROBESON COUNTY, NORTH CAROLINA, AND ON BEHALF OF SAID COUNTY, v. BOARD OF EDUCATION OF ROBESON COUNTY; BOARD OF COUNTY COMMISSIONERS OF ROBESON COUNTY; C. L. GREEN, COUNTY SUPERINTENDENT OF COUNTY SCHOOLS; W. D. REYNOLDS, ROBESON COUNTY MANAGER; LUMBERTON ADMINISTRATIVE SCHOOL UNIT; RED SPRINGS ADMINISTRATIVE SCHOOL UNIT; FAIRMONT ADMINISTRATIVE SCHOOL UNIT; L. McK. PARKER, ROBESON COUNTY TAX COLLECTOR; AND HONORABLE HARRY McMULLAN, ATTORNEY-GENERAL OF NORTH CAROLINA.

(Filed 23 May, 1951.)

1. **Schools § 10h—**

The right to sue for the protection or recovery of school funds of a particular school administrative unit upon allegation of threatened wrongful diversion or expenditure of such funds, belongs to the particular unit, whether it be a county administrative unit or a city administrative unit. G.S. 115-11, 115-128, 115-129, 115-165, 115-49.

2. **Same: Public Officers § 7d: Counties § 31: Municipal Corporations § 45a—**

Taxpayers may not bring an action on behalf of a public agency or political subdivision unless the proper authorities have wrongfully neglected or refused to act, and therefore the complaint in such action is demurrable unless it alleges not only that plaintiffs are taxpayers of the unit, but also that the proper authorities have refused to act after demand or circumstances indicating affirmatively that demand would have been unavailing.

3. **Schools § 10h: Pleadings § 2—**

An action to enjoin allegedly unlawful expenditure or diversion of funds belonging to four separate school administrative units and to compel an allocation of such funds to the respective units, there being no controversy as to the respective shares of each unit in the fund, is demurrable for misjoinder of parties and causes of action.

APPEAL by plaintiff from *Grady, Emergency Judge,* at the January Term, 1951, of ROBESON.

Civil action to enjoin an allegedly unlawful expenditure of school funds, and to compel an allocation of such funds to various school administrative units.

This case is here for the second time. The former appeal merely involved the validity of an order dissolving a temporary restraining order. *Branch v. Board of Education,* 230 N.C. 505, 53 S.E. 2d 455. The present appeal is concerned with the sufficiency of the complaint.

The plaintiffs prosecute this action against nine defendants, that is to say: Harry McMullan, Attorney-General of North Carolina; Robeson

County; W. D. Reynolds, County Manager of Robeson County; L. McK. Parker, Tax Collector of Robeson County; the Board of Education of Robeson County; C. L. Green, County Superintendent of Public Instruction of Robeson County; the Board of Trustees of the Fairmont City Administrative Unit; the Board of Trustees of the Lumberton City Administrative Unit; and the Board of Trustees of the Red Springs City Administrative Unit. The Attorney-General is made a party under General Statutes, section 1-260, because the plaintiffs allege certain statutes to be unconstitutional.

The gist of the complaint is as follows:

The plaintiffs sue solely in their capacities as taxpayers of Robeson County, North Carolina, which contains four school administrative units, to wit, a county administrative unit controlled by the Board of Education of Robeson County, and three city administrative units governed respectively by the Board of Trustees of the Fairmont City Administrative Unit, the Board of Trustees of the Lumberton City Administrative Unit, and the Board of Trustees of the Red Springs City Administrative Unit. Acting under two unconstitutional statutes, namely, Chapters 486 and 487 of the 1945 Session Laws of North Carolina, Robeson County and its County Manager have unlawfully diverted various school funds belonging to each of the four school administrative units "to a capital reserve fund" totaling $295,000, which Robeson County retains and proposes to expend in some allegedly "unlawful and unauthorized manner" not explained in the pleading. The plaintiffs pray that Chapters 486 and 487 of the 1945 Session Laws of North Carolina be declared unconstitutional, that Robeson County be enjoined from expending any of the moneys in the capital reserve fund pending the trial of the action, and that a final judgment be entered in the cause requiring Robeson County to allot the moneys in the capital reserve fund to the four school administrative units in conformity to their respective interests in them.

After the decision on the former appeal was certified to the Superior Court of Robeson County, the several defendants demurred to the complaint for failure to state a cause of action, and for misjoinder of causes and parties. Judge Grady rendered judgment sustaining the demurrers and dismissing the action, and the plaintiffs appealed, assigning such ruling as error.

Malcolm McQueen, Frank McNeill, Frank Hackett, and Hector McLean for plaintiffs, appellants.

McKinnon & McKinnon and McLean & Stacy for the defendants, Robeson County; W. D. Reynolds, County Manager of Robeson County; and L. McK. Parker, Tax Collector of Robeson County, appellees.

E. M. Johnson for defendant, Board of Education of Robeson County, appellee.

Ozmer L. Henry for defendants, Board of Trustees of the Lumberton City Administrative Unit and Board of Trustees of the Red Springs City Administrative Unit, appellees.

F. Wayland Floyd for defendant, Board of Trustees of the Fairmont City Administrative Unit, appellee.

ERVIN, J. Under the statutes regulating the public school system, city administrative units and county administrative units constitute separate and distinct governmental agencies. General Statutes, sections 115-8, 115-11, 115-56, 115-77, 115-83, 115-128, 115-129, 115-352. The county board of education, as the governing board of the county administrative unit, has control of the school funds of the county administrative unit, and the board of trustees, as the governing board of the city administrative unit, has management of the school funds of the city administrative unit. General Statutes, sections 115-11, 115-128, 115-129, 115-165. This being so, the right to sue for the protection or recovery of the school funds of a particular school administrative unit belongs by necessary implication to the governing board of that unit. 56 C.J., Schools and School Districts, section 894. Indeed, a relevant statute confers upon the county board of education in explicit terms the power to sue for the preservation and recovery of the money or property of the county administrative unit. G.S. 115-49.

The law is heedful of realities when it fashions rules to regulate the affairs of men. It knows that public officers are sometimes derelict in the performance of official duties. As a consequence, it permits a taxpayer to bring a taxpayer's action on behalf of a public agency or political subdivision for the protection or recovery of the money or property of the agency or subdivision in instances where the proper authorities neglect or refuse to act. The law takes cognizance, however, of the disruptive tendency of officious intermeddling by taxpayers in matters committed to the decision of public officers. Consequently, it decrees that a taxpayer cannot bring an action on behalf of a public agency or political subdivision where the proper authorities have not wrongfully neglected or refused to act, after a proper demand to do so, unless the circumstances are such as to indicate affirmatively that such a demand would be unavailing. *Hughes v. Teaster,* 203 N.C. 651, 166 S.E. 745; *Murphy v. Greensboro,* 190 N.C. 268, 129 S.E. 614; *Waddill v. Masten,* 172 N.C. 582, 90 S.E. 694; *Merrimon v. Paving Company,* 142 N.C. 539, 55 S.E. 366, 8 L.R.A. (N.S.) 574; 20 C.J.S., Counties, section 287; 64 C.J.S., Municipal Corporations, section 2138; 56 C.J., Schools and School Districts, section 913.

It necessarily follows that where a plaintiff undertakes to bring a taxpayer's suit on behalf of a public agency or political subdivision, his complaint must disclose that he is a taxpayer of the agency or subdivision. *Hughes v. Teaster, supra; Michigan City v. Marwick,* 67 Ind. A. 294, 116 N.E. 434; *Price v. Flannery,* 225 Ky. 186, 7 S.W. 2d 1067. Moreover, it must allege facts sufficient to establish the existence of one or the other of these alternative requirements: (a) That there has been a demand on and refusal by the proper authorities to institute proceedings for the protection of the interests of the public agency or political subdivision (*Hughes v. Teaster, supra; Merrimon v. Paving Company, supra*); or (b) that such a demand on such authorities would be useless. *Murphy v. Greensboro, supra.* See, also, in this connection: 52 Am. Jur., Taxpayers' Actions, section 35; 64 C.J.S., Municipal Corporations, section 2164.

The plaintiffs in the case at bar do not sue to protect their individual rights. They attempt to bring a taxpayer's action for the benefit of four separate and distinct school administrative units located in Robeson County. Their complaint does not even allege that they are taxpayers of the three city administrative units. Consequently, it does not appear that they have any interest in the premises entitling them to sue on behalf of the Board of Trustees of the Fairmont City Administrative Unit, the Board of Trustees of the Lumberton City Administrative Unit, or the Board of Trustees of the Red Springs City Administrative Unit. Furthermore, the complaint does not aver that the governing boards of the several school administrative units have ever been requested to take the steps necessary for the proper protection of the interests of such units, and have neglected or refused to do so. Besides, the pleading does not allege facts showing that such a request would be a mere idle ceremony. These things being true, the complaint does not state facts sufficient to constitute a cause of action.

The complaint could not survive the demurrers, however, even if it contained the omitted allegations mentioned in the preceding paragraph. In such event, it would be demurrable for misjoinder of four independent causes of action belonging to four separate governmental agencies, to wit, the Board of Education of Robeson County, the Board of Trustees of the Fairmont City Administrative Unit, the Board of Trustees of the Lumberton City Administrative Unit, and the Board of Trustees of the Red Springs City Administrative Unit. *Mills Co. v. Earle, ante,* 74, 62 S.E. 2d 492. The complaint does not intimate that there is any controversy in regard to the respective shares of the several school administrative units in the capital reserve fund.

For the reasons given, the judgment sustaining the demurrers and dismissing the action is

Affirmed.

CLIFF A. ERICKSON v. LEXINGTON BASEBALL CLUB, INC.

(Filed 23 May, 1951.)

1. Games and Exhibitions § 3—

The management of a baseball park is not guilty of negligence in failing to provide a patron with a choice between screened and unscreened seats at a game attended by an unusually large number of spectators.

2. Same—

The management of a baseball park is not an insurer of the safety of its patrons, but is required to exercise care commensurate with the circumstances to protect them from injury, and to this end is required to provide screening for seats in areas back of home plate where the danger is greatest, and to provide such screened seats in sufficient number to accommodate as many patrons as reasonably may be expected to call for them on ordinary occasions.

3. Same—

After obtaining a seat in the bleachers, plaintiff's view of home plate became increasingly obscured intermittently by later arrivals of an unusually large crowd, some of whom were standing between the bleachers and the fence, and a few on the other side of the fence. Plaintiff was struck by a foul ball which he contended he was prevented from seeing in time, or from dodging, by reason of the crowding and disposition of the spectators, contending the management was negligent in thus subjecting him to extra hazards. *Held:* Plaintiff was cognizant of his danger, and by failing to move to a place of greater safety, assumed the risk and was guilty of contributory negligence barring recovery.

4. Negligence § 19c—

Nonsuit on the ground of contributory negligence is proper when this conclusion is the sole reasonable inference deducible from the evidence.

APPEAL by plaintiff from *Clement, J.*, at September Civil Term, 1950, of DAVIDSON. Affirmed.

Civil action to recover damages for personal injury sustained by plaintiff when hit by a foul ball while attending a league baseball game. The plaintiff, after purchasing his ticket, first went to the grandstand, which was screened. All seats there being occupied, he was directed by a policeman to the right field bleachers where he took a seat behind first base. The bleacher seats were unscreened.

From judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning errors.

Hubert E. Olive and S. A. DeLapp for plaintiff, appellant.
Phillips & Bower for defendant, appellee.

JOHNSON, J. The plaintiff insists that his case should have been submitted to the jury on the theory that the defendant was negligent in not providing him with a choice between screened and unscreened seats. We are inclined to the other view.

This was a post-season, play-off game. Interest was at a high pitch. An unusually large crowd was in attendance, the like of which one witness said had never been seen before in Lexington. The grandstand and bleachers ordinarily seated about twenty-five hundred people. That night more than four thousand came. Play-offs like this seldom occurred. There was one admission price to all,—no reserved seats. It was a case of "first come, first served." The plaintiff reached the park about ten minutes before game time. All of the screened seats were then occupied. He was familiar with the park, having previously attended about a dozen games there.

The defendant's failure to provide the plaintiff with a screened seat under the facts here developed does not support an issue of actionable negligence, and Judge Clement correctly so held.

This is not to say that the management of a baseball park is not required to exercise reasonable care for the safety of its patrons. Nevertheless, it is not an insurer of their safety. Reasonable care is all that is required,—that is, care commensurate with the circumstances of the situation,—in protecting patrons from injuries. Anno.: 142 A.L.R. 868 (p. 869).

And the duty to exercise reasonable care imposes no obligation to provide protective screening for all seats in the stands and bleachers. This is so in part for the reason that many patrons prefer to sit where their view is not obscured by screening. Nor is management required, in order to free itself from negligence, to provide protected seats for all who may possibly apply for them. It is enough to provide screened seats, in the areas back of home plate where the danger of sharp foul tips is greatest, in sufficient number to accommodate as many patrons as may reasonably be expected to call for them on ordinary occasions. Protected seats for an unusual crowd, such as was in attendance at the game here involved, need not be provided. *Brisson v. Minneapolis Baseball and Athletic Assn.*, 185 Minn. 507, 240 N.W. 903; *Quinn v. Recreation Park*, 3 Cal. 2d 725, 46 P. 2d 144; Anno.: 142 A.L.R. 868 (p. 870 *et seq.*).

Anyone familiar with the game of baseball knows that balls are frequently fouled into the stands and bleachers. Such are common incidents of the game which necessarily involve dangers to spectators. And where a spectator, with ordinary knowledge of the game of baseball, on finding all screened seats filled, proceeds to sit in an unscreened stand, as did the plaintiff under the circumstances of this case, he thereby accepts the common hazards incident to the game and assumes the risks of injury, and ordinarily there can be no recovery for an injury sustained as a result of being hit by a batted ball. *Brummerhoff v. St. Louis Nat'l Baseball Club* (Mo. App.), 149 S.W. 2d 382; *Quinn v. Recreation Park, supra; Brisson v. Minneapolis Baseball and Athletic Assn., supra.*

The plaintiff cites and relies on the decision in *Cates v. Exhibition Co.*, 215 N.C. 64, 1 S.E. 2d 131. However, the facts here are different. The cases are distinguishable. In any event, it was there said, as here, that management need not provide screened seats for unusually large crowds.

Nor was the plaintiff entitled to have his case submitted to the jury on the other theory urged by him: that the management of the ball park was negligent in subjecting him to an extraordinary hazard by allowing spectators from an overflow crowd to congregate in front of him in such manner as to prevent him from seeing and dodging the ball by which he was hit.

On this phase of the case, the plaintiff's evidence tends to show he was seated in the bleachers on the second row from the ground. In front of the bleachers was a mesh-wire fence about four feet high. This fence was about six feet from the bleachers in front of plaintiff's seat. His line of vision out on the playing field was about six inches above the top of the mesh-wire fence. At first, the section of the bleachers in which he was sitting was not crowded, but the "crowd kept coming." Finally, all seats were taken. The plaintiff testified that soon after the game got under way spectators crowded in front of him and interfered "part of the time" with his view of the playing field, particularly home plate. He said they were in front of him,—all along the walkway between the bleachers and the wire fence, from a point near the grandstand up to and beyond where he was sitting, and that some of the spectators made their way into the spaces between the fence and the playing field.

This condition of obscured vision continued to exist, off and on, until the game was about half over, at which time he was hit. At that particular time, he said, he could not see the batter, "because a person (was) standing in my way inside the fence on the playing field. I did not see the batted ball until those in front, who were able to get out of the way, allowed the ball to pass through and I saw a white flash and simultaneously it crashed me on the nose." Those in front "scrambled and there

was the ball right on me. . . . I was not able to move my body and dodge it, everybody was just packed in so close together that I did not have a chance to get myself free."

In our opinion the foregoing evidence is insufficient to fix the defendant with liability on the theory of "extraordinary hazard." Especially so in view of the plaintiff's statements that "You could see home plate when you hollered out 'down in front' and they would sit. . . . If everybody had sat down, it would have been all right. . . . I would say that they attempted to stop people from moving around and milling about in front of people. There were patrolmen and policemen who I assumed were there for the purpose of trying to control the crowd."

In any event, the crowded condition complained of, which at intermittent intervals obscured the plaintiff's view, obtained for some considerable time before the mishap occurred. He was fully cognizant of what was going on. If, as the game wore on, his hazard of danger increased, he was aware of it nonetheless. That this is so is epitomized by these frank statements of the plaintiff: "I did not get up and move because I had a good position. I had a seat. . . . If everybody had sat down, I would have been all right. . . . I could see when they moved out of the way." Thus, it would seem that the plaintiff, with full knowledge of all the dangers of the occasion, voluntarily assumed the risks of his situation, or failed to exercise due care to protect himself from the natural dangers incident to his situation. And no other reasonable inference being deducible from the evidence, the motion for nonsuit was properly allowed below. 38 Am. Jur., Negligence, Sec. 349, p. 1055; *Brummerhoff v. St. Louis Nat'l Baseball Club, supra; Gaddy v. R. R.*, 175 N.C. 515, 95 S.E. 925; *Marshall v. R. R., ante,* 38, 62 S.E. 2d 489; *Weston v. R. R.*, 194 N.C. 210 (p. 216), 139 S.E. 237; 38 Am. Jur., p. 845, *et seq.;* 52 Am. Jur., p. 308, *et seq.*

Affirmed.

STATE v. PRESTON McMILLAN.

(Filed 23 May, 1951.)

1. Statutes § 5a—

Where the language of a statute is plain and unambiguous and expresses a single, definite and sensible meaning, such meaning is conclusively presumed to be the meaning intended by the Legislature.

2. Homicide § 27i—

G.S. 14-17, as amended, gives the jury the unconditional and unqualified right to recommend life imprisonment upon its finding that defendant is guilty of murder in the first degree, and defendant has a substantive right

to have the jury so instructed, and therefore a charge to the effect that the jury might recommend life imprisonment if the jury felt it warranted by the facts and circumstances, must be held for reversible error.

APPEAL by defendant from *Frizzelle, J.*, at September Term, 1950, of BLADEN.

Criminal prosecution upon an indictment charging that defendant on 30 July, 1950, did "unlawfully, wilfully, feloniously and of his malice aforethought kill and murder one Laura McMillan, against the form of the Statute," etc.

Defendant, upon arraignment, pleaded not guilty.

Upon the trial in Superior Court, the evidence offered by the State tends to show that defendant and Laura McMillan had been married about five or six years; that they lived about 100 yards from where her brother John H. Rhodie lived; that about 3 o'clock on afternoon of 30 July, 1950, Laura McMillan and defendant went to house of John and Jessie Rhodie,—Laura came in first, and defendant about a minute later; that they were arguing—defendant cursing; that he cursed for about 30 minutes; that defendant told Laura to let's go home, and she said she was going to her mama's house before she went home; that defendant pulled Laura out of the door by the arm and knocked her down with his fists, and dragged her to the woodpile, about 18 feet, and got an axe and hit her with the back of the axe on the back of her head, knocking her down; that she begged him not to kill her; that he said he was going to kill her; that he hit her three times, and cut her with the blade of the axe while she was lying down on the woodpile; that the first time he hit her with the axe she fell on her knees, and "the next time" he hit her she was lying down. And evidence for the State also tends to show that as defendant and Laura went out of the Rhodie's house they were cursing and knocking each other with their hands and fists; that neither of them had any weapon, until defendant got the axe. And "for the purpose of the record it is admitted by counsel for defendant that the deceased came to her death as a result of a blow or blows from an axe."

Defendant offered no evidence. His motions, aptly made, to dismiss the case were denied, and he excepted.

Verdict: "Guilty of murder in the first degree, in manner and form as charged in the bill of indictment."

Judgment: Death by inhalation of lethal gas.

Defendant appeals therefrom to Supreme Court, and assigns error.

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

Worth H. Hester and R. J. Hester, Jr., for defendant, appellant.

WINBORNE, J. By assignments of error 5 and 6, predicated upon exceptions 5 and 6, defendant challenges the correctness of these portions of the charge of the court to the jury:

"Under the law of the State at this time, the court instructs you that if you return a verdict of guilty of murder in the first degree as charged in the bill of indictment against the defendant, then you have the right and the power in the exercise of your discretion to accompany that verdict with a recommendation of life imprisonment for the defendant, and the statute giving that right and authority and discretion to the jury, also instructs or provides that it is the duty of the court to instruct the jury that they do have the authority, the right and the power to accompany their verdict of first degree murder with a recommendation of that sort if they feel that under the facts and circumstances of the crime alleged to have been committed by the defendant, they are warranted and justified in making that recommendation. That is a matter to be exercised by you gentlemen, in your own discretion"; and

"If the State has satisfied you upon the evidence beyond a reasonable doubt of the guilt of the defendant of murder in the first degree, it is your duty to so find. If you do so find and in the exercise of your discretion you think it proper to do so, you are authorized to accompany that verdict with the recommendation of life imprisonment for the defendant; if you do not so feel under the facts and circumstances, why then of course it is a matter that addresses itself to you as to whether or not you will make that recommendation."

Defendant contends, and properly so, we hold, that these instructions are erroneous, in that they inveigh against the provisions of the statute, G.S. 14-17, as amended by 1949 Session Laws of North Carolina, Chapter 299, Section 1, pertaining to punishment for murder in the first degree. This Section, as so amended, reads as follows: "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate, any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court the jury shall so recommend, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury." The proviso embraces the 1949 amendment.

The language of this amendment stands in bold relief. It is plain and free from ambiguity and expresses a single, definite and sensible meaning, —a meaning which under the settled law of this State is conclusively presumed to be the one intended by the Legislature. *Asbury v. Albe-*

marle, 162 N.C. 247, 78 S.E. 146; *Mfg. Co. v. Turnage,* 183 N.C. 137, 110 S.E. 779; 44 L.R.A. (N.S.) 1189; *Motor Co. v. Maxwell,* 210 N.C. 725, 188 S.E. 389.

It is patent that the sole purpose of the act is to give to the jury in all cases where a verdict of guilty of murder in the first degree shall have been reached, the right to recommend that the punishment for the crime shall be imprisonment for life in the State's prison. (Compare *S. v. Shackleford,* 232 N.C. 299, 59 S.E. 2d 825.) No conditions are attached to, and no qualifications or limitations are imposed upon, the right of the jury to so recommend. It is an unbridled discretionary right. And it is incumbent upon the court to so instruct the jury. In this, the defendant has a substantive right. Therefore, any instruction, charge or suggestion as to the causes for which the jury could or ought to recommend is error sufficient to set aside a verdict where no recommendation is made.

In the light of these principles, we are of opinion and hold that the clause in the paragraph of the charge first quoted above, reading "if they feel that under the facts and circumstances of the crime alleged to have been committed by the defendant, they are warranted and justified in making that recommendation," and the phrase in the other quoted paragraph reading "under the facts and circumstances," impose unauthorized restrictions upon the discretion vested in the jury.

It may be noted that we are here dealing with a different factual situation from that involved in *S. v. Johnson,* 218 N.C. 604, 12 S.E. 2d 278, and those in the cases referred to there in the main opinion of the Court.

The Attorney-General for the State, and counsel for defendant cite decisions of the Supreme Court of the United States, and of the courts of last resort in other States treating the subject of recommendation of mercy by a jury, and the effect of such recommendation on question of punishment of the accused. They are of interest, and persuasive, but not controlling here. For annotations on the subject, see 17 A.L.R. 1117, 87 A.L.R. 1362, 138 A.L.R. 1230.

For error pointed out, it is ordered that there be a

New trial.

STATE v. HERMAN SIPES.

(Filed 23 May, 1951.)

1. Robbery § 1a—

Robbery is the felonious taking of personal property from the person of another, or in his presence, without his consent, or against his will, by violence, intimidation or putting in fear, the degree of force being immaterial so long as it compels the victim to permit the taking.

2. Same—

Force as an element of robbery may be actual or constructive; constructive force being all means, including demonstrations of force or menaces, by which the victim is put in fear sufficient to suspend the free exercise of his will or prevent him from resisting the taking.

3. Robbery § 3—

Evidence tending to show that defendant and two other men unknown to the prosecuting witness directed the witness to get into defendant's car, that he was driven to a secluded spot where his knife was taken away from him and thrown away, and that defendant then took the witness' pocketbook containing fifteen dollars, the three being together with one of them having his hand in his pocket in such a manner as to lead the witness to believe he had some weapon, and that the witness surrendered his money from fear, *is held* sufficient to overrule defendant's motions to nonsuit in a prosecution for robbery.

APPEAL by defendant from *Clement, J.*, December Term, 1950, GUILFORD (High Point Division).

Criminal prosecution on bill of indictment charging the defendant with the commission of the crime of robbery with the use or threatened use of firearms.

On the night of 11 August 1950, Luther Coble went to the West Green Tavern in High Point for a bottle of beer. He was approached by defendant who suggested they match for a drink. Coble won. Sipes then suggested they match for 50 cents. Defendant won and then suggested they match for $1. Coble won. The defendant refused to pay, and they started arguing. The man behind the counter ordered them to leave. They went out, and two other men came up and said, "All right, Coble, come and let's get in Sipes' car." One of them had his hand in his pocket. Not knowing what the man had in his pocket, but thinking he might have a weapon, Coble got in the car. The three other men also got in and Sipes drove down behind the railroad cafe into an old cement mixing plant, turned around, and told Coble to get out. He asked Coble if he had a knife. Coble replied in the affirmative and gave his knife to Sipes who threw it away. He then took Coble's pocketbook, took out $15, and hit Coble in the face. Coble ran away and called the police. Later, Sipes was arrested in the tavern where he and Coble first met. Sipes denied he had ever seen Coble. Coble testified that he went with the three men because he was scared and gave up his pocketbook because he did not know whether they had a gun. After Sipes was arrested he told Coble "he would pay me my money back if he could and told me at first, I will give you your money back if you don't appear in court against me and it will be easier on each of us."

There being no sufficient evidence of the use of firearms, the court submitted the cause to the jury on the count of robbery. There was a verdict of guilty. The court pronounced judgment on the verdict and defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Charles G. Powell, Jr., Member of Staff, for the State.

York, Morgan & York for defendant appellant.

BARNHILL, J. Only one question is presented for decision. Is the evidence, considered in the light most favorable to the State, sufficient to repel defendant's motion to dismiss as in case of nonsuit?

Robbery is the felonious taking of personal property from the person of another, or in his presence, without his consent, or against his will, by violence, intimidation or putting in fear. *S. v. Bell,* 228 N.C. 659, 46 S.E. 2d 834; *S. v. Lunsford,* 229 N.C. 229, 49 S.E. 2d 410.

The degree of force is immaterial so long as it is sufficient to compel the victim to part with his property or property in his presence, and the element of force may be actual or constructive. *S. v. Sawyer,* 224 N.C. 61, 29 S.E. 2d 34.

"Constructive force" includes all demonstrations of force, menaces, and other means by which the person robbed is put in fear sufficient to suspend the free exercise of his will or prevent him from resisting the taking. *S. v. Sawyer, supra.*

The evidence tested by these controlling principles leads to the conclusion that it is sufficient to support the verdict.

Defendant and two other men unknown by Coble directed him to get into defendant's automobile. He was driven to a secluded spot. His knife was taken and thrown away. Defendant then took his pocketbook containing $15. There were three to one, and one of the three had his hand in his pocket in such manner as to lead Coble to believe he had some weapon. Coble was put in fear and his money was taken from his person by defendant and his companions. Whether in so doing they committed the crime of robbery was for the jury to decide.

In the trial below we find

No error.

STATE v. HANIBAL WOOD.

(Filed 23 May, 1951.)

1. Criminal Law § 40b—

Where defendant does not go upon the stand, his evidence of good character is substantive evidence bearing directly on the question of his guilt or innocence upon the theory that a man of good character is unlikely to do a dishonest or immoral act inconsistent with the record of his past life.

2. Criminal Law § 42d—

Evidence of good character of witnesses for the prosecution is corroborative and relevant and material only as bearing upon the credibility of their testimony.

3. Criminal Law § 53j—

A charge to the effect that the character evidence of defendant and the character evidence of witnesses for the prosecution constituted substantive, direct evidence, must be held for reversible error.

4. Criminal Law § 77d—

The Supreme Court is bound by the record as certified.

APPEAL by defendant from *Hatch, Special Judge,* October Term, 1950, CUMBERLAND. New trial.

Criminal prosecution on bill of indictment charging the defendant with the commission of the crime of incest.

There was evidence the defendant committed the crime charged. The State offered evidence of the good reputation of the prosecutrix and her grandmother, witnesses for the State. While defendant did not testify in his own behalf, he likewise introduced evidence of his good reputation.

There was a verdict of guilty. The court pronounced judgment on the verdict, and defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Moody, and Charles G. Powell, Jr., Member of Staff, for the State.

John H. Cook, George S. Quillen, and Everette Doffermyre for defendant appellant.

BARNHILL, J. In its charge the court instructed the jury as follows: "Character testimony, gentlemen of the jury, is substantive testimony; that is, it is different than corroborative testimony. It is testimony that is direct from that person that testifies on the witness stand that a person has a good character and reputation, that is, direct to that point and that you should believe what that witness has testified to, whoever the witness might be."

This must be held for error.

The charge as it appears in this record makes no distinction between evidence of the good reputation of witnesses other than the defendant and of the defendant himself.

When the defendant does not go on the witness stand, but puts his good reputation in issue, such testimony constitutes substantive evidence. Substantive evidence is direct evidence and direct evidence is that which immediately points to the question at issue. It is positive in character and is to be considered by the jury as bearing directly upon the issue of defendant's guilt or innocence of the crime charged, upon the theory that a man of good character who has pursued an honest and upright course of conduct is unlikely to deviate therefrom and do a dishonest or grossly immoral act, as here charged, inconsistent with the record of his past life. *S. v. Bridgers, ante,* p. 577, and cases cited.

On the other hand, evidence of the good reputation of witnesses, other than the defendant, is merely corroborative in nature and is relevant and material only as bearing upon the credibility of their testimony. It is offered for the sole purpose of aiding the jury in determining what weight, if any, shall be given the testimony of the witnesses about whom such evidence has been offered.

The quoted instruction draws no such distinction. It characterizes evidence of good reputation as substantive evidence, without qualification. It fails to define correctly the meaning of direct evidence and seemingly directs the jury that it should believe the witness about whom such testimony was offered "whoever the witness might be."

It is entirely possible that the record is not an exact transcript of the charge as actually given by the court below. But we are bound by the record as it comes to this Court and must decide the questions presented as they appear therein.

On authority of *S. v. Bridgers, supra,* the quoted instruction must be held for prejudicial error for which there must be a

New trial.

RELIABLE TRUCKING CO. v. HORACE MITCHELL PAYNE.

(Filed 23 May, 1951.)

1. Damages § 10—

Some latitude must be allowed in the pleading of special damages.

2. Appeal and Error § 40f—

The Supreme Court will not chart the course of the trial on appeal from an order upon motion to strike. G.S. 1-153.

3. Damages § 1c—

Loss of profits constitute a proper element of damage where such loss is the direct and necessary result of defendant's tort, and such loss may be recovered when capable of being shown with a reasonable degree of certainty.

4. Damages § 10: Pleadings § 31—

Plaintiff alleged that by reason of the damage to his tractor-trailer in the collision in suit he lost the use of same for two and one-half months notwithstanding every reasonable effort for quick repair, and that it was impossible to rent a substitute, and alleged the approximate monthly profit from the use of the trailer. *Held:* Defendant's motion to strike the allegations was improperly allowed.

APPEAL by plaintiff from *Moore, J.*, April Term, 1951, of GUILFORD.

Civil action to recover property damage and loss arising from a tractor-trailer-automobile collision.

Plaintiff alleges that on 18 March, 1950, its 1946-1947 tractor-trailer was in collision with defendant's 1948 Oldsmobile coupe at the intersection of Highways Nos. U. S. 220 and N. C. 62; that plaintiff was engaged, and had been for sometime, in hauling freight with its tractor-trailer unit, netting a profit of approximately $500 per month from its operation; that immediately after the collision plaintiff made every reasonable effort to get its trailer repaired, but was unable to do so in less than two and one-half months; that it was not possible to rent a substitute in the meantime, and that plaintiff's loss from the use of its trailer and in business profits, in addition to the damage to its trailer, amounted at least to the sum of $1250, all of which resulted directly and proximately from the negligence of the defendant.

There were other allegations relative to statements made by the defendant in respect of the collision and his willingness to pay for the damage done to plaintiff's trailer, etc.

In apt time, the defendant moved to strike from the complaint all allegations relative to statements alleged to have been made by him in connection with the collision, and also all allegations in respect of loss from the use of the trailer and loss of profits from plaintiff's business. Motion allowed; exception.

Plaintiff appeals, alleging error in striking from the complaint allegations in respect of loss of use of the trailer and loss of profits from plaintiff's business during the period the trailer was undergoing repairs.

Smith, Sapp, Moore & Smith for plaintiff, appellant.

Welch Jordan for defendant, appellee.

STACY, C. J. The question for decision is whether the special damages pleaded by plaintiff are proper in an action to recover for alleged negligent damages to a commercial vehicle constantly needed and currently being used in a business enterprise. The trial court answered in the negative. We are inclined to a different view.

It should be observed *in limine* perhaps that the question is one of pleading, which may suggest sufficient liberality to include the greatest amount of damages to arise on the evidence. *Parker v. Duke University,* 230 N.C. 656, 55 S.E. 2d 189; *Hill v. Stansbury,* 221 N.C. 339, 20 S.E. 2d 308. The common-law pleading in this respect has been relaxed by the Code of Civil Procedure. A party may not recover all that he alleges, although he is limited in his recovery to his plea. For this reason some latitude may be expected in allegation which would not be permitted in the evidence. In other words, the plaintiff is not to be put in a straightjacket in drafting his complaint, *Terry v. Ice & Coal Co.,* 231 N.C. 103, 55 S.E. 2d 926, nor is the Court disposed to chart the course of the trial on motions to strike. G.S. 1-153; *Parlier v. Drum,* 231 N.C. 155, 56 S.E. 2d 383; *Pemberton v. Greensboro,* 205 N.C. 599, 172 S.E. 196.

It is true that at common law and in some of the earlier decisions loss of profits from a business enterprise, occasioned by the negligent damage to property, was regarded as too remote, uncertain and speculative to be included in the recoverable damages for the tort. *Jones v. Call,* 96 N.C. 337, 2 S.E. 647; *Sledge v. Reid,* 73 N.C. 440; *Boyle v. Reeder,* 23 N.C. 607. And even now such is still the rule in respect of certain businesses where the profits are speculative, contingent or uncertain. *Thompson v. S. A. L. Ry. Co.,* 165 N.C. 377, 81 S.E. 315; *Brewington v. Loughran,* 183 N.C. 558, 112 S.E. 257, 28 A.L.R. 1543.

The earlier rule has been modified, however, not only in respect of pleading, but also in regard to the scope of the recovery, especially in actions purely of tort. 15 Am. Jur. 556; *Johnson v. R. R.,* 140 N.C. 574, 53 S.E. 362. In the case just cited, it was held (as stated in the 3rd syllabus): "Where the profits lost by defendant's tortious conduct, proximately and naturally flow from his act and are reasonably definite and certain, they are recoverable; those which are speculative and contingent are not." This was followed with approval in *Lumber Co. v. Power Co.,* 206 N.C. 515, 174 S.E. 427.

Under the modern rule, then, it may be said that lost profits constitute a proper element of damage where such loss is the direct and necessary result of the defendant's wrongful conduct, and such profits are capable of being shown with a reasonable degree of certainty. *Steffan v. Meiselman,* 223 N.C. 154, 25 S.E. 2d 626; *Binder v. Acceptance Corp.,* 222 N.C. 512, 23 S.E. 2d 894; *Wilson v. Motor Lines,* 207 N.C. 263, 176 S.E. 750; Anno. 169 A.L.R. 1074; 15 Am. Jur. 558.

At any rate, it would seem that the present challenged allegations in the complaint ought to survive a motion to strike if only the loss of use and profits are permitted to be shown in evidence and considered in arriving at the amount of damages sustained though not in themselves furnishing the proper measure of damages. *Johnson v. R. R., supra; Jones v. Call, supra;* 15 Am. Jur. 791.

The allegations stricken and brought forward on the appeal should be allowed to remain in the complaint. The exceptions to those not brought forward in plaintiff's brief are of course abandoned. Rule 28.

Error and remanded.

E. M. BRASWELL, ADMINISTRATOR OF RICHARD N. McCORMICK, DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 23 May, 1951.)

Process § 5a—

Where defendant has been duly served with summons, together with a copy of an order extending the time for filing complaint, and within that time complaint is properly filed with copy, defendant is in court and the action may not be summarily dismissed for lack of service of process, the effect of plaintiff's failure to see that the clerk make the proper order and the sheriff serve copy of the complaint (G.S. 1-121) being that defendant is not compelled to plead until the requirements of the statute are observed. Plaintiff would not be entitled to judgment by default for want of an answer until elapse of the time prescribed by G.S. 1-125 for answering. Ch. 1113, Session Laws of 1949.

APPEAL by plaintiff from *Patton, Special Judge,* February Term, 1951, of CUMBERLAND. Reversed.

Defendant's motion, on special appearance, to dismiss the action for want of proper service of process was allowed, and the plaintiff appealed.

Nance & Barrington and Robert H. Dye for plaintiff, appellant.

Shepard & Wood for defendant, appellee.

DEVIN, J. The defendant's motion was based on the following uncontroverted facts: Summons in the above entitled action was issued 16 November, 1950, and at same time order was made by the clerk extending the time for filing complaint for 20 days. The summons and copy of the order of extension were duly served on the defendant on the same day. On 5 December following, and within the 20 days, plaintiff filed his complaint, but no order was made by the clerk directing the sheriff to serve a copy of the complaint on the defendant, and the sheriff did not within

10 days make such service. G.S. 1-121. Nor does it appear that copy of the complaint has since been served by the sheriff. On the hearing below the plaintiff offered for the consideration of the court a petition filed 1 December, 1950, by attorneys for this defendant in a companion case praying for additional time within which to answer the complaint which had been filed in that case on the ground that it would be impractical to answer in that case until the complaint in this action should have been received. In the judgment appealed from the court recited that a copy of the complaint in this action "some time after December 5, 1950," had come into the possession of one of counsel for the defendant. On this showing judgment was entered allowing defendant's motion and dismissing the plaintiff's action.

The inconvenience formerly experienced in the prosecution of civil causes due to the delays in filing pleadings finally resulted in the change in procedure (Ch. 66, Public Laws 1927), which required that the complaint be filed at the time of issuance of summons and a copy delivered to the defendant at the time of service of the summons, with provision authorizing the clerk by order to extend the time for filing the complaint for 20 days, copy of order to be delivered to defendant. In that case when complaint was filed plaintiff was required to file a copy thereof, and to furnish additional copies on notice to the plaintiff from the clerk. There was then no provision for service of a copy of the complaint on the defendant by an officer. In *Wilson v. Robinson,* 224 N.C. 851, 32 S.E. 2d 601, where no copies of the complaint were left with the clerk or defendant, judgment by default was set aside and this ruling was affirmed here on appeal, though on another ground.

However, by Chapter 1113, Session Laws 1949, it was provided that where complaint was filed after the order extending the time, a copy of complaint should be served on the defendant by the sheriff under order of the clerk. Section 1 of this statute contains these provisions: "When the complaint is not filed at the time of the issuance of the summons the clerk shall, when the complaint is filed, make an order directing the sheriff to serve a copy of such complaint on each of the defendants by delivery of a copy thereof to each of them, and the sheriff shall within 10 days make such service and make written return on the paper containing the order issued to him . . ." But in section 2 of the Act of 1949, in amending G.S. 1-125, there is the following additional provision: "If the time is extended for filing complaint, and a copy of the complaint, when filed, is not served on the defendant, then, in such case, said defendant shall have 30 days after the date of the sheriff's return showing that service was not made of such complaint, pursuant to G.S. 1-121, or the defendant shall have 30 days after the final day fixed for filing the complaint, whichever is the later date, in which to plead."

It will be noted that the first section of the Act of 1949 makes no provision as to the effect of failure to serve copy of complaint filed after the summons and the order of extension have been served, but we think construing this section with section 2 of the Act (now codified as amendment to G.S. 1-125) it is obvious it was not the intent of the Legislature that failure of the clerk to make the order or the sheriff to serve a copy of the complaint which has been filed in apt time, should necessitate dismissal of the action, but rather that the defendant would not be required to plead until "30 days after the date of the sheriff's return showing that service was not made of such complaint pursuant to G.S. 1-121."

Where the defendant has been duly served with summons together with a copy of the order extending the time for filing complaint, and within the time the complaint is properly filed with copy, the defendant is in court and the plaintiff's cause may not be summarily dismissed for lack of service of process.

While diligence is required in the prosecution of an action (*Pepper v. Clegg,* 132 N.C. 312, 43 S.E. 906; *Johnson v. Sidbury,* 225 N.C. 208, 34 S.E. 2d 67), and it was incumbent upon the plaintiff here to see that the clerk made the order and the sheriff served the copy of the complaint, the penalty for failure so to do, imposed by the statute, is that his adversary is not compelled to plead until the requirements of the statute are observed, nor would the plaintiff be entitled to judgment by default for want of an answer until the time prescribed by G.S. 1-125 within which to answer has elapsed.

The judgment dismissing the plaintiff's action was improvidently entered and must be

Reversed.

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

(Filed 23 May, 1951.)

1. Partnership § 14—

Where the debts of a partnership are in excess of its assets, the receiver may be ordered to take possession of property belonging to the partners individually, including certificates of stock in a corporation controlled by them but not the physical property of the corporation, with the partners' right to homestead and personal property exemptions to be determined in due time and in an orderly manner in the receivership proceedings.

2. Appeal and Error § 6c (3)—

Where the sole exception is to the entering and signing of the order appealed from, it will be presumed that the court found facts sufficient to support its judgment and the judgment will be affirmed when it is regular in form and no error is made to appear on the face of the record.

APPEAL by defendants from *Clement, J.*, January Term, 1951, MOORE. Modified and affirmed.

Proceeding in receivership.

The partnership property is now in the possession of W. Lamont Brown, duly appointed receiver. The receivership property was ordered sold and creditors were restrained from pursuing their claims other than through the receiver. *Surety Corp. v. Sharpe, ante,* 83. The plaintiff moved the court that the receiver be ordered and directed to take into his possession and administer the property of the individual partners. *Phillips, J.*, allowed the motion and issued an order restraining the defendants from selling any of the property of the Moore Central Railroad Company, of which they are the principal stockholders, and set the rule to show cause for hearing 13 January 1951. The hearing on the rule was continued to be heard before *Clement, J.*, at the January Criminal Term of Moore County Superior Court. When the cause came on to be heard, the court entered its order directing the receiver to take into his possession "all of the property of the defendants, both individually and as partners, which has not heretofore been taken into his possession . . ." The right of creditors to a marshalling of the assets was expressly reserved.

Defendants excepted to the order entered and appealed.

John M. Spratt and Carroll & Steele for appellee York Mills, Inc.
Seawell & Seawell for defendant appellants.

BARNHILL, J. The order entered in effect extended the receivership to include the property belonging to the defendants individually. It was made to appear that the debts of the partnership alone are many times in excess of the value of the partnership property. The only exception in the record is to the "entering and signing order dated January 24, 1951." It is presumed that the court found facts sufficient to support his order. *Hall v. Coach Co.*, 224 N.C. 781, 32 S.E. 2d 325; *Craver v. Spaugh*, 227 N.C. 129, 41 S.E. 2d 82. The judgment is regular in form and no error is made to appear on the face of the record. *Rader v. Coach Co.*, 225 N.C. 537, 35 S.E. 2d 609; *Roach v. Pritchett*, 228 N.C. 747, 47 S.E. 2d 20; *Russos v. Bailey*, 228 N.C. 783, 47 S.E. 2d 22.

However, the record does leave in doubt whether the order directs the receiver to receive and take into his possession the physical property of Moore Central Railroad. The receiver is entitled to the certificates of stock held by defendants or which have been wrongfully conveyed by them to defeat the rights of creditors, but not to the physical property and assets of the corporation. Let the order be so modified.

The right of the defendants to homestead and personal property exemptions is not precluded by the order. This and other questions defendants

sought to debate on this appeal will be heard and decided in due time and in an orderly manner.

The order entered, as herein modified, is affirmed.

Modified and affirmed.

NATIONAL SURETY CORPORATION, YORK MILLS, INC., AND ALL OTHER CREDITORS WHO DESIRE TO MAKE THEMSELVES PARTIES TO THIS ACTION, v. VAN B. SHARPE AND LOUISE R. SHARPE, CO-PARTNERS, TRADING AND DOING BUSINESS AS CARTHAGE WEAVING COMPANY.

(Filed 23 May, 1951.)

1. Receivers § 11—

Motion in the cause is the proper procedure to recall the order of sale or restrain sale by the receiver thereunder.

2. Judges § 2a—

A judge has no jurisdiction to hear a motion made without notice to the adversary in a cause pending in a county outside the district of his residence and outside the district he is riding.

3. Appeal and Error § 31e—

Where an act sought to be restrained has been done pending appeal, the question becomes moot and the appeal will be dismissed.

APPEAL by O. B. Taylor, creditor, from *Phillips, J.*, in Chambers in Rockingham, 9 April 1951, MOORE.

Proceeding in receivership.

On 24 February 1951, *Phillips, J.*, entered an order directing the receiver to sell the receivership property at public auction. The property was duly advertised for sale. On 30 March 1951, O. B. Taylor, a creditor, appeared before *Williams, J.*, at Sanford, N. C., and entered a motion in the cause, in affidavit form, that the receiver be restrained and enjoined from making said sale. *Williams, J.*, issued a temporary restraining order and notice to the receiver to appear before *Phillips, Resident J.*, 14 April, and show cause, if any he has, why the restraining order should not be continued to the final hearing.

The order having been duly served, the receiver, on 2 April, appeared before *Clement, J.*, and also *Phillips, J.*, and moved that said order be vacated for the causes set forth in his motion. Both judges set the hearing on said motion before *Phillips, J.*, in Chambers at Rockingham, 7 April. *Phillips, J.*, later continued the hearing until 9 April. On the day appointed, *Phillips, J.*, after hearing the evidence and argument of

counsel, entered an order dissolving the temporary restraining order. Taylor excepted and appealed.

Seawell & Seawell for O. B. Taylor, appellant.

W. D. Sabiston, Jr., and Carroll & Steele for receiver appellee.

BARNHILL, J. As the property in controversy was in the possession of the receiver under order of court, a motion in the cause to recall the order of sale or to restrain the sale was the proper procedure. But the motion was made out of the county and out of the district without notice and before a judge who was neither the resident judge nor the judge riding the district. Said judge was without jurisdiction to hear a motion in a cause pending in Moore County. For this reason alone, if for no other, the restraining order was properly dissolved and vacated.

Furthermore, it is conceded here that pending this appeal the sale was had and the property was sold as ordered and advertised. The question the appellant now seeks to present is academic. *Saunders v. Bulla,* 232 N.C. 578, 61 S.E. 2d 607. The motion of the receiver to dismiss the appeal must be allowed.

Appeal dismissed.

STATE v. M. B. WILKES.

(Filed 23 May, 1951.)

1. Criminal Law § 12c—

Prosecution for violating a parking meter statute which provides that the punishment shall be a fine of fifty dollars or imprisonment not exceeding thirty days is in the exclusive original jurisdiction of a justice of the peace, and indictments originating in the Superior Court should be quashed on motion. G.S. 14-4, 7-63, 7-129, Constitution of N. C., Art. IV, sec. 27.

2. Indictment § 13—

An indictment may be quashed for lack of jurisdiction of the court to try the case.

3. Criminal Law § 83—

Where quashal of indictments in the Superior Court is correct because the court was without jurisdiction to try the case, the judgment of dismissal will not be disturbed on appeal irrespective of the reason assigned by the lower court for dismissal.

4. Appeal and Error § 40l: Criminal Law § 81i—

The Supreme Court will not pass on a constitutional question until the necessity for doing so has arisen.

STATE *v.* WILKES.

APPEAL by the State from *Sink, J.*, at the November Term, 1950, of SCOTLAND.

The grand jury returned two indictments against the defendant, M. B. Wilkes, at the November Term, 1950, of the Superior Court of Scotland County charging that on two occasions during the preceding month he parked his automobile next to a parking meter in a parking meter zone within the corporate limits of the Town of Laurinburg, a municipality, without depositing the required fee in such parking meter in violation of a parking meter ordinance enacted by the governing body of the Town of Laurinburg under the authority of Chapter 66 of the 1947 Session Laws of North Carolina. The indictments were consolidated by consent for the purpose of trial. Before pleading, the defendant moved to quash the indictments upon the ground that the ordinance and the enabling Act are unconstitutional. The court sustained the motion for the reason assigned, and entered judgment quashing the indictments and discharging the defendant. The State appealed under G.S. 15-179, assigning this ruling as error.

Attorney-General McMullan and James W. Mason for the State, appellant.

Varser, McIntyre & Henry for the defendant, appellee.

ERVIN, J. The law apportions original jurisdiction over criminal cases between the Superior Court and the justice of the peace in this fashion:

1. The Superior Court has original jurisdiction of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days. G.S. 7-63; *S. v. Faulk,* 154 N.C. 638, 70 S.E. 833; *S. v. Wiseman,* 131 N.C. 795, 42 S.E. 826; *S. v. Addington,* 121 N.C. 538, 27 S.E. 988; *S. v. Deaton,* 101 N.C. 728, 7 S.E. 895; *S. v. Hollingsworth,* 100 N.C. 535, 6 S.E. 417; *S. v. Edney,* 80 N.C. 360; *S. v. Hampton,* 77 N.C. 526.

2. The justice of the peace has original jurisdiction of all criminal matters where the punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days. N. C. Constitution, Art. IV, Sec. 27; G.S. 7-129; *S. v. Wilkes,* 149 N.C. 453, 62 S.E. 430; *S. v. Bossee,* 145 N.C. 579, 59 S.E. 879; *S. v. Davis,* 129 N.C. 570, 40 S.E. 112; *S. v. Harrison,* 126 N.C. 1049, 35 S.E. 591; *S. v. Wilson,* 84 N.C. 777; *S. v. Dudley,* 83 N.C. 660; *S. v. Jones,* 83 N.C. 657; *S. v. Craig,* 82 N.C. 668; *S. v. Benthall,* 82 N.C. 664.

The charges against defendant originated in indictments in the Superior Court of Scotland County. This being true, the Superior Court of Scotland County had no jurisdiction to try the charges for the very simple

reason that the parking meter ordinance of the Town of Laurinburg prescribes that "any person . . . violating any provision of this ordinance . . . shall be punished as provided by statute," and the statute specifies that "if any person shall violate an ordinance of a city or town, he . . . shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days." G.S. 14-4; *S. v. Wood,* 94 N.C. 855; *S. v. Threadgill,* 76 N.C. 17.

Since an indictment may be quashed or dismissed for lack of jurisdiction of the court to try the case, the presiding judge entered the proper judgment irrespective of the validity of the reason assigned by him for so doing. *S. v. Beasley,* 208 N.C. 318, 180 S.E. 598; *S. v. Rawls,* 203 N.C. 436, 166 S.E. 332; *S. v. Harrison, supra; S. v. Styles,* 76 N.C. 156. In consequence, the judgment quashing the indictments must be affirmed without consideration of the interesting question so ably debated by counsel, *i.e.,* the constitutionality of the ordinance and its underlying enabling act. This course is in keeping with the settled practice that courts do not pass on constitutional questions until the necessity for so doing has arisen. *Horner v. Chamber of Commerce,* 231 N.C. 440, 57 S.E. 2d 789.

Affirmed.

STATE v. MARION COBB.

(Filed 23 May, 1951.)

Criminal Law § 81c (4)—

Where but one sentence is imposed upon a general verdict of guilty, and there is no error in respect to one of the counts, error relating to the other counts cannot be prejudicial.

APPEAL by defendant from *Sharp, Special Judge,* at January Term, 1951, of GUILFORD—High Point Division.

Criminal prosecution upon warrant issued out of Municipal Court of the City of High Point, heard in Superior Court, on appeal thereto, on amended warrant charging that defendant did unlawfully (1) "barter, sell, give away, furnish, deliver, exchange, and otherwise dispose of" nontax-paid intoxicating liquors, (2) "transport and import" nontax-paid intoxicating liquors, (3) "purchase, receive, have on hand and possess . . . 34 gallons" of nontax-paid liquors, against the statute in such cases made and provided, etc.

Upon trial in Superior Court, the State offered evidence. Defendant offered none. Motions of defendant, aptly made, for judgment as of nonsuit on each count were denied. Defendant excepted. The court sub-

mitted the case to the jury only on the third count. The jury returned this verdict: "Defendant is guilty as charged."

Judgment: Confinement in the common jail of Guilford County and assigned to work under the supervision of the State Highway and Public Works Commission for a period of twelve (12) months.

Defendant appeals therefrom to Supreme Court and assigns error.

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

Gold, McAnally & Gold for defendant, appellant.

PER CURIAM. Defendant assigns as error the ruling of the trial court in denying his motions for judgment as of nonsuit on each count, and to the failure of the court to charge on each count. Manifestly, the evidence offered upon the trial below is sufficient to support a verdict of guilty on the third count. And the charge on this count appears to be proper. However, the verdict is general, and the judgment imposes only one sentence. Therefore, the judgment is affirmed on authority of *S. v. Smith*, 226 N.C. 738, 40 S.E. 2d 363.

No error.

STATE v. M. H. McFARLAND.

(Filed 23 May, 1951.)

APPEAL by defendant from *Clement, J.*, January Term, 1951, RICHMOND. No error.

Criminal prosecution under a bill of indictment which charges an assault with intent to commit rape.

The trial judge, being of the opinion that there was no sufficient evidence of an intent on the part of the defendant to commit the crime of rape, submitted the cause to the jury on the lesser count of an assault upon a female, he, the defendant, being a male person over eighteen years of age.

There was a verdict of guilty. The court pronounced judgment on the verdict and defendant appealed.

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

Gavin, Jackson & Gavin, Jones & Jones, and D. E. McIver for defendant appellant.

PER CURIAM. This cause resolved itself into an issue of fact. There was ample testimony offered by the State to repel defendant's demurrer to the evidence and require its submission to the jury. The assignments of error brought forward by defendant and discussed in his brief fail to disclose cause for disturbing the verdict. Upon the consideration of the whole record we find in the trial

No error.

IN RE: HOUSING AUTHORITY OF THE CITY OF CHARLOTTE, N. C., HOUSING PROJECT N. C. 3-3.

(Filed 7 June, 1951.)

1. Municipal Corporations § 8d: Eminent Domain § 14—

The hearing before the Utilities Commission of a petition of a housing authority for a certificate of public convenience and necessity is solely for the purpose of determining the public need for such project in the particular community, and it is not required that the petition set out a description of the property which the authority may select as the *situs* or that the owners of such property be made parties or be given notice of the proceedings before the Utilities Commission. G.S. 40-53, G.S. 157-28, G.S. 157-45, G.S. 157-51.

2. Same—

The selection of a site for a public housing project after the issuance of a certificate of public convenience and necessity is within the sound discretion of the housing authority upon its resolution finding in good faith that the acquisition of such property is in the public interest and necessary for public use, and while it will be presumed that a housing authority has acted in good faith in the exercise of such power, the owners of the property may in the condemnation proceedings challenge the selection of the site on the ground that the authority acted arbitrarily, capriciously or fraudulently in making such selection. G.S. 40-36, G.S. 157-11, G.S. 157-50.

3. Public Officers § 9—

It will be presumed that public officials have exercised their powers in good faith in accord with the spirit and purpose of law.

4. Municipal Corporations § 8d: Eminent Domain § 14: Utilities Commission §§ 3, 5—

In passing upon the petition of a housing authority, the Utilities Commission determines only the public need for such project in the particular community, and its issuance of a certificate of public convenience and necessity does not give the housing authority any right, title or interest in real estate, even though the property be described in the petition, and therefore the individual property owners are not parties and have no right

to appeal from the order of the Utilities Commission. G.S. 40-53, G.S. 157-28, G.S. 157-45, G.S. 157-51.

5. Utilities Commission § 3: Municipal Corporations § 8d: Eminent Domain § 14—

The order of the Utilities Commission granting a certificate of public convenience and necessity to a housing authority cannot be collaterally attacked in the eminent domain proceedings thereafter instituted by the housing authority when it appears that the certificate of the Utilities Commission was issued after due investigation upon its finding based upon the evidence that there existed in the area a need for public housing and that the statutory procedure had been followed.

6. Appeal and Error § 6c (3)—

Where the evidence is not brought forward in the record it will be presumed that there was competent evidence to support the court's findings of fact.

7. Municipal Corporations § 8d: Eminent Domain §§ 4, 6—

The fact that a few isolated properties in an area sought to be condemned for a public housing project are above the standard of slum properties does not affect the public character of the taking, and such properties may be condemned in proper proceedings by a municipal housing authority.

8. Same—

A municipal housing authority is given the power by G.S. 157-11 and G.S. 157-50 to condemn by eminent domain any real property which it may deem necessary for a housing project, and G.S. 40-10 does not apply to such proceedings.

BARNHILL and ERVIN, JJ., dissent.

APPEAL by petitioner and respondents from *Bennett, Special Judge,* January Term, 1951, of MECKLENBURG.

This is a proceeding to authorize the Housing Authority of the City of Charlotte to condemn certain lands as a site for the construction of 400 additional units of decent, safe and sanitary low-rent dwellings.

On 30 March, 1950, the North Carolina Utilities Commission, upon application of the Housing Authority of the City of Charlotte, N. C., issued to said Authority its certificate of public convenience and necessity for a project or projects for the construction of not exceeding 600 low-rent dwelling units.

After the procurement of the certificate of public convenience and necessity for the project or projects, the Housing Authority adopted an appropriate resolution declaring that the acquisition of the property described therein was in the public interest and necessary for public use, as required by G.S. 157-11 and 157-50.

Thereafter, said Housing Authority filed a petition with the Clerk of the Superior Court of Mecklenburg County to condemn the respective properties described in the aforesaid resolution as a site upon which to erect 400 low-rent dwelling units, as provided in the Public Works Eminent Domain Law, G.S. 40-30 to G.S. 40-53, inclusive. Attached to and incorporated therein by reference was a copy of the certificate of public convenience and necessity issued by the North Carolina Utilities Commission.

In apt time, the owners of 31 out of 109 parcels of land compromising the site described in the petition, challenged the validity of the condemnation proceeding. After hearing, the Clerk of the Superior Court held that the proceeding was invalid as to respondents who owned and resided in homes located in the area sought to be condemned, but valid as to all others. Whereupon the Housing Authority and respondents who did not own homes appealed to the Superior Court.

When this cause came on for hearing in the Superior Court, counsel for all parties stipulated as follows:

"1. That no notice was given the owners of the subject property of any proceeding before the Utilities Commission.

2. That the subject property was not described in the certificate of convenience and necessity.

3. That the subject property had not been selected as the site for this project at the time the Utilities Commission made its investigation, entered its order and issued its certificate.

4. That no order of the Utilities Commission was served on the owners of the subject property prior to the institution of this eminent domain proceeding.

5. That the Housing Authority of the City of Charlotte is established and exists in conformity with the provisions of Chapter 157 of the General Statutes of North Carolina.

6. The Housing Authority of the City of Charlotte is a corporation of the type enumerated in G.S. 157-50.

7. The Housing Authority of the City of Charlotte did pass an appropriate resolution as required by G.S. 157-11 and 157-50.

8. That no notice was given to the individual respondents of the action of the Housing Authorities in the adoption of the foregoing resolution.

9. The provisions of G.S. 40-36 with regard to notice have been complied with.

10. The court may hear the evidence and find the facts in this case.

11. That the property line map by J. W. Spratt, County Surveyor, dated 30 June, 1950, and filed with the petition in the office of the Clerk of the Superior Court of Mecklenburg County, accurately reflects the property which is the subject of this proceeding."

The court, upon hearing evidence and argument of counsel, held that the action taken by the Housing Authority of the City of Charlotte was not arbitrary, capricious or fraudulent, nor was it an abuse of discretion. The court further found the facts to be as stipulated by counsel and entered its conclusions of law, as follows:

"1. The right of eminent domain provided for in G.S. 40-30 through 40-53, inclusive, can be exercised for the purpose of constructing new low-rental housing despite the fact that the area sought to be condemned may not be a slum area.

2. That no notice was required at the time of the adoption of a resolution by the Housing Authority of the City of Charlotte to the effect that the acquisition of the property described in said resolution was necessary and convenient and in the public interest for the purposes expressed in the Housing Authority Law.

3. That no notice to the individual respondents of the action of the Utilities Commission of North Carolina was necessary for the issuance of a certificate of convenience and necessity, as required by Sec. 40-53 and Secs. 157-28, 157-45, 157-51 of the G.S. of North Carolina.

4. That no copy of the certificate of convenience and necessity need have been served upon the owners of property which is sought to be condemned by the Housing Authority.

5. That no notice other than that prescribed in G.S. 40-36 need have been given at the time of institution of eminent domain proceedings under G.S. 40-30 through 40-53.

6. That G.S. 40-10 does not apply to this proceeding and that the Housing Authority of the City of Charlotte was authorized and empowered to condemn, without consent of the owners, their dwelling houses, yards, kitchens, gardens or burial grounds.

7. That the Utilities Commission must hold a hearing before issuing a certificate of convenience and necessity for a housing project.

8. That a certificate of convenience and necessity from the Utilities Commission of North Carolina was a condition precedent to the institution of condemnation proceedings against specific property under the Housing Authority Law, and that the certificate of convenience and necessity issued by the Utilities Commission and made a part of the petition was null and void in that the *situs* of the property to be taken was not sufficiently described, and that the Utilities Commission did not have reference to any specific property and therefore did not have the subject matter of the action before it when it issued said certificate of convenience and necessity, and that the action taken by the Utilities Commission of the State of North Carolina may be collaterally attacked in this proceeding."

Upon these conclusions of law the court entered judgment, the pertinent parts of which are set out below.

As to respondents Murphey McKnight and wife, Isabel McKnight, and Henry Porter and wife, Janie Mae Porter: "It is therefore, . . . Ordered, Adjudged and Decreed, that the Motion to Dismiss of the respondents be and the same is hereby allowed, sustained and granted, and the proceedings heretofore had in this matter be and the same are hereby dismissed, vacated, and ordered null and void. . . ."

As to the remaining respondents: "It is Ordered, Adjudged and Decreed that the petition does not state a cause of action and that the demurrer *ore tenus* and motion to dismiss be sustained and allowed as to the respondents. It is Further Ordered, Adjudged and Decreed that the proceedings heretofore had in this matter are void and of no effect as to respondents named herein."

Petitioner, Housing Authority of the City of Charlotte, N. C., excepts to the judgment granting respondents Murphey McKnight and wife and Henry E. Porter and wife's motion to dismiss, and further excepts to judgment sustaining the other respondents' demurrer *ore tenus* and granting their motion to dismiss, and appeals to the Supreme Court.

All the respondents except to the conclusions of law hereinabove set out numbered one to six, and appeal to the Supreme Court.

Lassiter & Moore and Elmer E. Rouzer for petitioner.

Attorney-General McMullan and Assistant Attorney-General Paylor, Amicus Curiæ.

Elbert E. Foster for respondents McKnight and Porter.

Goodman & Goodman, Sol Levine, and Wendell R. Wilmoth for respondents other than McKnight and Porter.

DENNY, J. This Court upheld the constitutionality of the Housing Authorities Law enacted by the General Assembly in 1935, being Chapter 456 of the Public Laws of 1935, and codified in our General Statutes in Sections 157-1 to 157-60, inclusive, in the case of *Wells v. Housing Authority,* 213 N.C. 744, 197 S.E. 693. It was there decided that a housing authority created pursuant to the provisions of the Housing Authorities Law is a municipal corporation; that the act comprehends a public governmental purpose, and that the corporation is invested by it with a governmental function. This decision has been followed and approved in *Cox v. Kinston,* 217 N.C. 391, 8 S.E. 2d 252, and in *Mallard v. Housing Authority,* 221 N.C. 334, 20 S.E. 2d 281.

The respondents do not contend that the proposed project is not needed in the City of Charlotte, or that the proposed construction of 400 low-

rent dwelling units by the Housing Authority of the City of Charlotte is not in the public interest and necessary for public use. The findings of the petitioner in this respect are not challenged. Furthermore, it is stipulated that the Housing Authority of the City of Charlotte is a corporation, duly established and existing in conformity with the provisions of the Housing Authorities Law, and that it did pass an appropriate resolution as a prerequisite to the institution of this proceeding, as required by G.S. 157-11 and 157-50. Therefore, it is conceded by all parties that the Housing Authority of the City of Charlotte has found that the acquisition of the property which it seeks to acquire by eminent domain is in the public interest and necessary for public use.

However, in the hearing below, the respondents challenged the validity of the proceeding on the ground that the petitioner had failed to observe all the statutory requirements governing such project or projects. And the court concurred in this view and held the certificate of public convenience and necessity was null and void because the application of the Housing Authority of the City of Charlotte, for such certificate, did not sufficiently describe the *situs* of the property to be taken in the condemnation proceeding as a site for the proposed housing project; and, also held that the Utilities Commission must hold a hearing before issuing a certificate of public convenience and necessity, but that the individual respondents were not entitled to any notice with respect thereto.

The respondents base their contentions on the provision contained in the following statute: "Notwithstanding any findings of public convenience and necessity, either in general or specific, by the terms of this article, the right of eminent domain shall not be exercised unless and until a certificate of public convenience and necessity for such project has been issued by the utilities commission of North Carolina, and the proceedings leading up to the issuing of such certificate of public convenience and necessity, and the right to appeal therefrom shall be as now provided by law and said rights are hereby expressly reserved to all interested parties in said proceedings. In addition to the powers now granted by law to the utilities commission of North Carolina, the said utilities commission is hereby vested with full power and authority to investigate and examine all projects set up or attempted to be set up under the provisions of this article and determine the question of the public convenience and necessity for said project." G.S. 40-53.

These identical provisions are also contained in G.S. Sections 157-28, -45 and -51.

The Housing Authority of the City of Charlotte, acting in co-operation with the City of Charlotte, is subject to the provisions set forth in G.S. 157-40 and subsequent sections in the Housing Authorities Law. In G.S. 157-40 and in G.S. 157-48, the Legislature of North Carolina made

a finding and declaration of necessity with respect to the need for safe and sanitary dwelling accommodations for persons of low income. The Legislature also made a similar finding which is contained in G.S. 40-31, which is a part of the Public Works Eminent Domain Law. This law defines a "public works project" as any work or undertaking which is financed in whole or in part by a federal agency, as therein defined, or by a state public body, as therein defined, G.S. 40-32 (a). While it is said in the Housing Authorities Law, G.S. 157-3 (10): " 'Housing project' shall include all real and personal property, buildings and improvements, stores, offices, lands for farming and gardening, and community facilities acquired or constructed or to be acquired or constructed pursuant to a single plan or undertaking (a) to demolish, clear, remove, alter or repair unsanitary or unsafe housing, and/or (b) to provide safe and sanitary dwelling accommodations for persons of low income. The term 'housing project' may also be applied to the planning of the buildings and improvements, the acquisition of property, the demolition of existing structures, the construction, reconstruction, alteration and repair of the improvements and all other work in connection therewith." And in G.S. 157-41 (4), it is provided that a " 'housing project' shall mean any undertaking (a) to demolish, clear, remove, alter or repair unsafe and unsanitary housing, and/or (b) to provide dwelling accommodations for persons of low income, and said term may also include such buildings and equipment for recreational or social assemblies for educational, health or welfare purposes, and such necessary utilities as are designed primarily for the benefit and use of the housing authority and/or the occupants of such dwelling accommodations."

We think the finding of public convenience and necessity, either in general or specific terms, as pointed out in G.S. 40-53, has reference to any finding made "either in general or specific" terms by the Legislature and set forth in the Housing Authorities Law, which finding shall not be sufficient to warrant the exercise of eminent domain in connection with any project authorized thereby. But a certificate of public convenience and necessity for such project must be obtained from the Utilities Commission—that is, the public need for such a project in a particular community must be made to appear and a certificate of public convenience and necessity must be obtained before the petitioner may proceed to condemn property for such a project. We do not think, however, that it was the legislative intent to require a petitioner to select and describe in detail the land it might need for the construction of a proposed project before it ascertained whether or not it would be permitted to proceed with the project.

It is contended by the respondents that if the petitioner was not required to inform the Utilities Commission as to the specific property it

proposed to condemn as a site for its housing project, at the time it applied for a certificate of public convenience and necessity, it is conceivable that the Housing Authority of the City of Charlotte, after obtaining such certificate, might have proceeded to condemn the property surrounding the intersection of Trade and Tryon Streets in the City of Charlotte, as a site for its housing project, if it had so desired. However, it would be difficult to conceive how the officials of the Housing Authority of the City of Charlotte could find in good faith that the acquisition of such property was in the public interest and necessary for public use. Moreover, there is a presumption that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. *Kirby v. Board of Education,* 230 N.C. 619, 55 S.E. 2d 322; 31 C.J.S., Evidence, Section 146, p. 799, *et seq.,* and cited cases.

We know of no statutory requirement to the effect that the application of a housing authority for a certificate of public convenience and necessity in this State must contain a description of the property upon which the low-rent dwellings are to be located, or to require notice to the owners of such property of the filing of an application for such certificate. The statute does not provide for the North Carolina Utilities Commission to select or approve the selection of the site for a housing project. On the contrary, the selection of a site for such project is vested in the housing authority. In *State ex rel. Porterie v. Housing Authority,* 190 La. 710, 182 So. 725, the Court, in considering the resolution to the effect that certain realty was necessary for a housing project, said: "What this provision means is that a housing authority, and not the administrative or executive department of a city, is to determine the propriety of locating a project in any particular part of the city, and that, as to that, the decision of the housing authority is conclusive."

It is our opinion, however, and we so hold, that if a local housing authority should act in bad faith in the selection of a site for a housing project, that is, if it should act arbitrarily, capriciously or fraudulently in making such selection, such action may be challenged in the proceedings to condemn the property. G.S. 40-36. But in the absence of an allegation charging that the action of the local housing authority was arbitrary, capricious or fraudulent, the selection of a site for a housing project will not be disturbed. *Brammer v. Housing Authority,* 239 Ala. 280, 195 So. 256. And it will be noted that in this proceeding the court below found as a fact that the action taken by the Housing Authority of the City of Charlotte was not arbitrary, capricious or fraudulent, nor was it an abuse of discretion, and there is no exception to such finding.

A housing authority must do two things before it may institute a proceeding for the taking of property under the right of eminent domain,

pursuant to the provisions of the Public Works Eminent Domain Law. G.S. 40-30 to 40-53, inclusive. It must obtain a certificate of public convenience and necessity from the North Carolina Utilities Commission and it must adopt a resolution "declaring that the acquisition of the property described therein is in the public interest and necessary for public use." G.S. 157-11 and 157-50. When these requirements have been met, the housing authority is empowered by statute to acquire by the right of eminent domain any real property, including fixtures and improvements thereon, described in its resolution passed pursuant to the provisions of G.S. 157-11. G.S. 157-50.

In our opinion, the North Carolina Utilities Commission has only one question to consider and determine in connection with an application of a housing authority for a certificate of public convenience and necessity, and that is whether the area within the jurisdiction of the particular housing authority is eligible for the construction of the low-rent dwellings proposed, within the purview of the Housing Authorities Law. The statute only empowers the Utilities Commission to investigate and examine all projects set up or attempted to be set up under the provisions of the Housing Authorities Law to determine "the question of the public convenience and necessity for said project." G.S. 40-53, 157-28, 157-45 and 157-51. It is true these statutes provide for an appeal from the ruling of the Commission, on an application for a certificate of public convenience and necessity, by interested parties. The question then arises as to who are interested parties. The answer is found in G.S. 62-26.6, which provides for an appeal from a determination or decision made by the Utilities Commission by any party affected thereby. However, such affected party must file exceptions to the determination or decision within ten days after notice of the determination or decision. And it has been repeatedly held by this Court that an appeal from the Utilities Commission is limited to parties to the proceeding, *Utilities Com. v. Kinston,* 221 N.C. 359, 20 S.E. 2d 322; *Corporation Commission v. R. R.,* 196 N.C. 190, 145 S.E. 19; *Corporation Commission v. R. R.,* 170 N.C. 560, 87 S.E. 785; *Hardware Co. v. R. R.,* 147 N.C. 483, 61 S.E. 271; and a party is not affected by a ruling of the Utilities Commission unless the decision "affects or purports to affect some right or interest of a party to the controversy and in some way determinative of some material question involved." *Hardware Co. v. R. R., supra; Chicago B. & Q. R. Co. v. Cavanagh,* 278 Ill. 609, 116 N.E. 129; *Zurn v. City of Chicago,* 389 Ill. 114, 59 N.E. 2d 18. And the issuance of a certificate of public convenience and necessity for the construction of low-rent dwellings in the City of Charlotte is in no way determinative of any right of these respondents. Such certificate does not give a local housing authority any right, title

or interest in real estate, even though the property may be described in the petition for the certificate of public convenience and necessity.

In the case of *Chicago B. & Q. R. Co. v. Cavanagh, supra,* the State Public Utilities Commission, after an investigation of existing conditions, found that public convenience and safety required a relocation of the petitioner's railroad tracks between certain points. The petitioner was directed to make such changes in the location of its existing right of way as might be necessary to comply with the order, and to acquire, either by purchase or the exercise of eminent domain, whatever property might be necessary for the purpose. The defendants contended, just as the respondents do in the proceeding before us, that since they were not served with notice of the hearing or investigation, nor with a certified copy of the order, so that they might contest it before the Commission and appeal from the order, that it was not binding on them and that the petitioner was, therefore, not entitled to take their property under the right of eminent domain. The lower court concurred in this view and dismissed the proceeding, but upon appeal to the Supreme Court, the lower court was reversed. The Supreme Court of Illinois held that the statute requiring notice and giving the right of appeal applied only "to notice or service of an order upon some person or corporation either complained of or required to do something or to comply with some order, rule, or regulation. . . . The order of the Commission did not amount to an appropriation of the defendants' property or any interest in it, which could only be accomplished by the filing of a petition and the ascertainment and payment of compensation for the property, so that there was no violation of the due process provision of the Constitution. The defendants were not deprived of their property, nor of any interest therein, by the mere making of the order, which neither gave the petitioner any interest in or right to possession of the property. The General Assembly has unlimited power to take private property for public use, or to authorize it to be taken, upon making compensation, reserving to the property owner the right to contest the question whether the proposed use is public or private, and whether the power is to be exercised for the purpose for which it was conferred."

In *Zurn v. City of Chicago, supra,* the statute provided that Neighborhood Redevelopment Corporations, which were only semi-public, in applying for a certificate of convenience and necessity should contain a description of the property to be obtained, and, further, provided that "no steps may be taken by a redevelopment corporation, in the process of slum clearance and rehabilitation, until its development plans have been approved by the Commission and the Commission has issued its certificate of convenience and necessity as provided in the act." The plaintiff contended that since the Neighborhood Redevelopment Corporation Law

did not provide for notice to the property owners of the application for a certificate of convenience and necessity, the act was invalid. Other provisions in the act were also attacked. Judgment was entered holding the act invalid and enjoining the defendants from using any public funds in carrying out its provisions. The judgment was reversed on appeal and the Court, with respect to lack of notice complained of by the property owners, said: "It is argued that the failure of the act to provide for actual notice of such hearing to the property owners constitutes a denial of due process of law. It should be kept in mind that this hearing is merely an application for a certificate of convenience and necessity. . . . It is argued that when the commission issued its certificate of convenience and necessity, this authorizes the corporation to proceed with the project and to acquire the property located within the development area by eminent domain. It is obvious, however, that no property or property interests are to be taken or interfered with on this hearing. It is simply one of the steps prescribed by the act in the chain of events authorizing the redevelopment corporation to proceed with the development and to acquire property by voluntary conveyance and by eminent domain for that purpose."

It appears from the record in this proceeding that the Utilities Commission found the facts, upon which it issued the certificate of public convenience and necessity, from the duly verified petition of the Housing Authority of the City of Charlotte, and from representations of counsel for the petitioner. By consent of counsel for all parties the petition of the Housing Authority of the City of Charlotte was not made a part of the record. However, the findings of fact and conclusions of law are set out in the order of the Commission, and they are sufficient to support the order. Among other things, the Commission found that the City of Charlotte, after having made due investigation, found and determined that there exists in the City of Charlotte a need for an additional 600 units of decent, safe and sanitary low-rent dwellings, and adopted a resolution to that effect in a regular meeting on 21 December, 1949; and that the City of Charlotte had entered into a co-operative agreement with the Housing Authority of the City of Charlotte, as required by the Public Housing Administration. And since the evidence upon which the Utilities Commission made its findings of fact is not brought forward, it will be presumed that there was competent evidence to support its findings, *Carter v. Carter,* 232 N.C. 614, 61 S.E. 2d 711; *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; and the order of the Utilities Commission granting the certificate of public convenience and necessity may not be attacked in this proceeding.

In our opinion the record supports the view that the petitioner herein complied with the preliminary requirements of the Housing Authorities Law prior to the institution of the proceeding for the condemnation of the respondents' parcels of land. And since it is conceded that the notices required by the Public Works Eminent Domain Law, G.S. 40-36, have been given in accordance with the provisions of the statute, the judgment dismissing the proceeding should be reversed.

RESPONDENTS' APPEAL.

We have in effect heretofore considered and passed upon all but two of the exceptions entered by the respondents to the court's conclusions of law, made in the hearing below, in our consideration of the petitioner's appeal.

The respondents excepted to and assign as error the ruling of the court below to the effect that the right of eminent domain provided for in G.S. 40-30 to 40-53, inclusive, may be exercised for the purpose of constructing low-rent dwellings despite the fact that the area sought to be condemned may not be a slum area.

In the selection of a location for a housing project as authorized under the Housing Authorities Law, the project may be built either in a slum area which has been cleared, or upon other suitable site. The housing authority is given wide discretion in the selection and location of a site for such project. *Housing Authority v. Higginbotham,* 135 Texas 158, 143 S.W. 2d 79, 130 A.L.R. 1053; *Riggin v. Dockweiler,* 15 Cal. 2d 651, 104 P. 2d 367; *Chapman v. Huntington W. Va. Housing Authority,* 121 W. Va. 319, 3 S.E. 2d 502; *Stockus v. Boston Housing Authority,* 304 Mass. 507, 24 N.E. 2d 333; *Housing Authority of the City of Oakland v. Forbes,* 51 Cal. A. 2d 1, 124 P. 2d 194. And the fact that a few isolated properties in an area may be taken and dismantled which are above the standard of slum properties, or that some few desirable homes will be taken, will not affect the public character of the condemnation proceeding. *Blakemore v. Cincinnati Metropolitan Housing Authority,* 74 Ohio App. 5, 57 N.E. 2d 397; *In re Edward J. Jeffries Home Housing Project of Detroit,* 306 Mich. 638, 11 N.W. 2d 272.

The respondents also except to the ruling of the court below to the effect that G.S. 40-10 does not apply to this proceeding, and that the Housing Authority of the City of Charlotte may condemn, without the consent of the owners, their dwelling houses, yards, kitchens, gardens, or burial grounds.

We concur in the ruling of the court below. The Housing Authorities Law expressly gives the housing authority, created pursuant to the act, the power to obtain by eminent domain any real property, including the

improvements and fixtures thereon, which it may deem necessary for the construction of a housing project. G.S. 157-11 and 157-50.

All the exceptions of the respondents to the court's conclusions of law are hereby overruled, and the judgment from which the petitioner appeals is reversed and remanded for further proceedings in accord with this opinion.

Reversed and remanded.

BARNHILL and ERVIN, JJ., dissent.

MOUNT OLIVE MANUFACTURING COMPANY, INC., v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 7 June, 1951.)

1. Railroads § 4—

The evidence in this case, taken in the light most favorable to plaintiff, *is held* sufficient to be submitted to the jury on the issue of the negligence of the defendant railroad company in causing a collision with plaintiff's automobile at a grade crossing.

2. Same—

Evidence tending to show that an officer of plaintiff corporation was told to move plaintiff's car so that a spur track into the property could be used, that in doing so he had cleared the spur track and was on the siding track when the car was struck by the backing, shifting train, and that under the circumstances, and in accordance with custom, he expected the train to go upon the spur rather than continue upon the siding, *is held* not to disclose contributory negligence as a matter of law on his part in driving the car upon the siding in front of the oncoming train.

3. Negligence § 10—

The doctrine of last clear chance does not arise unless a sufficient length of time elapses after plaintiff has put himself in a position of peril by his own negligence for defendant to discover such peril and appreciate plaintiff's danger in time to avert the accident.

4. Trial § 36—

It is error for the trial court to submit an issue when there is no evidence to support an affirmative finding thereon by the jury, or if the evidence is so slight as not reasonably to warrant the inference of fact in issue or leaves the matter in mere conjecture.

5. Railroads § 4: Negligence § 21—

Evidence tending to show that plaintiff's agent drove plaintiff's car upon a railroad siding such a short distance in front of defendant's moving train that the engineer could not have done anything in time to have

avoided the collision, *is held* insufficient to support the submission of the issue of last clear chance.

6. Negligence § 22—

Where the jury answers the issues of negligence, contributory negligence and last clear chance all in the affirmative, and the submission of the issue of last clear chance was erroneous because not supported by the evidence, defendant is entitled to judgment.

JOHNSON, J., dissenting.

APPEAL by defendants from *Carr, J.*, at October Civil Term, 1950, of WAYNE.

Civil action to recover for damage to automobile of plaintiff sustained in collision with engine of defendant allegedly resulting from actionable negligence of defendant.

Plaintiff, in its complaint, makes substantially these allegations: 3. That on 20 January, 1949, at about three o'clock p.m., while defendant, through its railroad employees, was engaged in moving cars in and through Bell Siding and Byrd Spur, adjacent to properties of plaintiff, it moved its engine and one or two cars northwardly into the Bell Siding approximately one hundred feet north of the switch where the Byrd Spur enters into the Bell Siding; that before doing this, defendant through its conductor, in charge of the movement of said engine and cars, instructed S. B. Taylor, officer of plaintiff, to have moved an automobile belonging to Shelton Taylor, which had been parked close to the east side of Bell Siding; that after S. B. Taylor had moved this automobile, he was requested and instructed by the conductor to move the plaintiff's automobile, which was parked in front of plaintiff's office close to the Byrd Spur, in order that defendant's engine and cars, which were then in Bell's Siding, north of plaintiff's office as aforesaid, might be moved into the Byrd Spur, through the switch connecting the two tracks; that S. B. Taylor, pursuant to said request and instructions, proceeded to move the plaintiff's automobile, so located, over the driveway across Bell Siding toward the east side of Center Street "as he had been accustomed to doing on innumerable and similar occasions to enable the said railroad engine and cars to be moved from the Bell Siding into the Byrd Spur track, well knowing that in order to make such movement it was necessary for the railroad employees to shift the switch at the junction of the two tracks before such movement could be made"; that S. B. Taylor, "relying upon said instruction and the fact that the switch had to be changed before such movement of the railroad cars were made, proceeded to drive plaintiff's automobile over the driveway running from plaintiff's property across the Bell Siding to Center Street, in order to get out of the way of the contemplated

movement of the railroad's engine and cars; that just as he was proceeding across said siding the defendant railroad company negligently and carelessly caused its engine and cars to be moved southward without making the required shift for entry into the said Byrd Spur track and struck the side of the plaintiff's automobile with such force that the said automobile was crushed in on its left side, causing great damage to it in the sum of $1074.78."

Plaintiff further alleges in his complaint other grounds, predicated upon the above factual situation, apparently as basis for invoking the doctrine of last clear chance. Of these allegations paragraphs 7 and 8 are as follows:

"7. That, before entering said track, the said S. B. Taylor, in moving the plaintiff's automobile, had been advised by said conductor that the next movement of said engine and cars was to be into the Byrd spur track, and both engineer and the said S. B. Taylor knew that the switch at the junction had to be shifted to enable such entry and knew that such switch had not been shifted.

"8. That the said conductor supervising the movement of said engine and cars and the engineer operating said engine and the switchman on said cars, as well as the plaintiff's official, S. B. Taylor, well knew from previous similar movements that the only and the usual method and place of movement of the plaintiff's automobile from its location in front of plaintiff's offices was from the west side of the said siding and spur tracks over the driveway to the east side of Center Street."

Defendant, answering, denies in material aspects the allegations of the complaint, and pleads in specific detail contributory negligence of plaintiff in bar of his right to recover in this action.

These facts, portraying the scene of the collision, do not appear to be in dispute: The collision occurred on the Bell railroad siding, south of its junction with the Byrd railroad spur, in the town of Mount Olive, in front of plaintiff's office on the west side of the main line of defendant's railroad running from Goldsboro, N. C., to Wilmington, N. C. This main line runs in a general north-south course,—down the middle of Center Street,—the portion of the street on the west side being paved. The Bell Siding branches off the main line on the west side and runs in a northerly direction,—first verging to the westward to and across Center Street, and then, parallel to the main line and along the west side of Center Street to and across Maple Street. Byrd's Spur branches off the west side of the Bell Siding at a point west of Center Street, and runs in southerly direction about parallel to the main line and the street, a short distance to Byrd coal yard in which there was a coal car. The siding and the spur are connected by a switch. The turning of the switch is

required for railroad engines and cars to enter the Byrd spur from the Bell siding.

The office of plaintiff is located on the west side of Byrd spur. The space between the west rail of the spur and the office steps is 13 feet wide on the north, and 10 feet wide on the south. The switch connecting the siding and the spur, as variously estimated by evidence offered by plaintiff, is from 35 or 40 feet, or 50 or 60 feet north of the office. It is "just about even with the factory, maybe a few feet north of it." This building according to measurement made by civil engineer of defendant is 49 feet from center of office. There are dirt roads on both the north and south sides of the office, both of which are used. According to the civil engineer, as witness for defendant, the one on the north, that is, south of the brick building, is 39 feet from the center of the office, and the space between the west rail of the Bell siding and the east rail of Byrd spur, at point where this dirt road crosses, is three feet. And, according to evidence for plaintiff, this space between such rails at point of collision is estimated to be 5 or 6 feet. The gauge of the tracks is 4 feet and 8½ inches. The space in front of the office and over the tracks is level,—for about 40 feet, admitting passage of automobiles. The Company car, the one involved in this action, was parked, headed south on the west side of Byrd's spur, right in front of the Company's office.

Upon the trial in Superior Court, for plaintiff, S. B. Taylor testified:

"I am secretary and treasurer of Mount Olive Manufacturing Company . . . As result of what the brakeman said, I moved my son's car. When I moved this car the train, the engine and two cars, backed up . . . to another car . . . the north end of Bell siding. I started back to the office and Mr. Matthis, the conductor, met me about the middle of the street . . . I walked just as straight as I could go to my car and go across and the train was coming down—and I thought the train was going to stop. At that time the train was coming along very slowly . . ." Here the following questions were asked by the court, to which the witness answered as shown: Q. "How close was this car that was hit by the train . . . was that car too close to that track for them to go on the Byrd spur? A. Yes, sir, I have moved it a hundred times, I expect. Q. What did the conductor tell you at that time? A. He told me I would have to move my car, that he was coming in here on Byrd's spur and get that car."

Then the witness continued: "To go to Byrd's spur it was necessary to pull the switch . . . In consequence of what the conductor told me, I went straight to my car. It was cold weather and the car was closed. I turned as quick as I could to get out of the way of the train coming in here . . . My car was hit in south direction . . . After getting in my car I turned immediately to my left. When I came across, the train instead of going in the spur stayed on the main line and struck me just as

I crossed Bell siding . . . I have seen this train shifting in and out of this siding ever since 1911 when I went there . . . Prior to reaching that switch point I would say the train was going four or five miles an hour . . . but about the time he reached the switch he was picking up and going a little faster going out on the main line. From the point I moved my car to the point I was hit on Bell siding is about 12 or 15 feet . . ."

Then in answer to the question by the court: "Had you cleared Byrd's track when you were hit?", the witness answered "Yes, sir" . . . "It is about 5 feet from the point where the tracks separate to the point where I was hit."

Then on cross-examination the witness continued: ". . . The train proceeded northwardly on Bell siding—backing in—Beyond my office it went probably 100 or 150 feet, something like that . . . to couple up some cars back there. The switch post on Bell's siding is something like 35 or 40 feet north of my office. Northwardly beyond that the train went on across the street 150 feet . . . to bring out some empty cars. I don't believe the engine crossed that street, but it might. I never paid no attention to it . . . I don't know whether it was one or two coupled to it; they had one or two on the engine when it backed in . . . I saw the cars when they coupled up, they were up there in front of some warehouses across Maple Street, on the north side of Maple Street. Might have been 200 feet, the length of the engine and tender and a couple of others, then it coupled up two more . . . I saw the train as it proceeded southwardly on Bell siding. I don't think it was going over four or five miles an hour the last time I saw it. I didn't pay any attention to it after I got in the car because I thought he was slowing up to go in Byrd's spur . . . I didn't say I saw the train pick up a little speed. I said it was picking up some when it started out to the main line."

Then upon interrogation by the court the witness answered as shown following: Q. "Do you mean before it hit the car? A. Yes, sir. No, I didn't see the train. I knew it was picking up when I got across there and it was right on me. Q. At the point it passed the switch didn't you know it was picking up? A. Yes, sir, when I was so close on the track I couldn't get off. Q. You didn't know it was picking up until it got right on you? A. No, sir."

Then the witness continued: ". . . I didn't see the train at the point it passed the switch . . . There was nothing between me and train at that point. After I looked I was so close I couldn't help myself. Yes, if I had looked I reckon I could have seen it. I thought he was going to stop there and come in on the switch like he had told me . . . I did not hear the bell ringing . . . I don't know that I did listen for it . . . It was cold and I had the windows of my car up, closed . . . I drove my

car off just about as short as I could turn it. The distance between the western rail of Bell's siding and eastern rail of Byrd's spur is I should say about 5 or 6 feet where I crossed; anyway . . . I was clear of Byrd's track when I was hit on Bell's track . . . I knew where the train was when the conductor told me to move the car . . . I looked back and the train was back against the building,—maybe 100 to 150 feet. Yes, I saw the train. Of course I crossed in front of it. I thought he was going to stop at the switch . . . When I left the conductor I saw the train traveling southwardly. Yes, when I crossed in front of it, I saw the train traveling southwardly, but it was on Bell's siding beyond the switch. It wasn't on Byrd's spur. . . . Yes, sir, my car was equipped with a rear-view mirror, and . . . with a side-view mirror . . . Yes, I started my car . . . I did not look in the rear-view mirror . . . I did not look in my side-view mirror . . . I turned to my left . . . I could see clearly up the track . . . I turned onto Byrd's spur before I reached the Bell siding . . . When I pulled my car onto the western rail of Byrd's spur my car was at such angle that I could see to my left, northward. I don't know whether I looked at that point or not. It was a turn for just a second or two, and I didn't see the train until it was about on me. I guess I could have seen that the train was not on Byrd's spur if I had looked, but I wasn't expecting it. I don't know whether I looked or not, but I know it was on me before I saw the train."

And, on re-direct examination, the witness said in pertinent part: "That was the only way I could get out of the way . . . When I left the conductor in the middle of the street I went straight to my office and went to the car as fast as I could walk, got right in the car and turned straight across. I thought he was going to throw that switch and go in Byrd's spur; that's what he told me. My car was straight across Bell's siding when the train struck the car in the middle . . . After my conversation with the conductor, the conductor went right up the track toward the train . . . northwardly toward the switch . . ."

Defendant, reserving exception to denial of its motion for judgment as of nonsuit when plaintiff first rested his case, offered testimony of several witnesses.

For the defendant: A. E. Matthis, conductor on the train #519 testified: "I got off the engine and walked to . . . where the track crossed Center Street . . . I was at this crossing . . . and when the train passed over it, I met Mr. Taylor . . . just a little bit north of Mr. Taylor's office . . . Mr. Taylor asked me if we were going to use Byrd's spur and I told him we were. As to when we were going to use it, I told him nothing . . . That was the entire conversation . . . At the time of the impact I was at the switch that leads into Byrd's spur . . . north of the impact on the west side of Byrd's spur on the building side . . . The engine was coming

out of Bell's siding and passed me right at the switch . . . I went to the scene after the impact . . ."

Then under cross-examination the witness continued: ". . . I have operated on Bell's siding on different occasions during and since 1949. . . . I was familiar with the surroundings. On other occasions I have told Mr. Taylor we had to use the track and his car was on the track . . . When Mr. Taylor moved that car from in front of the office it was because the car was parked there . . . If a car is parked close to the office porch there is room to get in and out of Byrd's spur . . . When the car had to be moved Mr. Taylor always took the car across the track . . . I didn't see him move it. There was no other way to move it than across the tracks . . . At the time we hit his car we were going to the main line and finish switching . . ." And, again, "The train was about 100 feet north of the switch when I spoke to Mr. Taylor. I think at that time it was standing still. It began to move out just as soon as we could make a couple and reverse the engine and start out. I don't know about Mr. Taylor moving his car because I wasn't up there . . . I was back there at the switch . . . 100 feet from his office . . . I saw the train when it started out. It was moving six or eight miles per hour."

Then as to the distance required to stop, this colloquy between the court and the conductor follows: "Q. It was perfectly dry that day? A. The weather was dry, but I don't know. Q. Don't you know that a locomotive going six miles an hour can be stopped almost instantly? A. The conditions have a lot to do with that if the wheels pick up and slide. Q. I am talking about a fair day as you had with a locomotive of the type you had, going six miles an hour, if it can't be stopped almost instantly? A. It don't take a great sight of space to stop one. Q. It should stop in 6 or 8 feet? A. If the conditions are favorable. Q. You said you had good brakes? A. I don't know anything about that. Q. It should be stopped in 6 or 8 feet? A. I think a train moving at that speed, if conditions are good it ought to stop, yes. Q. 6 or 8 feet?" (No answer.)

W. A. Spencer, as witness for defendant, testified: "I was engineer on train #519 . . . When backing the train from the main line into Bell's siding I had an engine and two cars . . . I proceeded northwardly . . . stopped across a little street at the north end of Mt. Olive Manufacturing Company . . . covered that street crossing. We coupled one car and the trainman gave me the signal to proceed out I turned in my seat and started out . . . the speed of my engine was about five or eight miles an hour. My position in the engine was . . . on the right side. As I reached the switch point the engine was running approximately the same speed . . . The throttle was closed. That means the engine is shut off . . . power is shut off . . . I could see Mr. Taylor's automobile all the way from the point we started back . . . I first observed a movement of

that automobile when I was a very close distance to it, probably five or six feet from the front of the pilot the best I could see it. I observed no signal whatever from the driver of the automobile . . . the bell was ringing—no whistle was blowing. At that point just as the automobile started to move, I applied the brakes in emergency, but I was so close to him the engine couldn't possibly stop in that distance. The distance it takes to stop the engine varies an awful lot; I wouldn't say exactly . . . there is a decline at that point, but the way I feel it stopped reasonably well at that time . . . it actually took 15 or 16 feet to stop the engine. I applied the brakes when his car turned toward the track . . . I saw the car as it was at the Byrd track . . . when it started to move it pulled to its left . . . I had automatic brakes . . . there was nothing else I could have done to stop the engine . . . when it came to rest, the cab of the engine was practically in front of the office . . . at the door . . . and the distance from the cab . . . to the pilot is . . . not over about 15 feet."

Then on cross-examination, the witness continued, omitting repetition: ". . . I did not see Mr. Taylor get in the car . . . I was on the lookout all the time . . . We hit the car as he turned across these tracks . . . practically in front of the office . . . directly across . . . After going in north on Bell's siding I saw the conductor first after the accident . . . I did not get any signal from him."

L. H. Norfleet, also witness for defendant, testified that he was fireman on train #519; that he was sitting on the east, or left side of the engine coming out of Bell's siding, and could not see plaintiff's automobile; that the bell was ringing automatically; that the speed of the engine as it proceeded southwardly along Bell's siding was about five to seven miles per hour; and that at that speed he didn't know exactly what distance it takes to stop the engine.

Defendant renewed its motion for judgment as of nonsuit at the close of all the evidence. The motion was denied, and defendant excepted.

The case was submitted to the jury on four issues, as to (1) Negligence of defendant, (2) contributory negligence of plaintiff, (3) the last clear chance, and (4) damages.

Defendant objects to the submission of the third issue. The court overruled the objection and defendant excepted.

The jury answered the first three issues in the affirmative, and the fourth in specific amount.

Defendant appeals to Supreme Court and assigns error.

Langston, Allen & Taylor and W. R. Allen for plaintiff, appellee.

Bland & Bland and W. B. R. Guion for defendant, appellant.

WINBORNE, J. Did the trial court commit error (1) in overruling defendant's objection to the submission of the third issue, that is, as to last clear chance; (2) in overruling defendant's motions, aptly made, for judgment as of nonsuit; and (3) in declaring and explaining the law arising on the evidence with respect to the first and third issues? These are the questions involved as stated by defendant in its brief filed on this appeal.

Considering the second question first: The evidence shown in the record on appeal, taken in the light most favorable to plaintiff, as is done in testing its sufficiency on motions for judgment as of nonsuit, appears to be sufficient to take the case to the jury on the first issue.

Moreover, in the light of the extenuating circumstances under which the agent of plaintiff drove plaintiff's automobile on the track in the face of an oncoming railroad train, as revealed by the evidence shown in the record, the question as to contributory negligence of plaintiff was properly submitted to the jury. *Cooper v. R. R.*, 140 N.C. 209, 52 S.E. 932; *Shepard v. R. R.*, 166 N.C. 539, 82 S.E. 872; *Oldham v. R. R.*, 210 N.C. 642, 188 S.E. 106.

However, as to the first question: We are of opinion and hold that the doctrine of last clear chance is inapplicable upon the facts of record, and that the issue in that respect should not have been submitted to the jury.

It is stated by this Court in *Redmon v. R. R.*, 195 N.C. 764, 143 S.E. 829, *Brogden, J.*, writing, that the doctrine of last clear chance does not arise until it appears that the injured party has been guilty of contributory negligence; that no issue with respect thereto must be submitted to the jury unless there is evidence to support it; and that the burden of such issue, when submitted, is upon the plaintiff.

Moreover, in *Miller v. R. R.*, 205 N.C. 17, 169 S.E. 811, opinion also by *Brogden, J.*, this Court declared that "peril and the discovery of such peril in time to avoid injury constitute the backlog of the doctrine of last clear chance."

And in *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 35 S.E. 2d 337, in opinion by *Barnhill, J.*, it is said: "The practical import of the doctrine is that a negligent defendant is held liable to a negligent plaintiff if the defendant, being aware of plaintiff's peril, or in the exercise of due care should have been aware of it in time to avoid injury, had in fact a later opportunity than the plaintiff to avoid the accident . . . Its application is invoked only in the event it is made to appear that there was an appreciable interval of time between plaintiff's negligence and his injury during which the defendant, by the exercise of ordinary care, could or should have avoided the effect of plaintiff's prior negligence . . . It is what defendant negligently did or failed to do, after plaintiff put himself in peril that constitutes the breach of duty for which defendant is

held liable. To sustain the plea it must be made to appear that (1) plaintiff by his own negligence placed himself in a dangerous situation, (2) the defendant saw, or by the exercise of reasonable care should have discovered, the perilous position of plaintiff, (3) in time to avoid injuring him, and (4) notwithstanding such notice of imminent peril negligently failed or refused to use every reasonable means at his command to avoid impending injury, (5) as a result of which plaintiff was in fact injured," citing cases. To like effect is *Aydlett v. Keim,* 232 N.C. 367, 61 S.E. 2d 109, opinion by *Denny, J.*

The discovery of the danger, or duty to discover it, as basis for a charge of negligence on the part of defendant after the peril arose, involves something more than a mere discovery of, or duty to discover, the presence of the injured person, it includes a duty, in the exercise of ordinary care under the circumstances, to appreciate the danger in time to take the steps necessary to avert the accident. It has been said by the Supreme Court of the State of Washington, in *Hartley v. Lasater,* 96 Wash. 407, 165 P. 106, that "last clear chance implies thought, appreciation, mental direction, and the lapse of sufficient time to effectually act upon the impulse to save another from injury, or proof of circumstances which will put the one charged to implied notice of the situation . . . A mere statement of the rule reveals its inapplicability to a case where the contributory negligence began and culminated without the lapse of appreciable time." See also *Shanley v. Hadfield* (Wash.), 213 P. 932; Annotation 92 A.L.R. 47.

There must be legal evidence of every material fact necessary to support the verdict, and such verdict "must be grounded on a reasonable certainty as to probabilities arising from a fair consideration of the evidence, and not a mere guess, or on possibilities." 23 C.J. 51. *Mercer v. Powell,* 218 N.C. 642, 12 S.E. 2d 227, and other cases, including *Poovey v. Sugar Co.,* 191 N.C. 722, 133 S.E. 12.

In the *Poovey case, supra,* it is said: " 'The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue or furnish more than material for a mere conjecture, the court will not leave the issue to be passed on by the jury' (citing cases). This rule is both just and sound. Any other interpretation of the law will unloose a jury to wander aimlessly in the field of speculation."

Tested by these principles, there is no substantial evidence that, after S. B. Taylor drove plaintiff's automobile into a place of danger, there was anything defendant could have done to avert the collision between the automobile and defendant's engine.

Indeed, the colloquy between the court and the conductor, as to the distance within which an engine and train of cars traveling at speed of

six miles per hour could be stopped, lacks probative value. In the first place, it does not stand the test of mathematical calculation, even "for just a second or two." In the second place, evidence reveals estimates of the speed of the engine varying from four to eight miles per hour.

Where issue of last clear chance is erroneously submitted, and the jury answers both issues, negligence and contributory negligence in affirmative, and issue as to last clear chance in affirmative, defendant is entitled to judgment. *Reep v. R. R.*, 210 N.C. 285, 186 S.E. 318. So it is in the present case,—the defendant is entitled to judgment.

So holding,—it becomes unnecessary to consider the third question.

Hence the judgment below is

Reversed.

JOHNSON, J., dissenting: This record leads me to the view that the issue of last clear chance was properly submitted to the jury.

It seems to me there was enough evidence on the plaintiff's side to sustain the jury-finding that the engineer, in the exercise of reasonable care, should have stopped the locomotive before striking the plaintiff's automobile. True, the engineer's testimony tends to show he did not have sufficient time to avert the collision. He said: "The front pilot (the cow-catcher of the locomotive) got within 5 or 6 feet of the car before he moved. . . . At that point, just as the automobile started to move, I applied the brakes and emergency, but I was so close to him the engine couldn't possibly stop in that distance. . . . From the point I first saw him move and applied the brakes and emergency, it actually took 15 or 16 feet to stop the engine. Yes, sir, I applied the brakes when the car was turned toward the track."

However, there is substantial evidence tending to support the contrary view, *i.e.*, that enough time elapsed after the engineer discovered, or in the exercise of due care should have discovered the perilous position of plaintiff's agent, S. B. Taylor, to have enabled the engineer, in the exercise of reasonable care, to stop the locomotive and avert the collision: The engineer testified that after backing northwardly into Bell siding beyond the Byrd spur switch, where he picked up a car at a warehouse, he then proceeded back southwardly toward the spur track switch and the plaintiff's office. He said: *"I could see Mr. Taylor's automobile all the way from the point where we started back southwardly on Bell siding."* And the plaintiff's witness Taylor, who moved the automobile, said he traveled "about 12 or 15 feet" before he was hit. This contradicts the engineer's statement that the front of the locomotive was only 5 or 6 feet from the automobile before it moved. Moreover, the evidence as to distances on the ground tends to corroborate the plaintiff's evidence that the automobile traveled from 12 to 15 feet, rather than only 5 or 6 feet.

The engineer's statement that he saw the automobile only during the interval it traveled the last 5 or 6 feet, when considered with the rest of his testimony and with the plaintiff's evidence, lends support to the plaintiff's contention that the engineer did not exercise due care to avoid the collision. This is further accentuated by the plaintiff's evidence tending to show that the automobile was pushed 40 feet down the track and that the locomotive brakes were not applied until after the collision. Witness Taylor testified, in part, that the locomotive brakes were not applied until after he was hit: . . . "I heard the brakes when they caught against the wheels and the squealing. You could even see the fire coming from it. I know it and I saw it. My car had been pushed at least 30 feet when I heard that noise. . . . It carried my car southwardly along Bell siding 40 feet before coming to a stop. . . . I don't think it was going over four or five miles an hour the last time I saw it. I didn't pay any attention to it after I got in the car because I thought he was slowing up to go in Byrd's spur." The engineer said the speed of the engine was 5 to 8 miles per hour. The fireman said from 5 to 7 miles.

The following testimony of the conductor also tends to show that the engineer, in the exercise of reasonable care, might have stopped the locomotive during the interval the automobile was traveling the distance of "from 12 to 15 feet": "Q. Don't you know that a locomotive going six miles an hour can be stopped almost instantly? A. The conditions have a lot to do with that if the wheels pick up and slide. Q. I am talking about a fair day (and all the evidence shows the weather was fair) as you had with a locomotive of the type you had, going six miles an hour, if it can't be stopped almost instantly? A. It don't take a great sight of space to stop one. Q. It should stop in 6 or 8 feet? A. If the conditions are favorable. Q. You said you had good brakes? A. I don't know anything about that. Q. It should be stopped in 6 or 8 feet? A. I think a train moving at that speed, if conditions are good it ought to stop, yes. Q. 6 or 8 feet? (no answer)."

Add to this the evidence tending to show that the automobile was parked where it customarily stayed; that it was being moved by witness Taylor at the request of the conductor, so as to free this seldomly used spur track for a shifting operation thereon; that the automobile was being moved across both the spur and the siding tracks, the only way it could be moved, and like it had been moved many times before under similar conditions when the locomotive was to go in the spur track. The automobile was moved according to the established, customary pattern. But contrary to the customary pattern, the locomotive this time did not go in on the spur track,—and that's the heart of this case. It passed the switch and struck the automobile on the other track,—on the Bell siding track. Why the trainmen did not follow the usual pattern, Mr. Taylor,

in driving the automobile out of the way, knew not. Before he got in the automobile he saw the conductor going toward the switch, as if to throw it and turn the locomotive in on the spur, as was usually done. Why the switch was not thrown this time does not appear. The conductor said he was standing there at the switch. All of this was calculated to lull Mr. Taylor into a sense of safety. It should have spurred the engineer's call to diligence.

This evidence, it would seem, was enough to sustain the jury in finding, as they did, that the engineer, in the exercise of due care, should have averted the collision. I am constrained to so vote.

J. A. MATHENY v. CENTRAL MOTOR LINES, INC., AND JOHN D. MONTGOMERY.

(Filed 7 June, 1951.)

1. Evidence § 17—

While a party may not impeach the credibility of his own witness, he is not precluded from showing the facts to be otherwise than as testified to by the witness.

2. Automobiles § 8i—

A driver along a servient highway who comes to a complete stop before its intersection with a dominant highway is under duty to exercise reasonable care to ascertain that he can enter upon the intersection with reasonable assurance of safety to himself and others, and it is negligence for him to enter upon the intersection in the path of a vehicle approaching along the dominant highway unless such other vehicle is a sufficient distance from the intersection to afford the driver upon the servient highway reasonable ground to believe that he can cross the intersection in safety. G.S. 20-158. G.S. 20-155 applies to moving vehicles approaching an intersection at approximately the same time.

3. Automobiles § 18h (3)—

Plaintiff's own evidence tended to show that he was driving along a servient highway and stopped his car before entering upon an intersection with a dominant highway at a point from which he had a clear and unobstructed view of traffic upon the dominant highway, and that he moved out into the intersection in front of a large truck approaching along the dominant highway at a rate of thirty miles per hour and was struck by the truck before his car had traveled more than nine or ten feet. *Held:* Plaintiff's evidence discloses as a matter of law contributory negligence constituting a proximate cause of the accident.

4. Negligence § 19c—

While the question of proximate cause is ordinarily for the jury, where it appears from plaintiff's own evidence that he was guilty of negligence

constituting a proximate cause of the injury and this is the sole reasonable inference deducible therefrom, nonsuit on the ground of contributory negligence is proper.

5. Negligence § 10: Automobiles § 18c—

Evidence tending to show that defendant, after having come to a complete stop, drove his car into an intersection with a dominant highway in the path of a truck approaching the intersection along the dominant highway at a speed of thirty miles per hour, and was struck by the truck after he had traveled some nine or ten feet, *is held* insufficient to support an issue of last clear chance, since this doctrine is not applicable unless plaintiff discovers or should have discovered defendant's peril in time to have avoided the injury.

APPEAL by plaintiff from *Crisp, Special Judge,* December Term, 1950, of MECKLENBURG. Affirmed.

This was an action to recover damages for injury to person and property resulting from collision between plaintiff's automobile and defendants' motor truck. This was alleged to have been caused by the negligence of the defendants. At the close of plaintiff's evidence defendants' motion for judgment of nonsuit was allowed, and from judgment dismissing the action plaintiff appealed.

Covington & Lobdell, J. Laurence Jones, and Guy T. Carswell for plaintiff, appellant.

Tillett, Campbell, Craighill & Rendleman for defendants, appellees.

DEVIN, J. The collision between plaintiff's automobile and the truck of the defendant Motor Lines, Inc., driven at the time by defendant Montgomery, which forms the basis of plaintiff's action, occurred 16 November, 1949, at the intersection of State Highway #27 and State Highway #151. The general direction of Highway #27 is east and west, and that of Highway #151 north and south. Both are much traveled highways with paved surface 20 feet wide, Highway #27 carrying more traffic than the other. These highways intersect at right angles in a rural area, with gasoline filling stations near each corner. At the northwest corner of the intersection is a vacant lot and immediately west of it the motor service station of Beatty Motor Company. As the driver of a motor vehicle approaches the intersection from the north going south there are highway signs requiring him to stop before entering, and as one approaches from the east along Highway #27 there is a sign "slow."

The collision occurred about 2:45 p.m. on a clear day. There was no obstruction to the view. Highway #27 along which the truck was moving was straight and level for some distance on each side of the intersection. The plaintiff, with his wife beside him, was driving south on Highway

#151 in a Mercury automobile, and defendant Montgomery was proceeding west on Highway #27 driving defendant Motor Lines' truck with a cargo of merchandise. The truck was a tandem tractor-trailer type, 32 to 36 feet long and some 10 feet high.

The plaintiff approaching the intersection brought his automobile to a complete stop 2 or 3 feet from the edge of the paved surface of Highway #27, and so remained for an appreciable length of time. The plaintiff's witness Hipp first expressed opinion the time was as long as 30 seconds but later said he couldn't say how many seconds as the "whole thing happened mighty fast." Defendants' truck coming from the east was visible for a distance of 300 yards, or according to another witness 400 feet, from the intersection and was being driven at the rate of 30 miles per hour according to the testimony of plaintiff's witness who was driving a smaller truck immediately behind the defendants' truck.

The plaintiff's automobile moved from its stopped position and started across the intersection, and when its front had reached a point 2 feet from the center line of Highway #27, having traveled only 9 or 10 feet, it was struck on its left front fender by the defendants' truck. Apparently the truck driver at the moment had attempted to turn the tractor to the left so that the right front of the tractor struck the left front fender of the automobile, but the trailer to which the tractor was attached was unable to change direction so quickly and its landing gear, located about the middle of the trailer, struck the automobile on the side and knocked it off the highway and across the northwest corner of the intersection into a ditch, injuring plaintiff and his wife. The tractor-trailer of the defendants, at the time of the impact, was turned slightly to the left, and then turned diagonally across the highway to the right, to the north, and after striking a gasoline tank and signpost came to rest in front of Beatty Motor Company's place, a distance of 183 feet from the point of intersection of the highways. The highway patrolman observed marks left by the wheels of the truck extending back 200 feet and showing those marks began at a point 20 feet east of the intersection and in the north lane of Highway #27. These marks were not in a straight line, but bore first to the left across the center of the highway and then to the right to where the truck had stopped. For the last 100 feet of the progress of the truck after the collision the tire marks could hardly be seen. The debris indicating the point of collision was 2 feet west and 2 feet north of center of intersection.

Both plaintiff and his wife testified they suffered concussion so severe as to produce in each retrograde amnesia, and neither had any recollection of the circumstances of the collision and was unable to testify about it. The only eyewitness offered by the plaintiff as to the facts of the collision was H. M. Hipp whose deposition taken by the defendants was

offered by the plaintiff. The motion to nonsuit having been allowed at the close of plaintiff's evidence, the defendants offered no evidence.

On this occasion Hipp was driving a Ford delivery truck traveling west behind the Motor Lines truck on Highway #27. He had endeavored to pass the slower moving truck, and after they passed the crest of a slight elevation 300 yards from the intersection he pulled out to his left to pass, but seeing the intersection ahead pulled back behind the defendants' truck. At that time when the truck was 150 to 200 feet away he could see the plaintiff's automobile already stopped just north of the intersection. We quote from his testimony as follows: "The fellow in the Mercury pulled up there and stopped. The fellow in front of me, in the Central Motor Lines truck, had slowed down and touched his brakes, because his red stop-lights blinked in my face, and at that time the Mercury pulled out directly in front of the truck. The truck swerved to the left to avoid hitting the Mercury and the point of impact was right at the center of the road. The right front of the tractor hit the left front fender of the Mercury. The trailer did not move over, as there wasn't enough distance for the trailer to follow the tractor; and all that moved out of the center of the road was the tractor, at which point he lost control of his tractor. The driver lost control of the tractor, because he hit his brakes and the trailer had started to jack-knife after the impact of the tractor on the automobile. And, so far as I could see, he had no more brakes and he proceeded to hit the gas pumps in front of Beatty Motor Company. I have an opinion satisfactory to myself as to how fast the Central Motor Lines truck was going at the time it entered the intersection. My opinion is approximately 30 miles an hour."

Hipp also testified the front of the tractor was 35 or 40 feet away from the automobile when the automobile started from its stopped position into the intersection. On cross-examination this witness was asked how far the truck was from the intersection when he first saw the automobile stopped at the intersection, and he replied: "He was far enough away to have sufficient time to stop if the Mercury had went ahead and pulled out at that time, but the Mercury didn't pull out then. He waited until he got up close to him."

The plaintiff, who was 76 years of age at the time of the collision, admitted he had had cataract removed from his left eye and wore thick bi-focal lens on that side, that through the bottom part of this lens he could not see anything at a distance, and that due to cataract unremoved he could see very little out of his right eye. He said his wife wore glasses but "She does not have as much trouble in seeing as I do." However, he testified he had automobile driver's license issued by the State of Virginia where he had spent the summer.

The plaintiff having offered the deposition of Hipp, could not impeach his credibility (*Lynch v. Veneer Co.*, 169 N.C. 169, 85 S.E. 289; *S. v. Freeman*, 213 N.C. 378, 196 S.E. 308), but would not thereby be precluded from showing other facts in some instances inconsistent with those deposed by this witness. And plaintiff's position is that the evidence as to the force of the collision and the physical facts disclosed by the testimony of the highway patrolman, taken in connection with that portion of Hipp's evidence which was most favorable to the plaintiff, were sufficient to carry the case to the jury on the issue of defendants' negligence; and that the evidence and inferences drawn therefrom relied on by defendants to show contributory negligence at most raise merely a question of fact for the jury as to the proximate cause of the injury complained of. Plaintiff contends there was evidence tending to show that defendants' driver failed materially to reduce speed in approaching and traversing an intersection of highways (G.S. 20-141 (c)), and that having seen plaintiff's automobile stopped at the edge of the highway he failed to exercise due care to avoid the collision (*Williams v. Henderson*, 230 N.C. 707, 55 S.E. 2d 462), and argues that plaintiff having entered the intersection had right of way.

Defendants, however, insist that a contrary view is compelled by the uncontradicted evidence offered by the plaintiff. They point out that the truck was proceeding at 30 miles per hour over a level concrete road, 20 feet wide, with no other traffic in view save plaintiff's automobile which had come to a complete stop; that the speed of the truck, not excessive, was not materially slackened as the driver observed that plaintiff's automobile had stopped apparently to await the passing of defendants' truck; that defendants' truck was proceeding over a dominant highway (G.S. 20-158), whereas the highway on which plaintiff was traveling #151 was made subservient by stop signs and red lights restricting entry into the highway #27 on which defendants' truck was moving; that defendants' driver had the right to assume that plaintiff would not start into the highway without seeing that such movement could be made in safety. G.S. 20-154; *Reeves v. Staley*, 220 N.C. 573, 18 S.E. 2d 239.

Furthermore, defendants contend that contributory negligence on the part of the plaintiff was conclusively shown by the evidence, and that judgment of nonsuit was properly entered on this ground. Defendants argue that no other reasonable conclusion can be reached from consideration of plaintiff's evidence but that the collision was caused by his own negligence. In support of this view defendants call attention to evidence tending to show that plaintiff having stopped in obedience to the highway sign was required before moving into the intersection to look for oncoming vehicles and to ascertain if he could do so with reasonable assurance of safety; that if he had looked and been able to see he would have ob-

served this large truck approaching when it was 150 to 200 feet away, and been able to judge of its speed; that according to Hipp's statement if plaintiff had at that instant started across, the truck would have had time to stop, that plainiff did not do so, but waited until the truck "got up close to him." This witness testified the automobile started from its stopped position when the tractor was 35 or 40 feet away. While later in his examination he estimated the distance as 50 to 75 feet, the defendants insist that disregarding those estimates of distance, it conclusively appears from the testimony and the physical facts that the plaintiff's automobile had traveled not more than 9 or 10 feet from its stopped position when it was struck, showing the automobile had started out into the highway when the truck was almost upon it.

The evidence discloses that the plaintiff driving south on Highway #151, in obedience to the stop signs, had come to a complete stop two feet from the edge of the intersecting Highway #27. The purpose of highway stop signs is to enable the driver of a motor vehicle to have opportunity to observe the traffic conditions on the highways and to determine when in the exercise of due care he might enter upon the intersecting highway with reasonable assurance of safety to himself and others. *S. v. Satterfield,* 198 N.C. 682, 153 S.E. 155. And the statute G.S. 20-154 also requires that before starting from a stopped position and moving into the line of traffic the driver shall first see that such movement can be made in safety. Under the circumstances here disclosed the duty devolved upon the plaintiff to exercise reasonable care to ascertain that his entry into the traffic lanes of #27 could be made with safety to himself and others before undertaking it. *Cooley v. Baker,* 231 N.C. 533, 58 S.E. 2d 115. In *Meyer v. Hartford Bros. Gravel Co.,* 144 Neb. 808, the rule was well stated as follows: "A driver of a motor vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be imprudent for him to proceed into the intersection." Under such circumstances it was said in *Bergendahl v. Rabeler,* 133 Neb. 699, "The duty of the driver of a vehicle . . . to look for vehicles approaching on the highway implies the duty to see what was in plain sight."

Since at the intersection described in the case at bar the driver of an automobile approaching the intersection from the north was required (G.S. 20-158) to bring his automobile to a complete stop, the right of way, or rather the right to move forward into this intersection, would depend upon the presence and movement of vehicles on the highway which he intended to cross. The rule as to right of way prescribed by G.S. 20-155 applies to moving vehicles approaching an intersection at approximately the same time. *Kennedy v. Smith,* 226 N.C. 514, 39 S.E.

2d 380. Where the driver has already brought his automobile to a complete stop, thereafter the duty would devolve upon him to exercise due care to observe approaching vehicles and to govern his conduct accordingly. One who is required to stop before entering a highway should not proceed, with oncoming vehicles in view, until in the exercise of due care he can determine that he can do so with reasonable assurance of safety. *Otey v. Blessing,* 170 Va. 542. Generally when the driver of an automobile is required to stop at an intersection he must yield the right of way to an automobile approaching on the intersecting highway (Blashfield, Secs. 997, 998, 1001; *Shoniker v. English,* 254 Mich. 76), and unless the approaching automobile is far enough away to afford reasonable ground for the belief that he can cross in safety he must delay his progress until the other vehicle has passed. *Cooley v. Baker,* 231 N.C. 533, 58 S.E. 2d 115; *S. v. Hill, ante,* 61, 62 S.E. 2d 532. Here the testimony of the witness Hipp as well as the physical evidence on the ground, shows that the plaintiff after coming to a full stop undertook to drive his automobile into the intersecting highway and was struck almost instantly by defendants' truck. From this the inference seems irresistible that at the moment plaintiff started forward the truck was so near that in the exercise of reasonable prudence he should have seen he could not cross in safety. While the plaintiff had the right to assume the driver of an approaching vehicle would exercise due care (*Holderfield v. Trucking Co.,* 232 N.C. 623, 61 S.E. 2d 904; *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239), that did not relieve the plaintiff of the duty of observing the approach of the truck and its speed, of which he had an unobstructed view, if he had looked.

In *S. v. Hill, ante,* 61, 62 S.E. 2d 532, the driver of an automobile who entered into and undertook to cross an intersecting street when another automobile was approaching at 20 miles per hour but 125 or 150 feet away, was absolved from the imputation of criminal negligence. In *Cab Co. v. Sanders,* 223 N.C. 626, 27 S.E. 2d 631, it was held that where plaintiff's automobile entered an intersection when another automobile was approaching from his right but far enough away (in this case 125 feet) to justify his belief in the exercise of due care that he could cross in safety he would not necessarily be guilty of contributory negligence. And the same result was reached in *Crone v. Fisher,* 223 N.C. 635, 27 S.E. 2d 642, when plaintiff entered the intersection with another automobile approaching 125 feet away. However, in *Hittle v. Jones,* 217 Iowa 598, it was held that the driver of an automobile on a subservient road driving into the intersection at speed of 10 miles per hour when he saw another automobile approaching at a distance of 80 or 90 feet was guilty of negligence as a matter of law.

The right of one starting from a stopped position to undertake to cross an intersection would depend largely upon the distance from the intersection of approaching vehicles and their speed, and unless under the circumstances he could reasonably apprehend no danger of collision from an approaching vehicle it would be his duty to delay his progress until the vehicle had passed. *S. v. Hill, ante,* 61, 62 S.E. 2d 532; 2 Blashfield, Sec. 1001, *et seq.*

The facts here are similar to those in *Horn v. Draube,* 132 So. 531. There the plaintiff, after stopping his automobile in a position of safety, saw an approaching truck, and then ventured to cross in front of it. It was held plaintiff's negligence was the sole cause of the injury. Another case similar to this is *Otey v. Blessing,* 170 Va. 542, from which we quote: "There can be no doubt about Otey's negligence. The stop sign at the crossing and the mandate of the statute give to the high road the right of way. Yet after having stopped and when this fast approaching car was but eighteen or twenty steps away in plain view, he attempted to pass in front of it in a car sixteen feet long. It was almost a suicidal movement. To stop and not to look is inexcusable and inexplainable."

Giving to the plaintiff's evidence the benefit of the rule of favorable consideration, *Howard v. Bingham,* 231 N.C. 420, 57 S.E. 2d 401; *Brafford v. Cook,* 232 N.C. 699, 62 S.E. 2d 327, the fact seems to have been established here by the uncontradicted evidence introduced by the plaintiff that he started his automobile from a stopped position at the edge of the pavement of the intersecting highway, from which point he had a clear and unobstructed view of oncoming traffic, and moved out into the highway in front of a large truck approaching in that lane of traffic at the rate of 30 miles per hour when the truck was so near that before his automobile had traveled more than 9 or 10 feet it was struck on its left front side by the oncoming truck. The conclusion seems inescapable that plaintiff's conduct in driving from a position of safety out in front of an approaching motor truck under the circumstances here disclosed indicated that before doing so he failed to look and to see what was in clear view and to exercise ordinary care for his own safety, and that this negligence on his part was a proximate contributing cause of his injury. *Godwin v. R. R.,* 220 N.C. 281, 17 S.E. 2d 137; *Wall v. Bain,* 222 N.C. 375 (379), 23 S.E. 2d 330; *Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355; *Carruthers v. R. R.,* 232 N.C. 183, 59 S.E. 2d 782.

The fact that the marks on the pavement made by the tires of the truck as testified by the highway patrolman, began 20 feet east of the intersection would seem to indicate application of brakes at that point presumably at the time the driver of the truck saw the automobile head into the highway. Whether or not the speed of the truck was appreciably lessened does not appear, but the over-all picture of the collision is one

of negligence on the part of the plaintiff in attempting to cross the highway immediately in front of the approaching truck with its bulk and speed plainly visible. *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808.

Ordinarily what is the proximate cause of an injury is a question for the jury. *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. But where the essential facts are not in dispute and only one reasonable inference can be drawn therefrom nonsuit on the ground of the contributory negligence of the plaintiff should be allowed. *Brown v. Bus Lines,* 230 N.C. 493, 53 S.E. 2d 539; *Bus Co. v. Products Co.,* 229 N.C. 352, 49 S.E. 2d 623; *Beck v. Hooks,* 218 N.C. 105, 10 S.E. 2d 608; *Marshall v. R. R., ante,* 38, 62 S.E. 2d 489. "It is the prevailing and permissible rule of practice to enter judgment of nonsuit in a negligence case, when it appears from the evidence offered on behalf of the plaintiff that his own negligence was the proximate cause of the injury, or one of them." *Godwin v. R. R., supra.*

There was no sufficient evidence to carry the case to the jury under the doctrine of last clear chance. *Redmon v. R. R.,* 195 N.C. 764, 143 S.E. 829; *Miller v. R. R.,* 205 N.C. 17, 169 S.E. 811; *Newbern v. Leary,* 215 N.C. 134, 1 S.E. 2d 384; *Aydlett v. Keim,* 232 N.C. 367, 61 S.E. 2d 109. This doctrine is applicable only in the event it is made to appear that after discovering plaintiff's peril there was an appreciable interval of time during which the defendant by the exercise of ordinary care could have avoided the effect of plaintiff's prior negligence. *Ingram v. Smoky Mountain Stages, Inc.,* 225 N.C. 444, 35 S.E. 2d 337.

The judgment of nonsuit was properly entered.

Affirmed.

BEATRICE MATHENY v. CENTRAL MOTOR LINES, INC., AND JOHN D. MONTGOMERY.

(Filed 7 June, 1951.)

Automobiles § 20b—

Where husband and wife jointly own an automobile, which was being driven by the husband with the wife's consent for a common purpose, the wife being an occupant, they are engaged in a joint enterprise so that negligence on the part of the husband will bar her right to recover for injuries received in a collision with another vehicle.

APPEAL by plaintiff from *Crisp, Special Judge,* December Term, 1950, of MECKLENBURG. Affirmed.

Covington & Lobdell, J. Laurence Jones, and Guy T. Carswell for plaintiff, appellant.

Tillett, Campbell, Craighill & Rendleman for defendants, appellees.

DEVIN, J. This is a companion case to that of *J. A. Matheny v. Central Motor Lines, Inc., ante,* 673. The plaintiff in this case is the wife of J. A. Matheny and was with him in their Mercury automobile at the time it collided with defendants' truck, to the injury of both. In the case of the husband who was driving we held that the judgment of involuntary nonsuit as to him was properly allowed. The only question now posed for decision is whether the negligence of J. A. Matheny was imputable to his wife.

It was admitted that the automobile in which plaintiff and her husband were riding and being driven at the time by him was their joint property, each owning one-half interest therein as tenants in common, and the evidence disclosed that they were transporting therein household and other joint personal property to their home in Florida. On this trip the husband and wife had shared the driving, but the husband was driving at the time of the collision.

The fact that the plaintiff was co-owner and occupant of the automobile, and that it was being driven at the time by her husband with her consent for the common benefit and purpose of both would seem to establish the essential elements of a joint enterprise. *James v. R. R., ante,* 591; *Albritton v. Hill,* 190 N.C. 429, 130 S.E. 5; *Pusey v. R. R.,* 181 N.C. 137, 106 S.E. 452. As such co-owner of the automobile in which she was riding, the plaintiff had equal right to direct and control its movement, and the conduct of the driver in respect thereto, and was in law chargeable with responsibility for the negligent operation of the automobile. Blashfield, sec. 2372. The control required is the legal right to control rather than actual physical control. *James v. R. R., supra.*

It was said in *Harper v. Harper,* 225 N.C. 260, 34 S.E. 2d 185: "The owner of an automobile has the right to control and direct its operation. So then when the owner is an occupant of an automobile operated by another with his permission or at his request, nothing else appearing, the negligence of the driver is imputable to the owner."

The court below, on the facts set out in J. A. Matheny's case (the two cases were tried together), sustained motion to nonsuit in the wife's case also, and in this, for the reasons stated, we concur.

Affirmed.

STATE v. ROBERT P. BOVENDER, ALIAS BUD, ALIAS CATFISH, NORMAN WALTER HALE, IRVIN JENNINGS KING AND RILEY WILLIAM KING.

(Filed 7 June, 1951.)

1. Criminal Law § 52a (2)—

The testimony of an accomplice is sufficient to support a conviction, *a fortiari* where the testimony of the accomplice is corroborated by other evidence.

2. Criminal Law § 81c (3)—

Exclusion of testimony cannot be held prejudicial when the testimony is thereafter admitted.

3. Same—

Exclusion of testimony cannot be held prejudicial when the record does not disclose what the witness would have testified.

4. Criminal Law § 79—

Exceptions which are not discussed in the brief are deemed abandoned.

5. Criminal Law § 51—

The act of the court in stopping defendants' counsel from exhibiting to the jury a dollar bill which had just been offered in evidence by the solicitor will not be held for error, the matter being in the discretion of the trial court in the orderly conduct of the trial.

6. Criminal Law § 34g—

Testimony that a conspirator had shown the officers the places where the stolen safe had been thrown off and later hidden, and as to what was found at such places, is not objectionable as relating to acts or declarations of the conspirator after the accomplishment of the purposes of the conspiracy, but is testimony of the witnesses as to facts within their personal knowledge.

7. Criminal Law § 42d—

Testimony as to the finding of incriminating circumstances at places designated by one conspirator is competent against co-conspirators for the purpose of corroborating the testimony of such conspirator at the trial.

8. Criminal Law § 81c (3)—

Refusal to permit a witness to testify as to a certain matter cannot be held prejudicial when the record shows that when the question was repeated the witness replied he did not remember.

9. Criminal Law § 50d—

A remark of the court will not be held prejudicial when it could in no way have adversely affected defendant.

10. Criminal Law § 36—

Exception to the refusal to allow the introduction in evidence of a certified copy of the weather report for the date in question cannot be sustained

when it appears that the witness testified from his personal knowledge as to all matters contained in the report, and further that the record fails to show that such certified copy was in fact offered in evidence. G.S. 8-35.

11. Criminal Law § 50f—

While counsel has the right to argue to the jury what he concedes to be the law of the case, G.S. 84-14, the court properly may warn counsel not to comment upon the failure of a defendant to testify, G.S. 8-54, even though as of that time counsel had made no improper comment, in order to prevent further comment which might violate the rule, and upon objection by counsel, to exclude categorically such comment, taking care that nothing be said or done which would unduly prejudice defendant.

12. Criminal Law § 81b—

Mere technical error will not entitle defendant to a new trial but it is necessary that error be material and prejudicial and amount to a denial of some substantial right in order to constitute reversible error.

13. Conspiracy § 7—

The court's instructions as to the definition and elements constituting criminal conspiracy *held* without error in this case.

14. Criminal Law § 81c (4)—

Where concurrent sentence is imposed on each count, error relating solely to one count is not prejudicial.

15. Criminal Law § 53b—

The court's charge on defendants' defense of alibi *held* without error.

APPEAL by defendants, Norman Walter Hale, Irvin Jennings King and Riley William King, from *Nettles, J.*, February Term, 1951, of FORSYTH. No error.

The defendants were charged in the bill of indictment with (1) conspiracy to break and enter the storehouse of Colonial Stores, Inc., in Winston-Salem with intent to steal therefrom, (2) with feloniously breaking and entering the storehouse of Colonial Stores, Inc., with intent to steal, and (3) with feloniously taking, stealing and carrying away an iron safe and contents of the value of $10,000, the property of Colonial Stores, Inc.

The defendant Bovender pleaded guilty and testified for the State. His evidence tended to show that he and his three co-defendants entered into a conspiracy to break, enter and to rob the store of the Colonial Stores, Inc., and that pursuant to this unlawful compact on the night of 24 December, 1950, about 10 p.m. they broke and entered this storehouse by cutting iron bars in the rear and breaking the locks on the back doors, and took and carried away a small iron safe set in concrete. After its removal from the store this safe was loaded on a truck of Salem Spring Company procured by defendant Hale, an employee of that Company,

and who had keys to its premises. Hale drove the truck away and the other three defendants followed in Riley King's automobile. They drove out of the city to a "little dirt road" near Wallburg and there dumped the safe out and returned to the city. The Salem Spring Company's truck was returned. The defendant Irvin King was taken to a point near his home and put out, as they thought he "would be sure to be picked up on the job." The other three then procured tools, including hammers, chisels and acetylene torch, and returned to where the safe had been left. Bovender now drove his own automobile and Riley King had secured a truck of Winston Laundry Company, a truck which he used as employee of the Laundry Company to pick up laundry, he having keys to the truck and to the premises of the Laundry Company. Attempt was made to open the safe, the cement and hinges were knocked off and the metal burned, but to no avail. So they rolled the safe up in the back of Bovender's automobile and then transferred it to the Laundry Company's truck and drove some distance to a place where there was a sawdust pile and hid the safe in the sawdust. Near this place the right front fender of the truck came in contact with a tree and some of the paint was scaped off. Pursuant to agreement that the safe was to be opened the following Thursday night, 28 December, Hale and Riley King brought the safe to the Laundry Company's garage in the rear of its premises, where Bovender joined them, and there by use of an electric drill a round hole was cut in the safe and with a wire coat hanger the money was fished out. There was one $100 bill, three $50 bills, bills of lower denominations and a large amount of silver currency. They divided the money into four parts, one for Bovender, one for Hale, and Riley King took two parts, one for himself and one for Irvin King. Bovender testified his share was $1,400. Checks and papers taken from the safe were burned. Then the safe was loaded on the truck, driven out, and from a bridge on Highway #421 dumped into the Yadkin River. The manager of Colonial Stores, Inc., testified the safe contained approximately $7,000 in cash and $3,000 in checks.

Bovender was arrested two weeks later, his automobile examined and scratches and marks in the rear discovered. After denying his guilt for several days Bovender confessed and told the officers the whole story as testified by him at the trial. He showed the officers where the safe was first hidden and also the sawdust pile. The officers found the broken cement and pieces of burnt metal near the dirt road, impression of a body and pieces of burnt metal in the sawdust, scraped paint on the bark of a tree nearby, and particles of burnt and broken metal on the floor of the garage of the Laundry Company. The officers also recovered the safe from the river, and this was produced at the trial and identified as having belonged to the Colonial Stores, Inc.

The particles of burnt metal and paint from the bark of the tree were examined by an expert who from microscopic and spectrographic examinations expressed opinion these were similar to the metal of the safe and the paint on the truck. The truck of the Laundry Company customarily driven by Riley King (known as No. 9) was examined and scratches and marks on metal slats in the floor of the truck were found and these slats were introduced in evidence. Defendant Hale on Friday following the division of the money traded for a new automobile, paying $900 in cash in bills as the difference. The dealer said the money was in various denominations and he thought one of them was a $100 bill.

None of the defendants, save Bovender, went on the stand, but they offered numerous witnesses, some fifty in number, in effort to show that each was either at home or elsewhere than at the places at the times testified by Bovender. Defendant Riley King offered witnesses who testified he was on the night of 24 December engaged in picking up laundry over an extended route in the vicinity of the city, with a helper, from 8:30 to 1:30 a.m. Defendants also offered evidence tending to show that on the Thursday night on which Bovender testified the safe was hauled back and forth and thrown in the river the weather was very cold, sleet falling and the roads icy and slick.

During the argument to the jury the following exception to the ruling of the court was noted:

"Mr. Johnson: The law says no man has to take the witness stand.

"Objection.

"The Court: That statement is not proper. Gentlemen of the jury, the defendant has the right to take the witness stand or he may remain off the witness stand, as he may be so advised. The fact that he does not go upon the witness stand and testify in his own behalf cannot be taken to his prejudice. It is not proper, gentlemen, for the attorneys for either side to make comment about it.

"Mr. Johnson: I thought I could comment on the law?

"The Court: No, sir. You can't make any comment at all. It is improper argument, gentlemen of the jury, for the attorneys on either side to make it, and don't repeat it again."

The jury returned verdict of guilty as to each of the defendants, Hale, Riley King and Irvin King, on all three counts as charged in the bill of indictment. Judgment was rendered imposing on each of these defendants concurrent terms in State Prison on each of the three counts. Prayer for judgment as to Bovender was continued to next term. Defendants Hale, Riley King and Irvin King appealed, assigning error.

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

Jno. D. Slawter and Joe W. Johnson for defendants, appellants.

DEVIN, J. The evidence of defendant Bovender, an accomplice, who pleaded guilty and testified for the State, was sufficient to carry the case to the jury on all counts (*S. v. Hale,* 231 N.C. 412, 57 S.E. 2d 322; *S. v. Ashburn,* 187 N.C. 717, 122 S.E. 832), and there was other evidence tending to corroborate this witness and to support the verdict.

The zeal of counsel for the convicted defendants is manifest by the number of assignments of error they have brought to our attention in the effort to secure a new trial for their clients. Errors assigned are fifty-six in number, but an examination shows some of them are based on exceptions to the exclusion of testimony which was afterward admitted; others relate to excluded questions to which the record does not disclose the answer or what response would have been made; while other exceptions not referred to in their brief are deemed abandoned. None of these require specific elaboration. However, some of the exceptions noted at the trial which are discussed in appellants' brief require consideration.

During the taking of the State's evidence a dollar bill which a witness testified he had "fished" out of the safe after its recovery, was offered in evidence by the solicitor. When counsel for defendants sought at the time to exhibit this to the jury the court stopped him, reminding him he was not offering evidence and it was not for him to exhibit it at that time. This was a matter in the discretion of the court in the orderly conduct of the trial.

Defendants noted exception to evidence that witness Bovender had shown the officers the places where the stolen safe had been thrown off and later hidden in sawdust. This exception was on the view that this was after the consummation of the alleged conspiracy and incompetent against the defendants. But this was testimony as to facts within the witness' personal knowledge and no declaration or act of either of his coconspirators since the accomplishment of the purposes of the conspiracy was offered. The principle invoked is inapplicable. Likewise, it was competent to elicit from this witness in corroboration that he had previously stated to the officers the facts about which he was testifying, and for the officers in corroboration to testify what he had told them. *S. v. Spencer,* 176 N.C. 709, 97 S.E. 155; Stansbury, sec. 51.

Defendants complain that the court refused to allow them to cross-examine Bovender as to what statement he had made in the City Court on a particular point, but the record shows when the question was repeated the witness replied he did not remember. Also, exception was noted to the refusal of the court to permit this witness to testify about the amount of his bond and that of his codefendants. It appeared, however, that the witness did testify that the amount of his bond was $5,000, and that he heard in the City Court the other defendants' bonds announced as $15,000. It later appeared that the bonds of Hale and Irvin

King were fixed at $12,000, and Riley King gave a $10,000 cash bond. Moreover, the bond of Bovender was introduced in evidence. It would seem defendants obtained whatever benefit there was in the fact that Bovender's bond had been reduced after he testified in the City Court. No harm to the defendants may be predicated on the court's ruling on this score. Nor is there cause for complaint that the court remarked it was immaterial who signed his bond as the bond admitted in evidence shows it was executed by a bonding corporation having no connection with the case.

The defendants asked officer Burke if the solicitor had talked to him about Bovender's bond. Objection was sustained and counsel permitted to put in the record the expected answer, but this was not done, and the record is silent as to what the witness would have said. A similar question, with same ruling, was asked officer Carter, and again the record is silent. We do not think defendants are in a position to complain. *S. v. Ashburn,* 187 N.C. 717 (722), 122 S.E. 833.

Defendants excepted for that Mrs. Riley King was not permitted to testify how long defendants' witness Brown had been living in their home and how long he had known her husband, but later Brown testified without objection he had been living there since December, 1949, and knew Riley King well for that length of time. At the time this evidence was first offered, its materiality was not apparent.

Bovender had testified that on the Thursday night, 28 December, when the safe was brought to the Laundry Company's garage and opened and subsequently thrown in the river the weather was cold, but he did not think there was any sleet and that the ground was dry. He said he did not remember what kind of night it was. To contradict him and to show the condition of the weather defendants called a witness, Wiley Sims, who testified he was meteorologist in charge of the weather records of the United States Weather Bureau at a local airport. Asked what the weather was on Thursday night, 28 December, he replied: "I have a certified copy here." He said he kept the records and they were at his office. The court ruled if he knew of his own knowledge he could testify but if he kept the record the record would be the best evidence, and that he could not testify from a copy. The witness then said he had an independent recollection of the weather on the night of 28 December, and testified that on that night the temperature was below freezing, that there was freezing rain during the early part of the night and up to 1:00 a.m.; that there was a trace of ice on the ground, and the streets were slippery and most transportation stopped. Defendants excepted to the ruling of the court on the ground that the court had refused to allow defendants to introduce a certified copy of the weather report for this date as authorized by G.S. 8-35. But the record does not show that such a certified copy was

offered. The only question presented to the court below seems to have been whether the witness could testify as to weather conditions on that night from a copy of the record or from his independent recollection. A copy of the record of the weather report is included in the record, but it does not affirmatively appear that it was offered as a properly authenticated copy of a public record in accordance with the statute G.S. 8-35, and the questions debated in defendants' brief do not appear to have been raised by the evidence offered. Stansbury, sec. 153; *Kearney v. Thomas,* 225 N.C. 156, 33 S.E. 2d 871. See also *Supply Co. v. Ice Cream Co.,* 232 N.C. 684, 61 S.E. 2d 895. However, all the facts the copy referred to by the witness would have disclosed were testified by him from his personal knowledge, and defendants introduced six other witnesses who testified the weather on this occasion was as described by Sims and as shown on the copy set out in the record. We perceive no resultant harm to the defendants' defense on this point.

Defendants contend they were prejudiced by the action of the court in sustaining objection to the statement made by defendants' counsel, during his argument to the jury, that "the law says no man has to take the witness stand." The statute G.S. 84-14 which places certain limitations on arguments of counsel to the jury concludes with this sentence: "In jury trials the whole case as well of law as of fact may be argued to the jury." The right of counsel to state in his argument to the jury what he conceives the law of the case to be has been upheld in numerous decisions of this Court. *Brown v. Vestal,* 231 N.C. 56, 55 S.E. 2d 797; *Sears, Roebuck & Co. v. Banking Co.,* 191 N.C. 500, 132 S.E. 468; *S. v. Hardy,* 189 N.C. 799, 128 S.E. 152. But applicable also to the question here presented is G.S. 8-54 which guarantees the right of a person charged with a criminal offense to testify in his own behalf, but adds that his failure to testify shall not create any presumption against him. *S. v. Harrison,* 145 N.C. 408 (414), 59 S.E. 867; *S. v. Bynum,* 175 N.C. 777, 95 S.E. 101; *S. v. Humphrey,* 186 N.C. 533 (536), 120 S.E. 85; *S. v. Tucker,* 190 N.C. 708, 130 S.E. 720; *S. v. Jordan,* 216 N.C. 356, 5 S.E. 2d 156; *S. v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733.

The decisions of this Court referring to this statute seem to have interpreted its meaning as denying the right of counsel to comment on the failure of a defendant to testify. The reason for the rule is that extended comment from the court or from counsel for the state or defendant would tend to nullify the declared policy of the law that the failure of one charged with crime to testify in his own behalf should not create a presumption against him or be regarded as a circumstance indicative of guilt or unduly accentuate the significance of his silence. To permit counsel for a defendant to comment upon or offer explanation of the defendant's failure to testify would open the door for the prosecution and

create a situation the statute was intended to prevent. In *S. v. Humphrey,* 186 N.C. 533 (536), 120 S.E. 85, a new trial was awarded because of the solicitor's adverse comments on defendant's failure to take the stand. In *S. v. Tucker,* 190 N.C. 708, 130 S.E. 720, in an opinion by the present *Chief Justice,* it was said: "In the decisions dealing directly with this statute, it has been held that counsel for the prosecution is precluded from referring in his argument to any failure on the part of a defendant to testify, or to become a witness in his own behalf. *S. v. Harrison,* 145 N.C. 414. It is not a proper subject for comment by counsel in arguing the case before the jury." And in *S. v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733, where exception was noted to the language in which the court in its charge referred to this statute, it was said in an opinion by *Justice Denny,* "The failure of a defendant to go upon the witness stand and testify in his own behalf should not be made the subject of comment, except to inform the jury that a defendant may or may not testify in his own behalf as he may see fit, and his failure to testify 'shall not create any presumption against him.' "

While the mere statement by defendants' counsel that the law says no man has to take the witness stand would seem to be unobjectionable, it is obvious that further comment or explanation might have been violative of the rule established by the decisions of this Court. Furthermore, it was the duty of the presiding judge by prompt action to prevent infringement of this rule and to require obedience to his ruling, though he should be careful that nothing be said or done which would be calculated unduly to prejudice the defendants. *S. v. Howley,* 220 N.C. 113, 16 S.E. 2d 705.

Here, the judge stated from the bench that a defendant had the right to take the witness stand or refrain from doing so, and that the fact he did not testify in his own behalf could not be considered to his prejudice, and added, "It is not proper for attorneys for either side to make comment about it." When counsel thereupon expressed his view that he thought he could comment on the law, the court ruled again that any comment on the subject was improper for attorneys on either side, and that counsel should not "repeat it again." In the charge to the jury the court again stated the rule that defendants' failure to testify should not create any presumption against them. That was all the defendants were entitled to in this regard. Nor do we think the defendants were disadvantaged by the ruling of the court. Verdicts and judgments are not to be lightly set aside, nor for any improper ruling which did not materially and adversely affect the result of the trial. *Collins v. Lamb,* 215 N.C. 719, 2 S.E. 2d 863. An error cannot be regarded as prejudicial unless there is a reasonable probability that the result would have been different. *Call v. Stroud,* 232 N.C. 478, 61 S.E. 2d 342. "Verdicts and judgments

are not to be set aside for harmless error, or for mere error and no more. To accomplish this result, it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, amounting to a denial of some substantial right." *Wilson v. Lumber Co.*, 186 N.C. 56, 118 S.E. 797.

Defendants noted exception to the court's instructions to the jury in respect to the definition of the elements necessary to constitute criminal conspiracy, but we think the charge considered contextually is in accord with the decisions of this Court on the subject and free from error. *S. v. Ritter*, 197 N.C. 113, 147 S.E. 733; *S. v. Wrenn*, 198 N.C. 260, 151 S.E. 261; *S. v. Davenport*, 227 N.C. 475 (494), 42 S.E. 2d 686; *S. v. Summerlin*, 232 N.C. 333, 60 S.E. 2d 322. Furthermore, each of the defendants was convicted on all three counts in the bill and the judgment imposed concurrent sentences on each count.

The court's reference to the defendants' defense of alibi seems to have followed approved precedents, and the exception thereto cannot be sustained. *S. v. Bridges, ante*, 577, 64 S.E. 2d 867.

After a long and warmly contested trial the jury has accepted the State's evidence as true and found each of the appealing defendants guilty as charged. A careful examination of the entire record leads to the conclusion that no sufficient ground has been shown for upsetting the result. It will not be disturbed.

No error.

STATE v. JOE GIBSON, ET AL.

(Filed 7 June, 1951.)

1. Indictment § 10—

A count charging named defendants with conspiracy to operate a lottery and further with selling lottery tickets charges but one offense of conspiracy, and therefore it is not required that the defendants be again named in regard to the selling of lottery tickets.

2. Indictment § 8: Conspiracy § 4—

An indictment containing a count charging named defendants with conspiracy to operate a race-horse lottery and subsequent counts charging the named defendants with operating a race-horse lottery, and with selling race-horse lottery tickets and further counts charging named defendants (the same parties except for the deletion of one of them) with conspiracy to operate a butter-and-egg lottery and with operating a butter-and-egg lottery and with selling butter-and-egg lottery tickets, *held* not objectionable for duplicity or multifariousness. G.S. 15-152.

3. Conspiracy § 5—

Where the indictment charges that the named defendants did conspire together with each other and "divers other persons" to commit a criminal offense, the State may show the identity of a person not named in the indictment who was a member of the conspiracy and introduce in evidence paraphernalia found in his possession used in furtherance of the common design.

4. Gaming § 8—

A calculator used as part of the paraphernalia in the operation of a lottery may be introduced in evidence.

5. Conspiracy § 5—

In a prosecution for conspiracy considerable latitude is allowed in the reception of evidence offered to establish the gravamen of the offense, and the evidence is not limited to direct evidence.

6. Criminal Law § 42d—

An article may be introduced in evidence to corroborate testimony in regard thereto by witnesses whose credibility has been attacked.

7. Criminal Law §§ 50d, 81c (1)—

While the trial court may not by language or conduct at any time during the trial impeach the credibility of a witness or discredit efforts of either party before the jury, and while such impeachment or depreciation once made cannot be cured or corrected, nevertheless appellants must make it plainly appear that the occurrence complained of prejudiced their cause sufficiently to overcome the presumption in favor of the regularity of the proceedings in the lower court.

8. Criminal Law § 81b—

Appellants have the burden of showing that alleged error was harmful, as the presumption is against them, and merely casting doubt upon the validity of the proceedings is insufficient.

9. Criminal Law § 62f—

The court may not suspend sentence for a period exceeding five years. G.S. 15-197, G.S. 15-200.

APPEALS by defendants from *Sharp, Special Judge,* September Criminal Term, 1950, of GUILFORD—Greensboro Division.

Criminal prosecution on indictment charging the defendants in a six-count bill with conspiracy to operate lotteries, with operating them, and with kindred offenses.

Count One charges C. A. (Shug) York, Joe Gibson, George Farley, Theo. Graves, Sammie Scott and W. C. (Bill) Coble with conspiracy to operate a race-horse lottery in Guilford County, and further with selling race-horse lottery tickets in said county.

Count Two charges the same defendants (naming them) with operating a race-horse lottery in Guilford County.

Count Three charges the same defendants (naming them) with selling race-horse lottery tickets in Guilford County.

Count Four charges C. A. (Shug) York, Joe Gibson, George Farley, Theo. Graves and W. C. (Bill) Coble with conspiracy to operate a butter-and-egg lottery in Guilford County, and further with selling butter-and-egg lottery tickets in Guilford County.

Count Five charges the same defendants mentioned in *Count Four* (naming them) with operating a butter-and-egg lottery in Guilford County.

Count Six charges the same defendants mentioned in Counts Four and Five (naming them), with selling butter-and-egg lottery tickets in Guilford County.

Immediately upon the call of the case by the solicitor, the defendants and each of them through counsel moved to quash the bill of indictment for duplicity and duplication, and also demurred *ore tenus* to the bill. Both were overruled; exceptions.

On the second day of the trial C. A. (Shug) York failed to appear in court and a mistrial was ordered as to him. Counts Five and Six were dismissed as against George Farley and Theo. Graves on their pleas of former jeopardy.

The trial proceeded against the remaining defendants on all the counts in the bill.

The principal witnesses for the prosecution were Ed Leonard, a confederate with the defendants in the lottery business, and Eugene Watlington, a "pick-up man" in the same business.

It appears from the testimony of these two witnesses that the defendants were engaged in two lotteries in Guilford County, one a butter-and-egg lottery, carried on principally during the morning hours five days a week from Monday to Friday; the other a race-horse lottery, operated principally in the afternoons and on Saturdays and Sundays.

Starting with the initial operators in the butter-and-egg lottery are the so-called "writers" who take orders for and write lottery tickets and collect for them. The purchaser selects a number of three digits which is written on the ticket. Next in order are the "head-men" who collect the tickets from the writers, and above these are the "pick-up men" who pick up the tickets from the head men or at certain designated places of concealment where they are left, and transmit them to lottery headquarters, in the instant case operated by C. A. (Shug) York, Joe Gibson and W. C. (Bill) Coble.

All tickets are required to reach headquarters by 11:30 each morning. The winning number is determined by taking the last digit in the butter quotation from the New York Stock Exchange of the preceding day and the first two digits in the quotation for the egg market.

If a player or a purchaser of ticket or tickets does not select the winning number he gets nothing back. "The ratio of the win, if you happen to hit was supposed to be $5.00 for one penny," or sometimes 300 to 1 instead of 500 to 1. But "it worked out so that any time the number was overhit for the day they would tell you" (the pick-up men), according to Leonard's testimony, "to change the number and make up some other number. . . . When I changed it, I would just make up some other number and declare that to be the winner" (winning number).

The race-horse lottery was operated in a similar manner to the butter-and-egg lottery, except for the difference in determining the winning number. This number came from the first three horse races held at certain tracks. "Whenever there was an overhit or hits for more than the amount of take that day, I changed the numbers, the people that I had picked up the numbers from who had selected the winning horse or winning position (or winning number) did not get their money."

The witness Leonard was permitted to testify, over objection, that one L. C. Sykes was "involved in this case"; that he had left the State or town; that he had a calculator in his home, used for totaling lottery tickets.

"Q. The Solicitor: Have you seen this machine which I show you before? Objection. Yes.

"The Court: What is the purpose of that?

"The Solicitor: The State desires to show that this calculator was found in the home of L. C. Sykes and that L. C. Sykes is a part of this entire conspiracy." Objection; overruled; exception.

The calculator was offered in evidence, over objection, and the witness testified that he had used it at Sykes' home in totaling lottery tickets, or "for running the work" as he called it.

During the examination of the witness Leonard the following occurred:

"Mr. Glidewell: Read that question, I wasn't listening.

"The Court (addressing Mr. Glidewell): What did you say?

"Solicitor: He said he wasn't listening, your Honor.

"Mr. Glidewell: What was that question—I was talking and didn't hear it—read it, will you?

"The Court: No. Go ahead, Mr. Witness.

"Mr. Glidewell: Do you mean to say I can't have the Reporter read a question for me?

"The Court: Not now; maybe later.

"Mr. Glidewell (rising and advancing): I want an exception to that put in the record.

"The Court: Sit down, Mr. P. W."

Objection; overruled; exception.

The defendants offered no evidence.

They complain also at one of the opening sentences of the charge as disparaging to their case: "By his plea of not guilty each defendant denies the charge against him as set out in the bill of indictment and he denies the credibility of the evidence upon which the State relies, even though that evidence is not contradicted." Exception.

Verdict: "All defendants guilty as charged on all counts."

Judgments pronounced on all six counts against the several defendants.

On Count Two the defendants, Gibson, Coble, Graves and Farley (in addition to being sentenced on other counts) were each sentenced to the roads for six months, "suspended for a period of ten (10) years upon good behavior of the defendant." Exceptions.

On Count Five the defendants, Gibson and Coble (in addition to being sentenced on other counts) were each sentenced to the roads for six months, "suspended for a period of ten (10) years upon good behavior of the defendant." Exceptions.

The defendants appeal, assigning errors.

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

P. W. Glidewell, Sr., Shelley B. Caveness, and Joe D. Franks, Jr., for defendants.

STACY, C. J. We have here for decision (1) the validity of the indictment, (2) the competency of evidence, (3) the propriety of a colloquy between court and counsel, and (4) the legality of suspended sentences.

I. THE VALIDITY OF THE INDICTMENT.

The defendants have pressed their motion for quashal of the indictment with conviction and apparent confidence. They seem assured that it offends the rule against duplicity or multifariousness in a single bill, and that in the first and fourth counts, two separate and distinct offenses are joined without naming the defendants in respect of the second alleged offense. For this latter position, they cite *S. v. Camel,* 230 N.C. 426, 53 S.E. 2d 313, as controlling: and *S. v. Robinson,* 224 N.C. 412, 30 S.E. 2d 320; *S. v. Wilson,* 121 N.C. 650, 28 S.E. 416, and *S. v. Cooper,* 101 N.C. 684, 8 S.E. 134, as fully supporting their position.

We think the defendants have misconceived the intent and purpose of the First and Fourth Counts in the bill. These counts charge only a single offense, *i.e.,* conspiracy to do two things: (1) to operate a lottery (violative of G.S. 14-290), and (2) to sell tickets therein (violative of G.S. 14-291.1). Thus, the State elected in drafting these counts to assume a double burden—to establish the operation of a lottery by the

defendants and the sale by them of tickets therein. The court was careful to make this plain to the jury. However, just one offense is charged, and a single sentence was imposed on each count. Hence, the authorities cited and relied upon would seem to be inapplicable to the facts of the instant record.

In respect of the alleged duplicity or multifariousness of the entire bill, it is sufficient to say the central indictment is for conspiracy. All the remaining counts are related to each other "and to the single transaction or series of transactions which grow out of the one concatenated design." *S. v. Dale,* 218 N.C. 625, 12 S.E. 2d 556; *S. v. Jarrett,* 189 N.C. 516, 127 S.E. 590.

Speaking to the question in *S. v. Malpass,* 189 N.C. 349, 127 S.E. 248, *Varser, J.,* said: "The rule in this State now is, that different counts relating to the same transaction, or to a series of transactions, tending to one result, may be joined, although the offenses are *not* of the same grade," citing as authority for the position: *S. v. Lewis,* 185 N.C. 640, 116 S.E. 259; *S. v. Burnett,* 142 N.C. 577, 55 S.E. 72; *S. v. Howard,* 129 N.C. 584, 40 S.E. 71; *S. v. Harris,* 106 N.C. 682, 11 S.E. 377; *S. v. Mills,* 181 N.C. 530, 106 S.E. 677.

The bill here suffices to withstand the charge of duplicity. The challenge is not sustained. G.S. 15-152; *S. v. Anderson,* 208 N.C. 771, 182 S.E. 643; 5 R.C.L. 1081; 11 Am. Jur. 562; I Wharton's Crim. Procedure 624; Joyce on Indictments 2d 657.

II. THE COMPETENCY OF EVIDENCE.

The defendants objected to the testimony of Leonard reciting that L. C. Sykes was one of the operators of the lotteries; that he had a calculator in his home for totaling tickets, which the witness identified; that Sykes had been tried and convicted and had since left the State or town.

The indictment charges that the defendants (naming them) "did . . . conspire together and with each other and divers other persons" to operate lotteries in Guilford County, etc. It was therefore competent to show who the "divers other persons" were, or to make known the other conspirators in the enterprise. *S. v. Andrews,* 216 N.C. 574, 6 S.E. 2d 35. Without objection, the witness freely told of conversations and transactions with C. A. (Shug) York after a mistrial had been ordered as to him or in his case. If the defendants now find it embarrassing to be identified as associates of L. C. Sykes, they have no one to blame but themselves. *S. v. Beal,* 199 N.C. 278, 154 S.E. 604. The association was originally of their own choosing.

Those who enter into a conspiracy to violate the criminal laws thereby forfeit their independence, and jeopardize their liberty, for, by agreeing

with another or others to engage in an unlawful enterprise, they thereby place their safety and freedom in the hands of each and every member of the conspiracy. *S. v. Williams,* 216 N.C. 446, 5 S.E. 2d 314. The acts and declarations of each conspirator, done or uttered in furtherance of the common, illegal design, are admissible in evidence against all. *S. v. Ritter,* 197 N.C. 113, 147 S.E. 733. "Everyone who enters into a common purpose or design is equally deemed in law a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any one of the others, in furtherance of such common design." *S. v. Jackson,* 82 N.C. 565; *S. v. Smith,* 221 N.C. 400, 20 S.E. 2d 360; *S. v. Summerlin*—"Hole-in-the-Wall" Case,—232 N.C. 333, 60 S.E. 2d 322; *S. v. Anderson,* 208 N.C. 771, *loc. cit.* 786, 182 S.E. 643; *S. v. Herndon,* 211 N.C. 123, 189 S.E. 173.

The calculator was competent to be shown in evidence as a part of the paraphernalia used in the operation of the lotteries. *S. v. Wells,* 219 N.C. 354, 13 S.E. 2d 613; *S. v. Fogleman,* 204 N.C. 401, 168 S.E. 536; *S. v. Lea,* 203 N.C. 13, 164 S.E. 737; Stansbury's N. C. Evidence, Sec. 85.

Moreover, in cases grounded on fraud or conspiracy, considerable latitude is allowed in the reception of evidence offered to establish the gravamen of the charge or offense. Direct evidence of the charge is not essential, though here it is both direct and positive, with its credibility, however, sharply challenged. The calculator was offered to bolster the testimony of the witness whose credibility was being attacked. It was competent for this purpose. *S. v. Anderson, supra.*

III. PROPRIETY OF COLLOQUY BETWEEN COURT AND COUNSEL.

The defendants stressfully contend that their cases were prejudiced when the court directed counsel to "sit down" as a result of the colloquy shown in the record; that the direction clearly revealed the court's impatience with their defenses and the manner in which they were being conducted, and that the court's displeasure or opinion in this respect was further emphasized at the opening of the charge when the jury was told the State's evidence "is not contradicted."

Conceding that the direction in question and the further remark in respect of the State's uncontradicted evidence may have been somewhat incautious or infelicitous or even indicative of impatience with the defenses offered by the defendants, we hardly think the effect was as hurtful or impeaching as the defendants now contend. At least, as we apprehend the record, the impeachment appears insufficiently pronounced to overcome the presumption against it. *In re Will of Johnson, ante,* 570. The appellants have the burden of showing harmful error, and they must make it appear plainly, as the presumption is the other way. Nor is it suffi-

cient merely to cast doubt on the validity of the proceeding. The appellants have the burden of showing error. *Collingwood v. R. R.*, 232 N.C. 192, 59 S.E. 2d 584; *Nichols v. Bank*, 231 N.C. 158, 56 S.E. 2d 429; *Scott v. Swift & Co.*, 214 N.C. 580, 200 S.E. 21.

True, the authorities are to the effect that at no time during the trial of a cause may the presiding judge cast doubt upon the testimony of a witness, impeach his credibility, or discredit the efforts of either party before the jury. *S. v. Cantrell*, 230 N.C. 46, 51 S.E. 2d 887; *S. v. Owenby*, 226 N.C. 521, 39 S.E. 2d 378; *S. v. Perry*, 231 N.C. 467, 57 S.E. 2d 774. This may be done by the use of language or conduct calculated to impair the credit which the jury might otherwise or under normal conditions give to the testimony or the position of one of the parties. *S. v. Simpson, ante*, 438, 64 S.E. 2d 568; *S. v. Carter, ante*, 581, 65 S.E. 2d 9; *S. v. Russell, ante*, 487, 64 S.E. 2d 579.

Of course, the fact the court later afforded counsel an opportunity to examine the witness further, or to have any question read, would not have cured the impeachment, if such it were, for impeachment or depreciation at any time during the trial ordinarily is incurable or incorrectible and fatal to the proceeding. *S. v. McNeill*, 231 N.C. 666, 58 S.E. 2d 366, and cases there cited.

In the light of the record as we understand it, the exception is not sustained.

IV. LEGALITY OF SUSPENDED SENTENCES.

It is the position of the defendants, Gibson, Coble, Graves and Farley, that as they were convicted of misdemeanors, the court was without authority to suspend their sentences on Counts Two and Five for a period of ten years on good behavior; that they did not consent to such suspensions, and that these suspended judgments should be vacated.

The position appears to be well taken in the light of G.S. 15-200 which appears in the Chapter on Criminal Procedure and provides that, "The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended, terminated or suspended by the court at any time, within the above limit."

In the case of *S. v. Wilson*, 216 N.C. 130, 4 S.E. 2d 440, the inherent power of a court having jurisdiction to suspend judgment or stay execution in a criminal case for determinate periods and for a reasonable length of time, was recognized and upheld under authority of the earlier cases, citing some of them, but it was there observed, "Since that time the period during which the execution of a sentence in a criminal case may be suspended on conditions has been fixed as five years, regardless of

the term of imprisonment authorized by the statute," citing the above statute.

What was said in *Wilson's Case* has not been changed or modified in subsequent decisions. *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143, and cases cited. The general authority recognized in G.S. 15-197 is to be read in connection with the limitation fixed by G.S. 15-200.

Perhaps it should be noted the defendant, Sammie Scott, has not appealed, and the judgment against the defendant Coble on Count Three is void for uncertainty or indefiniteness; immaterial, however, since only a concurrent sentence was entered on this count.

Those who are disposed or inclined to take part in a lottery, or the numbers racket, might do well to read the evidence in this case. It comes from the inside and is quite revealing. Duplicity, fraud, overreaching and false pretense appear to be the bases of operation. Chicanery is also employed. The appeal is to cupidity, rapacity, avarice and covetousness. It is a shabby business, if it can be called a business at all. How anyone could hope to gain in such an enterprise is difficult to perceive or to understand. The fixed pattern undoubtedly is "heads I win; tails you lose," with just enough lure or bait to attract and mislead the unwary. You can't win at the other fellow's game, especially if he be a charlatan. It would seem that only a knave, a dupe, a simpleton or a "blind fish" would bite at such a hook. But then, there are those who act as if they think with their feet or only in the aftertime. "A fool and his money are soon parted"—English proverb.

A careful perusal of the transcript leaves us with the impression the validity of the trial should be upheld, but as indicated, the case will be remanded for correction of errors in the suspended judgments.

Error and remanded.

E. Y. PONDER v. HUBERT DAVIS AND BRISTOL CROWDER.

(Filed 7 June, 1951.)

1. Contempt of Court § 5: Judges § 2d—

Where an order to show cause why defendants should not be held in contempt is issued in an action involving a contested election, the resident judge issuing the order should recuse himself upon petition and affidavit alleging that such judge took an active part on behalf of the plaintiff in the campaign and averring upon verification that in good faith affiant believes he could not obtain a fair and impartial hearing before such judge. G.S. 5-9.

2. Constitutional Law § 20a—

A fair trial in jury cases and an impartial judge in all cases are prime requisites of due process.

3. Contempt of Court § 5: Judges § 2d—

In contempt proceedings arising out of a contested election, verified petition and affidavit for recusation for bias alleging that "in good faith" defendants believe they could not obtain a fair and impartial hearing before the resident judge issuing the order because he had participated in the campaign on behalf of plaintiff, may not be declared scurrilous and untrue and ordered stricken from the record on the court's own notion or *ipsi dixit* without any counter-affidavit or evidence to contradict it, but, if the judge wishes to contest the averments, he should transfer the cause to another judge and file his affidavit in reply or request to be permitted to testify orally.

4. Same—

Upon petition for recusation for bias in contempt proceedings, the act of the judge, after finding facts, in transferring the matter to another judge for punishment lends color to the averment of prejudice and strengthens the conclusion that the matter should have been referred before attempting to find any facts.

5. Judges § 2d: Elections § 18a—

In an action involving a contested election, undenied and unchallenged averment in the petition and affidavit for the recusation of the judge that the judge personally took an active part in the campaign, *is held* to disqualify such judge to hear the case and he should have granted the petition for an order of recusation.

6. Contempt of Court § 6—

In contempt proceedings the facts upon which the contempt is based, especially the facts concerning the purpose and object of the contemnor, must be found and filed in the proceedings in order to sustain judgment of punishment, and where the judge to whom the matter is transferred for punishment is not authorized by the order of transfer to make any findings, and the findings by the judge ordering the transfer are ineffectual, judgment imposing punishment for contempt cannot be sustained.

7. Judges § 2d—

Where the unchallenged averment for recusation sets out *prima facie* a legal objection to prejudice all subsequent orders and judgments entered in the cause, including the denial of the petition, must be vacated.

APPEALS by defendants from *Nettles, J.*, in chambers at Asheville, N. C., 9 and 16 December, 1950, and 20 January, 1951, and from *Rudisill, J.*, at 8 January Civil Term, 1951, of BUNCOMBE,—from MADISON.

Civil action for temporary restraining order to prohibit the defendants from performing the duties of sheriff or jailer of Madison County.

The plaintiff, E. Y. Ponder, was the Democratic candidate for Sheriff of Madison County in the General Election of 7 November, 1950. The

defendant, Hubert Davis, was the incumbent sheriff of the county and the Republican candidate to succeed himself in the same election. The vote was close and each claimed to be the winner in the election.

On 16 November, a certificate of election was duly issued to the plaintiff by the County Board of Elections. He was inducted into the office on 4 December, 1950, by taking the required oath and submitting his bond which was approved. The defendant, Hubert Davis, on the other hand, claiming to be the successful candidate in the election, appeared before a justice of the peace, took the oath of office as sheriff and appointed Bristol Crowder his First Deputy and Jailer.

On 5 December, 1950, the plaintiff instituted this action in the Superior Court of Madison County and immediately applied to the resident judge of the district, Honorable Zeb. V. Nettles, who resides in Buncombe County, for a temporary injunction restraining the defendants, Davis and Crowder, from exercising any of the functions of sheriff or jailer in Madison County. The order was issued in accordance with the prayer of the complaint, returnable before the resident judge in Asheville at the courthouse at 11 o'clock a.m., 16 December, 1950.

Two days later, 7 December, 1950, on affidavit submitted by the plaintiff that Bristol Crowder, upon whom service of the order of 5 December had been made, refused to surrender possession of the jail, and that Hubert Davis, who was concealing himself to avoid service of process, had his former deputies in possession of the sheriff's office and they refused to surrender the office or the jail, the resident judge issued a supplemental order directing the defendants, Hubert Davis and Bristol Crowder, their agents and former deputies, naming them, to appear before him at the courthouse in Asheville at 11 o'clock in the forenoon on 9 December, 1950, "to show cause, if any there be, why they and each of them should not be punished for contempt of this court."

None of the defendants appeared before the resident judge in response to the show-cause order, but their counsel did appear with a written motion and affidavits signed by Bristol Crowder, made "on behalf of himself and all other deputies of Hubert Davis, Sheriff of Madison County," asking that the entire cause be set for hearing before some other Superior Court Judge, and specifically averring that "in good faith," this affiant "sincerely believes that he cannot obtain a fair and impartial hearing before this court upon the merits of this case; that a great number of people of Madison County . . . entertain the same opinion; . . . that as this affiant is informed and believes, this court personally came to the rural sections of Madison County immediately prior to the last political campaign in November 1950 and took an active part in the campaign for the plaintiff and other Democratic candidates; that this

court was a candidate during the last campaign along with the plaintiff and, while having no personal opposition, was active in behalf of the Democratic ticket; . . . that the great majority of the people of Madison County, regardless of the decision of the Court in the present case, would feel that political considerations were the determining factor."

Upon hearing the motion and affidavits read, the court found as a fact "that the motion in this cause is scurrilous and untrue and orders it stricken from the record. The court further finds that the actions of the attorneys in the matter for the defendants are not in good faith; . . . that the action of the attorneys in not bringing their clients into court in obedience to the orders of the court is illegal and unlawful and not in keeping with good order and good faith and is unethical on their part; that the allegations made as to the prejudice of the court are untrue and are untrue to the knowledge of the attorneys for the defendants." The court being of opinion that the defendant Davis ought to be served with process, continued the matter to be heard before him in Asheville on Saturday, 16 December, 1950. This order was entered 9 December, 1950.

Pursuant to the above order, counsel for the defendants appeared specially before the resident judge on 16 December, moved to dismiss for want of jurisdiction to hear the matter out of Madison County, filed answer for all the defendants and an affidavit of Hubert Davis in which he undertook to purge himself of any contempt.

The court overruled the motion, found all the defendants guilty of contempt in failing to appear before the court as ordered, and ordered the defendants in arrest and to appear before the regular judge holding the courts of the 19th Judicial District in Buncombe County on 8 January, 1951, for the purpose of receiving "such judgment as said Judge may decree in the premises."

The parties with their counsel appeared before Honorable J. C. Rudisill in accordance with the above order, undertook to purge themselves of any contempt, but were given fines as follows: Hubert Davis $100; Bristol Crowder $50, and the other defendants $25 each.

From this order, appeals were noted and bonds fixed.

Thereafter, on 20 January, 1951, motion was made before the resident judge to strike certain portions of the answer and cross-action of Hubert Davis and Bristol Crowder. Motion allowed; objection and exception by defendants.

The case on appeal was settled by Judge Rudisill, "in collaboration with Judge Zeb. V. Nettles, who heard a portion of said case."

Exceptions are taken to the order of 9 December, 1950, and all subsequent orders and judgments entered in the cause.

Defendants appeal, assigning errors.

J. Walter Haynes, A. E. Leake, and Shuford, Hodges & Robinson for plaintiff, appellee.

J. M. Baley, Jr., and Clyde M. Roberts for defendants, appellants.

STACY, C. J. The principal question for decision is whether the judgment of Judge Nettles, finding the defendants guilty of contempt, and the judgment of Judge Rudisill, imposing punishments on such finding, or either of them, can be sustained. The record impels a negative answer.

I. THE JUDGMENT OF JUDGE NETTLES.

In the first place, it should be noted that by G.S. 5-9, "In all proceedings for contempt and in proceedings as for contempt, the judge or other judicial officer who issues the rule or notice to the respondent may make the same returnable before some other judge or judicial officer"; and "When the personal conduct of the judge or other judicial officer . . . is involved, it is his duty to make the rule or notice returnable before some other judge or officer," unless the proceeding be for some act or conduct "committed in the presence of the court and tending to hinder or delay the due administration of the law," or "for the disobedience of a judicial order rendered in any pending action." This last limitation, or proviso, we apprehend, was not intended to cover an order entered in the same cause by the same judge when the propriety of his acting in the premises, and issuing the very order alleged to have been violated, is called in question. The statute declares a sound public policy that no judge should sit in his own case, or participate in a matter in which he has a personal interest, or has taken sides therein. *Moses v. Julian,* 45 N.H. 52, 84 Am. Dec. 114 and note. Here, it is alleged the judge took part on behalf of the plaintiff in the very election in which the plaintiff and one of the defendants were running for sheriff and about which they are now contending. We think the case comes within the spirit of the act requiring removal, if not within the letter, for the gravamen of the petition and affidavit of bias is, that the presiding judge took a partisan interest in the election contest, out of which the present controversy arose. *S. v. Hartley,* 193 N.C. 304, 136 S.E. 868; *S. v. Byington* (Utah—December 17, 1948), 200 Pac. 2d 723, 5 A.L.R. 2d 1393.

"If self the wavering balance shake,
It's rarely right adjusted."
—BURNS *(Epistle to a Young Friend)*

Aside from the statute, however, "Every litigant, including the state in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge." *S. ex rel. Mickle v. Rowe,* 100 Fla. 1382, 131 So. 331;

15 R.C.L. 539; 30 Am. Jur. 76 and 778. A fair jury in jury cases and an impartial judge in all cases are prime requisites of due process. *Chesson v. Container Co.*, 223 N.C. 378, 26 S.E. 2d 904. There is nothing on the record to contradict the petition and affidavit of Bristol Crowder or to support the findings of fact made by the judge in his order of 9 December, 1950. If he deemed it necessary or wise to challenge the matters set out in the petition and affidavit—and the plaintiff was not able to do it for him—it would seem that he might have transferred the matter to some other judge and filed his affidavit in reply thereto or asked to be permitted to testify orally in the case. *Sigourney v. Sibley*, 21 Pic. (Mass.) 101, 32 Am. Dec. 248; 48 C.J.S. 1097. To declare the petition and affidavit scurrilous and untrue and order it stricken from the record on the court's own notion without any counter-affidavit or evidence to contradict it, would seem to be making short shrift of the matters interposed by the defendants, notwithstanding the verified allegation of good faith. *Mfg. Co. v. Arnold*, 228 N.C. 375, 45 S.E. 2d 577; *Kendall v. Stafford*, 178 N.C. 461, 101 S.E. 15; *White v. Connelly*, 105 N.C. 65, 11 S.E. 177; *Gregory v. Ellis*, 82 N.C. 225; See, also, *Advisory Opinion*, 227 N.C. 705, 41 S.E. 2d 749.

It is true a party ought not be permitted to disqualify a judge or to interrupt a proceeding by a false and scurrilous attack upon the presiding officer, and if the instant petition and affidavit of Bristol Crowder should prove to be such, he may be dealt with summarily and punished accordingly. Precedent decrees that a judge should recuse himself in contempt proceedings where they involve personal feelings which do not make for an impartial and calm judicial consideration and conclusion in the matter. *Snyder's Case*, 301 Pa. 276, 152 Atl. 33, 76 A.L.R. 666; 30 Am. Jur. 786. And it has been declared the better practice in recusations for prejudice to call upon some other judge whose rulings have not been ignored or disregarded, especially in cases of indirect or constructive contempt. *Ex Parte Pease*, 123 Tex. Cr. 43, 57 S.W. 2d 575; 48 C.J.S. 1064. Indeed, in the instant case the fact the judge felt constrained or impelled to transfer the matter to another judge for judgment lends color to the view that it should have been transferred before any findings were made, since the judgment of contempt, to be effective, needs to recite the facts upon which it is founded. *In re Odum*, 133 N.C. 250, 45 S.E. 569. He evidently recognized some impropriety in finally disposing of the matter.

The remarks of *Chief Justice Taft* in the case of *Cook v. United States*, 267 U.S. 517, 69 L. Ed. 767, involving a similar petition for recusation, would seem to be appropriate here:

"The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining

the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backward and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency but it is not always possible. Of course where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed. But attempts of this kind are rare. All of such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place."

And it was said in *Berger v. United States,* 255 U.S. 22, 65 L. Ed. 481, that the policy or solicitude underlying the Federal statute on the subject, Section 21 of the Judicial Code, 28 U.S.C.A., applicable in the Federal Courts, is that "the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial,—free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment"; *i.e.,* shall also appear to be impartial. *Whitaker v. McLean,* 118 Fed. 2d 596.

Nor do we think the subsequent partial transfer of the proceedings to Judge Rudisill for judgment is in keeping with the usual course and practice in such cases. One judge may transfer a case to another, but it is unusual for one judge to transfer a case to another and still hold on to it for ultimate disposition. Then, too, a partial or half-way transfer is more likely to produce suspicion of prejudice than to avoid it—the very thing it seeks to eschew. Like appeasement, it defeats its own ends.

It is important that the judgments of the court should be respected. To insure this, however, the court must first make sure that they merit respect. The issue here raised transcends any consideration of the immediate personalities or parties to the proceeding. "The law is not so much concerned with the respective rights of judge, litigant, or attorney in any particular cause, as it is, as a matter of public policy, that the courts shall maintain the confidence of the people." *U'Ren v. Bagley,* 118 Or. 77, 245 Pac. 1074, 46 A.L.R. 1173; 30 Am. Jur. 768. As stated in *People ex rel. Roe v. Suffolk Common Pleas,* 18 Wend. 550: "Next in importance to the duty of rendering a righteous judgment is that of doing it in

such a manner as will beget no suspicion of the fairness and integrity of the judge." Or as a former member of this Court, *Allen, J.*, was wont to say: It is not enough for a judge to be just in his judgments; he should strive to make the parties and the community feel that he is just; he owes this to himself, to the law and to the position he holds. It is a great thing to have power, but it is an awful thing to have to use it in contempt proceedings, for in such hearings the wisdom and patience of the judge are often put to their severest test. "The purity and integrity of the judicial process ought to be protected against any taint of suspicion to the end that the public and litigants may have the highest confidence in the integrity and fairness of the courts"—*Wolfe, J.*, in *Haslam v. Morrison*, 113 Utah 14, 190 Pac. 2d 520.

To like effect is the announcement of the Michigan Court in *Talbert v. Muskegon Const. Co.*, 305 Mich. 345, 9 N.W. 2d 572: "One of the fundamental rights of a litigant under our judicial system is that he shall be entitled to a hearing before a court to which no taint or prejudice is attached." To which the language of the Florida Court in *State ex rel. Davis v. Parks*, 141 Fla. 516, 194 So. 613, may be added: "It is the duty of courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question."

Again in *Kentucky Journal Publishing Co. v. Gaines*, 139 Ky. 747, 110 S.W. 268—a case arising out of a political campaign in which the judge made speeches for the candidate opposed by the defendant—it was said: "It is but the utterance of a legal platitude to say that it is of the utmost importance that every man should have a fair and impartial trial of his case, and that to secure this great boon two things are absolutely essential; an impartial jury and an unbiased judge. But we go further, and say that it is also important that every man should know that he has had a fair and impartial trial; or, at least, that he should have no just ground for the suspicion that he has not had such a trial."

The central allegation of the petition and affidavit filed herein is that the resident judge "personally came to the rural sections of Madison County immediately prior to the last political campaign in November 1950 and took an active part in the campaign for the plaintiff and other Democratic candidates." If this averment be true,—and it is not denied or challenged on the record—we think it must be conceded the resident judge was disqualified to hear the case, and he should have granted the petition for an order of recusation. *State ex rel. La Russa v. Himes*, 144 Fla. 145, 197 So. 762. Characterizing the entire petition and affidavit as "scurrilous and untrue" and striking it from the record, in and by the order of 9 December, 1950, doubtless increased or heightened rather than

lessened or allayed, the defendants' fears and suspicious of bias or prejudice. *Kentucky Journal Publishing Co. v. Gaines, supra.*

II. THE JUDGMENT OF JUDGE RUDISILL.

There is no finding of contempt in Judge Rudisill's judgment, nor was he authorized to make any under the order of transfer, hence it is without sufficient foundation to support the imposition of the fines.

In contempt proceedings it is essential that the facts upon which the contempt is based should be found and filed in the proceedings, especially the facts concerning the purpose and object of the contemner, and the judgment should be based on the facts so found. *In re Odum,* 133 N.C. 250, 45 S.E. 569.

Since the unchallenged petition for recusation, *prima facie* at least, sets out a legal objection to prejudice, the order of 9 December, 1950, and all subsequent orders and judgments entered in the cause or proceeding will be vacated, and the matters remanded for further consideration not inconsistent herewith. 48 C.J.S. 1105.

Error and remanded.

E. Y. PONDER v. NORTH CAROLINA STATE BOARD OF ELECTIONS, ET AL.

(Filed 7 June, 1951.)

Injunctions § 1: Elections § 18a—

A person to whom certificate of election has been issued may not enjoin the State Board of Elections and others from investigating the election, it being admitted that the defendants could do nothing to affect the title to the office, since in such case no personal or property right of plaintiff is threatened or endangered so as to entitle him to invoke the equitable jurisdiction of the court, nor could the complaint state a cause of action in his favor. G.S. 163-10 (11).

APPEAL by defendants from *Rudisill, J.,* in Chambers at Asheville, N. C., 9 January, 1951. From MADISON.

Civil action to restrain defendants from investigating or pursuing an investigation in Madison County of alleged election irregularities in the 7 November, 1950, election pertaining to the offices of Sheriff and Representative of the County.

The complaint alleges that the plaintiff was a candidate for Sheriff of Madison County on the Democratic ticket in the 7 November, 1950,

General Elections, in opposition to Hubert Davis, the then incumbent sheriff, who was a candidate to succeed himself on the Republican ticket; that certain protests were filed before the County Board of Elections at which the canvass of the votes was had, involving the offices of Sheriff, Clerk and Representative; that after hearing said protests, the plaintiff was duly declared elected Sheriff of the County, issued his certificate of election and inducted into office on 4 December, 1950; that thereafter, Hubert Davis and R. S. Rice, defeated Republican candidates for Sheriff and Representative respectively, filed their protests with the State Board of Elections and attempted to support the same with a number of affidavits; that said protests were set for hearing by the State Board in Raleigh on 28 November, 1950, on which date, after full showing on both sides, the hearing was recessed until the morning of 6 December, 1950, the Chairman of the Board stating that he had requested the State Bureau of Investigation to make a complete investigation of the conduct of the election in Madison County including the protests filed by Davis and Rice; that the meeting of 6 December lasted all day and a second adjournment was taken until the 19th of December to permit the S.B.I. to complete its investigation, and that on the 19th of December, after receiving the report of the S.B.I. and considering the same, the State Board of Elections decided to conduct an additional and further hearing in Madison County on 8 January, 1951.

This action was instituted in Madison County 5 January, 1951, to restrain the defendants, the State Board of Elections and its individual members, from holding the proposed public hearing in Madison County on 8 January for the reason and causes, as set out in the complaint, that "no statement was made to the plaintiff or his counsel" at the hearing on 19 December, 1950, "nor has any been made since by said Chairman of said Board, or any member thereof, as to the nature of the meeting of the Board called for January 8, 1951, what investigation it proposes to make, the charges it proposes to examine into, and plaintiff is unable to obtain this information so as to enable him to produce proper witnesses—the only information plaintiff has obtained is that the hearing will be oral and that all parties, including the Election Board itself may subpoena witnesses to testify at said hearing and that thereafter the Board will consider all of the affidavits heretofore filed, the report of the investigation by the S.B.I. and said oral testimony, though plaintiff has no knowledge as to character of the S.B.I. report or whether the Board of Elections is seeking other and additional evidence than it has heretofore received or corroboration of the evidence it has already received, and plaintiff is advised and believes that said proposed meeting of the State Board of Elections in Madison County is not proper, not legally called and is in violation of the rights of the plaintiff to be informed of the nature of said

proceeding and further that the said Board of Elections is without authority to hold said meeting or hearing for the purpose of determining the vote cast for the office of Sheriff and Representative in the General Election held in Madison County, North Carolina on November 7, 1950, for that the Superior Court has exclusive original jurisdiction of said matter."

It is further alleged that title to the office of Sheriff of Madison County is presently at issue in a *quo warranto* proceeding pending in the Superior Court of the county; that the defendants are undertaking to usurp the functions of the court in the matter, and that the investigation which the defendants propose to make, as plaintiff is informed and believes, is not in good faith, is unlawful, and will result only in embarrassment, intimidation, and a disturbing nuisance.

The defendants interposed a demurrer to the complaint on the grounds:

1. That the State Board of Elections, an agency of the State, is immune from suit without legislative permission, which has not been given;

2. That the complaint does not state facts sufficient to constitute a cause of action;

3. That the facts alleged are not sufficient to invoke the equitable jurisdiction of the court.

Demurrer overruled; exception.

The defendants filed answer admitting that they had no power to change the results of the election or to revoke any of the certificates of election, and further conceding that their only authority and purpose was to investigate alleged election irregularities, which by statute, G.S. 163-10, subsection 11, they are authorized to do, and report such findings, if any, to the Attorney-General or the solicitor of the district.

The defendants were restrained from holding the contemplated hearing in Madison County "as regards the offices of Sheriff and Representative for said County." Exception.

Defendant appeals, assigning errors.

J. Walter Haynes, A. E. Leake, and Shuford, Hodges & Robinson for plaintiff, appellee.

Attorney-General McMullan and Assistant Attorney-General Moody for defendants, appellants.

STACY, C. J. The first question for decision is whether the complaint states facts sufficient to constitute a cause of action or to invoke the equitable powers of the court. The trial court answered in the affirmative. We are inclined to a different view.

The demurrer should have been sustained on the second and third grounds set out therein. The complaint reveals no personal or property

right of the plaintiff which is threatened or endangered by anything the defendants propose to do. Conversely, it is alleged the defendants can do nothing to affect the title to the office of Sheriff which the plaintiff holds, and this is admitted. The plaintiff has "jumped before he is spurred." *Warren v. A. C. L. R. R.*, 223 N.C. 843, 28 S.E. 2d 505. The facts alleged are not sufficient to attract the attention of a court of equity or to invoke its jurisdiction. *Greenville v. Highway Com.*, 196 N.C. 226, 145 S.E. 31, and cases there cited; 28 Am. Jur. 216, *et seq.* Nor is it deemed essential or presently pertinent that we animadvert on allegations *dehors* the field of equity or which linger outside its province.

In this view of the matter, the remaining exceptions become moot or academic. The restraining order entered below will be vacated, the action dismissed, and the plaintiff taxed with the costs.

Reversed.

PATRICK LOCKLEAR v. FRENCH OXENDINE AND WIFE, PEARLIE OXENDINE; CHALMERS OXENDINE, HERBERT OXENDINE, REEDY CHAVIS, JAMES ARTHUR OXENDINE, HOBB JACOBS, OCIE OXENDINE, QUINCEY LOCKLEAR AND CLIFFORD OXENDINE.

(Filed 7 June, 1951.)

1. Champerty and Maintenance § 2: Reference § 12—

A champertous contract is void in this State and therefore where defendants set up this defense and the case is referred to a referee who fails to find facts relating to whether plaintiff's claim is champertous, it is error for the court to render judgment for plaintiff without finding the facts or making any conclusions of law in regard thereto.

2. Trespass to Try Title § 3—

In an action of trespass to try title, defendants' denial of plaintiff's title and of the trespass places the burden on plaintiff to prove title in himself and the trespass.

3. Adverse Possession § 9c—

A party claiming under color of title must fit the description in the deed to the land claimed.

4. Adverse Possession § 9b—

Presumptive possession to the outermost boundaries of a deed under which a party claims cannot extend to that part of the land which is in the actual and hostile possession of another.

5. Adverse Possession § 7—

A daughter stands in privity to her father, and may tack his adverse possession to her adverse possession.

6. Tenants in Common § 8—

One tenant in common can recover the entire tract against a third party.

APPEAL by defendants, other than D. L. Stewart, from *Grady, Emergency Judge,* at February Criminal Term, 1951 (by consent of all parties), of ROBESON.

Civil action, instituted 4 August, 1948, to recover land, and for damages for trespass thereon, and for injunction against cutting and removing timber therefrom.

Plaintiff alleges, in his amended complaint, that he is the owner of a certain tract of land, located in Smith's Township, Robeson County, North Carolina, specifically described as shown, and being a part of the lands described in the deed from J. A. Stewart to D. L. Stewart, recorded in Book 3-V, page 23, Robeson County Registry; that said lands consist entirely of woods land and located thereon are large quantities of trees, and merchantable timber, and that defendants have unlawfully entered upon said land and engaged in cutting trees, etc., and threaten to continue to do so, to the damage of plaintiff.

Whereupon plaintiff prays that he be declared the owner in fee of said land; that defendants be enjoined from further cutting of trees thereon; and that he recover of defendants damages in specific amount.

While defendants, answering, admit that the land described in the amended complaint is woodland, they deny all other material allegations, —saying particularly that "they have had nothing whatever to do with the cutting of any timber on lands belonging to plaintiff, but that they have been interested in the cutting of timber from certain lands belonging to these defendants prior to August 2, 1948, with which plaintiff is not concerned in any respect whatever."

And for a further defense, defendants aver:

"1. That the defendants are informed and believe that this action is not instituted in good faith on the part of the plaintiff, etc.

"2. The defendants are informed and believe that the said deed is not a *bona fide* purchase and the said deed is without any proper consideration, and that the plaintiff has declared that he has paid nothing for the lands described therein, wherever the same may be located, and that he had an agreement with his grantors that he was to pay nothing therefor, unless he could win the said lands in a lawsuit which was contemplated when said deed was executed, and that the plaintiff took said deed without any Revenue Stamps, and registered the same so as to claim a right to recover the same for the benefit of other people, to wit, the grantors in said deed, and that the said deed is purely speculative and for the purpose of instituting a lawsuit, and in connection therewith the plaintiff says that the plaintiff stated to the defendants when they were cutting timber

prior to August 2, 1948, that he had no interest in said lands and that they could go ahead with the cutting as they desired.

"3. The defendants are informed and believe that the plaintiff is not the real party in interest and has no right to maintain this action.

"4. That the aforesaid deed, registered in Book of Deeds 10-0, page 105, in the office of the Register of Deeds of Robeson County, if the same shall be found to cover any of the defendants' lands, is a cloud upon their title to their said lands, and they are entitled to have the same removed therefrom."

In accordance therewith defendants pray judgment, etc.

A compulsory reference was ordered in the case.

Upon hearing before referee the parties stipulated "that this lawsuit does not include and does not affect the lands lying north of the line marked 'E 13.84' on the map between the letters N and A, and south of the line running from the point M to I, on the south as indicated on the map of D. A. Buie, surveyor, although the plaintiff's pleadings do embrace other lands outside of that boundary."

And plaintiff offered in evidence:

1. Deed from D. L. Stewart, Janie Stewart, Emily White and husband A. H. White, to Patrick Locklear, the plaintiff, dated 2 August, 1948, registered, in form in fee simple, with no warranty, and purporting to convey the land described in the amended complaint, and being a part of lands described in deed from J. A. Stewart to D. L. Stewart recorded in Book 3-V, page 23, of Robeson County.

2. Four other deeds (1) from D. L. Stewart and wife Nettie Stewart to Janie Stewart and Emily White, dated 23 March, 1946, and registered 3 August, 1948, (2) from G. B. Patterson to Nettie Stewart, dated 22 March, 1919, and registered, (3) from D. L. Stewart and wife Nettie Stewart to G. B. Patterson, dated 22 March, 1919, and registered, and (4) from J. A. Stewart, John A. Stewart and wife Eliza Stewart, to D. L. Stewart, date not shown, but registered 30 October, 1896, purporting to convey, in pertinent part, specifically or by reference, a boundary of land, as to which the testimony offered by plaintiff tends to show include the lands described in the complaint, and other lands.

3. And plaintiff offered testimony of numerous witnesses as to acts of possession on behalf of D. L. Stewart on various parts of the land both inside and outside the calls of the land as set out in the complaint. Plaintiff, himself, testified in this respect.

In plaintiff's testimony, as appears in the case on appeal, are these statements: (On direct examination): "This suit with French Oxendine was started right after I got the deed from Mr. Stewart . . . about two weeks after. I paid Mr. Stewart something over $400. . . . in consideration of this deed he gave me for this land in dispute. I was to give

him $50.00 an acre outside the swamp, and I have actually paid him a little over $400. He said he would have to finish running the land to see how many acres in the swamp and said he would let me have it for $10."

Then on cross-examination plaintiff said, in pertinent part: "I began this suit before I had this written agreement to purchase; I brought this suit before the agreement was made; I wouldn't be positive whether it was before or after; positive about the agreement. I cannot tell the date I brought this suit. I don't know whether I made this agreement after I got my deed, or not. I am not positive about what time it was . . . I think this agreement was dated August 2, 1948 . . . After this agreement was executed I paid him for the hill land . . . According to my agreement with Mr. Stewart I cannot pay him for it unless I recover this swampland; when he gives me a deed for it I will pay him but not before then. If I lose the land I wouldn't have any right to pay it." P. 66 of the record.

Plaintiff also offered in evidence a written agreement dated 12 August, 1948, purporting to relate to the consideration for the said deed from D. L. Stewart, *et al.*, to plaintiff dated 2 August, 1948.

Plaintiff also offered in evidence deposition of D. L. Stewart, date of its taking not being shown, but in which, after testimony in respect to the land in controversy, he states, among other things, that he was born 7 March, 1859, that until recently he has "been able to be up and about the place"; and that he has "been confined to bed about 12 months."

On the other hand, defendants offered testimony tending to show, in the main, that they, and Arch Bullard, father of defendant Pearlie Oxendine, have had more than twenty years adverse possession of the land claimed by plaintiff.

The referee made findings of fact, on which he concluded that plaintiff is the owner of the land described in the complaint except two small boundaries to which he finds and concludes the defendants French Oxendine and Pearlie Oxendine, by tacking their adverse possession to adverse possession of Arch Bullard, father of Pearlie Oxendine, have had twenty years such possession, and are entitled to be declared the owners thereof in fee simple.

Plaintiff filed specific exceptions to so much of the report as was adverse to him. Defendants did likewise as to so much of the report as was adverse to them—and defendants, also, excepted to the failure of the referee to find facts, and to make conclusions of law in respect to their plea that plaintiff cannot maintain this action on account of the champertous agreement between plaintiff and D. L. Stewart, *et al.*, under whom plaintiff claims title.

The judge of Superior Court, on hearing upon the exceptions filed to the report of referee, after making certain declarations, hereinafter re-

ferred to in pertinent part, sustained the exceptions filed by plaintiff, and overruled all exceptions filed by defendants.

Defendants take specific exception to practically every ruling, finding of fact, and conclusion of law so made by the judge,—and appeal to Supreme Court and assign error.

McKinnon & McKinnon and F. D. Hackett for plaintiff, appellee.

J. E. Carpenter and Varser, McIntyre & Henry for defendants, appellants.

WINBORNE, J. A careful consideration of the exceptions covered by the assignments of error presented on this appeal reveal error prejudicial to defendants.

I. The judge of Superior Court in disposing of defendants' exception to the failure of the referee to find the facts on the evidence bearing upon their plea that the deed to plaintiff from D. L. Stewart, *et al.*, is void in that the consideration therefor is champertous, likewise failed to find the facts, and to make the conclusions of law arising thereon.

Defendants group exceptions thereto, and pertaining thereto, and assign same as error. We agree, and hold that error appears.

The common law offenses of champerty and maintenance have been considered and condemned in this State. See *Merrell v. Stuart,* 220 N.C. 326, 17 S.E. 2d 458, where the authorities are discussed and the principles applied. See also *Martin v. Amos* (1851), 35 N.C. 201; *Barnes v. Strong,* 54 N.C. 100; *Munday v. Whissenhunt,* 90 N.C. 458. Compare *Smith v. Hartsell,* 150 N.C. 71, 63 S.E. 172; *S. v. Batson,* 220 N.C. 411, 17 S.E. 2d 511; 139 A.L.R. 614, and *Lamm v. Crumpler, post,* 717.

In *Martin v. Amos, supra,* this Court in opinion by *Nash, J.,* had this to say: "The object of all laws is to repress vice and to promote the general welfare of the State; and no one can be assisted by the law in enforcing demands founded on a breach or violation of its principles. Hence sprung the maxim at common law, *'Ex turpi contractu non oritur actio.'* It is the public good which allows a contract to be impeached for the illegality of the consideration . . . A defendant, therefore . . . may . . . prove that the consideration upon which it was given is illegal, as being immoral or contrary to public policy," and, continuing, "Maintenance is an offense against public justice, and is defined by *Justice Blackstone,* 4 Com. 134, to be 'an officious intermeddling in a suit that no way belongs to one by maintaining or assisting either party, with money or otherwise, to prosecute or defend it, . . . Champerty is a species of maintenance, being a bargain with a plaintiff or defendant to divide the subject in dispute, if they prevail, whereupon the champertor is to carry on the

suit at his own expense' . . . All contracts, then, founded upon either or both of these offenses are absolutely void."

While the applicability of the provisions of G.S. 1-57 may arise upon further hearing, we do not reach it on this record.

II. Defendants also take exceptions to recitals in the judgment which they contend indicate that the court found the facts in misapprehension of the law applicable to the case,—and assign same as error. The contention seems to have merit.

When in an action for the recovery of land and for trespass thereon defendant denies plaintiff's title and defendant's trespass, nothing else appearing, issues of fact arise both as to title of plaintiff and as to trespass by defendant,—the burden as to each being on plaintiff. *Mortgage Corp. v. Barco,* 218 N.C. 154, 10 S.E. 2d 642; *Smith v. Benson,* 227 N.C. 56, 40 S.E. 2d 451.

In such action, plaintiff must rely upon the strength of his own title. This requirement may be met by various methods which are specifically set forth in *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142; see also *Prevatt v. Harrelson,* 132 N.C. 250, 43 S.E. 800; *Moore v. Miller,* 179 N.C. 396, 102 S.E. 627; *Smith v. Benson, supra,* and many others.

Moreover, in all actions involving title to real property, title is conclusively presumed to be out of the State unless it be a party to the action, G.S. 1-36, but "there is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself. *Moore v. Miller, supra; Smith v. Benson, supra.*

In the light of such presumption, apparently, plaintiff in the present action, assuming the burden of proof, has elected to show title in himself by adverse possession, under known and visible lines and boundaries and under color of title, which is one of the methods by which title may be shown. In pursuing this method a deed offered as color of title is such only for the land designated and described in it. *Davidson v. Arledge,* 88 N.C. 326; *Smith v. Fite,* 92 N.C. 319; *Barker v. R. R.,* 125 N.C. 596, 34 S.E. 701; *Johnston v. Case,* 131 N.C. 491, 42 S.E. 957; *Smith v. Benson, supra.*

In *Smith v. Fite, supra,* this headnote epitomizes the opinion of the Court by *Smith, C. J.,* "Where a party introduces a deed in evidence, which he intends to be used as color of title, he must prove that its boundaries cover the land in dispute, to give legal efficacy to his possession." In other words, the plaintiff must not only offer the deed upon which he relies, he must by proof fit the description in the deed to the land it covers—in accordance with appropriate law relating to course and distance, and natural objects called for as the case may be.

The general rule as to this is that in order to locate a boundary, the lines should be run with the calls in the regular order from a known beginning, and the test of reversing in the progress of the survey should be resorted to only when the terminus of a call cannot be ascertained by running forward, but can be fixed with certainty by running reversely the next succeeding line. *Lindsay v. Austin,* 139 N.C. 463, 51 S.E. 990; *Land Co. v. Lang,* 146 N.C. 311, 59 S.E. 703; *Hanstein v. Ferrall,* 149 N.C. 240, 62 S.E. 1070; *Cornelison v. Hammond,* 224 N.C. 757, 32 S.E. 2d 326; *Belhaven v. Hodges,* 226 N.C. 485, 39 S.E. 2d 366.

Apparently the court, in considering the case, assumed that plaintiff had so located the boundaries of the lands described in the deeds to plaintiff's predecessors in title, on which plaintiff relies as color of title, and in this light, has considered evidence of possession outside the *locus in quo* as extending constructively to the *locus in quo.*

Furthermore, the court declared, "It is common learning that the possession of any part of the land described in his deed is constructive possession of the entire tract, against all persons, except those having a superior title to the part which is held only by constructive possession."

This declaration is not entirely in accord with what is held in the recent case of *Wallin v. Rice,* 232 N.C. 371, 61 S.E. 2d 82. The headnote there expresses the holding in this manner: "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." See also *Currie v. Gilchrist,* 147 N.C. 648, 61 S.E. 581, as to lappages.

III. The referee found as a fact, and concluded as a matter of law that defendants French Oxendine and Pearlie Oxendine are entitled to tack their adverse possession to the adverse possession of Arch Bullard, father of Pearlie Oxendine, in order to establish title to a certain portion of the disputed land, etc. Plaintiff excepted thereto. Defendants excepted also, for that the finding, and conclusion were limited to only a part of the *locus in quo.* The court overruled both the finding and the conclusion of the referee.

In this connection, the court said: "The sole question presented to the court was whether or not French Oxendine and his wife had been in the adverse possession of the lands in question for the statutory period of 20 years."

However, the principle prevails in this State that several successive possessions may be tacked for the purpose of showing a continuous adverse possession where there is privity of estate or connection of title between the several occupants. A daughter stands in privity to her father, and may tack his adverse possession to her adverse possession to ripen title by adverse possession. See *Ramsey v. Ramsey,* 224 N.C. 110, 29 S.E. 2d 340.

Moreover, one tenant in common can recover the entire tract against a third person. See *Winborne v. Lumber Co.,* 130 N.C. 32, 40 S.E. 825, and cases cited.

For reasons pointed out, the judgment from which appeal is taken will be and is set aside, and the cause is remanded for further proceedings as to justice appertains, and the rights of the parties may require. *Hanford v. McSwain,* 230 N.C. 229, 53 S.E. 2d 84; *Perkins v. Sykes, ante,* 147.

Error and remanded.

J. C. LAMM v. JUNE CRUMPLER AND T. R. HUMPHREY.

(Filed 7 June, 1951.)

1. Pleadings § 16—

A demurrer *ore tenus* for that the complaint fails to state a cause of action may be interposed at any time, even in the Supreme Court on appeal, or the Court may raise the question *ex mero motu.*

2. Contracts § 7—

A contract for the division of lands to be purchased at a judicial sale in consideration of the withdrawal of the raised bid on one tract by one of the parties and the agreement by both parties not to bid against the other as to the tracts in which they were interested, renders the contract contrary to public policy and void, and the agreement for the division of the lands may not be enforced by either.

APPEAL by defendants from *Carr, J.,* Resident Judge, Tenth Judicial District, of ALAMANCE.

Civil action to reform written contract pertaining to land, and for specific performance of contract as reformed for conveyance of land, heard in Superior Court upon demurrer to the complaint, and in Supreme Court on exception to ruling on said demurrer, and on demurrer *ore tenus* first entered in Supreme Court.

The complaint, at the outset, alleges that on 2 July, 1949, "the plaintiff and the defendant, June Crumpler, executed and delivered, under the circumstances hereinafter alleged, a certain written instrument, a copy

of which is attached hereto, marked Exhibit A, and made a part of the complaint."

Exhibit A is as follows:

"AGREEMENT

"NORTH CAROLINA
ALAMANCE COUNTY

"This agreement made and entered into this the 2nd day of July 1949 by and between J. C. Lamm, party of the first, and June Crumpler, party of the second part, all of Alamance County, North Carolina: WITNESSETH,

"(One) For and in consideration of the sum of $10.00, to each of the parties by the other party paid, and the agreements hereinafter set forth; the receipt of which is hereby acknowledged, the parties agree as follows:

"(Two) The party of the first part agrees to assign his bid on tract #35 of the R. G. Hornaday Estate to the party of the second part, and the said party of the first part does hereby assign his bid to the party of the second part.

"(Three) The party of the second part hereby agrees to convey to the party of the first part all that certain land in said Tract #35 (Thirty Five) consisting of a strip of land one hundred and fifty feet wide (150 feet) and nine hundred and seventy-two and nine-tenths feet long carved from the Western boundary line of said tract #35 (thirty five), this strip of land runs along the entire Western boundary line of tract #35, at and for the purchase price of Fifteen Hundred Dollars ($1500.00).

"(Four) It is agreed between both parties to this contract that the party of the first part has an option to purchase from the party of the second part an additional tract of land adjoining the described tract in the paragraph first above not to exceed two hundred and twenty-five (225) feet in width, and said tract to run the full depth of the property away from the Elon-Burlington Road, a line parallel with the Western boundary line of said tract #35 at the same price per acre as the remaining acres cost the party of the second part.

"(Five) The party of the second part agrees to reassign to the party of the first part the bid or property for the money invested by the party of the second part in the property; and the party of the first part agrees not to bid or cause anyone else to bid upon lot #34 or #35.

"(Six) The party of the second part agrees to dedicate a street fifty feet wide, at the request of the party of the first part, on the East boundary of the property described in paragraph three above; said street may be moved fifty-one feet East of said boundary line at the request of the party of the first part.

"In testimony whereof the parties have hereunto set their hands and seals, the day and year first above written.

"Wit. BARNIE P. JONES	J. C. LAMM	(SEAL)
Wit. EUGENE A. GORDON	JUNE CRUMPLER	(SEAL)."

Plaintiff then makes these allegations:

"3. That prior to the execution of said paper writing marked Exhibit A, to-wit: on or about June 22, 1949, certain real estate situate in Alamance County known to the plaintiff and the defendants and referred to in said paper writing as 'the R. G. Hornaday Estate' had been offered for sale at public auction by Commissioners of the Superior Court of Alamance County. That at said sale, the defendants jointly became the highest bidders for Tract No. 34, and the plaintiff became the highest bidder for Tract No. 35. That in accord with the terms of the sale announced by said Commissioners at said sale, said sales remained open for receipt of increased bids for a period of ten (10) days and were subject to the approval of the Court.

"4. That the ten-day period within which increased bids were permitted to be filed with said Commissioners expired at midnight on July 2, 1949, and within the time limited for the receipt of increased bids the plaintiff deposited with said Commissioners an increased or upset bid on Tract No. 34 of said lands, which increased bid was withdrawn by the plaintiff under the circumstances and upon the conditions hereinafter alleged. . . .

"6. That on July 2, 1949, after the defendants had learned that the plaintiff had deposited an increased bid on Tract No. 34, the defendant Crumpler, acting for himself and his co-defendant, insisted that the plaintiff meet with him for the purpose of discussing and, if possible, reaching some mutually satisfactory agreement with respect to the purchase of said Tracts Nos. 34 and 35 of the R. G. Hornaday Estate. After much urging, the plaintiff finally agreed to confer with the defendant, June Crumpler, and did meet him at a late hour on the night of July 2, 1949. At that time, the defendant, June Crumpler, represented to the plaintiff that he and his co-defendant, T. R. Humphrey, were compelled to acquire Tract No. 34, and in all probability a small part of Tract No. 35 of said lands for their housing development and that unless they did acquire said property their plans would not be approved by the appropriate Housing Authority; that for those reasons they wanted to make an agreement with the plaintiff to the effect that if plaintiff would withdraw his upset bid on Tract No. 34 and assign his bid on Tract No. 35 to the defendant, June Crumpler, the defendants would agree to advance the purchase price of Tract No. 35 and upon receipt of the conveyance of said lands from

the Commissioners, the defendants would immediately reconvey to the plaintiff so much of the west side of Tract No. 35 as they were then sure they would not be required to own in order to obtain approval of their housing development (as detailed) . . . and that thereafter, as soon as their housing project was approved and it was thereby determined how much of the remainder of Tract No. 35 the defendants were required to own, or if it was ascertained that approval could not be obtained for said housing development, the defendant, June Crumpler, acting for himself and his co-defendant, would reconvey all of the remaining part of Tract No. 35 to the plaintiff at the cost to the defendants and without profit to them. The plaintiff was reluctant to enter into the proposed agreement, but after repeated assurances by the defendant Crumpler, (in accordance with the agreement, etc.), the plaintiff accepted said proposal.

"7. That at the time said understanding and agreement was entered into as aforesaid, it was approximately midnight and the time within which upset bids could be deposited with the Commissioners was about to expire, and while the parties and their attorneys were engaged in great haste in an effort to reduce the aforesaid agreement to writing, the plaintiff, in reliance on the foregoing understanding and agreement and at the request of the defendant, Crumpler, withdrew his deposit as an upset bid on Tract No. 34. That the paper writing, marked EXHIBIT A, was then and there signed by the plaintiff and the defendant, June Crumpler."

It is also alleged in the complaint that the Superior Court on 6 July, 1949, confirmed the sale of Tract No. 34 to defendants, and of Tract No. 35 to plaintiff, as the last and highest bidders therefor, respectively, and directed the Commissioners to execute and deliver deeds in accordance therewith upon payment of the purchase price; that under circumstances detailed,—proposed by defendant Crumpler, a temporary division of Tract No. 35 was made, and in accordance therewith the Commissioners executed deed to plaintiff for a part, and the Commissioners and plaintiff made deed to defendants for the remainder of said tract, all of which was done "subject to the right of plaintiff to receive a conveyance from them (defendants) of all the said land which was not actually used by the defendants in their housing development"; that only a small portion of Tract No. 35 was used by defendants in their housing development, leaving a specific part thereof (described in paragraph 14), for which plaintiff is entitled to deed from defendants, which they decline to make.

Then plaintiff alleges, in paragraph 12 of the complaint, the facts in respect of his plea of mutual mistake and error of draftsman on which he asks reformation of the contract, etc.

Thereupon, plaintiff prays judgment (1) that the paper writing, Exhibit A, be reformed to express the real contract as alleged; (2) that defendants hold title to land described in paragraph 14 as trustees, in

trust for benefit of plaintiff; (3) that defendants be required to perform the contract as so reformed; (4) that in event defendants are unable to specifically perform said contract plaintiff have monetary damages; and (5) that plaintiff have such other and further relief to which he may be entitled.

Defendants demurred to the complaint for that it does not state facts sufficient to constitute a cause of action either for reformation of the written instrument, or for specific performance, in that (1) the agreement was "made openly and in the presence of plaintiff and his counsel and defendant and his counsel, and . . . plaintiff's counsel assisted plaintiff in preparing said written agreement," and (2) "the real property asked by the plaintiff to be conveyed was in fact conveyed to the defendants by written deed executed and acknowledged and delivered to the defendants by the plaintiff," etc.

This demurrer was heard by the Resident Judge of the District, by consent, who overruled it, by order duly entered.

Defendants appeal therefrom to Supreme Court, and assign this ruling as error.

And, further, defendants enter, in this Court, demurrer *ore tenus* to the complaint for that it "shows upon its face, that the action was brought to reform a written contract, and to enforce the contract, as reformed, and it shows further upon its face that the contract was one that tended to chill bidding at a public sale, and the contract in the record uses these words: "and the party of the first part (Lamm) agrees not to bid or cause anyone else to bid upon lot No. 34 or No. 35," and in that "plaintiff, being a party to this agreement, will not be allowed to invoke the equitable jurisdiction of the court to compel the conveyance to him of the real estate which he claims by virtue of the contract."

Brooks, McLendon, Brim & Holderness for plaintiff, appellee.

Allen & Allen and Young, Young & Gordon for defendants, appellants.

WINBORNE, J. The point raised by the demurrer *ore tenus* entered here for the first time, and debated orally, being well founded, takes precedence over, and renders it unnecessary to consider those questions of law arising upon the demurrer filed and heard in the trial court, and debated in the written briefs of the parties on this appeal. Hence we have abbreviate statement of facts pertaining to those questions of law.

A defendant in a civil action in this State may demur *ore tenus* at any time in either the trial court, or in the Supreme Court, upon the ground that the complaint does not state a cause of action. Indeed, the Court may raise the question *ex mero motu*. *Garrison v. Williams*, 150

N.C. 674, 64 S.E. 783; *Snipes v. Monds,* 190 N.C. 190, 129 S.E. 413; *Watson v. Lee County,* 224 N.C. 508, 31 S.E. 2d 535.

Hence the demurrer *ore tenus* interposed in this Court, as hereinabove set forth, is timely.

"A sale at auction is a sale to the best bidder, its object, a fair price, its means, competition,—any agreement, therefore, to stifle competition is a fraud upon the principles on which the sale is founded. It . . . vitiates the contract between the parties, so that they can claim nothing from each other . . .," so declared this Court in opinion by *Henderson, C. J.,* in *Smith v. Greenlee,* 13 N.C. 126. This principle has been applied through subsequent years. See *Morehead v. Hunt,* 16 N.C. 35; *Bailey v. Morgan,* 44 N.C. 352; *McDowell v. Simms,* 45 N.C. 130; *Ingram v. Ingram,* 49 N.C. 188; *Whitaker v. Bond,* 63 N.C. 290; *Davis v. Keen,* 142 N.C. 496, 55 S.E. 359; *Henderson v. Polk,* 149 N.C. 104, 62 S.E. 904; *Owens v. Wright,* 161 N.C. 127, 76 S.E. 735.

In *Whitaker v. Bond, supra,* the relief sought by the complainant is specific performance of a contract relating to land. The 4th headnote epitomizes the opinion of the Court: "Where a bidder at auction offered one, who also proposed to bid, that if he would desist she would divide the land with him: *Held,* to be a fraud upon the vendor and so to violate the contract of purchase afterwards made by her as the only bidder."

Moreover, it is an established principle, universally applied in this jurisdiction to various factual situations, that an executory contract, the consideration of which is against good morals, or against public policy, or the laws of the State, or in fraud of the State, or of any third person, cannot be enforced in a court of justice. *Sharp v. Farmer,* 20 N.C. 255; *Blythe v. Lovinggood,* 24 N.C. 20; *Allison v. Norwood,* 44 N.C. 414; *Ramsay v. Woodard,* 48 N.C. 508; *Ingram v. Ingram, supra; Powell v. Inman,* 52 N.C. 28; *King v. Winants,* 71 N.C. 469; *S. c.,* 73 N.C. 563; *York v. Merritt,* 77 N.C. 213; *Covington v. Threadgill,* 88 N.C. 186; *Griffin v. Hasty,* 94 N.C. 438; *Culp v. Love,* 127 N.C. 457, 37 S.E. 476; *Owens v. Wright, supra; Marshall v. Dicks,* 175 N.C. 38, 94 S.E. 514; *Penland v. Wells,* 201 N.C. 173, 159 S.E. 423; *Shoe Co. v. Dept. Store,* 212 N.C. 75, 193 S.E. 9.

For instance, in *Blythe v. Lovinggood, supra,* it is held: "The law prohibits everything which is *contra bonos mores,* and, therefore, no contract which originates in an act contrary to the true principles of morality can be made the subject of complaint in the courts of justice."

In this case commissioners, appointed to sell land for the State at public auction, declared, as one of the conditions of the sales, that if the highest bidder did not comply with his contract, the next highest should have the land. Defendant, second to plaintiff in highest bids, gave to plaintiff note for $100 for failing to comply with his bid. The court held that

the transaction was fraudulent toward the State, and that such note was void, on the ground of its fraudulent consideration.

And in *Ingram v. Ingram, supra,* it is held that agreements between persons interested in an estate, the consideration of which is not to bid against each other at the administrator's sale, is against the public policy, and void.

In *Marshall v. Dicks, supra,* the Court through *Hoke, J.,* restated the principle in these words: "It is the fixed principle with us, and, so far as we are aware, of all courts administering the same system of laws, that when the parties are *in pari delicto* they will not enforce the obligations of an executory contract which is illegal or contrary to public policy or against good morals. Nor will they lend their aid to the acquisition or enjoyment of rights or claims which grow out of, and are necessarily dependent upon such a contract."

Applying these principles to the case in hand: It clearly appears from the complaint that the withdrawal of the raised bid, plaintiff had placed on tract No. 34, was a consideration for the contract plaintiff now seeks to reform, and then to enforce. Manifestly, its purpose, reflected in the contract itself, was to stifle bidding on both tracts Nos. 34 and 35. Thus, the withdrawal of the amount required to raise the bid was fraudulent towards those interested in the property bringing a fair price through fair competition. *Blythe v. Lovinggood, supra; King v. Winants, supra,* and other cases *supra.*

This makes the transaction contrary to public policy, and void. Therefore, plaintiff has no right to be aided, and enforced. This is so, not for the sake of defendant, but "it is founded in general principles of policy." *Holman v. Johnson,* 1 Cowp. 343, 98 Eng. Rep. Full Reprint 1120. To like import are: *Blythe v. Lovinggood, supra; Ingram v. Ingram, supra.*

If the plaintiff and defendants were to change sides, defendants would be confronted with same obstacle.

For reasons stated, the demurrer *ore tenus* is allowed.

Demurrer sustained.

Action dismissed.

IN THE MATTER OF THE WILL OF FREDERICK GEER TATUM, DECEASED.

(Filed 7 June, 1951.)

1. Evidence § 21—

The fact that an answer is not responsive to the question does not in itself render the answer incompetent and justify the withdrawal of the testimony from the jury, but to the contrary if the answer contains relevant and pertinent testimony it is nonetheless competent because the matter contained therein was not specifically asked for.

2. Wills § 23b—

A nonexpert witness who has shown that he has had opportunity to form a reasonably reliable appraisal of the mental powers of testator, while he may not testify as to whether testator had sufficient mental capacity to make a will, may give his opinion as to whether testator had sufficient mental capacity to know the nature of his property, the natural objects of his bounty, and the nature and effect of a testamentary disposition of his property, and he may also state facts observed about the conduct of testator upon which the opinion is based.

3. Same—

In response to a question as to whether the witness had an opinion satisfactory to herself as to whether testator possessed sufficient mental capacity to know what property he had, who his relatives were and what claims they had upon him, and whether he understood the nature and effect of the disposition of his property by will, the witness narrated facts relevant to the inquiry concerning testator's conduct as she had observed it. *Held:* It is error to strike out the answer as not responsive to the question, since observed facts constituting a basis for an opinion as to the mental capacity are competent. Often the better practice would be for counsel to limit the scope of each question and move through the zone of opinion-inquiry step by step.

4. Wills § 21b—

Mental capacity to make a will is not a question of fact but is a conclusion of law to be drawn from the essential factual elements as to his capacity to know what property he has, the natural objects of his bounty and his understanding of the nature and effect of the testamentary disposition of his property, each of which is essential to support the conclusion.

5. Wills § 25—

A charge to the effect that named witnesses had testified that in their opinion testator did not have mental capacity to make a will must be held for reversible error as expressing an opinion in evaluating the opinion testimony. G.S. 1-180.

6. Wills § 30: Executors and Administrators § 1—

An executor is charged with the preservation of the estate pending final determination of the issue of *devisavit vel non* in favor of caveator upon appeal, unless and until he be removed, G.S. 28-32, and therefore upon the answer of the issue in favor of caveators it is error for the court to appoint commissioners with direction that they give bond and handle the estate.

APPEAL by propounders from *Hatch, Special Judge,* and a jury, at January Civil Term, 1951, of DURHAM. New trial.

Issue of *devisavit vel non* decided in favor of caveator on the question of testamentary capacity of the testator, Frederick Geer Tatum.

From judgment upon the verdict setting the will aside, the propounders appealed, assigning errors.

Egbert L. Haywood for propounders, appellants.

Victor S. Bryant, Robert I. Lipton, Ralph N. Strayhorn, Victor S. Bryant, Jr., and Fuller, Reade, Umstead & Fuller for caveator, appellees.

JOHNSON, J. The testator was an inmate of Watts Hospital in the City of Durham from 23 January, 1950, until his death on 2 March, 1950. The will was executed in the hospital on 17 February, 1950. Mrs. I. J. Newton, a registered nurse who was on duty at the hospital during the testator's last illness, was called as a witness by the propounders. She testified that the testator was a patient on Ward K, to which she was assigned during the period he was a patient at the hospital, and that she administered to him and saw and talked to him from time to time. The following examination then ensued:

"Q. Mrs. Newton, based upon your conversations and your observations, do you have an opinion satisfactory to yourself as to whether Mr. Tatum possessed on February 17, 1950, sufficient mental capacity to know what property he had, who his relatives were, what claims they had upon him and whether he was capable of disposing of his property by will and of understanding the consequences and effect of so doing: do you have such an opinion?

"A. I do have such an opinion.

"Q. What is your opinion, Mrs. Newton?

"A. Well, in my opinion February 17th was not any different date to him than any other day that he was in the hospital. I observed by his conversations that I had with him frequently that he knew what he was doing; he read the newspapers, he was a very witty person and the jolliest person on the ward, and when anybody told him a joke it just did everybody good to hear him laugh.

"Motion to strike on the grounds it is not responsive. Motion allowed.

"COURT: You will not consider the answer, gentlemen of the jury."

"Exception."

"Q. I will ask you: do you have an opinion satisfactory to yourself as to whether Mr. Tatum possessed on February 17, 1950, based upon your conversations and your observations, sufficient mental capacity to know what property he had, who his relatives were, what claims they had upon him, and whether he was capable of disposing of his property by will and of understanding the consequences and effect of so doing; do you have such an opinion.

"A. I do.

"Q. What is it: Just state your opinion and you can show your basis and make your explanation. State your opinion, if you will, please.

"A. In my opinion, I feel that he knew what he was doing, as he always did. There is not a doubt in my mind that he didn't know what he was doing.

"Motion to strike as not being responsive.

"Motion allowed.

"Exception."

Counsel for the propounders pursued the examination through several further questions. It produced nothing of substance for the record. The witness was then excused.

There was no objection to the form of the foregoing questions. The caveator's challenges were directed solely to the answers of the witness. The caveator moved to strike the answers on the ground they were not responsive to the questions. The propounders insist that the court erred in allowing the motions, and that this is so, even though it be conceded that the answers were not responsive to the questions.

Propounders' position appears to be well taken. Whether the answers were responsive to the questions is not controlling. The determinative question before the court below was whether the answers were relevant and competent as bearing upon the issue of mental capacity of the testator. If the answers furnished relevant facts, they were nonetheless admissible merely because they were not specifically asked for. Silence may not be imposed to eliminate relevant, pertinent testimony simply because it is not specifically requested. This rule is rooted in the fundamental tenets of natural justice and is supported by common sense. Its universal application can do no harm, for if an unresponsive answer produces irrelevant facts, they may be stricken out and withdrawn from the jury. See *Huffman v. Lumber Co.*, 169 N.C. 259, 85 S.E. 148; *Hodges v. Wilson*, 165 N.C. 323, 81 S.E. 340. See also Wigmore on Evidence, Third Edition, Vol. III, Sec. 785, p. 160, where it is said: "Courts ought to cease repeating the novel and unwholesome assertion that 'where an answer is not responsive to the question put, it is the duty of the Court to strike it out, on motion.' . . . This topic of responsiveness has somehow become in modern times beset with crude misunderstandings, that tend to suppress truth and turn the inquiry into a logomachy:" . . .

It is elementary that in the trial of a case involving the issue of testamentary capacity, a lay witness, who qualifies by showing he has had opportunity to form a reasonably reliable appraisal of the mental powers of the testator, may give an opinion or opinions as to the testator's measure of mental capacity to deal with certain given factual situations. And while a witness who gives an opinion as to testamentary capacity may also state observed facts about the conduct of the testator on which the opinion is based, it is not necessary that this be done. "All that needs to appear

in advance is that he had an opportunity to observe and did observe, whereupon it is proper for him to state his conclusions, leaving the detailed grounds to be drawn out on cross-examination." Wigmore on Evidence, Third Edition, Vol. VII, Sec. 1922, p. 20 (citing and commending opinion by *Stacy, J.* (now *C. J.*) in *S. v. Hightower,* 187 N.C. 300, 121 S.E. 616). See also Wigmore on Evidence, Third Edition, Vol. VII, Sec. 1935, p. 35.

It is established by our decisions that in the trial of a will case a qualified witness may express an opinion or opinions that the testator did or did not have sufficient mental capacity to know (1) the nature and extent of his property; (2) who were the natural objects of his bounty, that is, those persons who would or should or might be expected to take his property in the absence of a will (Words and Phrases, Permanent Edition, Vol. 28, p. 49); and (3) what he was doing, and to whom he wished to give his property and how, that is, the force and effect of his act in making a will, thereby disposing of his property. *In re Will of York,* 231 N.C. 70, 55 S.E. 2d 791; *Clary v. Clary,* 24 N.C. 78. And in the examination of a lay witness, it is not necessary, as intimated by the court below, for counsel to compress into a single question several elements of approved factual tests of testamentary capacity or lack of it. Nor is it required that a witness include all elements in the response. No sound reason is perceived why a witness may not express an opinion that embraces only part of the approved factual elements of the presence or absence of testamentary capacity. Frequently,—as possibly in the instant case,—a witness may feel only partially qualified to express an opinion as to the several tests included in an all-embracing question. Besides, when a lack of testamentary capacity is sought to be shown, it may suffice to establish the absence of only one of the essential factual elements. And, too, in deference to the mental processes of some witnesses, it is frequently not amiss for examining counsel to limit the scope of each question, and move through the zone of opinion-inquiry step by step, rather than in one leap.

And, of course, a nonexpert witness who appears to be qualified to give an opinion, nevertheless may refrain from doing so, and elect instead to relate the facts observed by him, and describe as best he can the acts, conduct, and demeanor of the person under investigation. Indeed, prior to the notable decision of this Court (delivered by *Gaston, J.*) in *Clary v. Clary, supra* (24 N.C. 78), it seems that under the rule which prevailed generally in the United States at that time, a lay witness was permitted to relate only observed facts, and never allowed to give an opinion based thereon. Wigmore on Evidence, Third Edition, Vol. III, Sec. 1933, p. 31 *et seq.*

In the instant case, the questions propounded to Mrs. Newton invited her to express an abstract opinion as to the mental capacity of the testator, based upon her observations of his conduct in the hospital. She chose to be more concrete. She eschewed the opinion, in part at least, and narrated facts about the testator's conduct as she observed them. Instead of conforming herself entirely to the abstract opinion called for, she elected to follow in part the more direct course of relating the facts as perceived by her,—the observed facts behind the opinion sought. Her answers as given are sanctioned by well considered authorities on the subject. *In re Will of York, supra* (231 N.C. 70); *In re Will of Stocks,* 175 N.C. 224, 95 S.E. 360; *In re Broach's Will,* 172 N.C. 520, 90 S.E. 681; *In re Rawlings' Will,* 170 N.C. 58, 86 S.E. 794, and cases there cited; *Smith v. Smith,* 117 N.C. 326, 23 S.E. 270; *Clary v. Clary, supra* (24 N.C. 78). See also Wigmore on Evidence, Third Edition, Vol. VII, Sections 1917 through 1938.

Another group of exceptions brought forward by the propounders relate to the charge. The court in summarizing the testimony of caveator's witnesses, compressed it into packaged opinions in this fashion: The first witness . . . Mr. O'Briant . . . testified that in his opinion Frederidk Geer Tatum did not have the mental capacity to make a will. . . ." "Mr. Conrad testified . . . that in his opinion Frederick Geer Tatum did not have the mental capacity to make a will. . . ." Then, right on through the testimony of nineteen other witnesses for the caveator, the court continued to so summarize the testimony of the various witnesses.

It is well established that a nonexpert witness may not be permitted to make the abstract statement that a testator "did not have the mental capacity to make a will." This is so for the reason that mental capacity to make a will is not a question of fact. "It is a conclusion which the law draws from certain facts as a premise." *In re Will of Lomax,* 224 N.C. 459, p. 462, 31 S.E. 2d 369; *In re Will of York, supra* (231 N.C. 70). See also Wigmore on Evidence, Third Edition, Vol. VII, Sec. 1958, p. 89.

The bulk of caveator's evidence was offered in substantial compliance with the foregoing rule. Counsel in eliciting the testimony appear to have observed the rule with meticulous care. The witnesses seldom deviated therefrom, and when they did so, their answers were rarely called in question. The few departures are inconsequential. Some twenty-one witnesses, in response to questions, the form of which has been sanctioned by this Court, stated in substance that in their opinions the testator on 17 February, 1950, did not have sufficient mental capacity to know the nature and extent of his property, to know who were the natural objects of his bounty, or to realize the full force and effect of the disposition of his property by will. *In re Will of York, supra* (231 N.C. 70).

Accordingly, the court, in telling the jury that these twenty-one witnesses testified that the testator in their opinions "did not have the mental capacity to make a will," inadvertently violated the very rule which the witnesses generally were required to observe in giving their opinions.

The record also indicates that while the testimony of these witnesses embraced in most instances an approved long-form opinion-answer, bearing on the alleged mental incapacity of the testator (*In re Will of York, supra* (231 N.C. 70)), it also included facts related by the witnesses bearing upon their observations of the conduct and demeanor of the testator. Also, the testimony of a number of the caveator's witnesses on cross-examination reveals that in some instances they did not fully understand or comprehend all elements of the long-form opinion-question answered favorably to the caveator on direct examination. One witness, when interrogated as to the meaning of "objects of Mr. Tatum's bounty," said: "Well, I should think it would be the worth of his property and the value of his property" . . . Another witness said he thought it related to "what he (Mr. Tatum) knew about taking care of his stuff and making stuff by bounty,—taking care of his property."

This method of compressing the component parts of the testimony of the caveator's witnesses into summary opinions no doubt was intended to shorten and simplify the charge. However, we are fearful that it led to an erroneous appraisal and evaluation of the opinion-testimony. We think it expressive of an opinion in violation of G.S. 1-180. It may not be approved, and this is so notwithstanding the court explained the formula to the jury in advance, and also used it in reviewing the evidence offered by propounders.

It appears that contemporaneously with the entry of the judgment below on 3 February, 1951, the court entered an order allowing attorney fees and appointing commissioners, with direction that they give bond and take over and handle the estate pending final determination of the cause. The propounders excepted to the portion of the order which appoints the commissioners and directs them to give bond. The exception appears to be well taken. It is sustained. Under the provisions of G.S. 31-36, the executor is charged with the preservation of the estate pending final determination of the issue raised by the caveat, unless and until he be removed. G.S. 28-32. *Edwards v. McLawhorn,* 218 N.C. 543, 11 S.E. 2d 562; *Elledge v. Hawkins,* 208 N.C. 757, 182 S.E. 468; *In re Palmer's Will,* 117 N.C. 133, 23 S.E. 104. Therefore, the portions of the order to which the exception relates will be stricken out.

Since the questions presented by the other exceptive assignments of error may not arise upon the retrial, we refrain from reviewing them.

New trial.

J. C. IDOL, JAMES DILLON, ORA PARNELL, H. C. PEDDYCORD AND F. E. ELLIOTT AND ALL OTHER PERSONS IN FORSYTH COUNTY OR IN THE STATE OF NORTH CAROLINA SIMILARLY SITUATED, v. DR. C. A. STREET, DR. GEO. T. HARRELL, JR., DR. J. R. BENDER, ROY CRAFT, REV. KENNETH WILLIAMS, SAM REED, DR. FRED G. PEGG, E. G. SHORE, SHERIFF OF FORSYTH COUNTY, AND JOHN M. GOLD, CHIEF OF POLICE OF WINSTON-SALEM, NORTH CAROLINA.

(Filed 7 June, 1951.)

1. Statutes § 2: Health § 2—

A statute which operates only in one county and its county seat and which confers power upon the county and the city to consolidate their health departments and name a joint city-county board of health and appoint joint city-county health officers, and which expressly repeals to the extent of any conflict all laws in conflict therewith, is a local act relating to health, and is void for repugnancy to Art. II, sec. 29, of the State Constitution.

2. Statutes § 6: Health § 2—

An unconstitutional act is void and is as inoperative as though it had never been passed, and therefore where a city-county board of health is created under a local statute which is unconstitutional because repugnant to provisions of Art. II, sec. 29, of the State Constitution, such city-county board never comes into legal existence, and health ordinances promulgated by it are without validity.

3. Public Officers § 5a—

It is necessary that a person be an incumbent of a *de jure* office in order to be even a *de facto* officer, and where the act creating the office is void, the incumbent of such office is not a *de facto* officer, and his acts may be collaterally attacked.

APPEAL by plaintiffs from *Moore, J.*, at the September Term, 1950, of FORSYTH.

Civil action for a declaratory judgment adjudging the invalidity of an ordinance regulating the sale of milk, and for an injunction enjoining the enforcement of such ordinance pending the final hearing.

Acting under Chapter 86 of the 1945 Session Laws of North Carolina, the Board of Aldermen of the City of Winston-Salem and the Board of Commissioners of the County of Forsyth consolidated their respective public health agencies and departments; named the defendants, Dr. C. A. Street, Dr. George T. Harrell, Jr., Dr. J. R. Bender, Roy Craft, Rev. Kenneth Williams, and Sam Reed, as the joint City-County Board of Health for the City of Winston-Salem and the County of Forsyth; and appointed the defendant, Dr. Fred G. Pegg, as joint City-County Health Officer for the City of Winston-Salem and the County of Forsyth. The

defendant, E. G. Shore, is the Sheriff of Forsyth County, and the defendant, John M. Gold, is the Chief of Police of the City of Winston-Salem.

On 16 February, 1950, the joint City-County Board of Health for the City of Winston-Salem and the County of Forsyth adopted a voluminous ordinance regulating the production of milk for sale in Winston-Salem and Forsyth County; banning the sale of all milk, except Grade A pasteurized milk, in Winston-Salem and Forsyth County on and after 16 August, 1950; and declaring that "every violation of the provisions of this ordinance shall constitute a separate offense" punishable by a fine not exceeding fifty dollars.

On 12 August, 1950, the plaintiffs, who are dairymen engaged in producing milk for sale in Winston-Salem and Forsyth County, brought this action against the defendants seeking a final judgment declaring the ordinance to be invalid and asking that the defendants be enjoined from enforcing it pending the final hearing. The complaint alleges in substance that the ordinance is void because it is unreasonable and because the joint City-County Board of Health was without constitutional or legal authority to adopt it; that the defendants are threatening to enforce the ordinance against the plaintiffs; and that the threatened acts of the defendants will cause irreparable damage to the property rights of the plaintiffs. The defendants answered, alleging the ordinance to be reasonable and valid.

A temporary restraining order was issued on the *ex parte* application of the plaintiffs. On the return day, Judge Moore heard the evidence submitted by the parties; concluded as matters of law that "the City-County Board of Health for the City of Winston-Salem and Forsyth County, if not a *de jure* board, was at least a *de facto* board "with lawful authority to adopt the ordinance in question, and that the ordinance was reasonable; and entered a judgment dissolving the temporary restraining order, denying the relief sought by the plaintiffs, and dismissing the action. The plaintiffs excepted and appealed, assigning errors.

Buford T. Henderson for plaintiffs, appellants.

Womble, Carlyle, Martin & Sandridge for defendants, appellees.

ERVIN, J. The ordinance under attack was adopted by the City-County Board of Health for the City of Winston-Salem and the County of Forsyth, which was created under Chapter 86 of the 1945 Session Laws of North Carolina. Hence, this question arises at the threshold of the appeal: Is Chapter 86 of the 1945 Session Laws repugnant to the provision of Article II, Section 29, of the North Carolina Constitution, which forbids the General Assembly to "pass any local, private, or special act

or resolution . . . relating to health, sanitation, and the abatement of nuisances"?

The organic law of the State was originally drafted and promulgated by a convention which met at Halifax in December, 1776. During the ensuing 140 years, the Legislature of North Carolina possessed virtually unlimited constitutional power to enact local, private, and special statutes. This legislative power was exercised with much liberality, and produced a plethora of local, private, and special enactments. As an inevitable consequence, the law of the State was frequently one thing in one locality, and quite different things in other localities. To minimize the resultant confusion, the people of North Carolina amended their Constitution at the general election of 1916 so as to deprive their Legislature of the power to enact local, private, or special acts or resolutions relating to many of the most common subjects of legislation.

The amendment is embodied in Article II, Section 29, of the State Constitution, and is couched in this language: "The General Assembly shall not pass any local, private, or special act or resolution relating to the establishment of courts inferior to the Superior Court; relating to the appointment of justices of the peace; relating to health, sanitation, and the abatement of nuisances; changing the names of cities, towns, and townships; authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys; relating to ferries or bridges; relating to non-navigable streams; relating to cemeteries; relating to the pay of jurors; erecting new townships, or changing township lines, or establishing or changing the lines of school districts; remitting fines, penalties, and forfeitures, or refunding moneys legally paid into the public treasury; regulating labor, trade, mining, or manufacturing; extending the time for the assessment or collection of taxes or otherwise relieving any collector of taxes from the due performance of his official duties or his sureties from liability; giving effect to informal wills and deeds; nor shall the General Assembly enact any such local, private, or special act by the partial repeal of a general law, but the General Assembly may at any time repeal local, private, or special laws enacted by it. Any local, private, or special act or resolution passed in violation of the provisions of this section shall be void. The General Assembly shall have power to pass general laws regulating matters set out in this section."

In thus amending their organic law, the people were motivated by the desire that the General Assembly should legislate for North Carolina in respect to the subjects specified as a single united commonwealth rather than as a conglomeration of innumerable discordant communities. To prevent this laudable desire from degenerating into a mere pious hope, they decreed in emphatic and express terms that "any local, private, or special act or resolution passed in violation of the provisions of this sec-

tion shall be void," no matter how praiseworthy or wise such local, private, or special act or resolution may be.

A "local act" is one operating only in a limited territory or specified locality. *S. v. Dixon,* 215 N.C. 161, 1 S.E. 2d 521. It cannot be gainsaid, therefore, that Chapter 86 of the 1945 Session Laws is a local act, for it operates only in Forsyth County and its county seat, the City of Winston-Salem.

Chapter 86 of the 1945 Session Laws of North Carolina undertakes to confer power upon the Board of Aldermen of the City of Winston-Salem and the Board of Commissioners of Forsyth County to do these things through joint action: (1) To consolidate their respective public health agencies and departments; (2) to name a joint city-county board of health for regulating the public health interests of Winston-Salem and Forsyth County; and (3) to appoint a joint city-county health officer for administering public health laws and regulations in Winston-Salem and Forsyth County. Moreover, Chapter 86 of the 1945 Session Laws expressly declares that "all laws and clauses of laws . . . in conflict with this act are hereby repealed to the extent of such conflict," and in that way attempts to abrogate as to Winston-Salem and Forsyth County only various provisions of general state-wide statutes creating county boards of health, authorizing county boards of health and the authorities of municipalities to regulate public health interests in their respective counties and municipalities, and requiring the separate election of county and municipal health officers. See: Articles 3 and 5 of Chapter 130 of the General Statutes.

These things being true, it is clear beyond peradventure that Chapter 86 of the 1945 Session Laws is a local act relating to health. It necessarily follows that it is void for repugnancy to Article II, Section 29, of the State Constitution, no matter how praiseworthy or wise its provisions may be. *Board of Health v. Comrs. of Nash,* 220 N.C. 140, 16 S.E. 2d 667; *Sams v. Comrs. of Madison,* 217 N.C. 284, 7 S.E. 2d 540.

Inasmuch as the statute purporting to create their offices is unconstitutional, the members of the City-County Board of Health for the City of Winston-Salem and the County of Forsyth were not lawful officers at the time of the adoption of the ordinance in question.

The defendants assert, however, that the judgment dismissing the action must be upheld even if Chapter 86 of the 1945 Session Laws does offend Article II, Section 29, of the North Carolina Constitution. They argue on this phase of the case that the members of the City-County Board of Health were at least *de facto* officers at the time of the adoption of the ordinance, and that in consequence the ordinance is binding upon the plaintiffs and the public.

This contention raises this question: Where the Legislature undertakes to create a public office by an unconstitutional statute, is the incumbent of such office an officer *de facto?*

This query must be answered in the negative for the very simple reason that there can be no officer, either *de jure* or *de facto,* unless there is a legally existing office to be filled. *In re Wingler,* 231 N.C. 560, 58 S.E. 2d 372; *S. v. Shuford,* 128 N.C. 588, 38 S.E. 808.

The argument now advanced by the defendants was put forward in the case of *Norton v. Shelby County,* 118 U.S. 425, 30 L. Ed. 178, 6 S. Ct. 1121, and was rejected by the Supreme Court of the United States with this unanswerable observation: "An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

As Chapter 86 of the 1945 Session Laws is void, the offices it undertook to create never came into existence. In consequence, the members of the City-County Board of Health for the City of Winston-Salem and the County of Forsyth were not officers *de facto,* and the ordinance in controversy is without validity. *King Lumber Co. v. Crow,* 155 Ala. 504, 46 So. 646, 130 Am. S. R. 65; *People v. Toal,* 85 Cal. 333, 24 P. 603; *In re Allison,* 13 Colo. 525, 22 P. 820, 10 L.R.A. 790, 16 Am. S. R. 224; *State v. Malcom,* 39 Idaho 185, 226 P. 1083; *People ex rel. Stuckart v. Knopf,* 183 Ill. 410, 56 N.E. 155; *Hildreth v. McEntire,* 1 J. J. Marsh (Ky.) 206, 19 Am. D. 61; *Board of Public Utilities v. New Orleans R. & Light Co.,* 145 La. 308, 82 So. 280; *People ex rel. Sinkler v. Terry,* 42 Hun. (N.Y.), 273, reversed on other grounds in 108 N.Y. 1, 14 N.E. 815; *Farrington v. New England Invest. Co.,* 1 N.D. 113, 45 N.W. 191; *Coyne v. State,* 22 Ohio App. 462, 153 N.E. 876; *Koch v. Keen,* 124 Okla. 270, 255 P. 690; *Davis v. Williams,* 158 Tenn. 34, 12 S.W. 2d 532; *State v. Gillette's Estate* (Tex. Com. App.), 10 S.W. 2d 984; *Ex Parte Bassitt,* 90 Va. 679, 19 S.E. 453; *Fanelon v. Butts,* 49 Wis. 342, 5 N.W. 784; *Van Slyke v. Trempealeau County Farmers' Mut. F. Ins. Co.,* 39 Wisc. 390, 20 Am. R. 50.

The able judge who heard this case in the court below was evidently misled into error by a misconstruction of the fourth classification of officers *de facto* made by *Chief Justice Butler* of the Supreme Court of Connecticut in the leading case of *State v. Carroll,* 38 Conn. 449, 9 Am. R. 407, which has been quoted in these North Carolina decisions: *Berry v. Payne,* 219 N.C. 171, 13 S.E. 2d 217; *Smith v. Carolina Beach,* 206 N.C. 834, 175 S.E. 313; and *S. v. Lewis,* 107 N.C. 967, 12 S.E. 457, 13 S.E. 247, 11 L.R.A. 100.

According to *Chief Justice Butler,* officers *de facto* fall into four categories. He describes the fourth group as follows: "An officer *de facto*

is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of *the office* were exercised . . . (4) under color of an election or appointment by or pursuant to a public unconstitutional law before the same is adjudged to be such." (Italics added to the words "the office" by the writer of this opinion.)

The precise meaning of *Chief Justice Butler's* words is laid bare by this illuminating comment of the Supreme Court of the United States in *Norton v. Shelby County, supra:* "Of the great number of cases cited by the *Chief Justice* none recognizes such a thing as a *de facto* office, or speaks of a person as a *de facto* officer, except when he is the incumbent of a *de jure* office. The fourth head refers not to the unconstitutionality of the Act creating the office, but to the unconstitutionality of the Act by which the officer is appointed to an office legally existing." And therein lies the explanation for the decision in *Smith v. Carolina Beach, supra.*

For the reasons given, the judgment dismissing the action is reversed and the cause is remanded to the Superior Court of Forsyth County for further proceedings not inconsistent with this opinion.

Judgment reversed.

HOMER SEAWELL v. OLIVER E. SEAWELL AND MATTIE GREEN SEAWELL, GILMER SEAWELL AND ELVA PHILLIPS SEAWELL, WILEY PURVIS AND ORA BELL PURVIS.

(Filed 7 June, 1951.)

1. Partition § 1c (1)—

Where a tenant in common seeks a sale in lieu of actual partition, he has the burden of alleging and proving that actual partition cannot be had without injury to some or all of the interested parties, and this must be found as a fact by the court in order to support decree of sale, G.S. 46-22. Thus, when all the parties seek actual partition, a decree of sale for partition in the absence of allegation, proof or finding of such injury, is error.

2. Wills § 31—

The intent of testator as gathered from the entire instrument, either in express terms or by clear inference from particular provisions of the will and from its general scope and import, must be given effect, since the intention of testator is his will.

3. Wills § 32—

The presumption against intestacy will be used as an aid in ascertaining the intent of testator.

4. Wills § 34c—Where description of share of each beneficiary is too indefinite to be given effect, court will nevertheless seek division of land in accordance with intent of testator.

The will in suit by one item devised to one son the "dwelling house" and fifty acres of land to be cut off and surveyed from a 166 acre tract; by subsequent item devised to another son "the four room tenant house and fifty acres" to be cut off and surveyed from the tract so as to include the tenant house; and by another item devised to three named children the sixty-six acres remaining in said tract, share and share alike; and by later item stipulated that no land was devised to one daughter because testator had theretofore given her a tract of land. *Held:* Conceding that the description of the share of each in the land devised is too vague and indefinite to be sustained, nevertheless the devises are not void and the intent of testator will be effected by giving the first son one-fifth in value of the land, including that portion of the land upon which the dwelling house stands without taking into consideration the value of the dwelling house or the land within its curtilage, and in the same manner a one-fifth value in the land to the second son, not considering the value of the tenant house and the land within its curtilage, since the devise of the buildings includes the land upon which they are situate, and the remainder divided into three equal shares for each of the other three named beneficiaries, with right to equalization by assessment of owelty charges if necessary, with no share to the daughter excluded from participation in the real estate under the will.

5. Partition § 4a—

Where named devisees become tenants in common under the provision of a will, and seek actual partition of their respective shares, it is error for the court to join another child of testator, or her heirs, when such child was specifically excluded from participating in the realty under the terms of the will.

6. Partition § 1c (1)—

Where in proceedings for actual partition among tenants in common it is alleged that the prior sale of the timber from the land would aid in the equitable division of the land among the tenants, the court should consider the petition that the timber be sold and rule thereon in such manner as the facts warrant.

APPEAL by plaintiff from *Sink, J.*, September Term, 1950, MOORE.

Petition for partition.

Catherine Alice Seawell died testate possessed of a tract of land situate in Moore County containing 166 acres. The pertinent parts of her will are as follows:

"THIRD. I give and devise to my son, Homer Seawell, the dwelling house where we now reside and fifty acres of land to be cut off and surveyed from the 166 acre tract, but not to include the four room tenant house on said tract, subject to the life estate of his said father, W. T. Seawell.

"FOURTH. I give and devise to my son, Oliver E. Seawell, the four room tenant house and fifty acres of the aforesaid 166 acre tract of land, to be cut off and surveyed, so as to include the four room tenant house on said 166 acre tract of land, subject to the life estate of his said father, W. T. Seawell.

"FIFTH. I give and devise to my other children, Floyd Seawell, Gilmer Seawell and Ora Bell Seawell Purvis the 66 acres, it being the remainder of the 166 acre tract of land, situated in said Ritters Township, Moore County, N. C., subject to the life estate of their said father, W. T. Seawell, share and share alike."

"NINTH. I have not given my daughter, Edna Myrick any of my land and real estate in this my last will and testament, for the reason that I have heretofore given to her a tract of land, being my share in my father's old place."

In 1938, plaintiff instituted this proceeding for partition, claiming fifty acres of land including the dwelling house. An order appointing commissioners was entered and the commissioners divided the land and made report to the clerk. Exceptions to the report were filed by defendants Gilmer Seawell and Ora Bell Seawell Purvis, mainly on the ground that the life estate of the husband of testatrix was still outstanding and the property was not subject to partition among the owners of the remainder interest.

On 7 December 1942, the clerk enterd an order "that this proceeding be stayed or held in abeyance until the falling in of the said life estate of the said W. T. Seawell . . ." The proceeding thereafter remained inactive on the clerk's docket until 1948. Ora Bell Seawell Purvis having died, the clerk, on 14 August 1948, appointed a guardian for her infant children. The guardian filed an answer in which he asserts the original partition by the commissioners is void and moves to vacate the same. He attacks the third, fourth and fifth paragraphs of the will of testatrix for that they are too vague and indefinite to be enforced. He also alleges that the timber on said land is so situated that a fair partition cannot be had until the timber is first sold. He prays that commissioners be appointed to sell the timber for partition and that the land then be partitioned among the tenants in common, devisees named in the will.

On 14 July 1950, the clerk entered an order (1) vacating the former order of partition and the report of the commissioners; (2) adjudging that paragraphs Third, Fourth, and Fifth of the will are void and unenforceable, and that the devisees, including those named in said paragraph, are tenants in common of the whole tract in equal shares, except Homer Seawell is entitled to two-fifths by reason of the fact he has purchased the interest of Floyd Seawell; (3) ordering the sale of the timber for division and appointing commissioners to make the sale; and (4) directing the

county surveyor and two other commissioners, after the sale of the timber, to partition said land as prayed by the parties. Plaintiff excepted and appealed to the Superior Court.

When the appeal came on for hearing in the Superior Court, the trial judge ruled that (1) paragraphs Third, Fourth and Fifth of the will are void for indefiniteness; (2) the entire tract constitutes undevised real property belonging to the heirs of Catherine Alice Seawell as tenants in common under the canons of descent; (3) the land is incapable of actual partition; (4) the child or children of testatrix not parties to this proceeding be made parties; and (5) the will, with the exception of paragraphs Third, Fourth, and Fifth, is valid. He thereupon ordered that the land be sold for partition among all the heirs at law of testatrix and appointed commissioners to make sale. The commissioners were directed to divide the land into small parcels and to sell first the several parcels separately and then the tract as a whole and report their proceedings to the court. Plaintiff excepted and appealed.

James H. Pou Bailey for plaintiff appellant.
Seawell & Seawell for defendant appellees.

BARNHILL, J. A tenant in common is entitled, as a matter of right, to a partition of the land to the end that he may have and enjoy his share therein in severalty, unless it is made to appear that an actual partition cannot be had without injury to some or all of the interested parties. G.S. 46-22; *Hyman v. Edwards,* 217 N.C. 342, 7 S.E. 2d 700; *Talley v. Murchison,* 212 N.C. 205, 193 S.E. 148; *Foster v. Williams,* 182 N.C. 632, 109 S.E. 834.

The burden is on him who seeks a sale in lieu of actual partition to allege and prove the fact upon which the order of sale must rest under the terms of G.S. 46-22, *Wolfe v. Galloway,* 211 N.C. 361, 190 S.E. 213, and before an order of sale may be entered, such fact must be found by the court. *Priddy & Co. v. Sanderford,* 221 N.C. 422, 20 S.E. 2d 341.

In the absence of any allegation, proof, or finding that an actual partition cannot be had without injury to some or all of the parties, the court has no jurisdiction to order a sale.

Here all the parties seek an actual partition of the land. The record fails to disclose any evidence to support an order of sale other than a sale of the timber. The parties now assert that none was offered. The essential fact was not found by the court below. It did conclude "as a matter of law that the said 166 acres of land is incapable of division due to the indefiniteness of the description." It is evident, however, that the court was referring to the description of the share devised to plaintiff contained in the will, for the description of the whole tract makes reference to

creeks, branches, and lines of adjoining tracts as its boundaries, in addition to calling for courses and distances. So much of the order entered as denies actual partition and directs a sale must be held for error.

This brings us to the more serious question presented by the appeal: Do the parties claiming the land take as purchasers under the will or is the land undevised property descending by inheritance to all the heirs of the testatrix?

The court below held that paragraphs Third, Fourth, and Fifth of the will are void. The appellant concedes that, as to the *quantum* of the shares attempted to be devised in paragraphs Third and Fourth, the description is too vague and indefinite to be sustained. So then, that particular question is not presented for discussion or decision. The appellant does contend, however, that paragraph Third is sufficiently definite to vest him with title to the main dwelling; that paragraph Fourth vests his brother Oliver with title to the tenant dwelling; that he and Oliver are each to have a share of the land; and that the three children named in paragraph Fifth take title to the remainder after the allotment of the shares to plaintiff and Oliver Seawell. In this the appellees concur. They say in their brief:

"That items in the will or sections in the will marked 'THIRD,' 'FOURTH,' and 'FIFTH' are not void so far as these defendants are concerned, and the fact that the Court holds that the lands cannot be allotted to Homer Seawell and Oliver Seawell because of indefiniteness does not void the sections and cause other children of Catherine A. Seawell to be brought into the position of devisees when they are not mentioned in any one of these sections. From reading the will it is definite that Catherine A. Seawell wanted these heirs named to receive the 166 acre tract. It is unfortunate that she did not properly describe the fifty acres to Homer Seawell and the fifty acres to Oliver Seawell, and for this reason the land cannot be divided to those heirs except as to the whole and all of them would be tenants in common on the whole tract of 166 acres."

The contention of the appellant and the concessions of appellees pose an interesting question, the exact counterpart of which has not heretofore been decided by this Court. It is an axiomatic rule of construction that the intent of the testator as expressed by him is to be ascertained from the four corners of the will and that this intent is the guiding star which must lead to the ascertainment of the meaning and purpose of the language used. *Smith v. Mears,* 218 N.C. 193, 10 S.E. 2d 659; *Schaeffer v. Haseltine,* 228 N.C. 484, 46 S.E. 2d 463. The objective of construction is to effectuate the intent of the testator as expressed in the instrument. *Trust Co. v. Miller,* 223 N.C. 1, 25 S.E. 2d 177; *Elmore v. Austin,* 232 N.C. 13, 59 S.E. 2d 205; *In re Will of Johnson, ante,* 570; *Williamson v. Williamson,* 232 N.C. 54, 59 S.E. 2d 214; *Buffaloe v. Blalock,* 232 N.C.

105, 59 S.E. 2d 625; *Weathers v. Bell,* 232 N.C. 561, 61 S.E. 2d 600. If the language used discloses an ascertainable intent, then that intent must be effectuated, *Bank v. Brawley,* 231 N.C. 687, 58 S.E. 2d 706; *Trust Co. v. Miller, supra,* for the intention of the testator is his will. *Jarrett v. Green,* 230 N.C. 104, 52 S.E. 2d 223.

The intention of testatrix need not be declared in express terms in the will, but it is sufficient if the intention can be clearly inferred from particular provisions of the will, and from its general scope and import. The courts will seize upon the slightest indications of that intention which can be found in the will to determine the real objects and subjects of the testatrix' bounty. 28 R.C.L. 218. And it is generally held that in seeking to discover this intention there is a presumption against intestacy. *Trust Co. v. Miller, supra.*

The will of testatrix, viewed in the light of these rules of construction, discloses her desire as to the disposition of her real property and effectively disposes of the whole tract owned by her at the time of her death. She devised to her son Homer Seawell "the dwelling house where we now reside" and to Oliver Seawell "the four room tenant house." These devises are definite and certain. The devise of the buildings included the land upon which they are situated—the messuage, *Tadlock v. Mizell,* 195 N.C. 473, 142 S.E. 713; *Blanton v. Boney,* 175 N.C. 211, 95 S.E. 361, and includes all that comes within the curtilage. *Broadhurst v. Mewborn,* 171 N.C. 400, 88 S.E. 628.

While plaintiff concedes he and his brother are not entitled to fifty acres of the land, each, for want of sufficient description, it is clear that the testatrix intended that plaintiff should have a share of her land and that it should be that share which included or surrounded the dwelling devised to him. The same is true as to her son Oliver.

It is equally certain that she intended that the remainder of the tract, after the allotment of shares to Homer and Oliver, should be equally divided among her three children named in the fifth paragraph, and that her daughter Edna Myrick should take no part of her real property.

This intent may be effectuated by the Commissioners appointed by the court. One-fifth of the land in value, including the main dwelling, but not including the value thereof or the value of the land within its curtilage, must be set apart and assigned to plaintiff. The same procedure as to the share of Oliver Seawell must be followed so that he may receive one-fifth of the land in value, not including the value of said tenant house and the land within its curtilage. The remainder of the tract must be divided into three shares of equal value, one of which will be allotted to plaintiff as grantee of Floyd Seawell and one each to Gilmer Seawell and the heirs of Ora Bell Seawell Purvis, with the right of equalization by the assessment of owelty charges, if necessary.

The court below adjudged the will valid as to paragraph "NINTH," and the effect of that paragraph is to exclude Edna Myrick from any further participation in the real estate of the testatrix. *Harper v. Harper,* 148 N.C. 453; *Thomason v. Julian,* 133 N.C. 309; *Hoyle v. Stowe,* 13 N.C. 318. It is not necessary that she, if living (or her heirs, if she is now deceased) be made parties to this proceeding as directed by the court below.

The court should further consider the petition of some of the parties that the timber be sold for division before the land is partitioned and rule thereon in such manner as the facts warrant.

The order entered in the court below is vacated and the cause is remanded for further proceedings accordant with this opinion.

Error and remanded.

STATE v. DAVE JARRELL.

(Filed 7 June, 1951.)

1. Criminal Law § 52a (1)—

On motion to nonsuit the evidence must be considered in the light most favorable to the State. G.S. 15-173.

2. Criminal Law § 52a (3)—

While circumstantial evidence is an accepted instrument in the ascertainment of truth, in order to sustain a conviction it is necessary that the circumstances be of such nature and so connected or related as to point unerringly to defendant's guilt and exclude any other reasonable hypothesis, and it is insufficient when the facts adduced are consistent with defendant's innocence.

3. Same: Assault § 13—

Circumstantial evidence which establishes motive and an opportunity of defendant to have committed the offense, and threats made by defendant against the victim of the secret assault, without evidence connecting defendant with the actual execution of the crime, is insufficient to overrule defendant's motion to nonsuit, since the circumstances are entirely consistent with defendant's innocence.

4. Criminal Law § 52a (2): Assault § 13—

Where in a prosecution for assault with a deadly weapon, the State introduces testimony of a witness that he was plowing with defendant at the time they heard a shot, the only shot fired that morning in the vicinity so far as the evidence revealed, and also testimony of a statement made by defendant that he knew nothing of the shooting, and there is no evidence directly contrary to this testimony, *held,* the State's own evidence establishes a defense by witnesses offered by it and presented as worthy

of belief, and defendant is entitled to avail himself of such defense on motion of nonsuit. G.S. 14-32.

APPEAL by defendant from *Moore, J.*, at October Term, 1950, of ALLEGHANY.

Criminal prosecution upon a bill of indictment containing two counts, charging substantially that on 10 June, 1947, defendant (1) did in secret manner maliciously assault one Mrs. Peggy Bowman with a deadly weapon, to wit, a 12-gauge shotgun, G.S. 14-31, and (2) did assault Mrs. Peggy Bowman with a deadly weapon, to wit, a 12-gauge shotgun, with intent to kill resulting in injury. G.S. 14-32.

Upon the call of the case for trial, defendant entered a plea of not guilty to the bill of indictment.

Upon trial in Superior Court the State offered evidence tending to show that Mrs. Peggy Bowman was shot, thereby sustaining serious and permanent injury, on the morning of 10 June, 1947, when she was in her strawberry patch picking strawberries; that after breakfast she returned to the field "along about 7:00 or 8:00, or some place"; that there were powder burns on leaves in the edge of the woods, about 75 feet from where she was picking strawberries; that some 12-gauge wads were found in first line with the burned leaves; but that Mrs. Bowman doesn't remember picking strawberries, or what happened.

On the other hand, Mrs. Bowman, testifying as witness for the State, gave this narrative, quoted in part, of events and circumstances in relation to defendant, preceding and subsequent to the time she was shot:

(1) That on 19 May, 1947, when she was out along a rock wall above the house, weeding iris, she saw defendant and his brother, Rufe, come down the road; that defendant had a shotgun; that he "squatted down" beside the wall, and "got to talking" to her, and among other things he said "someone was doing him dirty and he was going to even up, and . . . asked how come so many cars been turning up there at his place"; that she told him that Shine and Lawrence had been plowing her garden and cornfield, and he said, "Well, the next time Vaughn come about for me to tell him that he wanted to see him on some important business,"—she was living on Vaughn's place; (2) That the next morning defendant passed with Coy Kirby; (3) That the next time she saw defendant was "sometime the next week," when she was standing on the porch, churning; that she looked up the road, and saw Robe Cockerham and defendant; that defendant had a shotgun, and set it down at the bottom of the steps; that "he was crying and drunk when he came in there"; that "Robe went out to the locust tree," and defendant "come up on the porch," and said: "I want to talk to you. Did you tell Mr. Vaughn what I told you?"; that upon her reply to the effect that she

had not seen Mr. Vaughn, but had told his wife, mother and son, defendant said: "Well, I thought Lawrence and Shine would be here and start something and I ain't a good fighter any more, but I am a hell of a good shot; I brought the negro with me"; that he went into the room and told Connie, her daughter, he wanted to talk to her; that she, Mrs. Bowman, also went in there, and he told her to sit down on the bed beside him,—"that he wasn't going to hurt me now," and . . . said he understood that someone in Mt. Airy had picked up my pocketbook and read a letter and had turned him over to the Federal, and I told him I didn't do it, and he said, "Well, somebody told him that"; that he said, "Well, he didn't want to talk so much before Connie, that she was too smart anyhow," but he said, "You tell Mr. Vaughn the next time he comes up that if he couldn't get somebody in his house that didn't report him, that we could take the consequences," and I asked him what the consequences were, he said, "You will find out"; that when he started to leave, he said, "Hell, Peggy, if I knew you reported me, I would blow out your damn brains"; that he went out on the porch and down on the steps, and said, "Do you care if I take a drink?"; that she said "No," and he and Robe went to the spring and he took a drink out of a bottle and one out of the dipper, and went on home, "I guess"; (4) That on Sunday morning, about 8 o'clock, after she came home from the hospital, defendant came to her house, and ". . . said, 'If you had been shot with that .12 gun of mine up at the house it would have killed you,' that 'I was shot with a cheap gun' "; and that before he left, he said, "Thank God, Peggy, you didn't die; if you had died the law would send me to the penitentiary for my life." I saw him after that.

Moreover, the State offered evidence tending to substantiate in part, and to corroborate in part, the testimony of Mrs. Bowman.

Connie Holdner also testified that after her mother returned from the hospital, defendant came once, but did not see her, and then he came on Sunday morning; and that when he first walked up on the porch he asked how we were, or something like that, and, talking about her getting shot, he said, "If you knew who shot your mother would you tell?", and I said "No," and he said, "I wouldn't either," and he went on in the room and talked to Mother. (The witness adding statement he made substantially as detailed by Mrs. Bowman as hereinabove related.)

Robe Cockerham, as witness for the State (referring to defendant interchangeably as Mr. Jarrell or Mr. Dave, and Dave), testified on direct examination: That on morning of 10 June, 1947, Mr. Jarrell came in a car to get him to come and plow corn; that they started over to his house, —"I guess around 7:00 or 7:30, somewhere like that, when we got to his house"; that they put harness and things in back end of his car, and went over to his other place, a field between his house and Mrs. Bowman's

house, to catch the horse; that, after some difficulty, the horse was caught, and Mr. Jarrell went in his automobile; that he walked leading the horse, say three-quarters of a mile to where the plowing was to be done; that when he got over there, he saw Mr. Jarrell taking out the harness and cultivating plow; that he pointed out to the sheriff the field "we were plowing in," where Mr. Jarrell's car was parked, and he was taking the harness and things out; that "we plowed" until something about 11:00, maybe after, and that "we did not leave the field at all, only I went up there and got me some water, just a little ways," until Mr. Jarrell left to go to lunch.

On cross-examination this witness, Robe Cockerham, continued by saying, omitting unnecessary repetition: That he lives about three miles from Mr. Jarrell's; that on morning of 10 June, Dave "come over to my house . . . after me . . . to help cultivate corn"; that he got in the car and rode back with him; that he did not see any gun in the car at all; that after catching the horse, "I got over there . . . 15 minutes before or 15 minutes after eight, somewhere along there"; that "where we plowed is across the hill from Mrs. Bowman's,—this side"; that "we started plowing as soon as the horse was hooked up"; that "Mr. Dave was holding the plow and I was leading the horse on account of it was just a colt,—was just 'breaking it'"; that "sometime after we were there I heard a gun . . . one was all . . . I would say about between 9:00 and 10:00 o'clock . . . we hadn't plowed much"; that he has seen the garden, and the strawberry patch up at Mrs. Bowman's,—woods bordering on one side of the garden; that "neither me nor Dave were in the woods after we got out to the field"; that "the woods extend back a long ways, almost to the parkway"; that "when we quit plowing we went straight to Dave's home and to dinner,—a cloud was coming up and we quit early"; that "while we were at Dave's home, the sheriff come. He told me what had happened. We did not have any knowledge of what had happened until the sheriff told us. From the time we got to the field until we left . . . for lunch, Dave was not out of that field. I didn't see Dave with any gun any time that day."

Sheriff Glenn Richardson testified: That about 9:30 on morning of 10 June, Mr. Andy Killiam came and said there had been a shooting down there; that he went immediately,—probably taking 20 minutes to go,—reaching there something like 10 o'clock; that he, accompanied by Dr. Choate, went directly to the house; that, pursuant to information received there, he went immediately to the scene out at the strawberry patch, 200 yards away; that he found powder burned leaves near the strawberry patch, 75 feet from where the lady was picking strawberries, and 12-gauge wads between the powder burns and where the lady was; that the strawberry patch is 1/7th of a mile from the cornfield where defendant was

plowing; that the place where defendant parked his car, as pointed out by Cockerham, to strawberry patch is 1/10th of a mile; that to walk the distance from place "where defendant parked his car," as so pointed out, to the burned leaves, it took him practically four minutes in the woods; and that he had to go up in Dave's meadow 100 to 150 feet from where the car was before he could see the strawberry patch.

Lastly, Guy Scott, member of the State Bureau of Investigation, as witness for the State, testified in part: That he talked with defendant on 18 June in the back room of the sheriff's office, and asked defendant what he knew about the shooting, if anything; that defendant "said he didn't know anything about the shooting"; that he asked if he had been down to Mrs. Bowman's house before or since then, to which defendant replied "Not since," but before that about two weeks he went down and asked her if she was doing the reporting there in the neighborhood, and she told him "no," and then he told her, "Well, if you are, you ought to quit, me and you might get burned out sometime"; that defendant said the man that did the shooting of Mrs. Bowman was as "tall as you are" (meaning witness), and said: "I went and looked at the burned leaves on the edge of the woods." And, the witness concluding said: "I was here when this case was tried before. I didn't testify then."

Defendant offered no evidence, however he reserved exceptions taken to motions aptly made for judgment as in case of nonsuit. G.S. 15-173.

Verdict: Guilty of assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death.

Judgment: That defendant be confined in the State Prison at hard labor for a term of ten years.

Defendant appeals therefrom to Supreme Court, and assigns error.

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

R. F. Crouse and Folger & Folger for defendant, appellant.

WINBORNE, J. The statute, G.S. 14-32, declares that "any person who assaults another with a deadly weapon with intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony . . ." This is the crime of which defendant stands convicted. The validity of such conviction is challenged by his assignments of error. The one chiefly advanced by him, and properly so, we hold, is based upon exception to the denial of his motion, aptly entered at the close of all the evidence, for judgment of nonsuit in accordance with the provisions of G.S. 15-173.

When the sufficiency of the evidence offered on the trial in Superior Court is so challenged, the evidence is to be taken in the light most favor-

able to the State. And it is noted in the present case that the evidence is both circumstantial and direct.

The State relies upon the circumstantial evidence to sustain the conviction. But the direct evidence offered by the State wholly exculpates the defendant from guilt of the crime charged.

While circumstantial evidence is a "recognized and accepted instrument in the ascertainment of truth," *S. v. Coffey,* 210 N.C. 561, 187 S.E. 754, when the State relies upon such 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 nature and so connected or related as to point unerringly to the defendant's guilt, and to exclude any other reasonable hypothesis," *Stacy, C. J.,* in *S. v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472, citing *S. v. Stiwinter,* 211 N.C. 278, 189 S.E. 868. See also *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; *S. v. Fulk,* 232 N.C. 118, 59 S.E. 2d 617; *S. v. Hendrick,* 232 N.C. 447, 61 S.E. 2d 349; *S. v. Webb, ante,* 382.

The guilt of a person charged with the commission of a crime is not to be inferred merely from facts consistent with his guilt. They must be inconsistent with his innocence. *S. v. Massey,* 86 N.C. 658; *S. v. Harvey, supra; S. v. Webb, supra.*

"Evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict and should not be left to a jury." *S. v. Vinson,* 63 N.C. 335. See also *S. v. Webb, supra,* and cases there cited.

"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,* 230 N.C. 205, 52 S.E. 2d 908, and cases cited.

Also evidence of threats, when competent, as in the case in hand, without evidence connecting the defendant with the execution of them, or with the offense charged, is insufficient to take the case to the jury. See *S. v. Rhodes,* 111 N.C. 647, 15 S.E. 1038; *S. v. Freeman,* 131 N.C. 725, 42 S.E. 575.

In the *Rhodes case, McRae, J.,* speaking for this Court, said: "The evidence must be more than sufficient to raise a suspicion or conjecture."

In the light of these principles, the circumstantial evidence shown in the record on this appeal, and on which the State relies, does no more than point a finger of suspicion against defendant. It is entirely consistent with his innocence. It lacks sufficient probative value to support the verdict against defendant.

Now, turning to the direct evidence: It is a settled rule of law in this State that "Where a complete defense is established by the State's evidence, a defendant should be allowed to avail himself of such defense on a motion for judgment as of nonsuit." *S. v. Fulcher,* 184 N.C. 663, 113 S.E. 769. The rule is recognized and applied in these cases: *S. v. Cohoon,* 206 N.C. 388, 174 S.E. 91; *S. v. Todd,* 222 N.C. 346, 23 S.E. 2d 47; *S. v. Baker,* 222 N.C. 428, 23 S.E. 2d 340; *S. v. Boyd,* 223 N.C. 79, 25 S.E. 2d 456; *S. v. Watts,* 224 N.C. 771, 32 S.E. 2d 348; *S. v. Coffey,* 228 N.C. 119, 44 S.E. 2d 886; *S. v. Robinson,* 229 N.C. 647, 50 S.E. 2d 740.

In the *Robinson case, Barnhill, J.,* writing for the Court, summarized the rule in this manner: "When, however, the State's case is made to rest entirely on testimony favorable to the defendant, and there is no evidence *contra* which does more than suggest a possibility of guilt, or raise a conjecture, demurrer thereto should be sustained," citing cases.

The State, by offering Robe Cockerham as its witness, presents him as worthy of belief. Too, the State by offering the statement of defendant, made to the witness Scott, that "he didn't know anything about the shooting," presented it as worthy of belief. *S. v. Todd, supra. S. v. Coffey,* 228 N.C. 119, 44 S.E. 2d 886.

And the testimony of Robe Cockerham places defendant in his own field plowing at the time the shot was heard,—the only shot that morning, —so far as the evidence reveals. There is no evidence to the contrary. And defendant is entitled to an acquittal.

For reasons stated the judgment below is

Reversed.

THE FOLLOWING CASES WERE DISPOSED OF WITHOUT WRITTEN OPINIONS:

Brinson v. Brinson. Appeal by plaintiff from *Burney, J.,* November Term, 1950, of LENOIR. Appeal dismissed for want of jurisdiction. 27 March, 1951.

Surety Corp. v. Sharpe. Appeal by defendants from *Phillips, J.,* 26 May, 1951, at chambers in ROCKINGHAM. Motion to dismiss under Rule 17 (1) allowed. 7 June, 1951.

ALTON G. SADLER v. ALICE McCRAW SADLER.

APPEAL by defendant from *Hatch, Special Judge,* June Civil Term, 1950, of ORANGE.

Motion of plaintiff appellee to dismiss the appeal.

JOHNSON, J., for the Court. Motion allowed. Leave granted to appellant to move to reinstate appeal upon completion of record. December 13, 1950.

ARLINE McBRIDE DAVIS v. EUGENE G. SHAW, COMMISSIONER OF REVENUE, AND JOHN E. WALTERS, AS SHERIFF OF GUILFORD COUNTY.

APPEAL by plaintiff from *Patton, Special Judge,* 30 October, 1950, Civil Term of GUILFORD (High Point Division).

Motion of defendants, appellees, Eugene G. Shaw, Commissioner of Revenue, and John E. Walters, as Sheriff of Guilford County, to be allowed to withdraw demurrer, to have case remanded, and to file answer to complaint in the case of *Davis v. Shaw.*

ERVIN, J., for the Court. Upon motion of the defendants, this action is remanded to the Superior Court of Guilford County for remand to the Municipal Court of the City of High Point, where the defendants are to withdraw their demurrer, file an answer, and stay sales of property under execution until trial is had on merits. Costs of appeal are hereby taxed against the defendants. December 13, 1950.

APPENDIX.

AMENDMENTS TO RULES OF PRACTICE IN THE SUPREME COURT

Upon motion duly made and seconded, it was unanimously resolved that the Rules of Practice in the Supreme Court, as published in 221 N.C., p. 543 *et seq.*, be amended in the following particulars, effective 1 July, 1951:

Rule 5 (221 N.C., p. 546) shall be amended as follows:

(a) In paragraph one, line three, strike out the word "fourteen" and insert in lieu thereof "twenty-one," so that the paragraph shall read as follows:

> "The transcript of the record on appeal from a judgment rendered before the commencement of a term of this Court must be docketed at such term twenty-one days before entering upon the call of the docket of the district to which it belongs, and stand for argument in its order; if not so docketed, the case shall be continued or dismissed under Rule 17, if the appellee file a proper certificate prior to the docketing of the transcript."

(b) In paragraph two, line three, strike out the word "fourteen" and insert in lieu thereof "twenty-one," so that the paragraph shall read as follows:

> "The transcript of the record on appeal from a court in a county in which the court shall be held during the term of this Court may be filed at such term or at the next succeeding term. If filed twenty-one days before the Court begins the perusal of the docket of the district to which it belongs, it shall be heard in its order; otherwise, if a civil case, it shall be continued, unless by consent it is submitted upon printed argument under Rule 10."

Rule 6 (221 N.C., p. 547) shall be amended as follows:

In paragraph one, line one, strike out the word "fourteen" and insert in lieu thereof "twenty-one," so that the paragraph shall read as follows:

> "Appeals in criminal cases, docketed twenty-one days before the call of the docket for their districts, shall be heard before the appeals in civil cases from said districts. Criminal appeals docketed after the time above stated shall be called immediately at the close of argument of appeals from the Eleventh District, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket."

Rule 7 (221 N.C., pp. 548 and 549) shall be amended as follows:

In the paragraph which begins at the bottom of page 548 and ends at the top of page 549, in line one, page 549, after the word "allotted," and

in line two after the word "week," insert the following: "unless otherwise directed by the Court"; and in line four strike out the figures "14" and insert in lieu thereof "twenty-one," so that the paragraph shall read as follows:

"In making up the calendar for the two districts allotted to the same week, the appeals will be docketed in the order in which they are received by the clerk, but only those from the district first named will be called on Tuesday of the week to which the district is allotted, unless otherwise directed by the Court, and those from the district last named will not be called before Wednesday of said week, unless otherwise directed by the Court, but appeals from the district last named must nevertheless be docketed not later than twenty-one days preceding the call for the week."

Rule 17 (221 N.C., pp. 551 and 552) shall be amended as follows:

In line one, paragraph one, strike out the word "fourteen" and insert in lieu thereof "twenty-one," so that the paragraph shall read as follows:

"If the appellant in a civil action, or the defendant in a criminal prosecution, shall fail to bring up and file a transcript of the record twenty-one days before the Court begins the call of cases from the district from which it comes at the term of this Court at which such transcript is required to be filed, the appellee may file with the clerk of this Court the certificate of the clerk of the court from which the appeal comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been settled, with his motion to docket and dismiss at appellant's cost said appeal, which motion shall be allowed at the first session of the Court thereafter, with leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the cause; *Provided,* that such motion of appellee to docket and dismiss the appeal will not be considered unless the appellee, before making the motion to dismiss, has paid the clerk of this Court the fee charged by the statute for docketing an appeal, the fee for drawing and entering judgment, and the determination fee, execution for such amount to issue in favor of appellee against appellant."

Rule 28 (221 N.C., pp. 562 and 563) shall be amended as follows:

In paragraph two, page 563, line seven, strike out the word "Saturday" and insert in lieu thereof "Tuesday," so that the paragraph shall read as follows:

"Appellant shall, upon delivering a copy of his manuscript brief to the printer to be printed or to the clerk of this Court to be printed

or mimeographed, immediately mail or deliver to appellee's counsel a carbon typewritten copy thereof. If the printed or mimeographed copies of appellant's brief have not been filed with the clerk of this Court, and no typewritten copy has been delivered to appellee's counsel by 12 o'clock noon on the second Tuesday preceding the call of the district to which the case belongs, the appeal will be dismissed on the motion of appellee, when the call of that district is begun, unless for good cause shown the Court shall give further time to print the brief."

Rule 29 (221 N.C., p. 564) shall be amended as follows:

In paragraph one, line two, strike out the word "Saturday" and insert in lieu thereof "Tuesday," so that the paragraph shall read as follows:

"The appellee shall file 25 printed or mimeographed briefs with the clerk of this Court by noon of Tuesday preceding the call of the district to which the case belongs and the same shall be noted by the clerk on his docket and a copy furnished by the clerk, on application, to counsel for appellant. It is not required that the appellee's brief shall contain a statement of the case. On failure of the appellee to file his brief by the time required, the cause will be heard and determined without argument from appellee unless for good cause shown the Court shall give appellee further time to file his brief."

Rule 25 (221 N.C., pp. 560 and 561) having previously been amended, shall be further amended to read as follows:

"25. *Mimeographed Records and Briefs.*

"Counsel may file in lieu of printed records and briefs 25 mimeographed copies thereof, to be prepared under the immediate supervision and direction of the clerk of this Court, the cost of such copies not to exceed $1.40 per page of an average of 40 lines and 400 words to the page: *Provided, however,* that it shall be permissible and optional with counsel to file printed transcripts and briefs when it is possible to print such documents without unnecessary delay and inconvenience to the Court and appellee's counsel, and within time for an appeal to be heard in its regular order under Rule 5.

"The clerk of this Court is required to purchase the stencil sheets, arrange all matter to be mimeographed for the operator, to supervise the work and to index the mimeographed transcripts and mail copies promptly to counsel. A cash deposit covering estimated cost of this work is required as in Rule 23 under the same penalty as therein prescribed for failure to pay the account due for such work."

JOHNSON, J.,
For the Court.

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Wills—Construction and operation of trust estates, see Trusts; definiteness, *Burchett v. Mason*, 306; laches and limitations on caveat proceedings, *Burchett v. Mason*, 306; mental capacity, *In re Will of Johnson*, 570; *In re Will of Tatum*, 723; general rules of construction of wills, *In re Will of Johnson*, 570; *Seawell v. Seawell*, 735; presumption against partial intestacy, *Renn v. Williams*, 490; *Seawell v. Seawell*, 735; vested and contingent remainders, *Carter v. Kempton*, 1; designation of amount or share of beneficiaries, *Trust Co. v. Grubb*, 22; *Seawell v. Seawell*, 735; residuary estate, *Trust Co. v. Grubb*, 22; *Renn v. Williams*, 490.

Wine—Election on question of legalizing sale may not be held within sixty days of another election, *Ferguson v. Riddle*, 54.

Witnesses—May not testify as to intent of another, *Hooper v. Casualty Co.*, 154; testimony as to transactions with decedent, *Peek v. Shook*, 259; *Sprinkle v. Ponder*, 312; right of defendant not to testify, *S. v. Bovender*, 683; opinion testimony as invading province of jury, *S. v. Cuthrell*, 274; nonexpert may testify as to mental capacity of testator, *In re Will of Tatum*, 723; fact that answer is not responsive does not render testimony incompetent, *In re Will of Tatum*, 723; may testify that bus would have passed motorcycle had it continued in straight line, *Maddox v. Brown*, 519; medical experts may testify as to probable cost of future operations needed, *Dickson v. Coach Co.*, 167; expert testimony as to whether injury aggravated pre-existing infirmity, *Anderson v. Motor Co.*, 372; testimony as to footprints, *S. v. Rogers*, 390; demeanor of witness is in evidence and is proper subject of comment, *S. v. Mullis*, 542; evidence competent to corroborate witness, *S. v. Rogers*, 390; *S. v. Bridgers*, 577; *S. v. Wood*, 636; *S. v. Bovender*, 683; *S. v. Gibson*, 691; rule that party may not impeach own witness, *Matheny v. Motor Lines*, 673; cross-examination of, *S. v. Hicks*, 511; *Maddox v. Brown*, 519; court's remarks and direction to, as constituting expression of opinion, *S. v. Carter*, 581; arrest of witnesses as impeachment of their credibility, *S. v. Simpson*, 438; instructions on character evidence of defendant, *S. v. Bridgers*, 577; *S. v. Wood*, 636.

Workmen's Compensation Act—See Master and Servant.

Wrist Watch—Worn by deceased at time of homicide *held* competent in evidence, *S. v. Rogers*, 390.

Wrongful Death—See Death.

ANALYTICAL INDEX.

ACTIONS.

§ 8. Commencement of Action.

While an action is commenced by the issuance of summons, G.S. 1-88, defendant's rights are unaffected by the pendency of the action until he is brought into court by proper service of process or acceptance of service or general appearance. *Hodges v. Ins. Co.*, 289.

§ 10. Pendency, Discontinuance and Termination.

Where plaintiff, who has commenced his action prior to the bar of the statute of limitations, fails to obtain valid service upon defendant, he is required to sue out *alias* or *pluries* summons if he desires to prevent a discontinuance. G.S. 1-95. *Hodges v. Ins. Co.*, 289.

Rendition of judgment does not terminate an action but the action remains pending until judgment is satisfied, and is open to motion for execution, for recall of execution, to determine proper credits and for other matters relating to the existence of the judgment or the amount due thereon. *Anderson v. Moore*, 299.

ADOPTION.

§ 4. Nature of Proceedings, Jurisdiction and Venue.

Adoption proceeding is before the clerk of the Superior Court. *In re Blalock*, 493.

§ 8. Preliminary Orders.

An interlocutory order tentatively approving the adoption of a minor and expressly providing that the minor should remain a ward of the juvenile court, entered by the clerk upon the consent of the child's mother, does not oust the jurisdiction of the domestic relations court theretofore obtained in a proceeding for the custody of the child upon its adjudication that the child was a ward of the State. Furthermore, under G.S. 7-103 the domestic relations court would be included in the term "court" as used in the clerk's order. "Tentative" and "tentatively" defined. G.S. 110-23. *In re Blalock*, 493.

§ 10. Conclusiveness and Effect of Final Decree.

Foreign decree of adoption of child domiciled here, entered upon suppression of facts, *held* void. *In re Blalock*, 493.

ADVERSE POSSESSION.

§ 3. Adverse Character of Possession in General.

A grantee's occupation of land beyond the boundary called for in his deed under the mistaken belief that it belonged to him is not adverse to the true owner, since it is the intent to claim against the true owner which renders the entry and possession adverse. *Gibson v. Dudley*, 255.

Every possession of land is presumed to be under the true title and permissive rather than adverse. *Ibid.*

§ 7. Tacking Possession.

A daughter stands in privity to her father, and may tack his adverse possession to her adverse possession. *Locklear v. Oxendine*, 710.

ADVERSE POSSESSION—*Continued.*

§ 9b. Presumptive Possession to Outermost Boundaries of Deed.

Presumptive possession to the outermost boundaries of a deed under which a party claims cannot extend to that part of the land which is in the actual and hostile possession of another. *Locklear v. Oxendine*, 710.

§ 9c. Color of Title—Fitting Description to Land.

A party claiming under color of title must fit the description in the deed to the land claimed. *Locklear v. Oxendine*, 710.

ANIMALS.

§ 2. Liability for Damage Inflicted by Domestic Animals.

In order for the owner or keeper of a mule to be liable for an injury inflicted by the animal it must be alleged and proved that the animal possessed a vicious propensity and that the owner or keeper knew or should have known thereof, and where the complaint contains no such allegations it is demurrable notwithstanding other allegations that the area selected by the keeper for auction of the animal was congested due to overcrowding so that plaintiff could not move out of the way. *Sellers v. Morris*, 560.

APPEAL AND ERROR.

§ 2. Judgments and Orders Appealable.

The trial court overruled demurrer and, in the exercise of its discretion, allowed plaintiff time to amend the complaint. Defendants excepted and appealed. *Held:* The exception is, in effect, to the refusal to dismiss the action, from which no appeal lies, and the appeal will be dismissed as premature. *Gill v. Smith*, 86.

§ 3. Parties Who May Appeal.

Defendant has no right of appeal from a judgment which is entirely in its favor. *Hooper v. Casualty Co.*, 154.

Ordinarily, persons who are dismissed as additional parties defendant and therefore do not participate in the trial and are not parties thereto, may not appeal from the judgment upon exception to the issues submitted. *Essick v. Lexington*, 600.

§ 6b. Time of Objecting and Excepting.

Where the court enters an order directing payment by the receiver of a certain item, an exception taken to a subsequent order in the proceedings entered after the claim had been paid under the prior order, is too late to present the correctness of the order of payment. *Investment Co. v. Chemicals Laboratory*, 294.

§ 6c (3). Exceptions to Findings or to Judgment on Findings or to Judgment.

A general exception to the findings of fact is insufficient, but appellant must point out with particularity the findings excepted to. *Perkins v. Sykes*, 147.

An exceptive assignment of error to the judgment presents only whether the facts found are sufficient to support the judgment and whether error in matters of law appear upon the face of the record. *Ibid.*

A sole assignment of error to the rendering and signing of an order presents the single question whether the facts found are sufficient to support the order, and does not bring up for review the findings or the evidence upon which they are based. *Bailey v. McPherson*, 231.

A sole assignment of error to the sustaining of a demurrer filed in the cause presents the question as to whether error of law appears upon the face of the record. *Duke v. Campbell*, 262.

Exceptions to the findings of fact and to the denial of requests for special findings, challenge the sufficiency of the evidence to support the findings attacked. *Davis v. Martini*, 351.

A sole exception to the signing of the judgment presents only whether the facts found by the trial judge support the judgment and whether error in matters of law appear upon the face of the record, and does not bring up for review the findings of fact or challenge the sufficiency of the evidence upon which they are based. *Lumber Co. v. Sewing Machine Co.*, 407; *In re Blalock*, 493.

Where the sole exception is to the entering and signing of the order appealed from, it will be presumed that the court found facts sufficient to support its judgment and the judgment will be affirmed when it is regular in form and no error is made to appear on the face of the record. *Surety Corp. v. Sharpe*, 642.

Where the evidence is not brought forward in the record it will be presumed that there was competent evidence to support the court's findings of fact. *In re Housing Authority*, 649.

§ 6c (6). Exceptions to Statement of Contentions or Evidence.

An exception to the statement of the contentions of the opposing party will not be considered when the matter is not brought to the court's attention by the aggrieved party in time to afford opportunity for correction. *Dickson v. Coach Co.*, 167.

Where inadvertence in statement of evidence is brought to court's attention at the time, failure of court to make correction entitles appellant to a new trial upon exception. *Harris v. Draper*, 221.

§ 10a. Necessity for "Case on Appeal."

An exception to the order for the disbursement of the funds remaining in the hands of the receiver in accordance with the receiver's report theretofore filed, to which no exception was taken, presents the correctness of the judgment for review, and the alleged error being presented by the record proper, no case on appeal is required. *Bishop v. Black*, 333.

§ 14. Powers of and Proceedings in Lower Court After Appeal.

The signing by the presiding judge of the appeal entries, fixing and settling the contents of the case on appeal, *eo instanti* removes the matters involved from the jurisdiction of the Superior Court and transfers jurisdiction to the Supreme Court pending appeal, and thereafter the Superior Court is *functus officio* and has no jurisdiction to consider a second motion involving the same matters, and an order upon such second motion is a nullity. *Bailey v. McPherson*, 231.

After appeal from final judgment the trial court is without authority to hear a motion in the cause, even during the term. *Green v. Ins. Co.*, 321.

APPEAL AND ERROR—*Continued.*

§ 21. Grouping of Exceptions and Assignments of Error.

Where the exceptions and assignments of error are not grouped as required by Rule of Practice in the Supreme Court 19 (3), the appeal may be dismissed. *Investment Co. v. Chemicals Laboratory*, 294.

§ 24. Necessity of Exceptions to Support Assignments of Error.

Where there is no exception to an order, and the record does not include a copy of the order, the correctness of the order cannot be reviewed. *Investment Co. v. Chemicals Laboratory*, 294.

§ 29. Abandonment of Exceptions by Failure to Discuss in the Brief.

Exceptions not discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28. *Scenic Stages v. Lowther*, 555.

§ 31d. Dismissal for Want of, or Defective Briefs.

Where there are no assignments of error and no exceptions are brought forward in appellant's brief, the appeal will be dismissed. *Goldston Bros. v. Newkirk*, 428.

Where one appellant fails to file brief, such failure works an abandonment of his assignments of error except those appearing upon the face of the record which are cognizable *ex mero motu*, and where no such error appears and his counsel expressly states that he has abandoned his appeal, his appeal will be dismissed. *Dillard v. Brown*, 551.

§ 31e. Dismissal on Ground That Question Presented Has Become Moot.

The rule that an appeal from the refusal to restrain the holding of an election will be dismissed as academic when the election has been held pending appeal does not apply when plaintiffs also assert that if the election were held it would be void and that if the election went against the legalized sale of beer and wine they would suffer irreparable property and monetary loss for which they would have no adequate remedy at law. *Ferguson v. Riddle*, 54.

Appeal from the denial of *certiorari* in proceedings protesting the manner in which a registrar was performing his duties and seeking the removal of members of the county board of elections for alleged failure in their duties in regard to the appointment of the registrar and their action on the protest, will be dismissed as academic when the registration period fixed by law has expired and the dates fixed for holding the elections have passed pending the appeal. *Gordon v. Wallace*, 85.

Where the questions sought to be presented become moot as of the time for decision, the appeal will be dismissed. *In re Will of Johnson*, 576.

Where an act sought to be restrained has been done pending appeal, the question becomes moot and the appeal will be dismissed. *Surety Corp. v. Sharpe*, 644.

§ 37. Defects Cognizable Ex Mero Motu.

Where it is manifest from the public records of which the Supreme Court will take judicial knowledge that the person holding the term of court at which the judgment appealed from was rendered was not a qualified judge, the Supreme Court will vacate the judgment *ex mero motu*. Whether the parties themselves could have interposed any valid objection to the proceeding as being less than *de facto*, not presented or decided. *Motors Corp. v. Haywood*, 57.

APPEAL AND ERROR—*Continued.*

Where it is apparent on the record that the lower court was without jurisdiction to enter an order, the Supreme Court will declare it a nullity *ex mero motu*. *Bailey v. McPherson*, 231.

Where error is manifest on the face of the record the Supreme Court may correct it *ex mero motu*. *Duke v. Campbell*, 262.

§ 38. Presumptions and Burden of Showing Error.

The judgment of the lower court is presumed correct and the burden is upon appellant to show error. *Gibson v. Dudley*, 255.

The presumption is in favor of the correctness of the judgment of the lower court, and appellant has the burden of showing prejudicial error. *In re Will of Johnson*, 570.

§ 39a. Prejudicial and Harmless Error in General.

Alleged errors which do not challenge the validity of the trial in respect to the verdict as rendered must be deemed immaterial and harmless. *Yost v. Hall*, 463.

A judgment will not be disturbed for error which is too attenuate to have affected the outcome of the trial. *Scenic Stages v. Lowther*, 555.

Appellant must make prejudicial error plainly appear and it is insufficient merely to cast doubt upon the accuracy of the judgment of the lower court. *In re Will of Johnson*, 570.

§ 39b. Error Cured by Verdict.

Where excluded evidence is germane to the issues of negligence and contributory negligence, error in its exclusion cannot be rendered harmless by the verdict when only one of these issues is answered in favor of the party offering the testimony. *Harris v. Draper*, 221.

Appellant may not complain of alleged error relating to an issue answered in his favor. *DeWeese v. Belk's Department Store*, 281; *Scenic Stages v. Lowther*, 555.

§ 39c. Error Harmless Because Appellant Not Entitled to Relief on Any Aspect.

The contention of defendant that the judgment of the lower court in its favor should be sustained notwithstanding error because in any event defendant would be entitled to nonsuit on the issue of contributory negligence, cannot be sustained when the question of nonsuit is not presented on the appeal. *James v. R. R.*, 591.

§ 39e. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Exception to the admission of evidence cannot be sustained when it appears that testimony of the same import was theretofore admitted without objection. *Gibbs v. Armstrong*, 279.

The exclusion of evidence will not be held for reversible error when it does not appear what the testimony of the witness would have been. *Ibid.*

§ 39f. Harmless and Prejudicial Error in Instructions.

Where the court, instead of correcting an inadvertence in the statement of the testimony upon a crucial point, states that the narrative was in accordance

with the court's recollection, and the error is emphasized by the interjection of counsel for the opposing party that the narrative was in accordance with his recollection also, the error cannot be held cured by the court's instruction that the jury should take its own recollection of the evidence and not that of the court or counsel. *Harris v. Draper*, 221.

Exception to charge will not be sustained when the charge construed contextually is without substantial error. *Gibbs v. Armstrong*, 279.

Error in charge on burden of proof is prejudicial. *James v. R. R.*, 591.

§ 40d. Review of Findings of Fact.

The findings of the trial court upon motion to set aside a default judgment for surprise or excusable neglect are conclusive on appeal when supported by evidence. *Perkins v. Sykes*, 147.

Facts found by the trial court under a misapprehension of law are not binding on appeal, and in such instance the facts will be set aside and the cause remanded to the end that the evidence be considered in its true legal light. *Ibid.*

The findings of fact of the trial court are conclusive on appeal when they are supported by competent evidence notwithstanding there may be evidence to the contrary also, it being the function of the trial court to weigh the contradictory affidavits and to determine for itself the crucial issues of fact involved. *Davis v. Martini*, 351.

Finding which amounts to a conclusion of law is not binding on appeal. *Allman v. Register*, 531.

A finding by the trial court that at the time in question the son was operating the parent's car in this State within the purview of the "family-purpose doctrine" so as to render the nonresident parent subject to service under G.S. 1-105, is conclusive when supported by evidence. *Ewing v. Thompson*, 564.

§ 40e. Review of Jury's Verdict.

The verdict of the jury upon controverted issues of fact is conclusive in the absence of prejudicial error of law committed in the trial of the cause. *Morris v. Wrape*, 462.

§ 40f. Review of Orders on Motions to Strike.

Exception to refusal of motion to strike certain allegations from the complaint overruled on this appeal. *King v. Motley*, 42.

Upon appeal from the refusal of the court to strike allegations from a pleading, the Supreme Court will not attempt to chart the course of trial in advance of the hearing. *Clothing Store v. Ellis Stone Co.*, 126; *Trucking Co. v. Payne*, 637.

Where the refusal of a motion to strike certain allegations from the adverse party's pleading is not appealable, movant may preserve his exception and on his appeal from final judgment the exception will be sustained when the matter sought to be stricken is irrelevant to the issue involved in the case. G.S. 1-153. *Sprinkle v. Ponder*, 312.

Exception to the refusal to strike certain allegations from the complaint upon motion aptly made will be sustained when the matter is irrelevant and its retention in the pleading will cause harm or injustice to movant. *Council v. Dickerson's, Inc.*, 472.

APPEAL AND ERROR—*Continued.*

§ 51a. Law of the Case.

A decision of the Supreme Court on a former appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal. *Maddox v. Brown*, 519.

Where, in granting a new trial, the Supreme Court expressly holds that the evidence was sufficient to be submitted to the jury, a motion to nonsuit in the subsequent retrial may be properly granted only if the evidence at the retrial varies in some material aspect from that offered on the first trial, and variances, discrepancies, omissions and additions in the evidence upon the second trial cannot justify nonsuit therein when such differences relate solely to minor details and the evidence at both trials is substantially the same. *Ibid.*

§ 51c. Construction and Interpretation of Decisions of Supreme Court.

An opinion of the Supreme Court must be considered with a view to the case in which it was delivered. *Brown v. Hodges*, 617.

APPEARANCE.

§ 1. Distinction Between Special and General Appearance.

Whether an appearance is special or general is to be determined not by its form but by its character; an appearance for the purpose of testing the jurisdiction of the court over the person of defendant is a special appearance, and an appearance for the purpose of invoking the judgment of the court in any manner on any question other than that of jurisdiction of the court over the person of defendant, such as the court's jurisdiction over the subject matter, is a general appearance. *In re Blalock*, 493.

A purported special appearance in an adoption proceeding for the purpose of moving to dismiss for want of jurisdiction of the court over the minor child, the subject of the proceeding, is a general appearance waiving want of service upon movants. *Ibid.*

§ 2b. Effect of General Appearance.

A general appearance waives any defects in the jurisdiction of the court for want of valid summons or of proper service. *In re Blalock*, 493.

ARBITRATION AND AWARD.

§ 1. Nature and Requisites of Proceedings in General.

The provisions of G.S. 1-544 *et seq.* are cumulative and concurrent to common law arbitration. *Chair Co. v. Furniture Workers*, 46.

§ 13. Validity and Attack of Award.

An award is always open to attack on the ground that arbitrators exceeded their powers. *Chair Co. v. Furniture Workers*, 46.

In determining the validity of the decision of arbitrators the question is not whether they acted wisely but whether they went beyond the limits established by the agreement between the parties, and a decision within the terms of the agreement to arbitrate and the particular grievance submitted to them is final and binding upon both parties. *Ibid.*

Whether Christmas falling on a Sunday should be counted as day worked under contract with union *held* within question arising under the agreement

ARBITRATION AND AWARD—*Continued.*

and within the particular grievance submitted, and therefore decision of arbitrators is final. *Ibid.*

Award of arbitrators rendered in accordance with policy agreement may not be attacked for want of notice to mortgagee named in loss payable clause. *Green v. Ins. Co.*, 321.

ARMY AND NAVY.

§ 3. Prosecution of Servicemen for Crime in State Courts.

Duty of soldier to obey orders of superiors refers to lawful commands relating to military duty, and contention of soldier he committed assault on female under his sergeant's orders *held* no defense. *S. v. Ray*, 558.

ARSON.

§ 6. Competency and Relevancy of Evidence.

In a prosecution under G.S. 14-62 it is reversible error to admit opinion testimony that the fire was of incendiary origin since the facts constituting the basis for such conclusion are so simple and readily understood that it is for the jury to draw the conclusion from testimony as to the facts, and therefore the conclusion is not the subject of opinion testimony. *S. v. Cuthrell*, 274.

§ 7. Burden of Proof and Sufficiency of Evidence.

Defendant's plea of not guilty in a prosecution under G.S. 14-62 places the burden upon the State to prove (1) the fire, (2) that it was of incendiary origin, (3) and that defendant was connected with the crime. *S. v. Cuthrell*, 274.

ASSAULT.

§ 13. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence which establishes motive and an opportunity of defendant to have committed the offense, and threats made by defendant against the victim of the secret assault, without evidence connecting defendant with the actual execution of the crime, is insufficient to overrule defendant's motion to nonsuit, since the circumstances are entirely consistent with defendant's innocence. *S. v. Jarrell*, 741.

Where in a prosecution for assault with a deadly weapon, the State introduces testimony of a witness that he was plowing with defendant at the time they heard a shot, the only shot fired that morning in the vicinity so far as the evidence revealed, and also testimony of a statement made by defendant that he knew nothing of the shooting, and there is no evidence directly contrary to this testimony, *held*, the State's own evidence establishes a defense by witnesses offered by it and presented as worthy of belief, and defendant is entitled to avail himself of such defense on motion of nonsuit. G.S. 14-32. *Ibid.*

ATTORNEY AND CLIENT.

§ 8. Duration and Termination of Relationship.

An attorney retained generally to conduct an action enters into an entire contract to follow the proceeding to its termination, and he may not withdraw from the case except by leave of court for sufficient cause after reasonable notice has been given the client. *Perkins v. Sykes*, 146.

AUTOMOBILES.

§ 7. Safety Statutes and Ordinances in General.

The violation of a public statute regulating the operation of motor vehicles on a public highway constitutes negligence, and is actionable if the proximate cause of the injury. *Erwin v. Mills Co.*, 415.

§ 8c. Turning.

The violation of either of the requirements of G.S. 20-154 that a motorist before turning to the right or left from a direct line on the highway must first exercise reasonable care to ascertain that such movement can be made in safety and shall give the appropriate statutory signal of his intention to make a turn is negligence *per se* and is actionable if it proximately causes injury. *Grimm v. Watson*, 65.

A motorist making a left turn on the highway is not only required by statute to give the statutory signal during the last fifty feet traveled, but is also required first to exercise reasonable care to ascertain that the movement can be made in safety, G.S. 20-154, and further is under the common law duty to exercise that degree of care which an ordinarily prudent person would exercise under like conditions to avoid injury to others. *Ervin v. Mills Co.*, 415.

§ 8d. Parking and Parking Lights and Duty to Be Able to Stop Within Range of Lights.

The rule that a motorist traveling at nighttime must not exceed a speed at which he can stop within the distance that objects can be seen ahead of him on the highway is not a rule of thumb but requires of him only that he exercise that degree of care for his own safety which a reasonably prudent person would exercise in like circumstances and be able to stop before striking an object on the highway which he sees or should see in maintaining a proper lookout and attention to the road, but not that he should be able to bring his automobile to an immediate stop upon the sudden arising of a dangerous situation which he could not reasonably have anticipated, or require him to see that which is invisible to a person exercising due care. *Chaffin v. Brame*, 377.

The duty of a motorist to exercise that degree of care for his own safety which an ordinarily prudent person would exercise under similar circumstances requires him to keep a reasonably careful lookout and to keep his car under such control at night as to be able to stop within the range of his lights. *Marshall v. R. R.*, 38.

§ 8i. Intersections.

The "right of way" at an intersection means the right of a driver to continue in his direction of travel in a lawful manner in preference to another vehicle approaching the intersection from a different direction. *S. v. Hill*, 61.

Where an intersection has no stop signs or traffic signals and two vehicles approach it at approximately the same time, the vehicle on the right has the right of way, G.S. 20-155 (a); but when the vehicle on the left comes first to the intersection and the driver finds no vehicle approaching from his right within such distance as reasonably to indicate danger of collision, taking into consideration the respective distances of the vehicles to the intersection and their relative speeds and other attendant circumstances, the vehicle on the left has the right of way. *Ibid.*

A driver having the right of way may act upon the assumption, in the absence of notice to the contrary, that the other motorist will recognize his right of way and grant him free passage over the intersection. *Ibid.*

AUTOMOBILES—*Continued.*

A motorist turning left into an intersection is required to pass beyond the center of the intersection before making the turn. *Ervin v. Mills Co.*, 415.

Where a vehicle on a servient highway approaches an intersection at approximately the same time as a vehicle on his right traveling on the dominant highway, the vehicle on the dominant highway has the right of way both under G.S. 20-155 (a) and G.S. 20-158. *Yost v. Hall*, 463.

The fact that a motorist on a servient highway reaches an intersection a hairsbreadth ahead of one on the dominant highway does not give him the right of way, but it is his duty to yield the right of way to the motorist on the dominant highway unless such motorist is a sufficient distance from the intersection to warrant the assumption that he can cross in safety before the other vehicle, operated at a reasonable speed, reaches the crossing. G.S. 20-158. *Ibid.*

A driver along a servient highway who comes to a complete stop before its intersection with a dominant highway is under duty to exercise reasonable care to ascertain that he can enter upon the intersection with reasonable assurance of safety to himself and others, and it is negligence for him to enter upon the intersection in the path of a vehicle approaching along the dominant highway unless such other vehicle is a sufficient distance from the intersection to afford the driver upon the servient highway reasonable ground to believe that he can cross the intersection in safety. *Matheny v. Motor Lines*, 673.

§ 11b. Loading and Protruding Objects.

Employer standing at rear of truck behind loose load *held* entitled to have issues of negligence and contributory negligence submitted to jury in action against employee-driver when excessive speed under circumstances caused door constituting part of load to fly back and knock employer from truck. *Rollison v. Hicks*, 99.

Evidence that defendants' truck passed on the right side of the truck in which defendant was riding, and that defendants' truck was then turned to its right into a driveway, so that the rear of its load of lumber whipped around and struck the front of plaintiff's truck, *held* to raise issue of negligence. *Chambers v. Allen*, 195.

§ 12a. Speed in General.

The fact that a vehicle is being driven within the statutory speed limit does not render the speed lawful when by reason of special hazards the speed is greater than is reasonable and prudent under the existing conditions. G.S. 20-141. *Rollison v. Hicks*, 99; *Riggs v. Motor Lines*, 160; *Butler v. Allen*, 484.

§ 13. Passing Vehicles Traveling in Opposite Directions.

The fact that accident occurs slightly to plaintiff's left of center of highway is not conclusive on question of contributory negligence when evidence discloses that shortly before accident defendant was slightly to his left and caused plaintiff to put on brakes suddenly and skid to left. *Journigan v. Ice Co.*, 180.

§ 14. Passing Vehicle Traveling in Same Direction.

The statutory requirement that a motorist before attempting to pass another vehicle traveling in the same direction shall sound his horn does not apply in a business district of a city. *Ervin v. Mills Co.*, 415.

AUTOMOBILES—*Continued.*

Evidence *held* not to show that cyclist was attempting to pass truck, but only that he attempted to avoid collision after truck started to turn left. *Ibid.*

§ 17. Children on Highway.

Evidence of frontal collision with child where vision was unobstructed *held* for jury on issue of negligence. *Edwards v. Cross*, 354.

Evidence of excessive speed *held* to require submission of issue to jury notwithstanding that child suddenly ran into highway in front of defendant's car. *Register v. Gibbs*, 456.

While ordinarily a motorist proceeding at a lawful and reasonable speed is not liable for injuries to a child who darts from behind another vehicle or other object into the street so suddenly that he cannot avoid striking the child, where the motorist travels at a speed in excess of the statutory limit or greater than is reasonable and prudent under the existing conditions he is not relieved of liability if his excessive speed prevents him from avoiding the accident after he saw or should have seen the child in the exercise of due care. *Butler v. Allen*, 484.

§ 18a. Pleadings in Auto Accident Cases.

Allegations to the effect that plaintiff was a pupil in a school bus and was injured in a collision between the bus and a truck belonging to the corporate defendant and operated by the individual defendant in the course of his employment, and that as the truck driver approached a bridge at a place known to him to be hazardous, he failed and neglected to keep his truck under control and failed to drive the truck to his right so as to leave one-half the width of the bridge for the passage of the school bus, proximately resulting in the collision in suit, *is held* sufficient to state a cause of action and overrule defendants' demurrer notwithstanding other allegations at variance therewith or less favorable to plaintiffs, the facts alleged being insufficient to support the doctrine of insulated negligence as a matter of law *Bryant v. Ice Co.*, 266.

§ 18b. Proximate Cause and Anticipation of Injury.

Motorist is not required to anticipate negligence on part of others. *Chaffin v. Brame*, 377.

§ 18c. Contributory Negligence.

Motorist is required to exercise due care for own safety. *Marshall v. R. R.*, 38.

Motorist cannot be guilty of contributory negligence unless he acts or fails to act with actual or constructive knowledge of danger which his conduct involves. *Chaffin v. Brame*, 377.

§ 18d. Concurring and Intervening Negligence.

Complaint *held* not to establish insulated negligence as a matter of law. *Bryant v. Ice Co.*, 266.

§ 18e. Last Clear Chance.

Evidence tending to show that defendant, after having come to a complete stop, drove his car into an intersection with a dominant highway in the path of a truck approaching the intersection along the dominant highway at a speed of thirty miles per hour, and was struck by the truck after he had traveled some nine or ten feet, *is held* insufficient to support an issue of last clear

chance, since this doctrine is not applicable unless plaintiff discovers or should have discovered defendant's peril in time to have avoided the injury. *Matheny v. Motor Lines*, 673.

§ 18g (1). Presumptions and Burden of Proof.

In the absence of evidence to the contrary it will not be assumed that either motorist involved in a collision was operating his vehicle in excess of the legal limit permitted under the circumstances. *Yost v. Hall*, 463.

The fact that a party is prevented from testifying as to events relating to the collision because of amnesia resulting from injuries received in the accident raises no presumption that he exercised due care when there is positive evidence of negligence on his part, and in such event the loss of memory should not be considered either in favor or against him. *Ibid.*

The presumption that a motorist exercised due care in the absence of evidence to the contrary cannot be used to create a presumption of negligence on the part of the other driver involved in the collision. *Ibid.*

§ 18g (2). Relevancy and Competency of Evidence in General.

Where each defendant testifies that his injury in the collision at an intersection produced a state of retrograde amnesia so that neither could say whether he saw the other vehicle involved in the accident, testimony of statements made immediately after the collision by defendant driver in the presence of defendant owner, who was a passenger, that they were in a hurry, that he did not see the railroad track or stop sign, did not remember seeing the other vehicle or the stop sign before the intersection with a dominant highway, *held* for the jury as to whether they amounted to nothing more than a disavowal of memory, the asserted amnesia not applying to such statements. *Yost v. Hall*, 463.

§ 18g (4). Opinion Evidence.

The driver of a car hit by another at right angles at an intersection is competent to testify as to his opinion of the speed of such other car when it struck the car he was driving, the weight and credibility of his testimony being for the jury. *Harris v. Draper*, 221.

Testimony of an eyewitness that a bus pulled over far enough to get around a motorcycle traveling ahead of it in the same direction had the motorcycle continued straight ahead, may be upheld as a statement of composite fact and not objectionable as invading the province of the jury by expressing a theoretical opinion about a matter of simple physical fact. *Maddox v. Brown*, 519.

§ 18g (5). Physical Facts at Scene as Evidence of Speed.

The physical facts at the scene of an accident may disclose that the operator of the vehicle was traveling at excessive speed. *Riggs v. Motor Lines*, 160.

The physical facts at the scene may be more convincing than oral testimony. *Yost v. Hall*, 463.

Where a motorist is mortally wounded in a collision so that he may not have been in condition to apply his brakes or make any effort to stop his vehicle after the impact, the fact that his vehicle traveled a distance of ninety feet after the collision is a mere circumstance for the consideration of the jury, and does not compel the conclusion that he was traveling at an excessive speed at the time. *Ibid.*

AUTOMOBILES—*Continued.*

§ 18g (6). Admissions, Express or Implied.

Defendant's failure to stop after hitting a pedestrian, G.S. 20-166, and his nervousness upon being later apprehended and questioned about the accident, permits the inference of conscious wrong or dereliction on his part, and is some evidence that he was guilty of negligence in the operation of the vehicle. *Edwards v. Cross*, 354.

§ 18h (2). Sufficiency of Evidence and Nonsuit on Issue of Negligence.

Evidence tending to show that plaintiff, following defendant's bus on the highway, turned into the left or passing lane of the highway and blew his horn to warn of his intention to pass the bus, which was traveling in the right traffic lane, and that when plaintiff's car was abreast the rear wheels of the bus, the bus driver turned sharply to the left without any signal or warning, resulting in collision in suit, *is held* sufficient to be submitted to the jury on the issue of negligence. *Grimm v. Watson*, 65.

Evidence that excessive speed under circumstances caused door of loose load to fly back and knock plaintiff-employer from back of truck, where he was standing to hold load on truck, *held* to take case to jury on issue of employee-defendant's negligence. *Rollison v. Hicks*, 99.

Evidence tending to show that defendant's tractor-trailer was being operated on a wet highway in a drizzling rain, and that after a collision with another vehicle it jumped a road ditch bank about 1½ feet high, went 200 feet, tore down a cedar fence post six or eight inches in diameter, proceeded about 250 feet further and broke down an iron pipe post, knocked down a gas pump and crashed into a cinder block wall of a store and came to rest some eight or ten feet inside the store, *is held* sufficient to be submitted to the jury upon the question of whether the tractor-trailer was being operated at an execssive speed under the existing conditions notwithstanding defendant's evidence that it was traveling under 45 miles per hour. *Riggs v. Motor Lines*, 160.

Plaintiffs' evidence tending to show that the driver of defendants' truck passed the truck in which plaintiffs were riding on its right and turned right into a driveway, causing the rear of the truck, which was loaded with lumber, to whip around and hit the radiator of the truck in which plaintiffs were riding, causing the injuries in suit, *is held* sufficient to overrule defendants' motion to nonsuit notwithstanding that defendants' evidence was in sharp conflict with that of plaintiffs. *Chambers v. Allen*, 195.

Evidence tending to show that a six-year-old child was struck by the front of a car owned and operated by defendant as the child was crossing the highway along an intersecting farm road plainly visible to a motorist on the highway, that the highway was straight for a quarter of a mile with nothing to obstruct the view of a motorist, and that the driver did not slacken speed or sound his horn before the collision and failed to stop afterwards, although he slackened speed after traveling a short distance after the impact, and was nervous when later apprehended and questioned about the occurrence, *is held* sufficient to be submitted to the jury upon the issue of defendant's negligence. *Edwards v. Cross*, 354.

Evidence of negligence in making left turn *held* sufficient to be submitted to the jury. *Ervin v. Mills Co.*, 415.

"Sudden appearance doctrine" *held* not to warrant nonsuit in action for death of child struck on highway. *Register v. Gibbs*, 456; *Butler v. Allen*, 484.

AUTOMOBILES—*Continued.*

Physical evidence *held* to show negligence in operation of car along servient highway causing collision at intersection. *Yost v. Hall*, 463.

Plaintiff's own evidence tended to show that he was driving along a servient highway and stopped his car before entering upon an intersection with a dominant highway at a point from which he had a clear and unobstructed view of traffic upon the dominant highway, and that he moved out into the intersection in front of a large truck approaching along the dominant highway at a rate of thirty miles per hour and was struck by the truck before his car had traveled more than nine or ten feet. *Held:* Plaintiff's evidence discloses as a matter of law contributory negligence constituting a proximate cause of the accident. *Matheny v. Motor Lines*, 673.

§ 18h (3). Nonsuit on Ground of Contributory Negligence.

Evidence that driver struck railroad overpass supports while driving at night *held* to show contributory negligence as matter of law. *Marshall v. R. R.*, 38.

Nonsuit on issue of contributory negligence is proper only if plaintiff's own evidence establishes contributory negligence. *Grimm v. Watson*, 65.

Plaintiff-employer *held* not contributorily negligent as matter of law in standing at rear of truck to hold loose load on truck being driven by employee-defendant. *Rollison v. Hicks*, 99.

Fact that accident occurs slightly to plaintiff's left of center of highway is not conclusive on question of contributory negligence when evidence discloses that shortly before accident defendant was slightly to his left and caused plaintiff to apply brakes suddenly and skid to left. *Journigan v. Ice Co.*, 180.

Evidence *held* not to show contributory negligence as a matter of law on part of motorist striking unlighted vehicle on highway at nighttime. *Chaffin v. Brame*, 377.

Evidence *held* not to show contributory negligence of motorcyclist in hitting truck attempting to make left turn. *Ervin v. Mills Co.*, 415.

§ 18h (4). Nonsuit for Intervening Negligence.

The evidence tended to show that defendant's truck was being operated at an excessive speed under the circumstances and that after a collision with another vehicle it careened into a store by the side of the highway, injuring plaintiffs. *Held:* Nonsuit on the ground of intervening negligence of the driver of the vehicle with which the truck collided was properly denied since if the excessive speed of the truck was the reason or one of the reasons why it could not be stopped before crashing into the store, then such negligent speed was at least one of the proximate causes of the injuries and the negligence of the operator of the other vehicle was only a contributing or concurring cause. *Riggs v. Motor Lines*, 160.

§ 18i. Instructions in Auto Accident Cases.

An instruction to the effect that the negligence of an independent third party would not insulate defendant's negligence if, in the natural and usual course of events, defendant could have foreseen the act of negligence on the part of such third person, constitutes prejudicial error, since a motorist is never required to foresee or anticipate negligence on the part of other motorists on the highway. *Riggs v. Motor Lines*, 160.

Plaintiff predicated defendant's negligence upon evidence of excessive speed and defective brakes upon defendant's vehicle. *Held:* Defendant was entitled,

upon his supporting evidence, to an unqualified instruction that if the jury should fail to find by the greater weight of the evidence that defendant's truck was being operated at excessive speed or without adequate brakes, to answer the issue of negligence in the negative, and an instruction which in each instance qualified a negative finding, in whole or in part, upon a finding that defendant could not have anticipated the negligent act of an independent agency or third party, constitutes prejudicial error. *Ibid.*

An instruction as to the law in passing a vehicle at an intersection when the left side of the highway is not free of oncoming traffic for a sufficient distance to permit the movement to be made in safety, *is held* not prejudicial upon the evidence in this case which showed that the driver of defendant's bus, traveling upon a four lane highway, had suddenly swerved to the left to go around a car in front of him, which was turning right at the intersection, and completely diverted his attention from the direction in which he was traveling, and collided on his right of the center of the highway with a vehicle approaching from the opposite direction 25 feet after the bus had cleared the intersection. *Dickson v. Coach Co.*, 167.

Reading of pertinent statutes without applying law to the evidence in the case is insufficient. *Chambers v. Allen*, 195.

An instruction in general terms on the questions of negligence and proximate cause will not be held for error as failing to apply the law to the facts in evidence when theretofore the court has correctly instructed the jury with particularity as to the acts of negligence relied on, the evidence in support thereof, and the facts necessary to be found by the jury to support an affirmative answer to the issue. *Yost v. Hall*, 463.

§ 20a. Negligence of Guest or Passenger.

Evidence of negligence of passenger engaged in joint enterprise with driver in failing to warn driver of approach of engine at crossing which passenger saw or should have seen in exercise of due care *held* for jury on issue of contributory negligence. *James v. R. R.*, 591.

§ 20b. Negligence Imputed to Guest or Passenger.

The doctrine that where the driver and the passenger are engaged in a joint enterprise, the negligence of the driver will be imputed to the passenger, applies only in regard to third persons and not in regard to their liability between themselves. *Rollison v. Hicks*, 99.

Where the owner of a car permits another to drive it for exclusive personal purposes of such other person, and rides in the car solely for the purpose of returning the car to his home after such other person has completed his trip, whether the driver is the agent of the owner while making the trip, *quære*, but it would seem to be a question for the jury. *Harris v. Draper*, 221.

What is a joint enterprise is a question of law, and therefore is for the determination of the court when the facts are not in dispute, it being an issue for the jury only upon disputed facts. *James v. R. R.*, 591.

Where the driver and passenger are engaged in a joint enterprise, negligence on the part of the driver will be imputed to the passenger and will bar the passenger's right to recover against a third person. *Ibid.*

It is not sufficient that the driver and passenger be engaged in a common enterprise in order for the doctrine of joint enterprise to obtain, but it is also

required that each have such control over the car as to be substantially in the joint possession of it. *Ibid.*

Evidence that two police officers of equal rank were engaged in patroling the streets of the municipality in an automobile furnished them by the city for their joint use in performing such duty, is sufficient to support a finding that they were engaged in a joint enterprise, since each had an equal right to direct and govern the movements and conduct of the car. *Ibid.*

Where husband and wife jointly own an automobile, which was being driven by the husband with the wife's consent for a common purpose, the wife being an occupant, they are engaged in a joint enterprise so that negligence on the part of the husband will bar her right to recover for injuries received in a collision with another vehicle. *Matheny v. Motor Lines*, 681.

§ 24c. Liability of Owner for Driver's Acts—Scope of Employment or Authority.

Allegations to the effect that appealing defendant had possession of the automobile in question for his use and enjoyment, that the driver was operating same as his servant and agent and under his direction, and that the appealing defendant was a passenger therein when the driver committed an assault upon plaintiff police officer with his fist and by means of reckless driving in order to escape arrest of them both by the officer, *is held* sufficient to state a cause of action against appealing defendant for assault on the theory of *respondeat superior*. *King v. Motley*, 42.

§ 25. Family Purpose Doctrine.

Family purpose doctrine obtains in this State. *Ewing v. Thompson*, 564.

§ 28e. Sufficiency of Evidence and Nonsuit in Homicide Prosecutions.

Where the evidence discloses that a vehicle approaching from the south came to a virtual stop at the southern edge of an intersection 23 feet from the northern edge thereof, and that a vehicle approaching the intersection from the east at a speed of 15 to 20 miles an hour was then more than 125 feet from the eastern edge of the intersection, the vehicle from the south, thus entering the intersection an appreciable length of time ahead of the vehicle from the east, has the right of way, and where he proceeds without notice that the driver of the vehicle from the east did not intend to grant him free passage, and is hit on his right side by the front of the vehicle from the east after he had traveled at least one-half way across the intersection, he cannot be held guilty of culpable negligence. *S. v. Hill*, 61.

Evidence tending to show that defendant drove his automobile at a speed of eighty miles an hour or more upon a sharp curve at the crest of a steep grade with the left wheels some three or four feet to the left of the clearly visible center line placed on the highway by the State Highway and Public Works Commission, and struck a car traveling in the opposite direction, killing three occupants of the other car, *is held* sufficient to be submitted to the jury on the charge of involuntary manslaughter, since it tends to show an intentional or reckless disregard of statutes enacted for the safety of persons on the highway, proximately causing the deaths of the occupants of the other car. *S. v. Goins*, 460.

AUTOMOBILES—*Continued.*

§ 29b. Prosecutions for Reckless Driving.

In this prosecution for reckless driving, the officers identified one of four speeding cars as a Mercury which one of them testified belonged to defendant, but the officers could not see who was driving the car. Defendant admitted he was the only person who drove his car on the night in question, but in the same statement denied that he was driving at the place in question and testified that he was at the time in a city some distance away, in which later statement he was corroborated by three other witnesses. *Held:* The evidence of defendant's identity as the driver of the speeding car is insufficient to be submitted to the jury. *S. v. Lloyd*, 227.

§ 30d. Prosecutions for Drunken Driving.

Where the quantity of whiskey remaining in a bottle taken from defendant after his arrest is stressed by both sides in a prosecution for drunken driving as having a material bearing upon defendant's condition at the time of his arrest, but the bottle is not introduced in evidence, the statement of the solicitor in his argument that he had the bottle in a paper sack and was willing to show it to the jury, is improper, and upon defendant's objection thereto, the error is not rendered harmless by an instruction that the solicitor had offered to let the bottle be offered *in evidence* at that time but that defendant's counsel objected to this statement and that the jury should not consider the argument at all. *S. v. Eagle*, 218.

Direct and positive testimony by the prosecuting witness that defendant was highly intoxicated and was under the steering wheel immediately after the collision, *is held* sufficient to be submitted to the jury on a charge of drunken driving, G.S. 20-138, the probative value of the testimony being for the jury. *S. v. Simpson*, 438.

§ 34b. Procedure to Revoke Drivers' Licenses.

While the Superior Court has no power to revoke a driver's license, it may suspend execution of judgment on condition that defendant not drive a car on highways for reasonable length of time. *S. v. Smith*, 68.

BASTARDS.

§ 1. Elements of Offense of Willful Failure to Support.

The offense of nonsupport of an illegitimate child is the willful and intentional failure to support the child without justification after notice and request, and since the begetting of an illegitimate child is not denominated a crime, paternity being merely incidental to the issue of nonsupport, a man cannot be held criminally liable for the willful failure to support an unborn illegitimate child. *S. v. Thompson*, 345.

§ 4. Warrant or Indictment in Prosecutions for Failure to Support.

An indictment charging defendant with being the father of prosecutrix' unborn illegitimate child may not be amended so as to charge, after the birth of the child, defendant's willful failure and refusal to support the child. *S. v. Thompson*, 345.

BOUNDARIES.

§ 3b. Calls to Natural Objects.

A call to a natural boundary will control courses and distances as set out in the description in the deed. *Brown v. Hodges*, 617.

BOUNDARIES—*Continued.*

§ 3d. Cotemporaneous Survey.

Where cotemporaneously with the execution of the deed, a line is run and marked and a corner made, such corner will control a call to a natural boundary or courses and distances set out in the deed. *Brown v. Hodges*, 617.

The rule that a cotemporaneous survey made by the parties will control courses and distances as set out in the description in the deed does not apply unless the line is marked and a corner made upon the land, which requires the giving to the line a permanent location and to the corner a permanent position, and stakes for marking the line and fixing the corner, without more, are too lacking in stability and fixedness to serve as monuments for this purpose. *Ibid.*

§ 5a. Parol Evidence of Boundary.

Parol evidence is not competent to alter the courses and distances as set out in the description in a deed when the deed contains no call to a natural boundary and there has been no cotemporaneous line run and marked and a corner made upon the land. *Brown v. Hodges*, 617.

§ 5h. Location of Corner of Contiguous Land.

A call to the corner of an adjacent tract will control distance called for in the description in the deed provided such adjacent corner is sufficiently established. *Brown v. Hodges*, 617.

BROKERS.

§ 11. Right to Commissions Where Sale Not Consummated.

The contract in suit provided that the corporate broker should be entitled to commissions at the close of sales as evidenced by contracts signed by purchasers, and that the broker should collect from the purchasers the first payment on property sold. After auction by the broker and the collection by it of initial payments on part of the property, *lis pendens* was filed in a suit instituted by a third person against the owners of the land, and thereafter the broker, without authorization from the owners, refunded the initial payments of those purchasers who had not stopped payment on their checks. *Held:* In the absence of evidence by the broker that the purchasers were bound in writing by their bids, or that performance was prevented by wrongful act of the owners, the broker is not entitled to commissions, since it had not shown performance of its antecedent obligations in respect to closing the sales, nor waiver of performance by the owners. *Goldston Bros. v. Newkirk*, 428.

Where consummation of sale of realty by a broker is prevented by the filing of *lis pendens* in an action brought by a third party, and consummation of sale is an antecedent obligation to the right to commissions, the broker must introduce evidence tending to show that the filing of *lis pendens* was due to wrongful conduct on the part of the owners in order to maintain that its nonperformance was excused. *Ibid.*

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 2. For Fraud.

Evidence that son, acting as mother's agent, prepared deed to himself for her signature, but fraudulently substituted description of different, more valuable property, *held* to take case to jury in heirs' action to set aside deed. *Vail v. Vail*, 109.

CANCELLATION AND RESCISSION OF INSTRUMENTS—*Continued.*

§ 12. Sufficiency of Evidence and Nonsuit.

Evidence *held* sufficient to make out *prima facie* case of fraud on part of son, acting as agent for mother in preparing deed to himself for her signature, in substituting description of another and more valuable tract. *Vail v. Vail*, 109.

CARRIERS.

§ 1½. Duty to Operate and Maintain Facilities.

The power of the Utilities Commission to require transportation companies to maintain substantial service to the public in the performance of the absolute duty to provide transportation facilities will not be denied even though the service will be unremunerative when singled out and related only to a particular instance or locality, if the loss is incidental and collateral when viewed in relation to and as a part of all its transportation operations as a whole. *Utilities Com. v. R. R.*, 365.

Where the discontinuance of an agency at a railroad station would result only in requiring that incoming freight be prepaid and in inconvenience to individual shippers from possible delay in notifying consignees of the arrival of freight, though otherwise the same freight service would be available, *held* the maintenance of the agency is incidental to the carrier's primary and absolute duty of furnishing transportation facilities, and loss to the carrier is properly considered in determining whether convenience to individuals and to the public outweigh the benefit which would inure to the carrier from the abandonment of the agency. *Ibid.*

No absolute rule can be set for determining a carrier's application to discontinue a particular service, but each case must be considered upon its own facts in accord with the criterion of reasonableness and justice to determine whether public convenience and necessity require the service to be maintained or permit its discontinuance, weighing the benefit to the carrier of abandonment against the inconvenience to which individual shippers may be subjected. *Ibid.*

§ 5. Licensing and Franchises.

The policy of the law controlling the granting of bus franchises is to provide adequate, economical and efficient bus service at reasonable cost to all communities of the State, without discrimination, undue privileges or advantages or unfair or destructive competitive practices, all to the end of promoting the public interest. *Utilities Com. v. Coach Co.*, 119.

The Utilities Commission is without authority to grant a franchise over a route served by another carrier except upon a finding that public convenience and necessity requires additional service over the proposed route, and then only after opportunity is afforded the other carrier to remedy such inadequacy, which it refuses or is financially unable or otherwise disqualified to do. *Ibid.*

In order to grant an application by a carrier to serve communities then being served by another carrier, who intervenes and protests the application, as distinguished from an application for duplication of routes, it is not required that Utilities Commission find that the existing carrier's service is inadequate and afford such existing carrier opportunity to remedy the inadequacy. *Ibid.*

Where an existing carrier intervenes and protests another carrier's application to serve the same communities, the determinative question is the public convenience and necessity, and while the Commission is required to consider whether proposed operations would unreasonably impair the efficient public

CARRIERS—*Continued.*

service of the protesting carrier, this is not determinative unless it would so seriously endanger and impair the operations of the existing carrier as to be contrary to the public interest. *Ibid.*

"Route" as used in Chap. 1132, Session Laws of 1949, means the highway or road traveled in serving communities, districts, or territories adjacent to it, and is not synonymous with "territory." *Ibid.*

G.S. 62-121.52 (7) does not purport to protect against all competition but is designed to protect authorized carriers against ruinous competition, and the statute does not prohibit service of the same points by different carriers over separate routes when such duplicate service is in the public interest. *Ibid.*

G.S. 62-121.52 (7) prohibits the granting of a franchise over any part of the route of an existing carrier except upon the prescribed conditions, and not merely a duplication of the same route from *terminus* to *terminus*, but the application to serve communities being served by the intervening carrier need not be denied *in toto* because there would be a duplication of routes along a short distance, since the existing carrier may be protected as to the duplication in route by proper restrictions in the certificate. *Ibid.*

§ 21b. Injuries to Passengers in Transit.

The evidence tended to show that defendant's bus was being operated at an excessive and unlawful speed, that the driver was watching a vehicle immediately in front of him which was turning right at the intersection, that the driver swerved to the left to avoid this vehicle, and, 25 feet past the intersection, collided with another vehicle approaching from the opposite direction which had turned to its left, slightly over the center line of the highway, in order to go around a vehicle in front of it which was waiting to make a left turn into the intersection, and that after the collision the bus traveled some 300 feet, ran off the highway and stopped at the foot of an embankment, causing injury to plaintiffs, passengers in the bus, with further evidence that the driver of the bus made no effort to apply the hand brake, although he testified it was in good condition prior to the collision and could have stopped the bus in 75 feet if in proper working order. *Held:* Defendant carrier's motions to nonsuit on the ground of intervening negligence of the driver of the other vehicle involved in the collision, were correctly denied. *Dickson v. Coach Co.*, 167.

CHAMPERTY AND MAINTENANCE.

§ 2. Effect of Champerty.

A champertous contract is void in this State, and plaintiff may not maintain an action founded on such contract. *Locklear v. Oxendine*, 710.

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§ 6½. Right of Mortgagor to Settle With Third Person for Injury to or Destruction of Property.

Mortgagor may settle loss with insurer under arbitration agreement in policy without notice to mortgagee in simple loss payable clause. *Green v. Ins. Co.*, 321.

CLERKS OF COURT.

§ 7. Jurisdiction as Juvenile Court. (Adoption proceedings see Adoptions; domestic relations court see Courts § 18.)

Domestic relations courts and clerks of court are separate branches of the Superior Court, the former being given exclusive original jurisdiction involving the custody of juveniles, G.S. 7-103, and the latter jurisdiction of adoption proceedings with power to award the custody of a child to a petitioner pending final decree of adoption. *In re Blalock*, 493.

CONSPIRACY.

§ 4. Indictment.

An indictment containing a count charging named defendants with conspiracy to operate a race-horse lottery and subsequent counts charging the named defendants with operating a race-horse lottery, and with selling race-horse lottery tickets and further counts charging named defendants (the same parties except for the deletion of one of them) with conspiracy to operate a butter-and-egg lottery and with operating a butter-and-egg lottery and with selling butter-and-egg lottery tickets, *held* not objectionable for duplicity or multifariousness. *S. v. Gibson*, 691.

§ 5. Competency of Evidence. (Testimony of co-conspirator see Criminal Law.)

Where the indictment charges that the named defendants did conspire together with each other and "divers other persons" to commit a criminal offense, the State may show the identity of a person not named in the indictment who was a member of the conspiracy and introduce in evidence paraphernalia found in his possession used in furtherance of the common design. *S. v. Gibson*, 691.

In a prosecution for conspiracy considerable latitude is allowed in the reception of evidence offered to establish the gravamen of the offense, and the evidence is not limited to direct evidence. *Ibid.*

§ 7. Instructions in Prosecutions for Criminal Conspiracy.

The court's instructions as to the definition and elements constituting criminal conspiracy *held* without error in this case. *S. v. Bovender*, 683.

CONSTITUTIONAL LAW.

§ 8c. General Assembly—Delegation of Powers.

General Assembly may not delegate to religious corporation any powers of a municipal corporation. *Lee v. Poston*, 546.

§ 19a. Searches and Seizures.

Where one officer armed with "John Doe" warrant and another armed with valid warrant act together it will be presumed that both acted under the valid writ. *S. v. Rhodes*, 453.

§ 20a. Due Process in General.

A fair trial in jury cases and an impartial judge in all cases are prime requisites of due process. *Ponder v. Davis*, 699.

§ 21. Due Process—Notice and Hearing.

The courts of this State have jurisdiction to alter the marriage status of a resident of this State even though the other spouse be a nonresident, provided

CONSTITUTIONAL LAW—*Continued.*

the form and nature of the substituted service on the nonresident meet the requirements of due process of law. *McLean v. McLean*, 139.

It is required that an adjudication affecting the marital status and finally determining personal and property obligations of the parties shall be preceded by notice and an opportunity to be heard. Constitution of N. C., Art. I, Sec. 17. 14th Amendment to the Constitution of the U. S. *Ibid.*

Notice and an opportunity to be heard are prerequisites of due process. *Comrs. of Roxboro v. Bumpass*, 190; *Bailey v. McPherson*, 231.

Where process, in spite of misnomer, is sufficient to give defendant notice that he was intended to be sued, service in strict accord with statute meets requirements of due process. *Bailey v. McPherson*, 231.

§ 22. Right to Jury Trial.

Where the parties to a civil action do not waive trial by jury, nor consent that the judge find the facts, it is error for the judge to enter judgment without the aid of a jury on controverted issues of fact raised by the pleadings. *Icenhour v. Bowman*, 434.

In an action by heirs to recover land on the ground of breach of condition of a conditional fee, defendants' answer asserting an unqualified fee simple, denying breach of condition, and setting up the defenses of waiver, estoppel and statutes of limitation, raises issues of fact for the determination of the jury, and it is error for the court in the absence of waiver of jury trial or consent that the court find the facts, to render judgment without the intervention of a jury. *Ibid.*

§ 28. Full Faith and Credit to Foreign Judgments.

The full faith and credit clause requires judgment in courts of this State for amount of alimony due under decree for absolute divorce rendered by court of another state, but does not require judgment for future installments, and contempt proceedings are not available to enforce judgment. *Willard v. Rodman*, 198.

Foreign decree may be attacked for fraud preventing adverse trial of issues. *In re Blalock*, 493.

Where a court of another state has jurisdiction over the parties and the minor children of the marriage, its divorce decree granting the custody of the children of the marriage to their mother is binding on our courts under the full faith and credit clause of the Federal Constitution and the only forum in which such decree can be modified is the court in which the decree was entered. *Allman v. Register*, 531.

§ 33. Constitutional Guarantees to Person Accused of Crime—Right to Trial by Impartial Jury.

The fact that the county commissioners in selecting the jury list used only the tax returns for the preceding year without a list of names of persons not appearing thereon who were residents of the county and over twenty-one years of age, as stipulated by the amendment to G.S. 9-1, does not tend to show racial discrimination in the selection of prospective jurors, and defendant's objection on this ground cannot be sustained in the absence of any evidence tending to show prejudice, bad faith, or the inclusion or exclusion of persons from the list because of race. *S. v. Brown*, 202.

CONSTITUTIONAL LAW—*Continued.*

The intentional, arbitrary and systematic exclusion or inclusion of any portion of the population from jury service, grand or petit, on account of race, color, creed, or national origin, is at variance with the fundamental law and cannot stand. *Ibid.*

A defendant does not have the right to be tried by a jury of his own race, or to have a representative of any particular race on the jury, or to have any proportional representation of the races thereon, but he is entitled to be tried by a jury from which there has been neither inclusion nor exclusion because of race. *Ibid.*

Every person charged with crime is entitled to trial before impartial judge and unprejudiced jury in atmosphere of judicial calm. *S. v. Carter*, 581.

§ 35. Right Not to Be Forced to Incriminate Self.

Objection by defendant that the taking of his footprint violated his constitutional right not to be compelled to give evidence against himself, Constitution of N. C., Article I, Section 11, *held* untenable both because the evidence disclosed defendant voluntarily suffered his footprint to be taken and because the constitutional protection does not extend to physical facts. *S. v. Rogers*, 391.

§ 36. Right Not to Be Put Twice in Jeopardy. (What constitutes double jeopardy see Criminal Law § 21.)

No person shall be twice put in jeopardy for the same offense. *S. v. Hicks*, 511.

CONTEMPT OF COURT.

§ 5. Hearings and Findings.

Where an order to show cause why defendants should not be held on contempt is issued in an action involving a contested election, the resident judge issuing the order should recuse himself upon petition and affidavit alleging that such judge took an active part on behalf of the plaintiff in the campaign and averring upon verification that in good faith affiant believes he could not obtain a fair and impartial hearing before such judge. G.S. 5-9. *Ponder v. Davis*, 699.

In contempt proceedings arising out of a contested election, verified petition and affidavit for recusation for bias alleging that "in good faith" defendants believe they could not obtain a fair and impartial hearing before the resident judge issuing the order because he had participated in the campaign on behalf of plaintiff, may not be declared scurrilous and untrue and ordered stricken from the record on the court's own motion or *ipsi dixit* without any counter-affidavit or evidence to contradict it, but, if the judge wishes to contest the averments, he should transfer the cause to another judge and file his affidavit in reply or request to be permitted to testify orally. *Ibid.*

Upon petition for recusation for bias in contempt proceedings, the act of the judge, after finding facts, in transferring the matter to another judge for punishment lends color to the averment of prejudice and strengthens the conclusion that the matter should have been referred before attempting to find any facts. *Ibid.*

In contempt proceedings the facts upon which the contempt is based, especially the facts concerning the purpose and object of the contemnor, must be found and filed in the proceedings in order to sustain judgment of punishment, and where the judge to whom the matter is transferred for punishment is not

CONTEMPT OF COURT—*Continued.*

authorized by the order of transfer to make any findings, and the findings by the judge ordering the transfer are ineffectual, judgment imposing punishment for contempt cannot be sustained. *Ibid.*

CONTRACTS.

§ 4. Acceptance and Mutuality.

To constitute a valid contract, the parties must assent to the same thing in the same sense. *Sprinkle v. Ponder*, 312.

§ 7. Contracts Against Public Policy.

A contract for the division of lands to be purchased at a judicial sale in consideration of the withdrawal of the raised bid on one tract by one of the parties and the agreement by both parties not to bid against the other as to the tracts in which they were interested, renders the contract contrary to public policy and void, and the agreement for the division of the lands may not be enforced by either. *Lamm v. Crumpler*, 717.

§ 8. General Rules of Construction.

The courts must construe a contract in accordance with the language of the agreement, and cannot create contractual rights for the protection of those who have failed to protect themselves. *Green v. Ins. Co.*, 321.

§ 18. Performance of Antecedent Obligations and Waiver.

As a general rule, nonperformance of antecedent obligations may not be excused by inability to perform due to unexpected difficulties or unforeseen impediments unless caused by wrongful act or conduct of the other party to the contract. *Goldston Bros. v. Newkirk*, 428.

As a general rule, prevention by one party excuses nonperformance of an antecedent obligation by the other provided such prevention is wrongful, but prevention of performance by interference of a third party, independent of wrongful conduct on the part of the other party to the contract, will not excuse nonperformance of an antecedent obligation. *Ibid.*

CORPORATIONS.

§ 7. Personal Liability of Officers and Directors to Third Persons.

Corporate directors and officers are personally liable for making fraudulent misrepresentations of fact as to the financial condition of the corporation to persons who deal with the corporation and suffer loss by reason of their reliance on such misrepresentations. *Mills Co. v. Earle*, 74.

Complaint *held* to allege cause against corporate officers for fraud and not one to set aside corporate conveyances as fraudulent. *Ibid.*

§ 11½. Transactions Between Corporations and Its Officers and Stockholders.

Where no unfair advantage is taken, stockholders and officers of a corporation may lend it money and take a mortgage on the corporate property as security. *Investment Co. v. Chemicals Labroatory*, 294.

CORPORATIONS—*Continued.*

§ 35. Receivership—Liens and Priorities.

The mortgagees in an unregistered mortgage are not entitled to priority as against the assets of the corporate mortgagor in the hands of a receiver. G.S. 47-20. *Investment Co. v. Chemicals Laboratory*, 294.

Officers and directors of a corporation who loan it money upon an agreement that the loan should be secured by a mortgage on corporate realty may not assert an equitable lien on the assets of the corporation upon appointment of a receiver before the execution of the mortgage. *Ibid.*

Where corporate officers and stockholders have lent the corporation money in good faith, such loans secured by mortgage on the corporate property are entitled to a preference, and such loans which are not so secured are properly admitted as an unpreferred claim against the receivership estate. *Ibid.*

COUNTIES.

§ 31. Right of Taxpayers to Maintain Action to Recover or Protect Public Funds.

Taxpayers may not maintain action to protect or recover school funds unless proper officials have wrongfully refused or neglected to bring such action. *Branch v. Board of Education*, 623.

COURTS.

§ 2. Jurisdiction of Courts in General.

Jurisdiction of the person of a defendant can be acquired only by service of process upon him or by his voluntary appearance. *In re Blalock*, 493.

§ 2½. Jurisdiction of Our Courts Where Some of Parties Are Nonresident.

The courts of this State have jurisdiction to alter the marriage status of a resident of this State even though the other spouse be a nonresident provided the form and nature of the substituted service on the nonresident meet the requirements of due process of law. *McLean v. McLean*, 139.

§ 4b. Appeals to Superior Court from County Court.

The jurisdiction of the Superior Court upon appeal from a general county court is limited to rulings on exceptions duly noted and brought forward, and the Superior Court is without authority to make additional findings of fact. *McLean v. McLean*, 139.

The findings of fact made by a general county court upon the hearing of a motion are conclusive on the Superior Court upon appeal and on the Supreme Court upon further appeal when the findings are supported by evidence. *Ibid.*

§ 6. Terms of Court—Expiration of Term.

A term of court ends when the trial judge finally leaves the bench, even though he does so before the expiration of the statutory term without formally adjourning the term. *Green v. Ins. Co.*, 321.

§ 11. Jurisdiction of County Courts.

The general county court of Alamance County is given jurisdiction by statute of actions for divorce. *McLean v. McLean*, 139.

COURTS—*Continued.*

§ 18. Jurisdiction of Domestic Relations Courts.

Where a domestic relations court acquires jurisdiction of a child under sixteen upon adjudication in proceedings for its custody that such minor is a ward of the State, such jurisdiction continues until the minor becomes of age or until the issuance of a valid court order to the contrary. G.S. 7-103, G.S. 110-21. *In re Blalock*, 493.

Such jurisdiction is not ousted by subsequent tentative decree of adoption. *Ibid.*

Domestic relations court is branch of Superior Court given exclusive jurisdiction involving custody of minors and the clerks of court exclusive jurisdiction of adoption proceedings. *Ibid.*

A domestic relations court has jurisdiction to modify an order for the custody of a child entered in a proceeding in which both the mother and child were before the court personally, even though at the time of entering the order of modification neither the child nor its purported adoptive parents are within its territorial jurisdiction, *a fortiori* where the purported adoptive parents have brought themselves within the jurisdiction of the court by a general appearance. *Ibid.*

§ 19. Orders Awarding Temporary Custody—Retention of Jurisdiction.

Persons awarded temporary custody of a child who is under the supervision and care of a domestic relations court have no right to take the child out of the State without the written consent of the State Board of Public Welfare, notwithstanding that they may have obtained the consent of the superintendent of a county board of welfare. *In re Blalock*, 493.

CRIMINAL LAW.

§ 6c. Defense That Defendant Was Acting Under Orders of Another.

The duty of a soldier to obey the orders of his superior officer refers only to lawful commands relating to military duty, and therefore a defendant soldier's contention that in committing an assault upon a female he was acting under the orders of his sergeant is feckless, since it could not constitute a defense. *S. v. Roy*, 558.

§ 12b. Jurisdiction—Place of Crime.

Our courts have jurisdiction of a prosecution for conspiracy if any one of the conspirators commits within the State an overt act in furtherance of the common design, notwithstanding that the unlawful agreement was made outside the State. *S. v. Hicks*, 511.

§ 12c. Jurisdiction—Degree of Crime.

Prosecution for violating a parking meter statute which provides that the punishment shall be a fine of fifty dollars or imprisonment not exceeding thirty days is in the exclusive original jurisdiction of a justice of the peace, and indictments originating in the Superior Court should be quashed on motion. *S. v. Wilkes*, 645.

§ 21. Former Jeopardy—Identity of Offenses.

Upon defendant's plea of former acquittal, whether the facts alleged in the second indictment, if given in evidence, would sustain a conviction under the first indictment is to be determined by the court; whether the same evidence

CRIMINAL LAW—*Continued.*

would support a conviction in each case is to be determined by a jury from extrinsic testimony if the plea of former jeopardy avers facts *dehors* the record showing the identity of the offenses. *S. v. Hicks*, 511.

Where the plea of former jeopardy avers no facts *dehors* the record showing the identity of the offenses, but merely sets forth the two indictments and the result of the former trial and draws the legal conclusion that defendant was being twice put in jeopardy for the same offense, *held:* the plea is determinable by the court and its refusal to submit issues to the jury as to the identity of the prosecutions is without error. *Ibid.*

Acquittal of maliciously conspiring to damage or injure the property of one person will not support a plea of former jeopardy in a prosecution for maliciously conspiring to injure the property of another person, even though the evidence in both prosecutions is virtually the same except as to the ownership of the property. *Ibid.*

§ 28. Presumptions and Burden of Proof.

Defendant's plea of not guilty places the burden upon the State to prove every fact necessary to establish guilt. *S. v. Cuthrell*, 247; *S. v. Webb*, 382; *S. v. Buchanan*, 477.

§ 31a. Expert and Opinion Evidence in General.

In a prosecution under G.S. 14-62 it is reversible error to admit opinion testimony that the fire was of incendiary origin since the facts constituting the basis for such conclusion are so simple and readily understood that it is for the jury to draw the conclusion from testimony as to the facts, and therefore the conclusion is not the subject of opinion testimony. *S. v. Cuthrell*, 274.

§ 31e. Expert Testimony—Footprints.

Where the State's witness testifies that he has studied the science of comparing fingerprints and footprints of human beings for the purpose of identification and had had years of practical experience in such work, the trial court properly admits testimony of the witness that the bare footprints found at the scene of the crime were identical with prints taken from defendant's corresponding foot when the evidence discloses that the prints found at the scene of the crime could have been impressed only at the time the crime was perpetrated. *S. v. Rogers*, 390.

§ 32e. Evidence of Motive and Malice.

In a prosecution for conspiracy to damage transformers used in connection with a radio station, antecedent threats made by defendant to injure the broadcasting company and his threats and expressions of ill will against the company are competent to show intent and motive. *S. v. Hicks*, 511.

§ 32½. Telephone Conversations.

A witness who has heard defendant talk and who expresses his opinion that the voice he heard on the telephone was that of defendant, may testify as to the telephone conversation, the witness' lack of assurance as to the identity of the speaker going to the weight of the evidence and not to its admissibility, especially where the telephone conversation contains internal evidence tending to identify defendant as the speaker at the other end of the line. *S. v. Hicks*, 511.

CRIMINAL LAW—*Continued.*

§ 33. Confessions.

That defendant is under arrest, held without warrant, or in custody at the time of making a confession, singly or collectively, does not render the confession involuntary as a matter of law unless the circumstances amount to coercion. *S. v. Brown*, 202.

A free and voluntary confession is admissible in evidence against the one making it, but a confession wrung from the mind by the flattery of hope or the torture of fear is incompetent. A confession is voluntary in law when, and only when, it is in fact voluntarily made. *Ibid.*

Where the trial court's ruling that the defendant's confession is voluntary and competent is supported by defendant's own testimony on the preliminary hearing, defendant's contention of error in its admission is untenable. *Ibid.*

An extrajudicial confession of guilt by an accused is admissible against him when, and only when, it was in fact voluntarily made. *S. v. Rogers*, 390.

A confession is presumed voluntary until the contrary is made to appear. *Ibid.*

Where the voluntariness of a confession is challenged the matter is to be determined by the trial judge after affording both the prosecution and defense a reasonable opportunity to present evidence on the question in the absence of the jury. *Ibid.*

The admissibility of a confession is to be determined by the facts appearing in evidence when it is received or rejected, and not by the facts appearing in evidence at a later stage of the trial. *Ibid.*

The finding by the trial court that a confession is voluntary is not subject to review if it is supported by any competent evidence. *Ibid.*

A confession is not rendered incompetent by the mere fact that the accused was under arrest or in jail or in the presence of armed officers at the time it was made. *Ibid.*

Where, on preliminary inquiry, the State offers testimony tending to show that defendant's confession was voluntarily made, and defendant, after being afforded an opportunity to do so, offers no evidence to the contrary, the ruling of the trial court that the confession was voluntary is conclusive since it is supported by the evidence at the time of its admission in evidence. *Ibid.*

§ 34g. Acts and Declarations of Co-conspirators.

Testimony that a conspirator had shown the officers the place where the stolen safe had been thrown off and later hidden, and as to what was found at such places, is not objectionable as relating to acts or declarations of the conspirator after the accomplishment of the purposes of the conspiracy, but is testimony of the witnesses as to facts within their personal knowledge. *S. v. Bovender*, 683.

§ 36. Evidence—Public Records.

Exception to the refusal to allow the introduction in evidence of a certified copy of the weather report for the date in question cannot be sustained when it appears that the witness testified from his personal knowledge as to all matters contained in the report, and further that the record fails to show that such certified copy was in fact offered in evidence. *S. v. Bovender*, 683.

CRIMINAL LAW—*Continued.*

§ 38c. Evidence—Articles Connected With the Crime.

Where the State's evidence tends to show that a wrist watch was worn by the deceased at the time of the homicide and that it was subsequently found detached from her person where the death-dealing blows were apparently struck by her slayer, the State is entitled to offer the watch in evidence and exhibit it to the jury. *S. v. Rogers*, 390.

Where the evidence tends to show that defendant furnished dynamite to his co-conspirator pursuant to a conspiracy to damage personalty, the State may properly introduce in evidence the dynamite which the co-conspirator found at the place designated by defendant in a telephone conversation and which was in the witness' possession at the time he was apprehended in attempting to consummate the conspiracy. *S. v. Hicks*, 511.

§ 38d. Evidence—Photographs.

Where the photographer identifies pictures made by him and states they were correct and true representations of the body of the deceased and the place where it was found, the photographs are rightly received in evidence for the limited purpose of explanation or illustration, notwithstanding that they may be of a shocking nature and tend to arouse passion or prejudice. *S. v. Rogers*, 390.

§ 40d. Character Evidence of Defendant.

The solicitor may impeach the defendant as a witness by cross-examining him as to antecedent acts of misconduct. *S. v. Hicks*, 511.

Where defendant testifies and then offers evidence of his good character, he is entitled to have the jury consider his character evidence both as bearing upon his credibility and as substantive evidence bearing directly upon the issue of his guilt or innocence. *S. v. Bridgers*, 577.

Where defendant does not go upon the stand, his evidence of good character is substantive evidence bearing directly on the question of his guilt or innocence upon the theory that a man of good character is unlikely to do a dishonest or immoral act inconsistent with the record of his past life. *S. v. Wood*, 636.

§ 41e. Credibility of Witnesses in General.

The demeanor of a witness on the stand is always in evidence. *S. v. Mullis*, 542.

§ 41g. Credibility of Accomplices.

It is competent for a co-conspirator to testify that he was then serving sentence for his offense to forestall a contention on the part of defendant conspirator that the witness was testifying to obtain personal immunity. *S. v. Hicks*, 511.

§ 42c. Re-direct Examination.

A soldier witness may testify that he appeared as a witness in obedience to military orders for the purpose of counteracting the implication made by the defense on his cross-examination that he was a hired witness. *S. v. Hicks*, 511.

§ 42d. Evidence Competent to Corroborate Witness.

Where a State's witness testifies concerning certain matters, testimony of consistent statements made by the witness prior to the trial is properly admitted for the restricted purpose of corroboration. *S. v. Rogers*, 390.

CRIMINAL LAW—*Continued.*

Evidence of good character of witnesses for the State is not substantive evidence but is competent only as bearing upon their credibility. *S. v. Bridgers*, 577.

Evidence of good character of witnesses for the prosecution is corroborative and relevant and material only as bearing upon the credibility of their testimony. *S. v. Wood*, 636.

Testimony as to the finding of incriminating circumstances at places designated by one conspirator is competent against co-conspirators for the purpose of corroborating the testimony of such conspirator at the trial. *S. v. Bovender*, 683.

An article may be introduced in evidence to corroborate testimony in regard thereto by witnesses whose credibility has been attacked. *S. v. Gibson*, 691.

§ 43. Evidence Obtained by Unlawful Means.

Where one officer armed with a "John Doe" warrant and another officer armed with a valid warrant correctly identifying the owner of the premises, act in concert in making the search, it will be presumed that both officers acted under the valid writ, and evidence discovered by such search is competent. *S. v. Rhodes*, 453.

§ 44. Continuance.

The refusal of a motion for continuance will not be held for error when defendants do not give the name of the alleged essential witness who was out of the State or make it appear that any effort was made to secure the witness' presence at the trial, and further there is no affidavit that defendants had not had time to prepare for trial. *S. v. Roy*, 558.

§ 48d. Withdrawal of Evidence.

An instruction from the court to disregard all controversy relating to an irrelevant and incompetent matter has the effect of striking out all evidence on the point, and thus cures the inadvertence in the initial reception of the evidence. *S. v. Campo*, 79.

§ 48e. Reopening for Additional Evidence.

When the interests of justice require, evidence may be offered even after the argument of counsel. *S. v. Eagle*, 218.

§ 50a. Course and Conduct of Trial in General.

Every person charged with crime is entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. *S. v. Carter*, 581.

§ 50d. Expression of Opinion by Court in Course of Trial. (In instructions is *infra* § 53f.)

Arrest of defendant and his witnesses to the knowledge of jury *held* impeachment of their testimony entitling defendant to new trial. *S. v. Simpson*, 438.

Where upon defendant's confession admitted in evidence, which was not challenged or repudiated by him, he is guilty of murder in the second degree at least, his contention that in the manner in which the court permitted the solicitor to cross-examine his witnesses and in the general conduct of the trial, the court impeached the testimony of witnesses and conveyed an expression of opinion to the jury on the merits in violation of G.S. 1-180, is feckless, and any

error in this respect will be held harmless upon appeal from conviction of second degree murder. *S. v. Russell*, 487.

The trial court must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. G.S. 1-180. *S. v. Carter*, 581.

Remarks of the trial judge will not be held for prejudicial error unless they deprive defendant of his right to a fair trial, considering the remarks in the light of the circumstances under which they were made, and a bare possibility that defendant may have suffered prejudice is not sufficient to overthrow an adverse verdict. *Ibid.*

The trial judge has discretionary authority to prevent the repetition of questions already answered, and remarks of the court to accelerate the proceedings that the witness had already "answered that question" and later, to "ask the witness something else," will not be held for reversible error as prejudicing defendant. *Ibid.*

In reply to a question as to his manner of driving on the occasion in question, defendant testified that he never drove or allowed his car to be driven at a high rate of speed. The court, upon objection by the solicitor for irrelevancy, directed defendant to "leave past history out." *Held:* The court's remark merely cautioned defendant to omit irrelevant matter, and cannot be held prejudicial. *Ibid.*

An order of the trial judge requiring defendant to reply to an unanswered question twice put to him by his counsel cannot be held prejudicial. *Ibid.*

Defendant's counsel asked him whether he was as normal at the time in question as he then was. The court's remark "let him say what his condition was" simply cautioned counsel to propound a correct interrogation in lieu of the leading question, and cannot be held prejudicial. *Ibid.*

Where at the time of the question no evidence had been introduced that defendant was suffering from asthma on the occasion in question, his counsel's direction that defendant tell "how asthma affected you on this occasion" is objectionable as assuming the existence of a fact not shown by the testimony, and the court's interjection "if it affected him at all" will not be held prejudicial as disparaging defendant's testimony, since it merely advised counsel that the inquiry was not proper. *Ibid.*

A remark of the court will not be held prejudicial when it could in no way have adversely affected defendant. *S. v. Bovender*, 683.

While the trial court may not by language or conduct at any time during the trial impeach the credibility of a witness or discredit efforts of either party before the jury, and while such impeachment or depreciation once made cannot be cured or corrected, nevertheless appellants must make it plainly appear that the occurrence complained of prejudiced their cause sufficiently to overcome the presumption in favor of the regularity of the proceedings in the lower court. *S. v. Gibson*, 691.

§ 50f. Argument and Conduct of Counsel and Solicitor.

In this prosecution of defendant for willful abandonment and nonsupport of his wife and minor child, the remark of the solicitor that the State would have to support the child unless the defendant were convicted is disapproved, but *is held* not prejudicial in the light of defendant's own evidence. *S. v. Campo*, 79.

CRIMINAL LAW—*Continued.*

Solicitor may not exhibit to jury in his argument article which has not been identified and introduced in evidence, and his statement that he had it in paper sack and was willing to show it to jury is improper, and upon defendant's objection thereto, the error is not rendered harmless by instruction that defendant objected to it being offered in *evidence*. *S. v. Eagle*, 218.

The solicitor has the right, within reasonable limits, to draw relevant inferences from and comment on the demeanor of a witness. *S. v. Mullis*, 542.

While counsel has the right to argue to the jury what he concedes to be the law of the case, G.S. 84-14, the court properly may warn counsel not to comment upon the failure of a defendant to testify, G.S. 8-54, even though as of that time counsel had made no improper comment, in order to prevent further comment which might violate the rule, and upon objection by counsel, to exclude categorically such comment, taking care that nothing be said or done which would unduly prejudice defendant. *S. v. Bovender*, 683.

§ 51. Authority and Duty of Court in General.

Trial court has discretionary authority to prevent repetition of questions already answered. *S. v. Carter*, 581.

The act of the court in stopping defendants' counsel from exhibiting to the jury a dollar bill which had just been offered in evidence by the solicitor will not be held for error, the matter being in the discretion of the trial court in the orderly conduct of the trial. *S. v. Bovender*, 683.

§ 52a (1). Consideration of Evidence on Motion to Nonsuit.

Upon demurrer to the evidence it must be taken in the light most favorable to the State. G.S. 15-173. *S. v. Webb*, 382; *S. v. Jarrell*, 741.

§ 52a (2). Sufficiency of Evidence to Overrule Nonsuit in General.

Upon motion to nonsuit the court is required to ascertain merely whether there is evidence to sustain the allegations of the indictment, and not whether it be true or the jury should believe it. *S. v. Alston*, 341.

Neither weight nor reconciliation of evidence is presented, but only sufficiency of evidence, considered in light most favorable to State. *S. v. Hovis*, 359.

The incredibility of the State's testimony cannot justify nonsuit, since the credibility of the witnesses is for the jury and not for the court. *S. v. Roy*, 558.

The testimony of an accomplice is sufficient to support a conviction, *a fortiori* where the testimony of the accomplice is corroborated by other evidence. *S. v. Bovender*, 683.

Where in a prosecution for assault with a deadly weapon, the State introduces testimony of a witness that he was plowing with defendant at the time they heard a shot, the only shot fired that morning in the vicinity so far as the evidence revealed, and also testimony of a statement made by defendant that he knew nothing of the shooting, and there is no evidence directly contrary to this testimony, *held*, the State's own evidence establishes a defense by witnesses offered by it and presented as worthy of belief, and defendant is entitled to avail himself of such defense on motion of nonsuit. *S. v. Jarrell*, 741.

§ 52a (3). Sufficiency of Circumstantial Evidence to Overrule Nonsuit.

Evidence of defendant's identity as the perpetrator of the offense *held* insufficient. *S. v. Lloyd*, 227.

CRIMINAL LAW—*Continued.*

Circumstantial evidence is a recognized and accepted instrumentality in the ascertainment of truth, and in many cases is sufficient to overrule defendant's motion to nonsuit even though the individual facts may be weak in themselves when they present a strong case considered together. *S. v. Alston*, 341.

While circumstantial evidence is an accepted instrumentality in the ascertainment of truth, in order to be sufficient to overrule nonsuit the circumstances must be so connected or related as to point unerringly to defendant's guilt and exclude any other reasonable hypothesis, and circumstantial evidence which is consistent with innocence or merely shows it possible that defendant committed the offense or raises a mere conjecture of guilt is insufficient to be submitted to the jury. *S. v. Webb*, 382; *S. v. Jarrell*, 741.

Circumstantial evidence which establishes motive and an opportunity of defendant to have committed the offense, and threats made by defendant against the victim of the secret assault, without evidence connecting defendant with the actual execution of the crime, is insufficient to overrule defendant's motion to nonsuit, since the circumstances are entirely consistent with defendant's innocence. *S. v. Jarrell*, 741.

§ 52a (4). Nonsuit—Contradictions and Discrepancies in Evidence.

Contradictions and discrepancies in the State's evidence, even though some of them relate to testimony of exculpatory statements made by defendant, do not justify nonsuit when other evidence of the State, including inculpatory statements made by defendant, tend to establish the State's case, the reconciliation of the evidence being the function of the jury alone. *S. v. Hovis*, 359.

§ 52a (6). Nonsuit for Variance.

A fatal variance between indictment and proof may be taken advantage of by a motion to nonsuit. *S. v. Hicks*, 31.

Variance between allegation and proof as to person owning real property which defendant is charged with malicious damage to, *held* fatal. *Ibid.*

Conviction of assault on female with intent to commit rape will not support nonsuit on ground that all the evidence tended to show the crime of rape, since the indictment included the lesser offense. *S. v. Roy*, 558.

§ 52b. Directed Verdict.

On demurrer to the evidence or motion for a directed verdict of not guilty, neither the weight nor the reconciliation of the evidence nor the credibility of the witnesses is for the court, but the court is required to determine only whether there is sufficient evidence, considered in the light most favorable to the State, to support a verdict for the prosecution. *S. v. Hovis*, 359.

§ 53b. Instructions on Burden of Proof—Alibi.

An instruction to the effect that evidence of an alibi need raise only a reasonable doubt of defendant's guilt to entitle him to an acquittal will not be held for reversible error when construed contextually with other portions of the charge categorically instructing the jury that an alibi is not a defense and that the burden of proof thereon does not rest upon defendant, but that the burden rests upon the State to show beyond a reasonable doubt all elements of the crime, including defendant's presence at the scene when necessary to the offense. Such instruction is not approved and the correct form of a charge upon the question is given. *S. v. Bridgers*, 577.

CRIMINAL LAW—*Continued.*

The court's charge on defendants' defense of alibi *held* without error. *S. v. Bovender*, 683.

§ 53f. Instructions—Expression of Opinion by Trial Court. (In conduct of trial, see *supra* § 50d.)

The trial court may not in any manner, whether directly or indirectly, by comment on the testimony, by arraying the evidence unequally in the charge, by imbalancing the contentions of the parties, by choice of language in stating the contentions, or by general tone and tenor of the trial, indicate what impression the evidence has made on his mind or what deductions he thinks should be drawn therefrom. *S. v. Simpson*, 438.

Misstatement of evidence and manner and language in stating the State's contentions *held* error as expression of opinion upon evidence. *Ibid.*

§ 53i. Charge on Character Evidence.

Where the court undertakes to charge upon the character evidence of the State's witnesses and of defendant, who had testified at the trial, a charge to the effect that the character evidence of both sides was direct testimony and should be taken into consideration in finding the facts in the case, must be held for reversible error, defendant being entitled to an instruction, if the matter is adverted to, that evidence of his good character should be taken into consideration both on the question of his credibility and as substantive evidence upon the question of his guilt or innocence. *S. v. Bridgers*, 577.

A charge to the effect that the character evidence of defendant and the character evidence of witnesses for the prosecution constituted substantive, direct evidence, must be held for reversible error. *S. v. Wood*, 636.

§ 53k. Statement of Contentions.

The trial court may properly give the contentions of the State upon relevant inferences reasonably deducible from the demeanor of a witness. *S. v. Mullis*, 542.

§ 56. Motions in Arrest of Judgment.

A motion in arrest of judgment for insufficiency of the indictment or warrant may be made for the first time in the Supreme Court. Rule 21. *S. v. Sawyer*, 76.

A motion in arrest of judgment must be based on matters appearing on the face of the record or which should appear thereon and do not, and therefore motion in arrest will not lie for a misnomer, since it can be supported only by facts *dehors* the record. *Ibid.*

Warrant and complaint construed together *held* to identify defendant sufficiently to defeat motion in arrest of judgment. *Ibid.*

A motion in arrest of judgment is inappropriate to present the contention that the jury list was not selected from the legally prescribed source, since the matters sought to be challenged are not apparent on the face of the record. *S. v. Brown*, 202.

Motion in arrest of judgment on the ground that the grand jury which indicted defendant had not been sworn cannot be allowed when the record proper reveals that the requisite oath was administered to all the grand jurors. *S. v. Rogers*, 390.

CRIMINAL LAW—*Continued.*

§ 62f. Suspended Judgments and Executions.

Where the suspension of sentence has been revoked by the county court for condition broken, *certiorari* will lie solely to review the regularity and legality of the judgment invoking the original sentence, and the "affirmance" of the judgment by the Superior Court is in effect a dismissal of the writ for want of merit, and will be so considered upon further review. *S. v. Smith*, 68.

Where a defendant does not object or except to the conditions upon which sentence is suspended nor appeal therefrom, the conditions become an integral part of the covenant voluntarily assented to by defendant, and he may thereafter contest the execution of the sentence for condition broken only on the ground of want of evidence to support a finding of breach of condition or on the ground that the conditions are unreasonable or for an unreasonable length of time. *Ibid.*

The presumption is in favor of the reasonableness of the conditions upon which sentence is suspended. *Ibid.*

Upon conviction of larceny of 900 pounds of seed cotton, suspension of sentence on condition that defendant not operate a motor vehicle on the highways of the State for one year will not be held unreasonable as having no relation to the offense, since it will be presumed in the absence of a showing to the contrary that the operation of a motor vehicle was involved in the larceny. In this case it appeared further that defendant was addicted to the use of alcoholic beverages. *Ibid.*

While the Superior Court is without jurisdiction to revoke a driver's license, it may suspend execution of sentence on condition that defendant not operate a motor vehicle on the highways of the State for a reasonable length of time when such condition bears a reasonable relation to the offense of which defendant stands convicted. *Ibid.*

The court may not suspend sentence for a period exceeding five years. *S. v. Gibson*, 691.

§ 77d. Conclusiveness and Effect of Record.

The Supreme Court is bound by the record as certified. *S. v. Wood*, 636.

§ 78e (2). Necessity of Calling Inadvertence in Statement of Evidence or Contentions to Attention of Trial Court.

Where misstatement of evidence and manner of statement of contentions amount to expression of opinion by trial court, the error will be ground for new trial notwithstanding the failure to bring the matter to the trial court's attention. *S. v. Simpson*, 438.

Objection to the court's recapitulation of the evidence and statement of the State's contentions based thereon may not be taken for the first time in the case on appeal. *S. v. Goins*, 460.

Objection to the statement in the charge of a legitimate contention of the State cannot be raised for the first time on appeal, it being incumbent upon defendant in apt time to have challenged the contentions or requested a counter contention on his own behalf. *S. v. Mullis*, 542.

§ 79. Briefs.

Exceptions not brought forward in defendant's brief and in support of which no argument is advanced or authority cited, are deemed abandoned. *S. v. Brown*, 202; *S. v. Carter*, 581; *S. v. Bovender*, 683.

CRIMINAL LAW—*Continued.*

§ 80b (4). Dismissal for Failure to Prosecute Appeal.

Where defendant gives notice of appeal in open court, but does nothing to perfect the appeal, the motion of the Attorney-General to docket and dismiss will be allowed, but where defendant has been convicted of a capital felony this will be done only after an inspection of the record proper fails to disclose error. *S. v. Hall*, 310; *S. v. Shedd*, 311.

§ 81b. Presumptions and Burden of Showing Error.

Where the charge is not in the record it will be assumed that the court correctly charged the jury. *S. v. Hovis*, 359; *S. v. Russell*, 487.

Where the record does not show to the contrary, it will be presumed that the procedure in the lower court was regular and free from error. *S. v. Mullis*, 542.

Presumption is in favor of regularity of proceedings in lower court. *S. v. Gibson*, 691.

§ 81c (1). Harmless and Prejudicial Error in General.

Where on defendant's unchallenged and unrepudiated confession he is guilty of the offense charged, at least, any error in trial is harmless. *S. v. Russell*, 487.

Mere technical error will not entitle defendant to a new trial but it is necessary that error be material and prejudicial and amount to a denial of some substantial right in order to constitute reversible error. *S. v. Bovender*, 683; *S. v. Gibson*, 691.

§ 81c (2). Harmless and Prejudicial Error in Instructions.

Exceptions to the charge will not be sustained when the charge read contextually is free from prejudicial error. *S. v. Hicks*, 511.

§ 81c (3). Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The unsuccessful effort of the solicitor to have a witness identify certain dynamite caps connected with the offense cannot be prejudicial when the dynamite caps are not introduced in evidence. *S. v. Hicks*, 511.

Exclusion of testimony cannot be held prejudicial when the testimony is thereafter admitted. *S. v. Bovender*, 683.

Exclusion of testimony cannot be held prejudicial when the record does not disclose what the witness would have testified. *Ibid.*

Refusal to permit a witness to testify as to a certain matter cannot be held prejudicial when the record shows that when the question was repeated the witness replied he did not remember. *Ibid.*

§ 81c (4). Harmless and Prejudicial Error—Error Relating to One Count Only.

Where but one sentence is imposed upon a verdict of guilty as to both counts in an indictment, alleged error relating to one count only cannot entitle defendant to a new trial when no error is found as to the other count, and the sentence imposed is within the limits prescribed for such offense. *S. v. Foy*, 228.

Where defendant is convicted on two counts, and equal concurrent sentences are imposed on each, error relating solely to one count is unavailing on appeal

CRIMINAL LAW—*Continued.*

when no error was committed in the trial in respect to the other count. *S. v. Hicks*, 511; *S. v. Bovender*, 683.

Where but one sentence is imposed upon a general verdict of guilty, and there is no error in respect to one of the counts, error relating to the other counts cannot be prejudicial. *S. v. Cobb*, 647.

§ 81c (5). Error Cured by Verdict.

Where defendant is convicted of manslaughter upon evidence fully justifying the verdict, alleged error relating to the charge of murder in the second degree cannot be prejudicial. *S. v. Artis*, 348.

§ 81f. Review of Exceptions to Refusal to Nonsuit.

The sustaining of defendant's motion to nonsuit in the Supreme Court has the force and effect of a verdict of not guilty. *S. v. Hill*, 61.

§ 81i. Review of Constitutional Questions.

The Supreme Court will not pass on a constitutional question until the necessity for doing so has arisen. *S. v. Wilkes*, 645.

§ 83. Determination and Disposition of Cause.

Where quashal of indictments in the Superior Court is correct because the court was without jurisdiction to try the case, the judgment of dismissal will not be disturbed on appeal irrespective of the reason assigned by the lower court for dismissal. *S. v. Wilkes*, 645.

DAMAGES.

§ 1a. Compensatory Damage for Personal Injury.

The living expenses of plaintiff are not an element of compensatory damage recoverable for negligent injury unless the injury augments them by necessitating convalescent care or recuperative attention, etc., in which case the amount expended over and above plaintiff's normal living expenses may be recovered. *Mintz v. R. R.*, 607.

Damages recoverable for a personal injury are all damages, past, present and prospective, sustained as a consequence thereof, embracing loss of past earnings, without interest, and the present cash value of prospective earnings, considering plaintiff's age, occupation and amount of income, and also indemnity for actual nursing and medical expenses and a reasonable satisfaction for actual suffering, physical and mental, which are the immediate and necessary consequences of the injury. *Ibid.*

§ 1c. Special Damages.

Loss of profits constitute a proper element of damage where such loss is the direct and necessary result of defendant's tort and such loss may be recovered when capable of being shown with a reasonable degree of certainty. *Trucking Co. v. Payne*, 637.

§ 10. Pleading of Damages.

Some latitude must be allowed in the pleading of special damages. *Trucking Co. v. Payne*, 637.

Plaintiff alleged that by reason of the damage to his tractor-trailer in the collision in suit he lost the use of same for two and one-half months notwith-

DAMAGES—*Continued.*

standing every reasonable effort for quick repair, and that it was impossible to rent a substitute, and alleged the approximate monthly profit from the use of the trailer. *Held:* Defendant's motion to strike the allegations was improperly allowed. *Ibid.*

§ 11. Relevancy and Competency of Evidence on Issue.

While plaintiffs' loss of time from their occupation must be limited to that which has occurred up to the time of trial, subsequent loss of time being included in a recovery for decreased earning capacity, where plaintiffs' evidence discloses that they were public school teachers and had contracts to teach for the year ensuing after the accident on 2 June, and that the cases were tried in June of the year following the accident, during which time they were completely disabled, evidence of their loss of salary for the school year is properly admitted. *Dickson v. Coach Co.*, 167.

Expert medical testimony as to the probable cost of surgical operations and medical attention still needed by plaintiffs at the time of trial *is held* without error. *Ibid.*

Where plaintiff seeks to recover compensatory damages only and there is no evidence that her living expenses were materially increased by reason of the negligent injury sued on, testimony of plaintiff, over objection, that since her injury she had been supported by her father and her brothers and sisters, must be *held* for prejudicial error as calculated to mislead the jury on the issue of damages and augment the recovery. *Mintz v. R. R.*, 607.

§ 13a. Instructions on Issue.

An instruction for the jury to answer the issue of damages in the amount it found justified from the greater weight of the evidence will not be held erroneous as inadequate when the court follows such instruction by a correct charge as to the measure of damages. *Dickson v. Coach Co.*, 167.

DEATH.

§ 8. Wrongful Death—Expectancy of Life and Damages.

In an action for wrongful death it is error to permit plaintiff administratrix to testify that intestate, who was her husband, had just come out of military service, as to the length of time he had been in the service, that they had a child two years old at the time of his death, and that she lost the home place to the mortgage people after his death, and that she paid his hospital and doctors' bills and burial expenses. *Journigan v. Ice Co.*, 180.

The measure of damages for wrongful death is the present worth of the net pecuniary value of the life of deceased, to be ascertained by deducting the probable cost of his own living and his usual or ordinary expenses from his probable gross income which might have been expected from his own exertions during his life expectancy, taking into consideration his age, health, earning capacity, habits, ability, skill and his employment. *Ibid.*

Any error in instructions upon the rule for ascertaining the present cash value of decedent's life to his dependents or in failing to elaborate upon the rule upon the request of the jury, *held* cured by the subsequent submission of a mathematical formula, to which counsel for both sides agreed, the formula, not appearing of record, being presumed correct and to have fully satisfied the members of the jury. *Yost v. Hall*, 463.

DEATH—*Continued.*

Comment by counsel in contrasting the financial condition of the widow of plaintiff's intestate with counsel's projected probable earnings of defendants, although highly improper, *held* cured, upon the record in this case, by the court's instruction that the jury should not consider the circumstances of the parties in determining the issue of damages and should disregard the argument, and should take the law from the court. *Ibid.*

DEEDS.

§ 4. Consideration.

Wife's acceptance of domicile selected by husband and extra work at home without agreement for compensation *held* not to show consideration for deed from him to her for half interest in land. *Sprinkle v. Ponder*, 312.

§ 6. Requisites and Validity of Deeds of Gift.

Agreement of married woman to live at domicile selected by husband is not legal consideration and cannot render the deed one of bargain and sale, and it is void unless registered within two years. *Sprinkle v. Ponder*, 312.

§ 13a. Estates and Interests Created.

Grant of land for garbage dump with covenant not to sue for annoyance arising from such operation *held* to convey easement running with land. *Waldrop v. Brevard*, 26.

§ 16b. Restrictive Covenants.

A grantor in a duly registered deed containing contractual restrictions upon the purposes for which the property may be used is entitled to enforce such agreement against a purchaser by *mesne* conveyances from the grantee when the restrictions are reasonable in character and duration and are not against public policy. *Starmount Co. v. Memorial Park*, 613.

A restriction on the enjoyment of property must be created in express terms or by plain and unmistakable implication. *Ibid.*

Contractual restrictions in a registered deed that the property should be used only for residential purposes and that it should not be used for business or commercial purposes except for truck farming or poultry raising, *held* to preclude a purchaser by *mesne* conveyances from the grantee from constructing and using a driveway across such property as an entrance to a commercial cemetery maintained on adjoining property, since use of the property as an incident to a forbidden business or enterprise would be tantamount to dedicating it to such proscribed use. *Ibid.*

Contractual restrictions placed in a deed for the benefit and convenience of grantor are not impaired by the fact that the grantor reserves the right to unrestricted use of other property retained by him in the vicinity. *Ibid.*

§ 16c. Agreements to Support Life Tenant or Grantee.

Breach of agreement by the remainderman to care for the life tenant during the remainder of her life, cannot entitle the life tenant to judgment declaring her the owner of the land free of the remainder. *Bowen v. Darden*, 443.

DESCENT AND DISTRIBUTION.

§ 13. Advancements.

The personalty of the estate is made the primary fund for the equalization of advancements of personalty, and the realty is made the primary fund for the equalization of advancements in realty, and it is only when and to the extent that there is an excessive advancement in either category of property over and above the share which may come to the other beneficiaries that such excess may be considered in the distribution of the other category. G.S. 28-150, G.S. 29-1 (2). *King v. Neese*, 132.

DIVORCE AND ALIMONY.

§ 3. Jurisdiction and Venue.

General county court of Alamance County is given statutory jurisdiction of actions for divorce. *McLean v. McLean*, 139.

§ 5d. Pleadings in Actions for Alimony Without Divorce.

In an action for alimony with divorce under G.S. 50-16 it is incumbent upon plaintiff to allege and prove that the acts of misconduct complained of were without adequate provocation on her part, but allegations that plaintiff had been a dutiful wife and had tried to make a home for defendant and live with him in peace, with her testimony on the trial that she had done nothing to provoke defendant's mistreatment of her, *is held* sufficient for this purpose. *Bateman v. Bateman*, 357.

§ 12. Alimony and Counsel Fees Pendente Lite.

Alimony *pendente lite* and counsel fees may not be awarded in an action for alimony without divorce unless plaintiff alleges in her complaint facts sufficient to constitute a good cause of action under the statute. *Ipock v. Ipock*, 387.

The court does not have an absolute and unreviewable discretion to allow temporary subsistence upon motion therefor made in an action for alimony without divorce, but is expected to look into the merits of the action and determine the matter in the exercise of his sound legal discretion, after considering the allegations of the complaint and the evidence of the respective parties, and it is error for the court to refuse to hear the evidence of the defendant in support of his contention that the separation was due to the fault of plaintiff and to enter the order based solely upon the allegations of the complaint and the plaintiff's evidence in support thereof. *Ibid.*

§ 14. Alimony Without Divorce.

G.S. 50-16 provides two separate remedies: (1) alimony without divorce, and (2) subsistence and counsel fees *pendente lite*. *Bateman v. Bateman*, 358.

An affirmative finding upon the issue as to whether defendant had offered such indignities to plaintiff's person as to render her condition intolerable and life burdensome will support judgment for alimony without divorce notwithstanding the negative findings of the jury upon the issues as to whether defendant had separated himself from plaintiff and failed to provide her subsistence, and had wrongfully abandoned her, and by cruel and barbarous treatment had endangered her life. *Ibid.*

Alimony without divorce may not be awarded unless the husband separates himself from his wife and fails to provide her with the necessary subsistence according to his income and condition in life, or unless he shall be guilty of

DIVORCE AND ALIMONY—*Continued.*

such misconduct or acts as would constitute a cause for divorce, either absolute or from bed and board. *Ipock v. Ipock*, 387.

§ 16. Enforcing Payment of Alimony Due Under Foreign Decree.

Under full faith and credit clause plaintiff is entitled to judgment for amount of alimony due under decree for absolute divorce rendered by court of another state, but not to judgment for future installments, nor may judgment be enforced by contempt proceedings. *Willard v. Rodman*, 198. See, also, *Allman v. Register*, 531.

§ 20. Enforcing Payments for Support of Children Due Under Foreign Decree.

Our courts may render judgment for past due and unpaid installments for the support and maintenance of children as set out in decree of sister state, but not for payment of future installments thereunder. *Allman v. Register*, 531.

§ 21. Validity and Attack of Foreign Decrees.

Where decree of divorce of another state awards the custody of the minor children of the marriage, our court has no jurisdiction in a proceeding under G.S. 50-13 to award the custody of the children except in conformity with the decree of the sister state unless the children are domiciled in this State at such time. *Allman v. Register*, 531.

§ 22. Validity and Attack of Decrees of This State.

Our courts have jurisdiction to alter the marriage status of a resident even though the spouse be a nonresident, provided the form and nature of the substituted service meet the requirements of due process of law. *McLean v. McLean*, 139.

The statutory right of a nonresident against whom judgment has been rendered on substituted service to come in and defend at any time within five years, does not apply to actions for divorce. *Ibid.*

Evidence that in original suit against nonresident spouse, she was notified by mail and appeared, that resident plaintiff thereupon took nonsuit and later instituted another suit in different county without attempting to obtain personal service, and, with full knowledge of her whereabouts, procured service by publication in newspaper of limited circulation, *held to* show fraud on jurisdiction of court, and decree is a nullity. *Ibid.*

DOMICILE.

Upon birth, an illegitimate child acquires the domicile of its mother, and such child is without power to change its domicile until its majority or emancipation. *In re Blalock*, 493.

An unemancipated infant cannot, of its own volition, select, acquire or change its domicile. *Allman v. Register*, 531.

The place of children's residence and the place of their domicile may not be the same. *Ibid.*

While the domicile of unemancipated children is ordinarily that of their father during their minority, where the father abandons his wife and children or the parents are separated by judicial decree or divorce which awards the

children's custody to the mother, the children's domicile follows that of the mother. *Ibid.*

Where it affirmatively appears from the record that the husband had abandoned his wife and children and that the children had continuously thereafter lived with their mother in another state except for brief periods when they were permitted to visit their father in this State, the children's domicile is in such other state, and a finding by our court upon the record that the domicile of the children was in this State is a conclusion of law and not binding on appeal. *Ibid.*

EASEMENTS.

§ 1. Creation by Deed.

The owner of a tract of land conveyed a portion thereof to a municipality for express use as a garbage dumping ground, and released and waived all right of action which grantors or their successors might ever have arising out of the use of the land conveyed for such purpose. *Held:* The waiver or release constituted a covenant not to sue, binding on grantors and their heirs and assigns, and operated to create an easement running with the land so that purchasers of the remaining lands of the grantors, either directly or by *mesne* conveyances, are estopped to maintain an action against the city for the nuisance resulting from the operation of the garbage dump in a reasonably careful and prudent manner, notwithstanding that the deed to the city was not in their chain of title. G.S. 47-27. *Waldrop v. Brevard*, 26.

§ 6. Easements Running With the Land.

Where the owner of land conveys a portion thereof together with an easement over his remaining lands by deed duly recorded, grantees of the servient tenement, directly or by *mesne* conveyances, take title subject to the duly recorded easement, notwithstanding that no deed in their chain of title refers to such easement. *Waldrop v. Brevard*, 26.

§ 9. Termination on Equitable Grounds.

Where a municipality acquires an easement over adjacent lands to maintain a garbage dump on lands purchased by it, change in conditions in the neighborhood cannot justify the release of the owners of the servient tenement of the burden of the duly recorded easement. *Waldrop v. Brevard*, 26.

ELECTIONS.

§ 1. Time of Election and Right to Submit Question to a Vote.

A county may not hold an election on the question of legalizing the sale of beer and wine therein within sixty days from an election in a municipality of the county on the same question, irrespective of the time of making the order calling such election. *Ferguson v. Riddle*, 54.

§ 18a. Contested Elections.

In an action involving contested election, undenied and unchallenged averment in petition for recusation that judge personally took active part in campaign *held* to disqualify him. *Ponder v. Davis*, 699. Successful candidate may not enjoin investigation of election by Board of Elections and S.B.I. *Ponder v. Board of Elections*, 707.

ELECTRICITY.

§ 7. Negligence in Maintaining Wires.

Evidence tending to show that a municipal utility maintained uninsulated wires carrying a lethal voltage only about four feet above a tramway being constructed over a street with the city's knowledge and permission (G.S. 143-136), and that a workman on the tramway, who was not warned that the wires carried a dangerously powerful current, was electrocuted when a strip of metal he was using to cap the top of the roof of the tramway came in contact with the uninsulated wires, *is held* sufficient to be submitted to the jury on the issue of negligence of the city and its utility commission. *Essick v. Lexington*, 600.

§ 10. Contributory Negligence of Person Injured.

Evidence tending to show that a carpenter while working on the roof of a tramway over a street was electrocuted when a strip of metal he was handling came in contact with uninsulated high voltage wires maintained only about four feet above the roof of the tramway, and that he had not been warned that the wires carried a dangerously powerful current, *is held* not to establish contributory negligence as a matter of law on the part of the workman. *Essick v. Lexington*, 600.

§ 11. Intervening and Insulating Negligence of Third Persons.

Failure of employer to warn employee of dangerously powerful current carried by wires in close proximity to place where employee was required to work *held* not intervening negligence insulating negligence of power company as a matter of law. *Essick v. Lexington*, 600.

EMINENT DOMAIN.

§ 4. Public Use.

Condemnation of property for public housing project is for public use. *In re Housing Authority*, 649.

Fact that few of properties sought to be condemned are above standard of slum property does not affect public character of the taking. *Ibid.*

§ 6. Delegation of Power to State Agencies.

A municipal housing authority is given the power by G.S. 157-11 and G.S. 157-50 to condemn by eminent domain any real property which it may deem necessary for a housing project, and G.S. 40-10 does not apply to such proceedings. *In re Housing Authority*, 649.

Housing authority may condemn non-slum property and homes when deemed necessary for public purpose by it in exercise of sound discretion. *Housing Authority, In re*, 649.

§ 14. Procedure.

Selection of site for housing project is in sound discretion of housing authority; no notice to property owners of hearing before Utilities Commission for certificate of public necessity is required. *In re Housing Authority*, 649.

EQUITY.

§ 1. Maxims of Equity.

Equity regards the substance and not the form. *Erickson v. Starling*, 539.

EQUITY—*Continued.*

§ 3. Laches.

Laches will not bar a right when the action in which the right may be asserted remains pending. *Anderson v. Moore*, 299.

ESTOPPEL.

§ 3. Estoppel by Record.

By participating in proceedings to sell timber from the lands devised in accordance with the will, the parties are thereafter estopped from attacking the validity of the will. *Burchett v. Mason*, 306.

EVIDENCE.

§ 2. Judicial Notice of Official Acts of Officers and Agencies of State.

The courts will take judicial knowledge as to the appointment and terms of a special judge of the Superior Court and the public records later made by him or at his instance. *Motors Corp. v. Hagwood*, 57.

§ 8. Burden of Proving Defenses.

Where the facts constituting a defense are within defendant's own peculiar knowledge it is incumbent upon him to prove them. *Joyce v. Sell*, 585.

§ 17. Rule That Party May Not Impeach Own Witness.

While a party may not impeach the credibility of his own witness, he is not precluded from showing the facts to be otherwise than as testified to by the witness. *Matheny v. Motor Lines*, 673.

§ 21. Direct Examination—Unresponsive Answer.

The fact that an answer is not responsive to the question does not in itself render the answer incompetent and justify the withdrawal of the testimony from the jury, but to the contrary if the answer contains relevant and pertinent testimony it is nonetheless competent because the matter contained therein was not specifically asked for. *In re Will of Tatum*, 723.

§ 22. Cross-examination.

Much latitude is permitted on cross-examination to test the consistency and plausibility of matters related by a witness on direct examination, and therefore questions which might be improper on direct examination may be permitted upon cross-examination. *Maddox v. Brown*, 519.

§ 25. Facts in Issue and Relevant to Issues.

Evidence which does not tend to establish the primary fact in issue by any logical inference is irrelevant and incompetent. *Sprinkle v. Ponder*, 312.

§ 27½. Facts Within Knowledge of Witness.

While a person may testify as to the intent with which he performs a particular act, no one else can have any personal knowledge in respect thereto, and therefore testimony of another as to such person's intent is without probative force. *Hooper v. Casualty Co.*, 154.

§ 32. Transactions or Communications With Decedent.

In order for testimony to be incompetent under G.S. 8-51, the witness must be a party to the action or a person interested in the event or a person from, through, or under whom a party or interested person derives his interest or

EVIDENCE—*Continued.*

title; the witness must be testifying in his own behalf or in behalf of the party succeeding to his title or interest; the witness must be testifying against the personal representative of a deceased person or the committee of a lunatic or a person deriving his title or interest from, through, or under a deceased person or lunatic; and the testimony must concern a personal transaction or communication between the witness and the deceased person or lunatic. *Peek v. Shook*, 259.

Testimony of plaintiff as to services rendered decedent *held* incompetent in action to recover therefor from estate. *Peek v. Shook*, 259.

G.S. 8-51 does not render incompetent testimony from an interested witness as to transactions with a decedent when such testimony is for and not against the person deriving title or interest from, through or under the deceased person, and therefore it is competent for a defendant to testify to the effect that deceased grantee, under whom she claims, performed certain acts as consideration for the deed. *Sprinkle v. Ponder*, 312.

§ 35. Legal Instruments and Court Records.

Ordinarily a judgment in another cause is not admissible to prove a fact in issue in the present action. *Scarboro v. Morgan*, 449.

§ 48. Medical Expert Testimony.

A medical expert may testify as to the probable cost of further surgical operations needed by plaintiffs at the time of trial. *Dickson v. Coach Co.*, 167.

§ 49. Opinion Evidence—Invasion of Province of Jury.

Testimony that bus would have passed motorcycle if both had continued in straight line *held* short-hand statement of composite fact and not objectionable as invading province of jury. *Maddox v. Brown*, 519.

EXECUTORS AND ADMINISTRATORS.

§ 1. Appointment of Executors and Administrators c. t. a.

The rule that a will must be construed to effectuate the intent of testator applies to the appointment of an executor therein. *In re Will of Johnson*, 570.

The will in suit. which disposed of a large estate, directed the payment of specified sums to the beneficiaries from the assets, when, as and if conveniently available as determined by testator's widow "who is hereby appointed my executor" and a trust company "hereby appointed trustee of my estate." The widow renounced her right to qualify as executrix. *Held:* The trust company named is entitled to administer the estate either as executor or as administrator *c. t. a.* in accordance with the tenor of the instrument, G.S. 28-22, and therefore judgment of the lower court that the clerk should issue letters testamentary to the trust company rather than to another nominated by the beneficiaries, will not be disturbed on appeal. *Ibid.*

§ 1a. Removal of Executors.

An executor is charged with the preservation of the estate pending final determination of the issue of *devisavit vel non* in favor of caveator upon appeal, unless and until he be removed, G.S. 28-32, and therefore upon the answer of the issue in favor of caveators it is error for the court to appoint commissioners with direction that they give bond and handle the estate. *In re Will of Tatum*, 723.

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 9d. Actions by Executors or Administrators.

Where in an action for wrongful death it is admitted that plaintiff had not qualified as administratrix, the court properly allows defendant to withdraw the admission in the answer of due qualification, to take voluntary nonsuit on its cross-action, and thereupon to dismiss plaintiff's action. *Journigan v. Ice Co.*, 180.

§ 20. Distribution of Estate.

It is the duty of the administrator to make distribution of the surplus of his intestate's personal property among those entitled thereto, G.S. 28-149, but it is not his function to partition the real estate of his decedent among the heirs. *King v. Neese*, 132.

§ 24. Family Settlements of Estates.

While family settlements, when fairly made, are favorites of the law, this rule is subject to material limitations when a testamentary trust is involved. *Carter v. Kempton*, 1.

Where a family agreement involves the rights of infants, the rule that the law looks with favor upon such agreements will not prevail over the precept that equity will be guided by the welfare of infants in determining the reasonableness and validity of the agreement. *Ibid.*

Equity cannot modify trust estate in accordance with family agreement merely to avoid controversy between trustees and one of beneficiaries. *Ibid.*

FOOD.

§ 4. Nature and Grounds of Liability for Foreign Substances or Unwholesomeness.

There is an implied warranty that an article sold in connection with food for human consumption is wholesome and fit for that purpose. *Davis v. Radford*, 283.

§ 14. Liability of Manufacturer or Distributor to Retailer.

Where retailer of article, sold in original package for use in connection with food, is sued by consumer for breach of implied warranty that article was wholesome, retailer is entitled to have wholesaler or distributor joined as co-defendant, even before he has suffered loss, upon allegation that wholesaler was primarily liable on the implied warranty. *Davis v. Radford*, 283.

FRAUD.

§ 1. Deception Constituting Fraud in General.

While fraud may not be defined, it embraces the taking of undue or unconscionable advantage of another through breach of legal or equitable duty by acts, omissions, or concealments. *Vail v. Vail*, 109.

To constitute actionable fraud there must be a false representation or concealment of a material fact, which is reasonably calculated to deceive and made with the intent to deceive, which does deceive to the hurt of the injured party. *Ibid.*

The breach of duty by a fiduciary to disclose all material facts constitutes fraud. *Ibid.*

FRAUD—*Continued.*

A fiduciary relationship exists whenever there is special confidence on the one side which results in superiority or influence on the other, and the relationship exists as between an agent and his principal. *Ibid.*

§ 5. Deception and Reliance on Misrepresentation.

The general rule that a literate party who signs an instrument is charged with knowledge of its contents, does not apply when the party offering the instrument for signature stands in a fiduciary relationship and there are elements of positive fraud and deception justifying the person signing the instrument in not discovering its contents. *Vail v. Vail*, 109.

§ 9. Pleadings.

A complaint alleging that defendants, officers and agents of a corporation, made fraudulent misrepresentations of fact as to the financial condition of the corporation, thereby inducing plaintiff to sell the corporation merchandise on credit, and that defendants thereafter secretly caused the corporation to convey its assets to them with the purpose of cheating and defrauding plaintiff and other creditors, and that the corporation was thereafter placed in receivership with virtually no assets, with prayer that plaintiff recover of defendants the amount lost through the extension of credit, *is held* to state only the one cause of action for actionable fraud on the part of defendants and is demurrable neither on the ground of misjoinder of causes nor the ground that it stated a cause of action to set aside the conveyances appertaining solely to the corporate receivers. *Mills Co. v. Earle*, 74.

FRAUDS, STATUTE OF.

§ 9. Contracts Affecting Realty—Application in General.

Testimony to the effect that grantee in an executed deed gave valuable consideration therefor, offered for the purpose of showing that it was not a deed of gift, is not incompetent under the statute of frauds, since the statute applies to executory and not executed contracts. *Sprinkle v. Ponder*, 312.

GAMES AND EXHIBITIONS.

§ 3. Liability of Proprietor for Injury to Patron.

The management of a baseball park is not guilty of negligence in failing to provide a patron with a choice between screened and unscreened seats at a game attended by an unusually large number of spectators. *Erickson v. Baseball Club*, 627.

The management of a baseball park is not an insurer of the safety of its patrons, but is required to exercise care commensurate with the circumstances to protect them from injury, and to this end is required to provide screening for seats in areas back of home plate where the danger is greatest, and to provide such screened seats in sufficient number to accommodate as many patrons as reasonably may be expected to call for them on ordinary occasions. *Ibid.*

After obtaining a seat in the bleachers, plaintiff's view of home plate became increasingly obscured intermittently by later arrivals of an unusually large crowd, some of whom were standing between the bleachers and the fence, and a few on the other side of the fence. Plaintiff was struck by a foul ball which he contended he was prevented from seeing in time, or from dodging, by reason

GAMES AND EXHIBITIONS—*Continued.*

of the crowding and disposition of the spectators, contending the management was negligent in thus subjecting him to extra hazards. *Held:* Plaintiff was cognizant of his danger, and by failing to move to a place of greater safety, assumed the risk and was guilty of contributory negligence barring recovery. *Ibid.*

GAMING.

§ 4. Lotteries.

A calculator used as part of the paraphernalia in the operation of a lottery may be introduced in evidence. *S. v. Gibson*, 691.

Prosecution for conspiracy to operate, and for operation of, butter and egg lottery and horse-race lottery. *Ibid.*

GRAND JURY.

§ 1. Qualification and Selection of Grand Jurors.

The fact that the county commissioners in selecting the jury list used only the tax returns for the preceding year without a list of names of persons not appearing thereon who were residents of the county and over twenty-one years of age, as stipulated by the amendment to G.S. 9-1, does not sustain defendant's contention that the list was not selected from the legally prescribed source, since the provisions of the statute are directory and not mandatory. *S. v. Brown*, 202.

HEALTH.

§ 2. County and City Boards of Health.

A statute which operates only in one county and its county seat and which confers power upon the county and the city to consolidate their health departments and name a joint city-county board of health and appoint joint city-county health officers, and which expressly repeals to the extent of any conflict all laws in conflict therewith, is a local act relating to health, and is void for repugnancy to Art. II, sec. 29, of the State Constitution. *Idol v. Street*, 730.

An unconstitutional act is void and is as inoperative as though it had never been passed, and therefore where a city-county board of health is created under a local statute which is unconstitutional because repugnant to provisions of Art. II, sec. 29, of the State Constitution, such city-county board never comes into legal existence, and health ordinances promulgated by it are without validity. *Ibid.*

HIGHWAYS.

§ 4b. Construction of Highways—Liability for Injury to Motorists.

When a contractor undertakes to perform work on a highway under a contract with the State Highway and Public Works Commission he is under positive legal duty to exercise ordinary care for the safety of the general public traveling over the road on which he is working. *Council v. Dickerson's*, 472.

In action by motorist against road contractor, allegation that defendant was doing work under contract with Highway Commission is relevant, but allegation as to precautions required of defendant by the contract and its failure to observe them, is irrelevant. *Ibid.*

HIGHWAYS—*Continued.*

§ 8b. Powers and Authority of State Highway Commission.

The State Highway and Public Works Commission has authority to designate one highway as the dominant highway at an intersection notwithstanding that it was built and is maintained in part by Federal funds and forms a link in an interstate system designated as U. S. Highways. G.S. 20-158. *Yost v. Hall*, 463.

HOMICIDE.

§ 4d. Murder in the First Degree—Murder Committed in Perpetration of Felony.

Murder committed in perpetration of robbery or rape is murder in the first degree. *S. v. Rogers*, 390.

§ 8a. Involuntary Manslaughter—Negligence or Culpability of Defendant.

Where one engages in an unlawful and dangerous act, such as handling a loaded pistol in a careless and reckless manner, or pointing it at another, and kills the other by accident, he is guilty of involuntary manslaughter, and no presumption is required to support a verdict of guilty of this offense. G.S. 14-34. *S. v. Hovis*, 359.

Where the unintentional killing of a human being results from an unlawful act not amounting to a felony or from a lawful act negligently done, the offense is involuntary manslaughter. *Ibid.*

§ 11. Self-defense.

A person in his own home or place of business, where he has a right to be, and acting in defense of himself and his habitation, is not required to retreat in the face of a threatened assault, regardless of its character, but is entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault, although he may not use excessive force in repelling the attack. *S. v. Sally*, 225.

§ 25. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that after an altercation between landlord and tenant as to whether the landlord should keep his dog in the tobacco barn near the tenant's house, both the parties armed themselves, and that as the landlord was passing through defendant tenant's yard, presumably on the way to the tobacco barn with the dog, defendant fired from the house inflicting mortal injury, *is held* to require the overruling of defendant's demurrer to the evidence, notwithstanding that defendant's evidence, if believed, would justify a self-defense acquittal. *S. v. Artis*, 348.

Evidence tending to show defendant shot deceased while they were "fooling" with pistol *held* sufficient to sustain verdict of guilty of manslaughter, notwithstanding exculpatory statements of defendant. *S. v. Hovis*, 359.

Where the State's evidence tends to show a murder committed in the perpetration of robbery and rape, and tends to identify defendant as the perpetrator of the crime by testimony of his confession, foot tracks, presence at the scene shortly before the crime was committed, discovery of articles connected with the crime in his possession or where he had hidden them, together with other circumstantial evidence and testimony of conflicting statements made by him when questioned after the occurrence *is held* sufficient to be submitted to the jury on the charge of murder in the first degree. *S. v. Rogers*, 390.

HOMICIDE—*Continued.*

§ 27f. Instructions on Self-defense.

An instruction which in effect requires defendant to retreat when an assault is made upon him in his own place of business, unless the assault be violent and the circumstances such that retreat would be dangerous, *is held* to constitute prejudicial error. *S. v. Sally*, 225.

§ 27i. Charge on Right to Recommend Life Imprisonment.

G.S. 14-17, as amended, gives the jury the unconditional and unqualified right to recommend life imprisonment upon its finding that defendant is guilty of murder in the first degree, and defendant has a substantive right to have the jury so instructed, and therefore a charge to the effect that the jury might recommend life imprisonment if the jury felt it warranted by the facts and circumstances, must be held for reversible error. *S. v. McMillan*, 630.

HUSBAND AND WIFE.

§ 4a. Marital Rights and Privileges in General.

Where there is no evidence that the husband acted unreasonably in choosing the domicile or that the home chosen was inimical to the wife's health, welfare and safety, her consent to go and live with him at the domicile cannot constitute consideration moving from her to him, since in such instance it is the wife's marital duty to go with him to the home of his choice, and as a matter of sound public policy the law will not permit it to be made the subject of contract. *Sprinkle v. Ponder*, 312.

Performance by the wife of work and labor beyond the scope of her usual household and marital duties, such as working in the fields, making rugs, etc., may entitle her in proper cases to compensation therefor provided there is a special contract to that effect between them; but in the absence of a special contract such services are presumed to have been gratuitous. *Ibid.*

§ 12c. Conveyances Between Husband and Wife.

Ordinarily the performance by a married woman of her agreement to help her husband build the home and other buildings and contribute from her separate estate for the cost of erection, is a valuable consideration which supports his deed to her for one-half interest in the land, but where the evidence tends to show only her executory contract to do so, without any evidence tending to show performance by her, it is without probative force upon the question of consideration. *Sprinkle v. Ponder*, 312.

Deed from husband to wife *held* deed of gift, void because not registered within two years, wife's acceptance of domicile selected by husband and work at domicile not contributing consideration. *Ibid.*

§ 22. Sufficiency of Evidence and Nonsuit in Abandonment Prosecutions.

Conflicting evidence as to whether defendant's failure to support his wife and minor children was willful, *held* adversely determined against defendant by the jury. *S. v. Campo*, 79.

INDEMNITY.

§ 1. Nature and Requisites of Indemnity Contract.

While ordinarily a contract of indemnity refers to and is founded upon another contract, either existing or anticipated, between the indemnitee and a third party, it requires only the two parties of indemnitor and indemnitee

and is an original promise by the indemnitor to the indemnitee to make good and save the indemnitee harmless from loss sustained by default or miscarriage of a third party when established by unsuccessful efforts by the indemnitee to collect from him, and creates no obligation to the third party, or to perform the contract of such third party. *Casualty Co. v. Waller*, 536.

An instrument under which one party promises the other party to save such other party harmless from all loss it might sustain by reason of the execution of the performance bond for a construction company in which the first party was a stockholder and also a silent partner in the making of the construction contract, *is held* an indemnity contract and not one of suretyship, and the promise of the indemnitor is an original and direct promise to pay indemnitee loss sustained by it under the performance bond, and further, the interest of the indemnitor in the construction contract was a substantial consideration for the execution of the indemnity agreement. *Ibid.*

INDICTMENT AND WARRANT.

§ 8. Joinder of Counts and Parties.

An indictment containing a count charging named defendants with conspiracy to operate a race-horse lottery and subsequent counts charging the named defendants with operating a race-horse lottery, and with selling race-horse lottery tickets and further counts charging named defendants (the same parties except for the deletion of one of them) with conspiracy to operate a butter-and-egg lottery and with operating a butter-and-egg lottery and with selling butter-and-egg lottery tickets, *held* not objectionable for duplicity or multifariousness. *S. v. Gibson*, 691.

§ 10. Identification of Person Charged.

The names "Sawyer" and "Swayer" *held* to come within the rule of *idem sonans*. *S. v. Sawyer*, 76.

The use of the words "the above" in the complaint in charging a criminal offense is not approved, but construing the verified complaint and the warrant subjoined together, it *is held* that the pleading sufficiently identified defendant, so as to defeat motion in arrest of judgment. *Ibid.*

A count charging named defendants with conspiracy to operate a lottery and further with selling lottery tickets charges but one offense of conspiracy, and therefore it is not required that the defendants be again named in regard to the selling of lottery tickets. *S. v. Gibson*, 691.

§ 12. Time of Making Motion to Quash and Waiver of Defects.

Objection for misnomer in the indictment or warrant must be raised by plea in abatement, and defendant waives his right to object thereto by entering a plea of not guilty and going to trial. *S. v. Sawyer*, 76.

§ 13. Quashal for Want of Jurisdiction of Court.

An indictment may be quashed for lack of jurisdiction of the court to try the case. *S. v. Wilkes*, 645.

§ 15. Amendment.

While the trial court has broad power to allow amendments to warrants, both as to form and substance, nevertheless amendments must relate to the charge

INDICTMENT AND WARRANT—*Continued.*

and the facts supporting it as they exist at the time it was formally laid, and may not be allowed to change the nature of the offense intended to be charged in the original warrant. *S. v. Thompson*, 345.

INJUNCTIONS.

§ 1. Nature and Grounds of Relief in General.

A person to whom certificate of election has been issued may not enjoin the State Board of Elections and others from investigating the election, it being admitted that the defendants could do nothing to affect the title to the office, since in such case no personal or property right of plaintiff is threatened or endangered so as to entitle him to invoke the equitable jurisdiction of the court, nor could the complaint state a cause of action in his favor. *Ponder v. Board of Elections*, 707.

INSURANCE.

§ 13a. Construction and Operation of Insurance Contracts in General.

While doubtful language in a policy must be construed in favor of insured and against insurer, and while the courts will adopt that construction favorable to insured when the policy is reasonably susceptible to two constructions, nevertheless the policy is a contract and is subject to the rules of interpretation applicable to written contracts generally, and must be construed to effectuate the intent of the parties as gathered from the language used. *Motor Co. v. Ins. Co.*, 251.

In interpreting the language of an insurance policy to ascertain the intent of the parties, consideration may be given to the character of the business of the insured and the usual hazards involved therein. *Ibid.*

Unambiguous terms in an insurance policy will be given their usual, ordinary and commonly accepted meaning. *Ibid.*

§ 21. Mortgagee Clauses.

The standard or union mortgage clause, which provides that the interest of the mortgagee in the proceeds of the policy shall not be invalidated by any act or neglect of the mortgagor, constitutes an independent contract between the insurer and the mortgagee effecting a separate insurance of the mortgage interest, and under such clause the mortgagee is not bound by any adjustment of the loss between insurer and the mortgagor had without his knowledge or consent. *Green v. Ins. Co.*, 321.

An open or simple loss payable clause in favor of the mortgagee does not create an original contract between the insurer and the mortgagee but merely makes the mortgagee an appointee of the insurance fund to the extent of his interest in derivation of the rights of the insured mortgagor, and therefore a mortgagee under such clause can have no greater right than the mortgagor and is bound by an appraisal or arbitration had in good faith between the mortgagor and the insured, even though he is not a party and has no notice of the proceeding. *Ibid.*

§ 24b (2). Fire Insurance—Arbitration and Adjustment of Loss.

Where arbitration proceedings are had in accordance with the policy agreement, the insured mortgagor participating in the proceedings is ordinarily bound by the award, and he may not attack it on the ground that the proceed-

ings were had without the knowledge or consent of the mortgagee. *Green v. Ins. Co.*, 321.

Where the policy contract specifically provides that the amount of loss should be determined by appraisers appointed by insured and insurer, without provision in any portion of the policy that the mortgagee named in the open or simple loss payable clause in the policy should be notified, the mortgagee is bound as to his rights against insurer by an arbitration had in accordance with the terms of the policy even though it was made without notice to him. *Ibid.*

§ 43d. Auto Liability Insurance—Drivers Within Coverage of Policy.

The extended coverage of a liability policy to persons operating vehicles owned by the named insured provided such use is with the permission of the named insured, operates regardless of whether such permission be expressed or implied, but in either case such permission must be predicated upon the language or conduct of the named insured or someone having authority to bind him in that respect. *Hooper v. Casualty Co.*, 154.

Whether an employee operating the truck of the named insured has expressed or implied permission from the insured for that particular trip, perforce cannot be established by the acts or declarations of the employee. *Ibid.*

Evidence tending to show merely that insured's employee had driven plaintiff to the home of plaintiff's sister and that the accident in suit occurred after they had left the house of plaintiff's sister and were traveling on a road which was not on the direct nor customary route of travel between the points the employee was authorized to drive the truck in the usual performance of his duties, without evidence of implied permission to the employee to use the truck for personal purposes, *is held* insufficient to be submitted to the jury on the question of insurer's liability under the clause of the policy extending coverage to the operation of the vehicle by persons with the permission of the named insured. *Ibid.*

Testimony of a passenger in a truck that at the time in question he and the employee-driver had started to the employer's plant to load the truck with brick, *is held* simply a statement of mental intent, and is without probative value as to the state of mind of the employee. *Ibid.*

In order to show that an employee has implied permission from insured to use insured's truck for personal purposes, there must be some evidence that the employee had theretofore used the truck for personal purposes or that on the occasion in question the employer knew he was so using it. *Ibid.*

§ 45½. Automobile Theft Insurance.

Theft of car by prospective purchaser *held* within exclusion of dealer's theft policy sued on. *Motor Co. v. Ins. Co.*, 251.

§ 48. Auto Insurance—Rights of Persons Injured or Damaged Against Insurer.

Where a policy insures against liability as distinguished from mere indemnity, coverage attaches when liability attaches regardless of actual loss by insured at the time, which coverage inures to the benefit of an injured third person who may sue the insurer as soon as the liability of the insured has been established by judgment, *a fortiori* where the policy itself provides that such injured person who has secured judgment against insured is entitled to recover under the policy. *Hall v. Casualty Co.*, 339.

INSURANCE—*Continued.*

Complaint in an action by the injured third person against insurer in a liability policy will not be held demurrable for failure to identify the particular vehicle insured when the policy provides coverage as to any other automobile driven by insured, and the complaint identifies insured as the driver of the vehicle causing the injury. *Ibid.*

Complaint in an action by the injured third person against insurer in a liability policy alleging notice to insurer of plaintiff's claim and insurer's refusal to appear and defend the action against insured, and the obtaining of judgment against insured, *is held* not demurrable for failure to allege compliance by insured with the conditions and terms of said policy, since conditions as to the conduct of insured subsequent to the accident relate to affirmative defenses notwithstanding they may be designated as conditions precedent, and plaintiff is not required to negative the existence of an affirmative defense. *Ibid.*

INTOXICATING LIQUOR.

§ 4b. Constructive Possession.

Possession of intoxicating liquor within the meaning of G.S. 18-2 and possession of property designed for the manufacture of intoxicating liquor within the meaning of G.S. 18-4 may be either actual or constructive, it being sufficient if the liquor or the property is within the power of the defendant in such sense that he can and does command its use. *S. v. Webb*, 382.

Possession of any intoxicating liquor for the purpose of sale, except as authorized by law, is unlawful, and possession within the meaning of the statute may be actual or constructive. *S. v. Buchanan*, 477.

§ 9b. Presumptions and Burden of Proof.

Proof of possession of more than one gallon of spirituous liquors at one time, whether in one or more places, constitutes *prima facie* evidence of possession for sale. G.S. 18-32. *S. v. Buchanan*, 477.

§ 9d. Sufficiency of Evidence and Nonsuit.

The State's evidence tended to show that each of the two appealing defendants and also another defendant who did not appeal, lived in apartments in a large farmhouse with their respective kinsmen or families, that a quantity of corn beer, liquor and property susceptible to use in the manufacture of intoxicating liquor were found on the premises, with tracks or paths running therefrom to the house. There was no evidence tending to identify any of the tracks as those of defendants, or that the tracks from the back of the house led from any particular apartment. *Held:* There is no sufficient evidence to support a finding that either of the appealing defendants had constructive possession of either the liquor or the utensils but leaves the matter in conjecture and speculation and is insufficient to be submitted to the jury. *S. v. Webb*, 382.

Circumstantial evidence *held* sufficient to support conviction of possession of nontax-paid liquor. *S. v. Rhodes*, 453.

Evidence tending to show that defendant operated a rooming house and that the officers found more than one gallon of tax-paid whiskey in the two rooms occupied by him, is sufficient to make out a *prima facie* case and overrule defendant's motion to nonsuit in a prosecution under G.S. 18-32. *S. v. Buchanan*, 477.

JUDGES.

§ 2a. Jurisdiction in General.

A judge has no jurisdiction to hear a motion made without notice to the adversary in a cause pending in a county outside the district of his residence and outside the district he is riding. *Surety Corp. v. Sharpe*, 644.

§ 2b. Emergency Judges.

A special judge who has been retired under the provisions of G.S. 7-51 on the ground of total disability is not an emergency judge. The provision of G.S. 7-50 that persons embraced within the provisions of G.S. 7-51 are constituted emergency judges is neither appropriate nor applicable to a judge who retires for total disability under the 1937 Amendment to G.S. 7-51. *Motors Corp. v. Hagwood*, 57.

§ 2d. Disqualification in Particular Cases.

Where order to show cause why defendants should not be held in contempt arises out of action involving contested election, resident judge issuing order should recuse himself upon affidavit alleging such judge took active part in campaign and averring defendants could not obtain fair trial before him. *Ponder v. Davis*, 699. All orders entered after filing of petition for order of recusation will be stricken out. *Ibid.*

JUDGMENTS.

§ 18. Validity—Process, Hearing and Jurisdiction.

If a fraud is perpetrated on the court whereby jurisdiction is apparently acquired when jurisdiction is in fact lacking, the court's judgment is a nullity and may be vacated on motion in the cause. *McLean v. McLean*, 139.

Divorce decree obtained against nonresident on substituted service when plaintiff knew of defendant's whereabouts and sought to keep her in ignorance of action, *held* void for fraud on jurisdiction of court. *Ibid.*

Notice and an opportunity to be heard are prerequisites of jurisdiction, and jurisdiction is prerequisite to a valid judgment. *Comrs. of Roxboro v. Bumpass* 190.

§ 20a. Modification or Correction by Trial Court.

After appeal from final judgment the trial court is without authority to hear a motion in the cause, even during the term. *Green v. Ins. Co.*, 321.

An "interlocutory order" is provisional or preliminary and does not determine the issues in the action, and is subject to change by the court during the pendency of the action to meet the exigencies of the case. *In re Blalock*, 493.

§ 25. Procedure to Attack.

Motion in the cause is proper procedure to recall order of sale or restrain sale by receiver. *Surety Corp. v. Sharpe*, 644.

§ 27a. Setting Aside Judgments for Surprise and Excusable Neglect.

In order to be entitled to have a default judgment set aside under G.S. 1-220, motion must be made in apt time and movant must show not only surprise or excusable neglect but also a meritorious defense. *Perkins v. Sykes*, 146.

The withdrawal of defendant's attorney from the case by leave of court when the case is called for trial without notice to the client constitutes "surprise" within the meaning of G.S. 1-220. *Ibid.*

JUDGMENTS—*Continued.*

Where the answer and the record disclose a meritorious defense the denial of the trial court of a motion to set aside the judgment under G.S. 1-220 because defendant had offered no evidence of a meritorious defense, is erroneous. *Ibid.*

§ 27b. Void Judgments.

Where a hearing is *coram non judice* because the person holding the term of court is not a qualified judge, the proceeding is a nullity and the judgment will be vacated and the case restored to the docket. *Motors Corp. v. Hagwood*, 57.

Judgment obtained by fraud on jurisdiction of court is a nullity. *McLean v. McLean*, 139.

No statute of limitations can bar the right of a litigant to attack a judgment on the ground that he had not been served with summons or brought into court in any manner sanctioned by law. *Comrs. of Roxboro v. Bumpass*, 190.

A nullity may be upset by direct or collateral attack, ignored, disregarded or treated as ineffectual anywhere at any time. *Ex nihilo nihil fit. Burchett v. Mason*, 306.

§ 27g. Setting Aside Judgments on Substituted Service.

The statutory right of a nonresident against whom judgment has been rendered on substituted service to come in and defend at any time within five years, does not apply to actions for divorce. G.S. 1-108. *McLean v. McLean*, 139.

§ 28½. Validity and Attack—Foreign Judgments.

Foreign decree of adoption of child domiciled here, entered upon suppression of facts, *held* void. *In re Blalock*, 493.

A judgment obtained in another state may be challenged in this State by proof of fraud practiced in obtaining the judgment which may have prevented an adverse trial of the issue, or by showing want of jurisdiction either of the subject matter or of the person of the defendant. *Ibid.*

§ 29. Conclusiveness of Judgment in General.

As a general rule a judgment of a court of competent jurisdiction is final and binding on the parties to the action or proceeding, and those standing in privity to them. *McCollum v. Smith*, 10.

The wife's decree of annulment of a prior marriage rendered after the death of the male party to a second ceremony is not binding upon his heirs at law, since they were not parties thereto. *Scarboro v. Morgan*, 449.

§ 32. Operation of Judgments as Bar to Subsequent Action in General.

A decree of foreclosure providing that mortgagors should be forever barred from any equity of redemption if they failed to redeem before sale *held* to bar purchasers from mortgagors from attacking commissioner's deed on ground that it was not executed within ten years and was not registered until subsequent to the registration of their deeds. *McCollum v. Smith*, 10.

A judgment is *res judicata* and bars a subsequent action between the same parties as to all matters actually litigated and determined therein and also as to all matters which properly could have been litigated and determined. *King v. Neese*, 132.

It is incumbent upon the party pleading estoppel by judgment to show that the particular point or question presented in the subsequent action was embraced in the former action. *Ibid.*

JUDGMENTS—*Continued.*

Judgment relating solely to advancements in personalty *held* not to bar subsequent proceeding to determine advancements in realty. *Ibid.*

JURY.

§ 8. Jury Rolls and Lists.

The fact that the county commissioners in selecting the jury list used only the tax returns for the preceding year without a list of names of persons not appearing thereon who were residents of the county and over twenty-one years of age, as stipulated by the amendment to G.S. 9-1, does not sustain defendant's contention that the list was not selected from the legally prescribed source, since the provisions of the statute are directory and not mandatory. *S. v. Brown*, 202.

LARCENY.

§ 7. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that on the morning after the night the tobacco of the prosecuting witness was stolen, defendants were seen in the truck owned by one of them when it became stuck on the side of the road, that the truck was then loaded with tobacco, but that later when the truck was pushed out of the ditch there was no tobacco in it, and that the tobacco belonging to the prosecuting witness was thereafter found in the woods opposite the place where the truck had been stuck, *is held* sufficient, with the other circumstantial evidence in the case, to overrule defendants' motions to nonsuit in this prosecution for larceny. *S. v. Alston*, 341.

LIMITATION OF ACTIONS.

§ 5b. Accrual of Right of Action—Fraud or Ignorance of Cause of Action.

A cause of action based on fraud does not accrue and the statute of limitations does not begin to run until the facts constituting the fraud are known or should have been discovered in the exercise of due diligence. *Vail v. Vail*, 109.

Where the person perpetrating the fraud is a fiduciary, the party defrauded is under no duty to make inquiry until something happens which reasonably excites his suspicion that the fiduciary has breached his duty to disclose all the essential facts and to take no unfair advantage. *Ibid.*

The mere registration of a deed, standing alone, will not be imputed for constructive notice to the grantor that a description other than the one intended had been surreptitiously substituted therein, in the absence of facts and circumstances sufficient to put the defrauded person upon inquiry, certainly where the person preparing the deed stands in a fiduciary relationship to the grantor. *Ibid.*

Defendant was directed by his mother to prepare a conveyance to himself of a certain tract of land. Defendant surreptitiously substituted a description of a larger and more valuable tract, which deed reserved therein, as directed, a life estate in the grantor. The grantor died some three years and seven months thereafter. There was nothing to rebut the inference that she retained possession of the property until her death. *Held:* There being nothing to excite the grantor's suspicion or to put her upon inquiry during her lifetime, the statute did not begin to run against her, and the action of the devisees of the property to set aside the conveyance for fraud, instituted within three years of the grantor's death, is not barred. G.S. 1-52 (9). *Ibid.*

LIMITATION OF ACTIONS—*Continued.*

Knowledge by a devisee that the grantee in a deed executed by his ancestor had perpetrated a fraud by substituting a different description in the deed, the statute not having begun to run against the grantor in her lifetime, *held* not to bar the devisee's action to set aside the conveyance for fraud instituted within three years of the grantor's death, since the devisee had no cause of action until the grantor's death. *Ibid.*

§ 6h. Parties Primarily or Secondarily Liable Under Ten Year Statute.

An action on an indemnity contract under seal is governed by the ten year, G.S. 1-47 (2), and not the three year, G.S. 1-52, statute of limitations. *Casualty Co. v. Waller*, 536.

§ 11. Institution of Action—New Action After Dismissal.

Where action begun prior to the bar of the applicable statute of limitations is dismissed for want of service of process on the defendant, a second action on the same cause of action commenced within twelve months after the dismissal, but after the expiration of the statutory limitation, is barred. G.S. 1-25. *Hodges v. Ins. Co.*, 289.

It is necessary that *alias* and *pluries* summons issue to prevent a discontinuance in such case. *Ibid.*

§ 12a. Part Payment.

Plaintiff's testimony was to the effect that the chattel mortgage executed by defendants was given as security for money loaned and as additional security for notes secured by a deed of trust theretofore executed by defendants. In plaintiff's action to foreclose the chattel mortgage, defendants paid a certain sum under a compromise agreement. Plaintiff deducted from the sum recovered the amount actually loaned on the chattel mortgage, without interest, and applied the balance *pro rata* to the notes secured by the deed of trust. *Held:* The prayer for relief in the action to foreclose the chattel mortgage is not controlling, and whether plaintiff was entitled to make the credits in this manner so as to constitute a part payment on the notes secured by the deed of trust and thus prevent the bar of the statute of limitations should have been submitted to the jury, and a directed verdict for defendant is error. *Sanders v. Hamilton*, 175.

§ 16. Burden of Proof.

Upon defendant's plea of the applicable statute of limitations, the burden is upon plaintiffs to show their claim is not barred. *Vail v. Vail*, 109.

LOST OR DESTROYED INSTRUMENTS.

§ 1. Rights of Parties in General.

When a deed has once been delivered, its subsequent loss or destruction will not divest title to the grantee. *McCollum v. Smith*, 10.

MARRIAGE.

§ 2f. Competency of Contracting Parties—Singleness.

A bigamous marriage cannot be given validity by a subsequent annulment of the first marriage. *Scarboro v. Morgan*, 449.

MARRIAGE—*Continued.*

§ 7. Grounds for Annulment.

Where suit for annulment on the ground that plaintiff was under fourteen at the time of the marriage is instituted after the ratification of Chap. 1022, Session Laws of 1949, and it is made to appear that children of the marriage were alive at the time decree of annulment was entered, the decree is in conflict with the statute and was improvidently entered. *Scarboro v. Morgan*, 449.

MASTER AND SERVANT.

§ 1. The Relationship in General.

A person performing work for hire under the supervision and control of another becomes the servant of such other in the performance of the work. *Rollison v. Hicks*, 99.

§ 4a. Distinction Between Employee and Independent Contractor.

A person undertaking a specific job by contract under which he retains control of the manner of doing the work, and the hiring, firing and payment of persons working under him, without being subject to the contractee except as to the result of the work, is an independent contractor, but if the contractee retains the right of control over the manner or method of doing the work, whether exercised or not, the contract creates the relationship of employer and employee. *McCraw v. Mills Co.*, 524.

The fact that the contractee retains the right to alter the specifications in immaterial aspects or provide for additional work for extra pay does not change the relationship of the parties from that of employer and independent contractor to that of master and servant. *Ibid.*

§ 15a. Common Law Liability of Master for Injury to Servant.

Evidence tending to show that three inches of the tread of the steps of a steel spiral stairway used by plaintiff employee in the performance of her work had been worn smooth and that the steps were thereby rendered extremely slick, and that the employee fell on the steps to her injury, *is held* sufficient to be submitted to the jury on the question of negligence of the employer in failing to exercise ordinary care to provide the employee a reasonably safe place in which to work. *Mintz v. R. R.*, 607.

It is not the absolute duty of the employer to furnish his employee a reasonably safe place to work, but only to exercise due care to provide such place. *Ibid.*

§ 20½. Employee's Liability for Injury to Employer.

The doctrine that the negligence of the employee will be imputed to the employer does not apply in an action by the employer to recover for injury sustained by reason of the negligence of the employee, the doctrine of imputed negligence being applicable upon such relationship only in regard to the employer's liability to third persons and in regard to contributory negligence when the employer seeks to recover for the negligent act of a third person. *Rollison v. Hicks*, 99.

§ 22c. Liability of Master for Injuries to Third Persons—Scope and Course of Employment.

The master is liable for injury inflicted by his servant upon a third person, whether malicious or negligent, when the tort is committed by the servant while acting within the course and scope of his employment. *King v. Motley*, 42.

MASTER AND SERVANT—*Continued.*

§ 37. Nature and Construction of Compensation Act in General.

While the Workmen's Compensation Act eliminates the question of negligence as a basis for recovery thereunder, it is not the equivalent of general accident or health insurance, but provides for compensation only for those injuries by accident which arise out of and in the course of the employment. *Vause v. Equipment Co.*, 88.

§ 39b. Independent Contractors and Sub-Contractors.

Painter *held* employee of independent painting contractor and not of mill company contracting to have work done. *McCraw v. Mills Co.*, 524.

§ 40a. Injuries Compensable in General.

Disability as used in the Workmen's Compensation Act is to be measured by the employee's capacity or incapacity to earn the wages he was receiving at the time of the injury, and a general physical disability not resulting in loss of wages is not compensable under the Act. *Dail v. Kellex Corp.*, 446.

§ 40c. Workmen's Compensation—Whether Accident "Arises Out of Employment."

"Arising out of" the employment as used in the Workmen's Compensation Act refer to the origin or cause of the accident, and required that the accident be a natural and probable consequence of the employment or incident to it, so that there be some causal relation between the accident and the performance of some service of the employment. *Vause v. Equipment Co.*, 88.

In order for an accident to arise out of the employment it is not required that a hazard of the employment be the sole cause of the accident, but it is sufficient if the physical aspects of the employment contribute in some reasonable degree toward bringing about or intensifying the condition which renders the employee susceptible to the accident and consequent injury. *Ibid.*

Injury due to a fall in an epileptic fit may be compensable if a particular hazard inherent in the working conditions also contributes to the fall and consequent injury, so that after the event it may be seen that the accident had its origin in the employment. *Ibid.*

Evidence *held* insufficient to show that injury from fall caused by epileptic fit arose out of the employment. *Ibid.*

Whether an accident arises out of the employment is a mixed question of fact and of law. *Ibid.*

§ 40d. Workmen's Compensation—Whether Accident "Arises in Course of the Employment."

"In the course of" the employment as used in the Workmen's Compensation Act refer to the time, place, and circumstances under which the accident occurs. *Vause v. Equipment Co.*, 88.

§ 40e. Causal Connection Between Injury and Disability.

Where it is in evidence that defendants agreed that plaintiff employee's disability resulted from the accident and there is evidence that a subsequent disability was accompanied by similar pain in the employee's back and chest, and there is expert opinion testimony that plaintiff had injured an intervertebral disc, which injury would not show up on an X-ray, *held* the evidence supports the finding that the subsequent disability resulted from the accident notwithstanding testimony by other expert witnesses that they were unable to

MASTER AND SERVANT—*Continued.*

find any definite and conclusive cause for plaintiff's subsequent condition. *Tucker v. Lowdermilk*, 185.

Claimant under the Workmen's Compensation Act must show not only that he has suffered personal injury by accident which arose out of and in the course of his employment but also that his injury caused him disability unless it is included in the schedule of injuries made compensable under G.S. 97-31 without regard to loss of wage earning power. *Anderson v. Motor Co.*, 372.

"Disability" as used in the Workmen's Compensation Act means impairment of wage earning capacity rather than a physical impairment. G.S. 97-2 (i). *Ibid.*

Findings to the effect that claimant suffered an injury by accident which arose out of and in the course of his employment but that he lost no time or wages as a result thereof, and after working for about a month with this employer, entered into business for himself, and that the disability of claimant is not a result of the accident but of a congenital infirmity, *is held* to sustain decision denying compensation, since the findings support the conclusion that the injury neither of itself nor in combination with the pre-existing infirmity resulted in any disability, and claimant is not entitled to have the cause remanded for a specific finding as to whether the injury proximately contributed to his disability by accelerating or aggravating his pre-existing condition. *Ibid.*

Where claimant's expert witness testifies to the effect that claimant had a congenital infirmity of the spine and that claimant now suffers a 10% disability, and further that claimant's disability could be the result of the accident or could have antedated it, such testimony does not impel the single conclusion that the injury accelerated or aggravated claimant's pre-existing infirmity, and further, the testimony related to a physical impairment rather than an impairment of wage earning capacity. *Ibid.*

§ 40f. Workmen's Compensation Act—Diseases.

In recognition of the insidious character of asbestosis and silicosis, the Legislature has provided that disablement from such diseases means the event of becoming actually incapacitated by such diseases from performing normal labor in the last occupation in which the employee was remuneratively employed; but that in all other cases of occupational disease "disablement" should be equivalent to "disability" and should mean incapacity because of injury to earn wages which the employee was receiving at the time of the injury in the same or any other employment. *Duncan v. Carpenter*, 422.

In order to be compensable, disablement from asbestosis, silicosis and lead poisoning must occur within two years from the last exposure to the hazards of the respective diseases. *Ibid.*

§ 41. Workmen's Compensation Act—Actions Against Third Person Tort-Feasor.

In an action by the personal representative of a deceased employee against the third person tort-feasor, it is proper for the court to submit, upon supporting evidence, an issue as to the contributing negligence of the employer and, upon an affirmative finding thereto by the jury, to preclude the employer and its insurance carrier from reimbursement for the amount of compensation paid under the provisions of the Workmen's Compensation Act. G.S. 97-10. In the absence of such finding they would be entitled to such reimbursement upon their certificate of interest even though they were not parties to the action. *Essick v. Lexington*, 600.

MASTER AND SERVANT—*Continued.*

§ 43. Notice and Filing of Claim.

A claim for compensation for disablement resulting from asbestosis, silicosis or lead poisoning is not barred if filed within one year from the date the employee has been advised by competent medical authority that he has such disease, notwithstanding that the disablement may have existed from the time the employee quit work more than a year prior to the filing of claim. *Duncan v. Carpenter*, 422.

§ 47. Jurisdiction of Industrial Commission.

Where at the time of the hearing the employee has returned to work, and the Industrial Commission awards him compensation for the amount of wages that he has lost as a result of the injury it has discharged its full duty and has no authority to retain jurisdiction upon its finding that the employee had suffered a general disability which might in the future result in loss of wages. *Dail v. Kellex Corp.*, 446.

§ 52. Hearing and Finding of Facts by Commission.

In passing upon issues of fact the Industrial Commission is the sole judge of the credibility of the witnesses and of the weight to be given their testimony, and may accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves the same. *Anderson v. Motor Co.*, 372.

Findings *held* sufficient to sustain award, and motion to remand cause to Commission for further findings, denied. *Ibid.*

§ 53a. The Award.

An agreement for the payment of compensation which is approved by the Commission is as binding as an award. *Tucker v. Lowdermilk*, 185.

§ 53c. Change of Condition and Review of Award by Industrial Commission.

The parties entered into an agreement for payment of compensation, approved by the Industrial Commission, which provided for payment of compensation "for necessary weeks" and stipulated that the employee had theretofore returned to work. The employer notified the Commission of final payment under such agreement, G.S. 97-18 (e). *Held:* A request for review of the award for changed condition made some sixteen months thereafter is barred, G.S. 97-47, since the disability for which compensation was agreed to be paid presumably terminated when the employee returned to work prior to the execution of the agreement, and therefore the phrase of the agreement "for necessary weeks" cannot be enlarged to include the subsequent disability. *Tucker v. Lowdermilk*, 185.

Where the parties agreed to the payment of compensation, approved by the Industrial Commission, the twelve month period for the filing of request for review of the award for changed condition expires twelve months after the last payment of compensation under the agreement, notwithstanding that the last payment for medical expenses may have been made at an appreciably later date. *Ibid.*

§ 55d. Review of Award of Industrial Commission.

A finding of the Industrial Commission is conclusive on appeal is supported by evidence, even though the evidence upon the entire record might support a contrary finding, but a finding not supported by evidence is not conclusive and

MASTER AND SERVANT—*Continued.*

the courts may review the evidence to determine this question. *Vause v. Equipment Co.*, 88.

If there is any competent evidence to support a finding of fact by the Industrial Commission, such evidence is conclusive on appeal, even though there is evidence that would support a finding to the contrary. *Tucker v. Lowdermilk*, 185.

Findings of fact of the Industrial Commission are conclusive when supported by legal evidence. G.S. 97-86. *Anderson v. Motor Co.*, 372; *McCraw v. Mills Co.*, 524.

MONEY RECEIVED.

§ 4. Trial of Action to Recover Money Received.

Plaintiff sought to recover as for money had and received the amount paid by it to a bank on a note secured by a chattel mortgage on an airplane executed by defendants. Defendants contended that plaintiff leased defendants' plane for student training under an agreement to pay the bank installments on the mortgage note as they became due out of the sums received from student pilots for use of the plane. *Held:* An instruction in effect leaving the jury to answer the issue of indebtedness either nothing or the amount of the note paid by plaintiff must be held for reversible error in failing to submit to the jury the question of the amounts received by plaintiff from student pilots which, under defendants' contentions, should have been paid by plaintiff on the note, under the rental agreement, leaving defendants liable only for the amounts paid by plaintiff on the note out of its corporate assets. *Flying Service v. Martin*, 17.

MORTGAGES AND DEEDS OF TRUST.

§ 2c. Equitable Mortgages.

Liens of equitable mortgages are ordinarily enforceable only as between the parties and privies, and may not be enforced against the receiver of the debtor. *Investment Co. v. Chemicals Laboratory*, 294.

§ 16b. Right of Mortgagor to Redeem.

Where the mortgagee is permitted to remain in actual possession as mortgagee for a period of ten years, and no action to foreclose or redeem has been instituted, the right to redeem is barred. *Anderson v. Moore*, 299.

§ 17c. Duty of Mortgagee to Account for Rents and Profits.

Ordinarily a mortgagee in possession is required to account for the rents and profits he receives from the premises. *Anderson v. Moore*, 299.

Where the right to redeem is barred the right to enforce an accounting is likewise barred. G.S. 1-47 (4). *Ibid.*

The right of the mortgagor to an accounting of rents and profits by the mortgagee in possession is exclusively equitable, and may be asserted only in a suit to foreclose or to redeem, or in connection with voluntary payment. *Ibid.*

The institution of suit to foreclose by the mortgagee in possession tolls G.S. 1-47 (4), and the right of the mortgagor to demand an accounting for the rents and profits is not barred during the pendency of the foreclosure suit. *Ibid.*

Laches will not preclude a mortgagor from demanding an accounting from the mortgagee in possession regardless of the length of time after the entry of decree of foreclosure so long as the foreclosure suit remains pending. *Ibid.*

MORTGAGES AND DEEDS OF TRUST—*Continued.*

Where the mortgagee permits decree of foreclosure to remain unexecuted and subject to further orders of the court, his delay precludes him from asserting that the mortgagor is barred by laches from moving for an accounting. *Ibid.*

§ 31g. Foreclosure Decree.

Where a decree of foreclosure is entered directing the commissioner appointed to sell the lands, but no further proceedings are had in the matter and no sale held, the foreclosure suit remains pending for the purposes of motions in the cause. *Anderson v. Moore*, 299.

§ 33b. Upset Bids and Resales.

Immediately upon the filing of an upset bid in the foreclosure of a mortgage or deed of trust, the clerk acquires jurisdiction and supervisory power over the sale, which continues until after final sale and confirmation thereof, and his record as to the amount of each bid, the purchase price, and the final settlement (G.S. 45-28 prior to enactment of Chap. 720, Session Laws of 1949) is a public record constituting an essential part of the foreclosure proceeding. *Foust v. Loan Asso.*, 35.

§ 38. Rights of Junior Lienors.

In a suit to recover on purchase money notes and to foreclose deed of trust given as security therefor, defendants may not set up as a counterclaim embarressment resulting from foreclosure of a prior mortgage executed by plaintiffs before their conveyance of the land to defendants, since defendants could have paid the prior lien and avoided the suit to foreclose. *Sanders v. Hamilton*, 175.

§ 39b. Waiver of Right to Attack Foreclosure and Estoppel.

Decree of foreclosure was entered directing the sale of lands and providing that the defendants therein should be forever barred from any and all equity of redemption if they failed to redeem before the date fixed for sale. More than ten years after the decree the commissioner executed deed to the purchaser at the sale, which deed recited that original deed to the purchaser had been lost or destroyed and had never been registered. *Held:* The defendants in the foreclosure action and those in privity with them are estopped to attack the title to the grantee in the commissioner's deed, and those who deraign title from such defendants may not maintain that the commissioner's deed was ineffective because not executed until more than ten years from the rendition of the decree of foreclosure, G.S. 1-47, G.S. 1-234, nor that the instruments in their chain of title were registered prior to the registration of the commissioner's deed, G.S. 47-18. *McCollum v. Smith*, 10.

§ 39e (1). Grounds for Attack and Setting Aside Foreclosure.

While inadequacy of the purchase price alone is insufficient to upset foreclosure of a mortgage or deed of trust duly and regularly made, nevertheless where there is an irregularity it may be considered on the question of whether the irregularity was material. *Foust v. Loan Asso.*, 35.

After upset bid, the property in suit, having a market value of from $5,500 to $6,000, was actually sold for $825. The trustee erroneously reported the bid as $6,400, which report was on record in the clerk's office from the date of the sale until confirmation. *Held:* The irregularity is of such substantial nature as to require a court of equity to vacate the confirmation and the deed

MORTGAGES AND DEEDS OF TRUST—*Continued.*

pursuant thereto without requiring trustors to prove that anyone was misled or failed to file an upset bid by reason of the erroneous report. *Ibid.*

§ 39e (5). Actions to Set Aside—Sufficiency of Evidence and Nonsuit.

In a suit to set aside foreclosure of a deed of trust for irregularity, defendants' defense that they were innocent purchasers for value is an affirmative one upon which they have the burden of proof, and therefore they cannot be entitled to nonsuit on the ground of such defense. *Foust v. Loan Asso.*, 35.

MUNICIPAL CORPORATIONS.

§ 1. Nature and Definition of Municipal Corporation.

A municipal corporation is a subordinate agency created by the State to assist in the civil government of the territory and people embraced within its limits. *Lee v. Poston*, 546.

A corporation organized to maintain a particular church and camp ground may not be delegated authority by the General Assembly to enact ordinances for the good government and protection of the camp ground "while occupied for worship" or to appoint special police to keep the peace and execute process "while occupied for divine worship" since such corporation is a religious corporation, and the attempted delegation of governmental powers to it is ineffectual. *Ibid.*

§ 8d. Public Housing Authorities.

The hearing before the Utilities Commission of a petition of a housing authority for a certificate of public convenience and necessity is solely for the purpose of determining the public need for such project in the particular community, and it is not required that the petition set out a description of the property which the authority may select as the *situs* or that the owners of such property be made parties or be given notice of the proceedings before the Utilities Commission. *In re Housing Authority*, 649.

The selection of a site for a public housing project after the issuance of a certificate of public convenience and necessity is within the sound discretion of the housing authority upon its resolution finding in good faith that the acquisition of such property is in the public interest and necessary for public use, and while it will be presumed that a housing authority has acted in good faith in the exercise of such power, the owners of the property may in the condemnation proceedings challenge the selection of the site on the ground that the authority acted arbitrarily, capriciously or fraudulently in making such selection. *Ibid.*

In passing upon the petition of a housing authority, the Utilities Commission determines only the public need for such project in the particular community, and its issuance of a certificate of public convenience and necessity does not give the housing authority any right, title or interest in real estate, even though the property be described in the petition, and therefore the individual property owners are not parties and have no right to appeal from the order of the Utilities Commission. G.S. 40-53, G.S. 157-28, G.S. 157-45, G.S. 157-51, G.S. 62-20. *Ibid.*

The order of the Utilities Commission granting a certificate of public convenience and necessity to a housing authority cannot be collaterally attacked in the eminent domain proceedings thereafter instituted by the housing authority when it appears that the certificate of the Utilities Commission was issued

MUNICIPAL CORPORATIONS—*Continued.*

after due investigation upon its finding based upon the evidence that there existed in the area a need for public housing and that the statutory procedure had been followed. *Ibid.*

The fact that a few isolated properties in an area sought to be condemned for a public housing project are above the standard of slum properties does not affect the public character of the taking, and such properties may be condemned in proper proceedings by a municipal housing authority. *Ibid.*

§ 11½. Police Officers.

A police officer has only such powers as are given him by the Legislature, expressly or derivatively. *James v. R. R.*, 591.

Police officers *held* engaged in joint enterprise while patrolling streets in municipal car. *Ibid.*

§ 14a. Defects or Obstructions in Streets or Sidewalks.

Plaintiff's evidence was to the effect that a leaking water-meter box projected about three inches above the ground in the dirt strip between the sidewalk and the curb, and that plaintiff fell over it when, instead of following the available pavement, she elected to cross the dirt strip in going to her parked car. *Held:* Nonsuit was properly entered. *Rivers v. Wilson*, 272.

The fact that a water-meter box maintained by a city between the sidewalk and the curb was leaking, without more, indicates no unsafeness in its condition. *Ibid.*

A municipality is under duty to keep the grass plot or space between the paved portion of the sidewalk and the curb in a reasonably safe condition for the purposes of its use. *Ibid.*

An action against a municipality to recover for a fall on a street or sidewalk is in tort for negligence, and plaintiff must show some breach of legal duty, *res ipsa loquitur* being inapplicable, and proof of the existence of the condition which caused the injury or the happening of the accident, being alone insufficient. *Ibid.*

A municipality is not an insurer of the safety of its streets and sidewalks but is under duty to exercise reasonable diligence to keep them in a reasonably safe condition. *Ibid.*

The evidence disclosed that in the middle of an eight foot sidewalk there was a hole two and one-half to three feet long and two feet wide which had been refilled with tamped dirt differing in color from the sidewalk, and that at the time of the injury the dirt was two and one-half to three inches below the level of the sidewalk. Plaintiff testified that pedestrians standing in front of the hole obstructed her vision, that when they moved aside to permit her to pass, she stepped into the hole and fell to her injury, and that she did not see the hole until after she fell. *Held:* That plaintiff must have seen the hole before stepping into it is a permissible inference of fact upon the facts in evidence, and therefore an instruction by the court to the effect that a person *sui juris* who selects a dangerous way when a safe way is open to use is guilty of contributory negligence, cannot be held for error. *Blake v. Concord*, 480.

§ 45a. Right of Taxpayers to Maintain Action.

Taxpayers may not maintain action to protect or recover public funds unless the proper officials have wrongfully neglected or refused to institute such action. *Branch v. Board of Education*, 623.

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence in General.

The law imposes upon every person who enters upon an active course of conduct, regardless of whether he does so in his own behalf or under contract with another, the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence. *Council v. Dickerson's, Inc.*, 472.

The standard of care required by law is always that care which a reasonably prudent man would exercise under the same or similar circumstances. *Butler v. Allen*, 484.

§ 4h. Excavations and Shoring Up.

Defendant was sued by the owner of adjacent property to recover damages to his property resulting from excavation for a building on defendant's property. *Held:* Defendant is entitled to join and set up the primary liability of his contractor predicated upon the contractor's active negligence and the indemnity agreement contained in the contract of construction. *Clothing Store v. Ellis Stone & Co.*, 126.

§ 7. Intervening Negligence.

Whether the independent negligent act of a third party insulates the negligence of defendant is dependent upon the question of proximate cause, and in order to exculpate defendant's negligence it must break the sequence or causal connection between defendant's negligence and the injury so as to exclude it as a proximate cause thereof; while if it is only a condition on or through which the negligence of defendant operates to produce the injury and merely diverts the effect of defendant's negligence temporarily or merely accelerates the result, it does not exculpate defendant's negligence. *Riggs v. Motor Lines*, 160.

Intervening negligence of a third party will not insulate defendant's negligence unless it entirely supersedes the operation of the negligence of the defendant, so that the intervening negligence, without the negligence of the defendant, products the injury. *Dickson v. Coach Co.*, 167.

Contributory negligence need not be sole proximate cause so as to constitute insulating negligence. *Essick v. Lexington*, 600.

§ 9. Anticipation of Injury.

A person is not bound to anticipate negligent acts or omissions on the part of others, but in the absence of anything which gives or should give notice to the contrary, he is entitled to assume and to act upon the assumption that every other person will perform his duty and obey the law and that he will not be exposed to danger which can come to him only from the violation of duty or law by such other person. *Chaffin v. Brame*, 377.

§ 10. Last Clear Chance.

The doctrine of last clear chance does not arise unless a sufficient length of time elapses after plaintiff has put himself in a position of peril by his own negligence for defendant to discover such peril and appreciate plaintiff's danger in time to avert the accident. *Mfg. Co. v. R. R.*, 661; *Matheny v. Motor Express*, 673.

NEGLIGENCE—*Continued.*

§ 11. Contributory Negligence in General.

In order to bar recovery, contributory negligence need not be the sole proximate cause of the injury, it being sufficient for this purpose if it be a proximate cause or one of them. *Marshall v. R. R.*, 38; *Scenic Stages v. Lowther*, 555.

A plaintiff cannot be guilty of contributory negligence unless he acts or fails to act with knowledge and appreciation, either active or constructive, of the danger of injury which his conduct involves. *Chaffin v. Brame*, 377.

§ 16. Pleadings in Negligence Actions.

In an action by a motorist against a road contractor for alleged negligence causing injury to plaintiff when she undertook to drive across a highway being worked on where it intersected the highway on which plaintiff was traveling, allegation that defendant was performing the work under contract with the State Highway and Public Works Commission is relevant as stating the circumstance out of which arose the duty owed by defendant to the traveling public to exercise ordinary care, and motion to strike such allegation was properly denied. *Council v. Dickerson's*, 472.

Allegations to the effect that a road contractor performing work on a highway under contract with the State Highway and Public Works Commission failed to provide flagmen and warning signs at particularized places as ordered to do by the highway engineer acting under the provisions of the contract, *held* irrelevant and should have been stricken on motion aptly made since the allegations relate to a breach of contractual obligations to the Commission and not the violation of a legal duty to the general traveling public. *Ibid.*

§ 17. Burden of Proof.

Contributory negligence is an affirmative defense which defendant must plead and prove. G.S. 1-139. *Rollison v. Hicks*, 99; *James v. R. R.*, 591.

§ 18. Evidence—Physical Facts.

The physical facts at the scene may outweigh the testimony of some of the witnesses. *Blake v. Concord*, 480.

§ 19a. Questions of Law and of Fact in General.

What is the proximate cause of an injury is ordinarily a question to be determined by the jury as a fact in view of the attendant circumstances. *Ervin v. Mills Co.*, 415.

§ 19b (1). Sufficiency of Evidence and Nonsuit on Issue of Negligence.

Evidence tending to show that plaintiff and her husband were tenants or share croppers, that they had been in possession of the mules in question for eighteen or twenty months and were aware of their propensities, and that plaintiff, while riding on top of a load of hay, her husband driving, was injured when one of the mules of a known unmanageable nature suddenly ran, throwing her to the ground, *is held* insufficient to be submitted to the jury on the issue of negligence in an action against those in charge of the farming operations. *Hobson v. Holt*, 81.

While no inference of negligence arises from the mere fact of an accident or injury, where the thing causing injury is shown to be under the control and operation of defendant and the accident is one which does not occur in the ordinary course of things if due care is exercised, the accident itself, in the absence of some explanation by defendant, affords some evidence of negligence. *Edwards v. Cross*, 354.

NEGLIGENCE—*Continued.*

§ 19c. Nonsuit on Ground of Contributory Negligence.

Defendant is not entitled to nonsuit on the ground of contributory negligence unless plaintiff's own evidence establishes the facts indispensable to sustain the plea. *Grimm v. Watson*, 65.

Nonsuit on the ground of contributory negligence is proper only when this defense is established by plaintiff's own evidence as the sole inference that can reasonably be drawn therefrom. *Rollison v. Hicks*, 99; *Essick v. Lexington*, 600; *Erickson v. Baseball Club*, 627.

While the question of proximate cause is ordinarily for the jury, where it appears from plaintiff's own evidence that he was guilty of negligence constituting a proximate cause of the injury and this is the sole reasonable inference deducible therefrom, nonsuit on the ground of contributory negligence is proper. *Matheny v. Motor Lines*, 673.

§ 19d. Nonsuit for Intervening Negligence.

Nonsuit on the ground of intervening negligence is proper only when it clearly appears from the evidence, considered in the light most favorable to plaintiff, that the injury complained of was independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person. *Riggs v. Motor Lines*, 160.

On motion to nonsuit on the ground of intervening negligence, the evidence must be considered in the light most favorable to plaintiff. *Dickson v. Coach Co.*, 167.

The evidence disclosed that intestate was electrocuted when a metal strip he was holding in the performance of his work in roofing a tramway over a street came into contact with uninsulated wires maintained about four feet above the roof. The failure of intestate's employer to warn him of the dangerously powerful current carried by the wires in close proximity to the place at which he was directed to work cannot be held as a matter of law to establish negligence on the part of the employer constituting the sole proximate cause of the accident or that the employer's negligence insulated the negligence of the utility so maintaining the wires. *Essick v. Lexington*, 600.

§ 20. Instructions in Negligence Cases.

The jury answered the issues of negligence and contributory negligence in the affirmative. *Held:* An instruction that defendant's negligence must be "the proximate cause" of the accident to justify an affirmative finding on the issue of negligence, whereas plaintiff's negligence need be only "one of the proximate causes" thereof to warrant an affirmative finding on the issue of contributory negligence, cannot be held for prejudicial error on plaintiff's appeal, since the charge on the issue of contributory negligence is without error and plaintiff cannot complain of alleged error relating to the issue answered in its favor. *Scenic Stages v. Lowther*, 555.

Where the issues of negligence and contributory negligence are raised by the pleadings and evidence, an instruction that no burden of proof rested on defendant, but that plaintiff had the burden of satisfying the jury by the greater weight of the evidence before plaintiff would be entitled to recover, must be held for reversible error, since the burden of proof on the issue of contributory negligence rested on defendant. *James v. R. R.*, 591.

§ 21. Issues and Verdict.

A finding by the jury on the issue of negligence which establishes that the alleged negligence of a third party was not the sole proximate cause of the

NEGLIGENCE—*Continued.*

injury and did not insulate the negligence of defendants is not inconsistent with a finding by the jury upon a subsequent issue that such third party was guilty of negligence contributing to the injury, since negligence of the third party may contribute to the injury without being either the sole proximate cause thereof or a new and independent cause insulating defendants' negligence. *Essick v. Lexington*, 600.

It is error to submit issue of last clear chance when there is no evidence sufficient to invoke the doctrine. *Mfg. Co. v. R. R.*, 661.

§ 22. Judgment.

Where the jury answers the issues of negligence, contributory negligence and last clear chance all in the affirmative, and the submission of the issue of last clear chance was erroneous because not supported by the evidence, defendant is entitled to judgment. *Mfg. Co. v. R. R.*, 661.

PARENT AND CHILD.

§ 2. Proof of the Relationship and Presumption of Paternity.

While the presumption of legitimacy which arises from the birth of a child in wedlock may be rebutted by a showing of nonaccess on the part of the husband, neither spouse is competent to testify as to such nonaccess. *S. v. Campo*, 79.

§ 14. Sufficiency of Evidence and Nonsuit in Abandonment Prosecutions.

Conflicting evidence as to whether failure to support child was willful *held* to take question to jury. *S. v. Campo*, 79.

PARTITION.

§ 1c (1). Actual Partition.

Where in proceedings for actual partition among tenants in common it is alleged that the prior sale of the timber from the land would aid in the equitable division of the land among the tenants, the court should consider the petition that the timber be sold and rule thereon in such manner as the facts warrant. *Seawell v. Seawell*, 735.

§ 1c (2). Sale for Partition.

Where a tenant in common seeks a sale in lieu of actual partition, he has the burden of alleging and proving that actual partition cannot be had without injury to some or all of the interested parties, and this must be found as a fact by the court in order to support decree of sale, G.S. 46-22. Thus, when all the parties seek actual partition, a decree of sale for partition in the absence of allegation, proof or finding of such injury, is error. *Seawell v. Seawell*, 735.

§ 4a. Proceedings for Partition.

Where, in partition proceedings the respondents plead testacy on the part of their common ancestor, the proceeding will be dismissed when it appears that the will is not a nullity, since petitioners *qua heirs* have no interest in the matter. The will is not before the court for construction in the proceeding, and it is error for the court to remand it to the clerk for partition in accordance with the will. *Burchett v. Mason*, 306.

Where named devisees become tenants in common under the provision of a will, and seek actual partition of their respective shares, it is error for the

PARTITION—*Continued.*

court to join another child of testator, or her heirs, when such child was specifically excluded from participating in the realty under the terms of the will. *Seawell v. Seawell*, 735.

PARTNERSHIP.

§ 12. Dissolution—Settlement Between Partners.

Where consent judgment entered in an action for dissolution of a partnership provides that the real estate should be divided by agreement of the parties, or, if the parties failed to agree, the property should be sold for division, *held:* a proposal for division submitted in writing by the attorney of one of the partners in accordance with a written memorandum drawn up by the partner, and accepted in writing by the attorney for the other partner, may be specifically enforced by such other partner upon motion and petition in the cause. *Young v. Young*, 247.

§ 14. Insolvency and Receivership.

Where the debts of a partnership are in excess of its assets, the receiver may be ordered to take possession of property belonging to the partners individually, including certificates of stock in a corporation controlled by them but not the physical property of the corporation, with the partners' right to homestead and personal property exemptions to be determined in due time and in an orderly manner in the receivership proceedings. *Surety Corp. v. Sharpe*, 642.

PAYMENT.

§ 8. Application of Payment Where Debtor Does Not Direct Application.

Where a mortgage is given to secure two debts, nothing else appearing, the law does not perforce prefer one over the other in foreclosure. *Sanders v. Hamilton*, 175.

Whether creditor was entitled to remit interest on one note to make part payment on others *held* for jury. *Ibid.*

§ 9. Burden of Proving Payment.

The burden of proving the defense of payment in whole or in part is upon defendant. *Joyce v. Sell*, 585.

PLEADINGS.

§ 1. Complaint—Filing and Service.

Where defendant has been duly served with summons, together with a copy of an order extending the time for filing complaint, and within that time complaint is properly filed with copy, defendant is in court and the action may not be summarily dismissed for lack of service of process, the effect of plaintiff's failure to see that the clerk make the proper order and the sheriff serve copy of the complaint being that defendant is not compelled to plead until the requirements of the statute are observed. Plaintiff would not be entitled to judgment by default for want of an answer until elapse of the time prescribed by G.S. 1-125 for answering. Ch. 1113, Session Laws of 1949. *Braswell v. R. R.*, 640.

§ 2. Joinder of Causes.

Cestuis may join in one action trustees and all parties knowingly participating in alleged maladministration of trust. *Erickson v. Starling*, 539.

PLEADINGS—*Continued.*

An action against separate defendants to enjoin them from committing separate and unconnected proscribed acts is properly dismissed upon demurrer for misjoinder of parties and causes, since there is no joint or common liability and no privity or community of interest among the separate defendants, G.S. 1-123. In the present case five taxicab operators were sued to enjoin the individual violation by them of G.S. 62-121.47, G.S. 62-121.72 (2). *Utilities Com. v. Johnson*, 588.

Where one of the causes alleged in favor of plaintiff is solely against one of several defendants, demurrer for misjoinder of parties and causes must be sustained and the action dismissed. *Sellers v. Ins. Co.*, 590.

Action against four separate school administrative units to enjoin diversion of funds separately belonging to them is demurrable. *Branch v. Board of Education*, 623.

§ 3a. Statement of Cause in General.

Plaintiff must choose the cause of action upon which she relies and state same in a clear and concise manner so that defendants will not be left in doubt as to how to answer and what defense to make. *Bowen v. Darden*, 443.

Matter should not be alleged which has no substantial relation to the controversy between the parties in the particular action. *Council v. Dickerson's, Inc.*, 472.

§ 7. Answer in General, Form and Contents.

The answer must contain a general or special denial of each material allegation of the complaint controverted by defendant, and may contain a statement of any new matter constituting a defense or counterclaim. *Chandler v. Mashburn*, 277.

§ 8. Answer—Matters in Traverse and Denial.

A denial in the answer of a material fact alleged in the complaint enables defendant to show any facts which go to deny the existence of the controverted fact, and therefore narration of evidence which defendant contends sustains his denial of the controverted fact is irrelevant pleading. *Chandler v. Mashburn*, 277.

§ 10. Counterclaims, Set-Offs and Cross-Actions.

The rule that a new and independent action may not be set up by cross-action does not preclude the owner of property sued for damage to adjacent property caused by excavation for the erection of a building, from joining and setting up the primary liability of his contractor on the theory that the contractor was guilty of positive and active negligence producing the damage, since such cross-action is relevant and germane to the main action, and is also sanctioned by statute. G.S. 1-222. *Clothing Store v. Ellis Stone & Co.*, 126.

Where a retailer of an article, sold in the original package for use in connection with food, is sued for breach of implied warranty that the product is wholesome and fit for human consumption, he may have his distributor joined as a codefendant and file cross-action against the distributor on the ground that the distributor had impliedly warranted to it that the article was fit for human consumption and that the distributor is primarily liable for injury resulting from breach of this warranty, since the cross-action relates to plaintiff's claim and is based upon an adjustment of that claim, and the defendants are entitled to have their ultimate rights as between themselves determined in the one action, G.S. 1-222. *Davis v. Radford*, 283.

PLEADINGS—*Continued.*

§ 16. Time of Interposing Demurrer.

A demurrer *ore tenus* for that the complaint fails to state a cause of action may be interposed at any time, even in the Supreme Court on appeal, or the Court may raise the question *ex mero motu*. *Lamm v. Crumpler*, 717.

§ 17a. Demurrer—Statement of Grounds.

A demurrer must distinctly specify the grounds of objection, and demurrer to the further defense and answer of defendant on the ground that it does not "constitute a counterclaim in that it does not state a cause of action" is insufficient. G.S. 1-128. *Duke v. Campbell*, 262.

A demurrer should point out the particular facts which should have been, but are not alleged. *Hall v. Casualty Co.*, 339.

§ 19b. Demurrer for Misjoinder of Parties and Causes of Action.

Demurrer for misjoinder of parties plaintiff and causes of action is perforce bad when there is but one party plaintiff; and further, in this case there was no misjoinder of causes, since there was but one cause alleged against corporate officers for fraud, and not a cause to set aside their conveyances. *Mills Co. v. Earle*, 74.

Where there is a misjoinder of parties and causes the court is without authority to order a severance but must sustain defendants' demurrer. *Erickson v. Starling*, 539; *Utilities Com. v. Johnson*, 588; *Sellers v. Ins. Co.*, 590.

§ 19c. Demurrer for Failure of Pleading to State Cause of Action.

A demurrer tests the sufficiency of a pleading, liberally construed and admitting the allegations of fact contained therein and relevant inferences of fact necessarily deducible therefrom, and the demurrer will not be sustained unless the pleading is fatally defective. *King v. Motley*, 42; *Bryant v. Ice Co.*, 266.

A demurrer admits the truth of all allegations of fact and inferences of fact reasonably drawn therefrom. *Mills Co. v. Shaw*, 71.

A complaint is not demurrable unless it is fatally defective in failing to allege any fact or combination of facts which, if true, entitles plaintiff to some relief. *Ibid.*

Where further defense and answer is set up in unity in five paragraphs in the answer, a demurrer directed to a portion of one of such paragraphs for failure to set up a counterclaim is a nullity, since in such instance the demurrer must be to the whole of the further defense and answer. *Duke v. Campbell*, 262.

§ 22b. Amendment by Permission of Trial Court.

Under the broad discretionary powers of the trial court to permit amendment of process and pleading, the court may allow amendment to correct a misnomer or mistake in the name of a party provided the amendment does not amount to a substitution or entire change of parties. *Bailey v. McPherson*, 231.

The power to permit amendments under G.S. 1-163 is divided into two categories: first, amendments before trial or during trial when the adverse party is given opportunity to investigate and rebut any new matter, in which case the court may allow the insertion of allegations "material to the case," and second, amendments offered during or after trial, in which case the power to allow amendments is limited to those making the allegations conform to the evidence and does not extend to those bringing in a new cause of action or

PLEADINGS—*Continued.*

changing substantially the form of action originally sued on. *Perkins v. Langdon*, 240.

The power of the court to allow amendments "material to the case" is a broad and discretionary power, and the phrase should be construed in connection with G.S. 1-123 so as to permit amendments relating to the cause alleged and to causes of action arising out of the same transaction or transactions dealing with the same subject of action, subject to the limitations that a wholly different cause of action may not be set up by amendment and that inconsistent causes of action may not be joined. *Ibid.*

The trial court may allow an amendment, even after verdict, to make the pleading conform to the evidence when the amendment does not change the claim of plaintiff. *Chaffin v. Brame*, 377.

§ 24a. Variance Between Allegation and Proof in General.

Where the difference between the allegation and proof is not substantial and could not mislead the other party, as where plaintiff declares on an express contract and seeks to recover on an implied agreement arising out of the same transaction, the variance is not fatal. *Flying Service v. Martin*, 17.

Allegation and proof must correspond, and where the proof offered is not directed to any issue raised by the pleadings, there is fatal variance requiring a dismissal. *Bowen v. Darden*, 443.

§ 25. Issues Raised by Pleadings.

The pleadings must raise the precise issues which are to be submitted to the jury so as to clearly define the nature of the cause of action. *Bowen v. Darden*, 443.

§ 28. Motion for Judgment on Pleadings.

Upon defendant's motion for judgment on the pleadings, the allegations of the complaint must be taken as true. *Green v. Ins. Co.*, 321.

§ 31. Motions to Strike. (Review of orders on motions to strike see Appeal and Error § 40f.)

Motion to strike *held* properly denied. *King v. Motley*, 42.

Upon motion of any party aggrieved, aptly made, the court may strike out irrelevant or redundant matter inserted in a pleading. *Chandler v. Mashburn*, 277.

Where defendant has denied a material allegation of the complaint, narration in his "further answer and defense" of evidential matters tending to sustain defendant's denial of the controverted fact is irrelevant, and should be stricken upon motion aptly made. *Ibid.*

Matter in a pleading is irrelevant and should be stricken on motion aptly made if it has no substantial relation to the controversy between the parties in the particular action. *Council v. Dickerson's, Inc.*, 472.

In action by motorist against road contractor for negligent injury, allegation that defendant was doing work under contract with Highway Commission is relevant, but allegation that defendant failed to take precautions for safety as required by the contract is irrelevant. *Ibid.*

Motion to strike allegations as to loss of profits while truck damaged in collision could not be used *held* improperly allowed, since the allegations related to a proper element of special damage. *Trucking Co. v. Davis*, 637.

PRINCIPAL AND SURETY.

§ 1. Nature and Requisites of Contract in General.

A contract of suretyship requires the three parties of principal, surety and promisee or obligee, and is the collateral promise of the surety superadded to that of the principal which constitutes a direct promise to perform the obligation of the principal in the event the principal fails to perform. *Casualty Co. v. Waller*, 536.

PROCESS.

§ 2. Issuance and Time of Service.

When summons is not served within ten days after its issuance it becomes *functus officio*, and service and return by the sheriff thereafter is tantamount to a return of non-service. G.S. 1-89. *Atwood v. Atwood*, 208.

§ 4. Alias and Pluries Summons.

Where the sheriff has served summons more than ten days after its issuance, his return is sufficient evidence of non-service to enable plaintiff to sue out an *alias* summons. G.S. 1-95. *Atwood v. Atwood*, 208.

§ 5a. Personal Service on Individuals.

Where defendant has been duly served with summons, together with a copy of an order extending the time for filing complaint, and within that time complaint is properly filed with copy, defendant is in court and the action may not be summarily dismissed for lack of service of process, the effect of plaintiff's failure to see that the clerk make the proper order and the sheriff serve copy of the complaint being that defendant is not compelled to plead until the requirements of the statute are observed. Plaintiff would not be entitled to judgment by default for want of an answer until elapse of the time prescribed by G.S. 1-125 for answering. Ch. 1113, Session Laws of 1949. *Braswell v. R. R.*, 640.

§ 6. Service by Publication.

The order of service of summons by publication in this case *held* to conform to the statutory requirements. G.S. 1-99. *McLean v. McLean*, 139.

But decree *held* void for fraud on jurisdiction of court because it appeared that plaintiff took active measures to prevent defendant from knowing of institution of action. *Ibid.*

Service of process by publication is in derogation of the common law and every statutory prerequisite must be observed. *Comrs. of Roxboro v. Bumpass*, 190.

The affidavit sufficient in form to support an order for service by publication is jurisdictional, and the affidavit must state the cause of action with sufficient particularity to disclose its nature and to enable the court to determine its sufficiency, G.S. 1-98. *Ibid.*

Failure of the affidavit for service by publication to state the cause of action cannot be cured by the complaint filed in the action when the affidavit and complaint are not filed simultaneously and it appears affirmatively that the complaint was not considered as the basis of the clerk's findings. *Ibid.*

§ 7. Service on Corporations Generally.

Where the summons commands the sheriff to serve defendant corporation, the sheriff's return of service on "Al Chaliff—Service Mgr. for State Sewing Machine Corp." is service on the corporation and not on the service manager individually. *Lumber Co. v. Sewing Machine Co.*, 407.

PROCESS—*Continued.*

§ 8a. Service on Corporations—Resident Process Agents.

Whether an officer or employee of a foreign corporation is an agent upon whom process may be served within the purview of G.S. 1-97 (1) is to be determined by the nature of the business and the extent of the authority given to and exercised by such person, and under the statute a process agent is not limited to agents with authority to receive money on behalf of the corporation, but extends to those persons regularly employed here who have some charge or measure of control over the business sufficient in character to afford reasonable assurance of notice to the corporation. *Lumber Co. v. Sewing Machine Co.*, 407.

A foreign corporation maintained a full time employee here to look after and manage the business of the corporation in this State with authority to settle, adjust, manage and compromise the very subject matter of the action. *Held:* Such employee is a "managing or local agent" of the corporation within the purview of G.S. 1-97 (1) upon whom process in an action against the corporation may be served. *Ibid.*

§ 8d. Service on Corporations—"Doing Business in This State."

A foreign corporation engaged in the business of contracting for the manufacture of sewing machine cabinets which it sells to its customers, entered into contracts with two North Carolina companies for the manufacture of the cabinets and had two full time agents here for the purpose of inspecting cabinets manufactured here and looking after its business within the State. *Held:* The foreign corporation was doing business in this State so as to subject it to the jurisdiction of our laws and render it amenable to process here. *Lumber Co. v. Sewing Machine Co.*, 407.

§ 10. Service on Nonresident Motorist or Owner of Car.

Where service of process on a nonresident motorist is had in strict accordance with the procedural requirements of G.S. 1-105, such process and pleading is subject to amendment in accordance with the general rules. *Bailey v. McPherson*, 231.

Where summons and complaint sent by registered mail are signed for by an individual carrying on a business under a firm name, and the papers give him unmistakable notice that he was intended to be sued, although the process runs against a nonexistent corporation of the same name as the firm operated by him, *held:* the service in strict accord with G.S. 1-105 is sufficient to meet the requirements of due process of law. *Ibid.*

G.S. 1-105, which authorizes service of process on the Commissioner of Motor Vehicles as agent of a nonresident defendant in an action arising out of his operation of a motor vehicle on the public highways of this State, is constitutional. *Davis v. Martini*, 351.

G.S. 1-105 authorizes service of process thereunder (1) upon a nonresident personally operating a vehicle on a public highway of this State and (2) upon a nonresident when the operation of the vehicle is under his control or direction, express or implied. *Ibid.*

Evidence tending to show that a nonresident issued bill of lading in the name of his transit company, agreed to transport the cargo between the designated points, that the cargo was transported in a truck bearing his firm name, that he gave directions as to who should drive the truck, the time of departure and arrival, and that the collision occurred while the cargo specified was being transported in the truck driven by the designated driver on a public highway

PROCESS—*Continued.*

in this State, *is held* sufficient to support the trial court's finding that the truck was under the control of the nonresident within the purview of G.S. 1-105, notwithstanding his conflicting affidavits that he was a mere freight forwarder without control of the truck, and that the truck was owned and operated by an independent contractor. *Ibid.*

A resident of Canada who operates a motor vehicle upon the public highways of this State is subject to service of process under the provisions of G.S. 1-105, since he is a "non-resident" within the meaning of the statute. *Ewing v. Thompson*, 564.

A resident of Canada who owns a car for the convenience and pleasure of the family may be served with process under G.S. 1-105 in an action involving a collision while the car was being driven in this State by the nonresident's son with her consent and approval, notwithstanding that she was not within the State at the time in question. 14th Amendment to the Federal Constitution. *Ibid.*

Finding by trial court that son was operating car of nonresident within purview of "family purpose" doctrine *held* conclusive. *Ibid.*

§ 12. Service and Return.

What constitutes service of process, and whether upon a given state of facts service has been made, are questions for the court. *Atwood v. Atwood*, 208.

While ordinarily the sheriff's return implies service as the law requires, this implication does not stand when the process itself discloses the contrary, as when the sheriff's return discloses that it was served more than ten days after its issuance. *Ibid.*

The sheriff's return raises the implication that the process was served according to law. *Lumber Co. v. Sewing Machine Co.*, 407.

§ 14. Amendment, Correction and Waiver of Defects.

The sole proprietor of a business carried on in the trade name of "M. H. Winkler Manufacturing Company" was served with process in accordance with G.S. 1-105. The process ran in the name of "M. H. Winkler Manufacturing Company, Inc.," a nonexistent corporation, but the individual personally signed for the registered letter containing the summons and complaint so that he was advised that he was the party intended to be sued and was in no wise misled or prejudiced by the mistake in name. *Held:* The court acquired jurisdiction over the person of the individual without service of new process, and had discretionary power to permit an amendment to the process and pleading. *Bailey v. McPherson*, 231.

PROPERTY.

§ 2. Distinction Between Real and Personal Property.

Transformers placed upon the land of another without being physically annexed thereto retain the character of personalty, *a fortiori* where the contract with the landowner specifies they should remain the property of the owner of the transformers. *S. v. Hicks*, 511.

§ 3. Malicious Injury to Property.

Where the indictment charges defendants with conspiracy to maliciously damage real property of a named owner, and the proof tends to show a conspiracy to injure the property of a different owner, there is a fatal variance,

PROPERTY—*Continued.*

and appealing defendant's exception to the refusal of his motions to nonsuit will be sustained. *S. v. Hicks*, 31.

Evidence tending to show defendant's participation in a conspiracy to damage or injure transformers which the owner had placed upon the land of another without annexation under a contract that they were to remain its property, *held* sufficient to support conviction of conspiracy to injure the personal property. *S. v. Hicks*, 511.

PUBLIC OFFICERS.

§ 5a. De Facto Officers.

It is necessary that a person be an incumbent of a *de jure* office in order to be even a *de facto* officer, and where the act creating the office is void, the incumbent of such office is not a *de facto* officer, and his acts may be collaterally attacked. *Idol v. Street*, 730.

§ 7b. Performance of Public Duties—Bias, Personal Interest or Want of Good Faith.

While the courts are alert to impeach any transaction where a public official has any pecuniary interest in a matter decided by him, mere allegation that a member of the board of education owns property in the vicinity of a site selected by the board for a school is insufficient to support a finding of bad faith on the part of the board in the absence of allegation that the member exercised an improper or corrupt influence over the other members of the board. *Kistler v. Board of Education*, 400.

It will be presumed that public officials have exercised their powers in good faith in accord with the spirit and purpose of law. *In re Housing Authority*, 649.

§ 7d. Right to Maintain Action to Recover or Protect Public Funds.

Taxpayers may not maintain action to protect or recover public funds unless proper officers have wrongfully refused or neglected to bring such action. *Branch v. Board of Education*, 623.

§ 9. Attack of Validity of Official Acts.

Where there is no allegation that members of a board of education were not duly appointed to their respective positions as required by law, the legality of the acts of these appointees is not open to attack in an action to enjoin the board from purchasing a school site selected by it. *Kistler v. Board of Education*, 400.

QUASI-CONTRACTS.

§ 1. Elements and Essentials of Quasi-Contracts.

Ordinarily recovery on *quantum meruit* may not be had where no benefit accrues to the party sought to be charged, and where the contract sued on is entire, and the party sought to be charged has received no benefit from the attempted performance by plaintiff, the refusal to submit the issue of *quantum meruit* is proper. *Goldston Bros. v. Newkirk*, 428.

QUIETING TITLE.

§ 2. Actions to Remove Cloud on Title.

In an action to remove claim of dower as a cloud on title, plaintiff's evidence and defendant's admissions tending to establish that at the time of defendant's

QUIETING TITLE—*Continued.*

marriage to deceased she had a living husband by a former marriage, and that the first marriage had not been dissolved by divorce at the time of the second ceremony, is sufficient to take the case to the jury. *Scarboro v. Morgan*, 450.

RAILROADS.

§ 4. Accidents at Crossings.

Plaintiff's evidence tending to show that there was sufficient light at the *locus* to see defendant's engine, which approached on a spur track across a street intersection at five or ten miles per hour, but that plaintiff was blinded by the lights of automobiles at the place and did not see the engine until it struck him, *is held* to disclose contributory negligence barring recovery as a matter of law, notwithstanding negative testimony of witnesses that they did not see a headlight on the engine or hear any warnings of its approach. *Bennett v. R. R.*, 212.

Evidence of negligence on part of driver of car in failing to keep a proper lookout and in failing to exercise due care for his own safety in driving upon a grade crossing in front of a slow-moving shifting engine *held* to require the submission of the issue to the jury. *James v. R. R.*, 591.

Evidence of negligence on part of passenger in car engaged in joint enterprise with driver in failing to warn driver of approach of engine to grade crossing which passenger saw or should have seen in exercise of due care, *held* to require submission of the issue to the jury. *Ibid.*

The evidence in this case, taken in the light most favorable to plaintiff, *is held* sufficient to be submitted to the jury on the issue of the negligence of the defendant railroad company in causing a collision with plaintiff's automobile at a grade crossing. *Mfg. Co. v. R. R.*, 661.

Evidence tending to show that an officer of plaintiff corporation was told to move plaintiff's car so that a spur track into the property could be used, that in doing so he had cleared the spur track and was on the siding track when the car was struck by the backing, shifting train, and that under the circumstances, and in accordance with custom, he expected the train to go upon the spur rather than continue upon the siding, *is held* not to disclose contributory negligence as a matter of law on his part in driving the car upon the siding in front of the oncoming train. *Ibid.*

Evidence tending to show that plaintiff's agent drove plaintiff's car upon a railroad siding such a short distance in front of defendant's moving train that the engineer could not have done anything in time to have avoided the collision, *is held* insufficient to support the submission of the issue of last clear chance. *Ibid.*

§ 5. Injury to Persons on or Near Track.

A person who enters on a railroad track without license, invitation, or other right, occupies the *status* of a trespasser. *Osborne v. R. R.*, 215.

A trespasser who sits on the end of a cross-tie until struck by defendant's engine is guilty of contributory negligence which precludes recovery unless liability can be predicated upon the doctrine of last clear chance or discovered peril. *Ibid.*

In order for the doctrine of last clear chance or discovered peril to apply to a trespasser upon a railroad track who is struck by an engine, it must be made to appear (1) that he was struck by defendant's engine, (2) that at the time he was down or in an apparently helpless condition upon the track, (3) that

the train crew either saw or by the exercise of ordinary care could have seen him in such condition in time to have enabled them, by the exercise of ordinary care, to stop the train before striking him, and (4) that they failed to exercise such care and thereby proximately caused the injury. *Ibid.*

Evidence tending only to show that intestate was last seen sitting on the end of a crosstie in an intoxicated condition, that at the place in question the engineer could have seen a man sitting on the track for 380 feet, and that the train which struck intestate could have been stopped within a distance of from two to three hundred feet, *is held* insufficient to invoke the doctrine of last clear chance or discovered peril. *Ibid.*

§ 6. Accidents at Overpasses.

In this action to recover for injuries received in a collision at night when plaintiff struck the timbers supporting a railroad overpass which encroached on the street in plaintiff's lane of travel from eight to twelve feet, the evidence *is held* to disclose contributory negligence as a matter of law on the part of plaintiff in failing to keep a reasonably careful lookout and such control over his car as to be able to stop within the range of his lights. *Marshall v. R. R.*, 38.

RAPE.

§ 25. Assault With Intent to Commit Rape.

Evidence *held* sufficient to support conviction of assault on a female with intent to commit rape. *S. v. Mullis*, 542.

§ 26. Rape—Conviction of Less Degree of Crime.

After announcement by the solicitor that he would not seek a conviction of rape, defendant was convicted of assault on a female with intent to commit rape. *Held:* Defendant's contention that his motion to nonsuit should be allowed because all the evidence tended to show the commission of the crime of rape rather than the less degree of the crime of which he was convicted, is untenable, since the indictment included the lesser offense and the conviction thereof was favorable to defendant. *S. v. Roy*, 558.

RECEIVERS.

(Of insolvent corporations see Corporations.)

§ 7. Preclusion of Independent Actions Against Insolvent.

A creditor of an insolvent may not object to an order in the receivership proceedings after notice requiring it to litigate its claim in that action and restraining it from maintaining an independent action thereon. *Surety Corp. v. Sharpe*, 83.

§ 11. Order of Sale—Recall of Order or Restraint of Sale.

Motion in the cause is the proper procedure to recall the order of sale or restrain sale by the receiver thereunder. *Surety Corp. v. Sharpe*, 644.

§ 12c. Priorities.

Under the provisions of R.S. 3466, 31 U.S.C.A. 191, the United States is entitled to priority upon its claim for taxes immediately upon the appointment of a receiver provided the debtor is insolvent at the time of the appointment, irrespective of the time its claim for taxes is docketed in the district. *Bishop v. Black*, 333.

RECEIVERS—*Continued.*

While the right of the United States to priority on its claim for taxes against an insolvent is not enforceable "against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector," 26 U.S.C.A. 3672, creditors who have attached property of the debtor prior to the appointment of the receiver but who have not reduced their claims to judgment at the time the right of the United States to priority of payment arises, do not come within this category and they are not entitled to priority over the claim for taxes. *Ibid.*

Where all claims filed with the receiver which were secured and superior to the claim of the United States for taxes have been paid in full, the claim of the United States for income taxes due from the debtor, filed with, approved and reported by the receiver, is entitled to full satisfaction out of the assets of the insolvent before any other claim or charges of other creditors can be paid from the assets. *Ibid.*

§ 12d. Exceptions to Report or Order of Payment.

Where there are no exceptions to the receiver's report, an exception to the order of the court directing the disbursement of the funds remaining in the receiver's hands presents the question of whether the priority of payment directed is correct upon the findings of the receiver. *Bishop v. Black*, 333.

REFERENCE.

§ 2. Consent Reference.

The consent of the parties to a reference continues until the order of reference is complied with by a full report, and prior thereto neither party may revoke the order of reference nor change the identity of the referee without the consent of the other. *Keith v. Silvia*, 328.

§ 3. Compulsory Reference.

An action in ejectment in which defendants plead the twenty (G.S. 1-39, G.S. 1-40) and the seven (G.S. 1-38) year statutes of limitation is not subject to compulsory reference. G.S. 1-189. *Alston v. Robertson*, 309.

§ 4. Pleas in Bar.

Where defendant pleads a statute of limitations, it is error for the court to order a compulsory reference without first disposing of the plea in bar. *Alston v. Robertson*, 309.

§ 5c. Removal of Referee.

Referee may not be removed for failure to file report by date fixed in order where parties waive delay by entering into stipulations in respect thereto; *a fortiori* where there is no evidence that he failed to file report as promptly as conditions would permit. *Keith v. Silvia*, 328.

§ 8. Report of Referee.

Where a party, after the expiration of the date fixed by the order of consent reference for the filing of the referee's report, enters into stipulations in respect thereto and waits until the report is prepared and copies thereof are furnished counsel before objecting, he waives his right to complain that the report was not filed by the date specified and may not urge the delay as cause for removing the referee. *Keith v. Silvia*, 328.

Mere failure to divide findings into findings of fact and conclusions of law is not fatal. *Ibid.*

REFERENCE—*Continued.*

§ 10. Review of Report—Duties and Powers of Trial Court in General.

Where the referee finds all the essential facts at issue, which facts are supported by evidence and are sufficient to support his conclusions of law, the mere failure of the referee to divide his report into the subtitles of "findings of fact" and "conclusions of law" does not justify the court in rejecting the report as being unacceptable. *Keith v. Silvia*, 328.

The broad supervisory power of the trial court to affirm, amend, modify, set aside, confirm in whole or in part, disaffirm the report, or make additional findings, must be exercised in an orderly manner in accord with recognized procedure upon exceptions duly entered or motion directly attacking the validity of the report, and the trial court may not vacate *ex mero motu* a report upon which no attack has been made by any of the parties. *Ibid.*

Motion for an order directing the referee to show cause why he should not be removed cannot constitute an attack upon the report of the referee thereafter filed, and therefore the report is not before the trial court and he may not vacate the report upon the hearing of such motion. *Ibid.*

Where there are no exceptions to the findings of fact made by the referee in a consent reference they are binding upon the Superior Court and become in effect facts agreed, and if no exceptions are filed the report should be affirmed and judgment entered in accord therewith. *Ibid.*

§ 12. Failure of Referee to Find Facts Relative to Material Question.

A champertous contract is void in this State and therefore where defendants set up this defense and the case is referred to a referee who fails to find facts relating to whether plaintiff's claim is champertous, it is error for the court to render judgment for plaintiff without finding the facts or making any conclusions of law in regard thereto. *Locklear v. Oxendine*, 710.

§ 16. Commissions of Referee.

Where the parties waive their right to object to the failure of the referee to file his report by the date specified in the order of consent reference, and there is no evidence that the referee willfully refused or intentionally failed to file his report as promptly as conditions would permit, the record fails to show dereliction of duty on the part of the referee, and the order of the trial court removing him on this ground and directing him to refund the amount paid him under the terms of the consent reference, is error. *Keith v. Silvia*, 328.

REFORMATION OF INSTRUMENTS.

§ 6. Parties.

The life tenant may not maintain an action against the remainderman to reform the deed without the joinder of the grantors. *Bowen v. Darden*, 443.

REGISTRATION.

§ 2. Necessity for, Requisites and Sufficiency of Registration.

Where mortgagors and their privities are barred by the decree of foreclosure from attacking the commissioner's deed, the fact that the commissioner's deed was not registered until after the mortgagor's deed to plaintiffs *held* immaterial. *McCollum v. Smith*, 10.

REGISTRATION—*Continued.*

§ 5c. Rights of Parties Under Unregistered Instruments.

Mortgagees in an unregistered instrument may not assert their claim of priority as against the receiver of insolvent mortgagor, since receiver represents creditors. *Investment Co. v. Chemicals Laboratory*, 294.

RELIGIOUS SOCIETIES AND CORPORATIONS.

§ 1. Nature and Essentials.

A religious corporation is a corporation whose purposes are directly ancillary to divine worship or religious teaching. *Lee v. Poston*, 546.

A corporation for the purpose of maintaining a particular church and camp ground is a religious corporation. *Ibid.*

Such corporation may not be delegated powers of a municipal corporation. *Ibid.*

ROBBERY.

§ 21a. Nature and Elements of the Offense in General.

Robbery is the felonious taking of personal property from the person of another, or in his presence, without his consent, or against his will, by violence, intimidation or putting in fear, the degree of force being immaterial so long as it compels the victim to permit the taking. *S. v. Sipes*, 633.

Force as an element of robbery may be actual or constructive; constructive force being all means, including demonstrations of force or menaces, by which the victim is put in fear sufficient to suspend the free exercise of his will or prevent him from resisting the taking. *Ibid.*

§ 3. Prosecution and Punishment.

Evidence tending to show that defendant and two other men unknown to the prosecuting witness directed the witness to get into defendant's car, that he was driven to a secluded spot where his knife was taken away from him and thrown away, and that defendant then took the witness' pocketbook containing fifteen dollars, the three being together with one of them having his hand in his pocket in such a manner as to lead the witness to believe he had some weapon, and that the witness surrendered his money from fear, *is held* sufficient to overrule defendant's motions to nonsuit in a prosecution for robbery. *S. v. Sipes*, 633.

SALES.

§ 20. Actions and Counterclaims for Purchase Price.

By alleging and offering evidence tending to show sale and delivery of goods at a certain price and the nonpayment of a portion of the purchase price, the seller makes out a *prima facie* case entitling him to go to the jury, and it is error to grant the purchaser's motion to nonsuit upon the purchaser's evidence tending to show a subsequent agreement under which the purchaser was to pay the remainder of the purchase price only in the event he was able to resell the goods for more than the amount paid, and if not, the amount paid should discharge the debt, since the burden is upon the purchaser to prove the defense under the subsequent agreement that he was unable to resell the goods for more than the amount paid. *Joyce v. Sell*, 585.

SCHOOLS.

§ 4d. Meetings of Boards and Decisions.

In a suit to restrain the purchase of a school site selected by the board of education of the county, the demurrer of the individual members of the board is properly sustained, since the board is authorized to prosecute and defend suits for or against it in its corporate capacity, G.S. 115-45, and the individuals have no authority to exercise any of the powers plaintiff seeks to enjoin. *Kistler v. Board of Education*, 400.

The fact that a member of the county board of education promises to call a public mass meeting to discuss and consider the selection of a school site, and later refused to do so, has no bearing upon the question of bad faith or abuse of discretion in the selection of a site by the board at a subsequent special meeting, since promises made by individual members of the board have no binding effect on it unless expressly authorized, and the board has no authority to transact business except at a regular or special meeting. *Ibid.*

A county board of education is not precluded by law from holding executive sessions. *Ibid.*

A board may hold regular or special meetings. *Ibid.*

The courts may not compel a board to hold a mass meeting. *Ibid.*

§ 6a. Selection of School Sites.

The selection of sites for schoolhouses in local school districts in a county, except in city administrative units, is vested in the sound discretion of the county board of education, and its action cannot be restrained by the courts unless there has been a manifest abuse of discretion or its action is in violation of some provision of law. *Kistler v. Board of Education*, 400.

The fact that the selection of a school site was voted at a special session of the board of education rather than at a regular meeting, G.S. 115-48, has no bearing on the question of bad faith or abuse of discretion in the selection of the site. *Ibid.*

While the courts are alert to impeach any transaction where a public official has any pecuniary interest in a matter decided by him, mere allegation that a member of the board of education owns property in the vicinity of a site selected by the board for a school is insufficient to support a finding of bad faith on the part of the board in the absence of allegation that the member exercised an improper or corrupt influence over the other members of the board. *Ibid.*

The law may not require a county board of education to hold a mass meeting in connection with the selection of a school site in the discharge of the board's discretionary responsibility. *Ibid.*

§ 10h. Allocation and Expenditure of Funds.

The right to sue for the protection or recovery of school funds of a particular school administrative unit upon allegation of threatened wrongful diversion or expenditure of such funds, belongs to the particular unit, whether it be a county administrative unit or a city administrative unit. *Branch v. Board of Education*, 623.

Taxpayers may not bring an action on behalf of a public agency or political subdivision unless the proper authorities have wrongfully neglected or refused to act, and therefore the complaint in such action is demurrable unless it alleges not only that plaintiffs are taxpayers of the unit, but also that the proper authorities have refused to act after demand or circumstances indicating affirmatively that demand would have been unavailing. *Ibid.*

SCHOOLS—*Continued.*

An action to enjoin allegedly unlawful expenditure or diversion of funds belonging to four separate school administrative units and to compel an allocation of such funds to the respective units, there being no controversy as to the respective shares of each unit in the fund, is demurrable for misjoinder of parties and causes of action. *Ibid.*

SEARCHES AND SEIZURES.

§ 2. Requisites and Validity of Warrant.

Where one officer armed with a "John Doe" warrant and another officer armed with a valid warrant correctly identifying the owner of the premises, act in concert in making the search, it will be presumed that both officers acted under the valid writ, and evidence discovered by such search is competent. *S. v. Rhodes*, 453.

Where the warrant and the supporting affidavit recite compliance with the statutory requirements, G.S. 18-13, G.S. 15-27, it will be presumed that the issuing officer properly examined the complainant and otherwise observed the requirements of the statute. *Ibid.*

STATUTES.

§ 2. Constitutional Inhibition Against Passage of Local or Special Acts.

A statute which operates only in one county and its county seat and which confers power upon the county and the city to consolidate their health departments and name a joint city-county board of health and appoint joint city-county health officers, and which expressly repeals to the extent of any conflict all laws in conflict therewith, is a local act relating to health, and is void for repugnancy to Art. II, sec. 29, of the State Constitution. *Idol v. Street*, 730.

§ 5a. General Rules of Construction.

Where a strict, literal interpretation of the language of a statute would contravene the manifest purpose of the Legislature, the reason and purpose of the law should control, and the strict letter thereof should be disregarded. *Duncan v. Carpenter*, 422.

Where the language of a statute is plain and unambiguous and expresses a single, definite and sensible meaning, such meaning is conclusively presumed to be the meaning intended by the Legislature. *S. v. McMillan*, 630.

§ 5d. Pari Materia.

Statutes *in pari materia* are to be construed together reconciling them so that no part of either statute should be meaningless, and where the language is ambiguous the courts must construe it to determine the true legislative intent. *Duncan v. Carpenter*, 422.

Statutes relating to the same subject will be construed together so that effect may be given to all provisions of each if possible by any fair and reasonable interpretation. *In re Blalock*, 493.

TAXATION.

§ 29. Levy and Assessment of Income Taxes.

Allegation of *bona fide* gift to educational institution in amount not exceeding 10% of net income *held* to state cause for allowable deduction. *Mills Co. v. Shaw*, 71.

TAXATION—*Continued.*

§ 38b. Remedies of Taxpayer—Attack of Validity of Tax.

Where the Commissioner of Revenue assesses additional income tax against a taxpayer in accordance with provisions of G.S. 105-160, and has the certificate filed in the county in which the taxpayer has property for the purpose of creating a lien, G.S. 105-242 (3), the taxpayer may not move in such county to vacate and set aside the certificate on the ground of irregularity or invalidity, no execution having been issued thereon nor any effort made to enforce the lien, but the taxpayer is remitted to the statutory remedies given him to contest the assessment or attack its validity. G.S. 105-163, G.S. 105-267. *Gill v. Smith*, 50.

§ 38c. Actions to Recover Tax Paid Under Protest.

In an action to recover additional assessment of income tax paid under protest, allegation that plaintiff made a gift of real property to a school board for educational purposes and that plaintiff's total gifts during the fiscal year did not exceed 10% of his total net income for that year, states a cause of action to have the gift allowed as a deduction, and defendant's contention that his demurrer should be sustained because of plaintiff's error in alleging the theory of value of the gift, is untenable, the value of the gift and the amount of plaintiff's allowable deduction therefor being matters to be determined at the trial. *Mills Co. v. Shaw*, 71.

§ 40c. Foreclosure of Tax Lien.

The owner of the remainder subject to a life estate is a necessary party in an action to foreclose a tax lien under G.S. 105-414. *Comrs. of Roxboro v. Bumpass*, 190.

Where remainderman is served by publication based on fatally defective affidavit, court acquires no jurisdiction over her, and foreclosure is nullity as to her interest. *Ibid.*

Whether a complaint which does not mention the remainderman in its body and is ambiguous in setting out her interest, states a cause of action against her in a tax foreclosure, G.S. 105-414, *quære? Ibid.*

A remainderman who has been served only by publication based upon a fatally defective affidavit, may attack the tax foreclosure more than one year afterward since neither G.S. 105-393, nor any statute of limitations can bar the right to attack a judgment for want of jurisdiction. *Ibid.*

TENANTS IN COMMON.

§ 8. Rights and Remedies Against Third Persons.

One tenant in common can recover the entire tract against a third party. *Locklear v. Oxendine*, 710.

TORTS.

§ 2. Distinction Between Tort and Breach of Contract.

An omission to perform contractual obligation is never a tort unless such omission is also the omission of a legal duty. *Council v. Dickerson's, Inc.*, 472.

§ 6. Joinder of Joint Tort-Feasors.

Upon equitable principles, apart from the provisions of G.S. 1-240, a person who is sued alone, and whose negligence is passive, is entitled to join and to set up by cross-action the liability of the person whose positive and active negli-

TORTS—*Continued.*

gence produced the injury, in order that the primary and secondary liability as between the joint tort-feasors may be adjudged in the one action, notwithstanding that both are equally liable to the injured person. *Clothing Store v. Ellis Stone & Co.*, 126.

TRESPASS TO TRY TITLE.

§ 3. Burden of Proving Title.

In an action of trespass to try title, defendants' denial of plaintiff's title and of the trespass places the burden on plaintiff to prove title in himself and the trespass. *Locklear v. Oxendine*, 710.

TRIAL.

§ 5. Course and Procedure in General.

In civil cases the parties have the right to select the manner of trial, and may waive trial by jury and submit the controversy to the judge presiding, or they may agree to submit the cause to a referee. *Keith v. Silvia*, 328.

Where plaintiff is not entitled to recover in the action as constituted. the court may not postpone further proceedings on the ground that the determination of another suit against one of the parties by a third person might affect the rights of the parties to the instant action, but must render final judgment. *Goldston Bros. v. Newkirk*, 428.

§ 7. Argument and Conduct of Counsel.

Improper argument of counsel as to amount received under Workmen's Compensation Act and contrasting financial condition and prospective earnings of defendants and plaintiff's intestate *held* cured by instructions. *Yost v. Hall*, 463.

§ 20. Questions of Law and of Fact.

Answer setting up defenses of waiver, estoppel and statutes of limitations *held* to raise issues of fact which court could not determine. *Icenhour v. Bowman*, 434.

Inferences of fact are for the jury and not the court. *Blake v. Concord*, 480.

§ 22a. Consideration of Evidence on Motion to Nonsuit in General.

On motion to nonsuit, plaintiff's evidence is to be taken as true. *Journigan v. Ice Co.*, 180.

In determining a motion to nonsuit, the evidence must be viewed in the light most favorable for plaintiff, giving him the benefit of every reasonable inference to be drawn therefrom and assuming to be true all facts in evidence tending to support his cause of action. *Ervin v. Mills Co.*, 415; *Register v. Gibbs*, 456.

On motion to nonsuit, the evidence is to be considered in the light most favorable for plaintiff, giving him the benefit of all reasonable inferences fairly deducible therefrom. *Butler v. Allen*, 484; *Joyce v. Sell*, 585.

§ 22b. Consideration of Defendant's Evidence on Motion to Nonsuit.

On motion to nonsuit, defendant's evidence in conflict with that of plaintiff is not to be considered. *Journigan v. Ice Co.*, 180; *Register v. Gibbs*, 456.

On motion to nonsuit, evidence offered by defendants will be considered to the extent to which it is favorable to plaintiff or tends to clarify and explain plaintiff's evidence. *Ervin v. Mills Co.*, 415.

TRIAL—*Continued.*

§ 22c. Contradictions and Discrepancies in Plaintiff's Evidence.

It is the province of the jury to dissolve discrepancies and dispose of contradictions in the evidence and therefore such discrepancies and contradictions cannot justify nonsuit. *Maddox v. Brown*, 519.

§ 23b. Sufficiency of Evidence—Prima Facie Case.

Prima facie case takes case to jury and requires overruling of nonsuit. *Vail v. Vail*, 109.

Where plaintiff establishes a *prima facie* case he is entitled to go to the jury notwithstanding defendant's evidence tending to establish an affirmative defense. *Joyce v. Sell*, 585.

§ 23f. Nonsuit for Variance.

While nonsuit should be granted for a fatal variance, since such variance amounts to a failure of proof, where the variance is not such as will defeat recovery and the allegation is not such as to mislead defendant, as where an express contract is alleged and the proof tends to establish an implied agreement, nonsuit is properly refused. *Flying Service v. Martin*, 17.

§ 24a. Nonsuit Upon Affirmative Defense. (On ground of contributory negligence see Negligence.)

Nonsuit may not be granted in favor of one who has the burden of proof. *Faust v. Loan Asso.*, 35.

Ordinarily, nonsuit will not be allowed in favor of the party upon whom rests the burden of proof except upon the issue of contributory negligence when plaintiff by his own evidence proves himself out of court. *Joyce v. Sell*, 585.

§ 30. Directed Verdict in Favor of Defendant.

In passing upon whether defendant is entitled to a directed verdict, plaintiff's evidence should not only be taken as true, but also should be considered in its most favorable light to plaintiff, giving plaintiff every reasonable intendment and legitimate inference fairly deducible therefrom. *Sanders v. Hamilton*, 175.

§ 31a. Instructions—Form, Requisites and Sufficiency in General.

The purposes of the court's charge to the jury are the clarification of the issues, elimination of extraneous matters, and declaration and explanation of the law arising on the evidence in the case. *Fish Co. v. Snowden*, 269.

§ 31b. Instructions—Statement of Evidence and Application of Law Thereto.

The court is required to state the evidence to the extent necessary to explain the law applicable thereto and to give equal stress to the respective contentions of the parties, G.S. 1-180, as rewritten by Chap. 107, Session Laws of 1949. *Flying Service v. Martin*, 17.

Reading of pertinent statutes without applying law to the evidence in the case is insufficient. *Chambers v. Allen*, 195.

The court misquoted the testimony of a witness on a crucial point. Plaintiff's counsel called the matter to the court's attention and the court replied that the statement was in accord with its recollection at which counsel for

defendant interjected agreement. *Held:* The failure of the court to correct the inadvertence must be held for prejudicial error upon exception and assignment of error properly presented. *Harris v. Draper*, 221.

Defendant admitted that plaintiff had advanced him $500.00 to be used in the purchase of fish for plaintiff's account, and set up a counterclaim in an amount in excess of $500.00 for fish purchased for plaintiff's account and for loading charges which plaintiff was required to pay under the contract. An instruction to the effect that if the jury should answer the issue as to defendant's indebtedness to plaintiff in any amount that the jury should not answer the issue as to the amount of indebtedness of plaintiff to defendant, *is held* reversible error, the action not being for an account stated, and the instruction being misleading upon the record. *Fish Co. v. Snowden*, 269.

Appellant's assignment of error for the failure of the court to declare and explain the law arising upon her evidence sustained upon authority of *Collingwood v. R. R.*, 232 N.C. 724. *Dillard v. Brown*, 551.

§ 31c. Instructions—Conformity to Pleadings and Evidence.

Charge *held* supported by inference of fact arising upon the facts in evidence. *Blake v. Concord*, 480.

§ 31e. Expression of Opinion by Court in Charge.

A charge to the effect that named witnesses had testified that in their opinion testator did not have mental capacity to make a will must be held for reversible error as expressing an opinion in evaluating the opinion testimony. G.S. 1-180. *In re Will of Tatum*, 723.

§ 36. Form and Sufficiency of Issues.

Defendants are husband and wife. Defendants' answer raised the issue as to the *feme* defendant's individual liability, if any, separate and apart from that of her husband, and there was evidence tending to support such issue. *Held:* The submission of an issue as to the indebtedness of defendants to plaintiff and the refusal to submit an issue directed to the separate liability of defendants must be held for error upon the *feme* defendant's appeal in failing to afford her opportunity to present her contention of nonliability. *Dillard v. Brown*, 551.

It is error for the trial court to submit an issue when there is no evidence to support an affirmative finding thereon by the jury, or if the evidence is so slight as not reasonably to warrant the inference of fact in issue or leaves the matter in mere conjecture. *Mfg. Co. v. R. R.*, 661.

§ 39. Form and Sufficiency of Answers to Issues.

Finding by jury that employee was guilty of contributory negligence but that it did not insulate negligence of third person defendant *held* not inconsistent. *Essick v. Lexington*, 600.

§ 47. New Trial for Newly Discovered Evidence.

A new trial for newly discovered evidence cannot be granted for evidence which is not competent, material or relevant under the pleadings. *Green v. Ins. Co.*, 321.

The trial court has no authority to hear a motion for a new trial for newly discovered evidence after the expiration of the term. *Ibid.*

TRIAL—*Continued.*

§ 49½. New Trial for Excessive or Inadequate Damages.

Whether a verdict should be set aside for excessiveness is ordinarily addressed to the sound discretion of the trial court. *Mintz v. R. R.*, 607.

TRUSTS.

§ 5c. Actions to Establish Constructive Trust.

An action by the life tenant against the remainderman and her husband to have the remainderman declared trustee *ex maleficio* cannot be maintained in the absence of evidence that the remainderman was guilty of any fraud or that there was collusion between the remainderman and her husband so as to charge her with liability for fraud alleged to have been committed by him. *Bowen v. Darden*, 443.

There must be allegation that provision in the deed conveying the remainder was inserted therein without the knowledge and consent of the life tenant in order to entitle the life tenant to have the remainderman declared a trustee for her use and benefit on the ground that the husband of the remainderman had the provision conveying the remainder inserted in the deed in violation of the trust and confidence reposed in him by the life tenant. *Ibid.*

§ 11. Title and Rights of Parties.

Under terms of this trust beneficiaries took contingent remainder and *corpus* does not vest until the termination of the trust in accordance with its terms. *Carter v. Kempton*, 1.

A devise to trustees to receive, dispose of, and lease the property as though they were absolute owners thereof vests the title to the property in the trustees subject to their duty to account for same, but conveys no beneficial interest to the trustees. *Ibid.*

§ 13. Merger of Legal and Equitable Estates.

Where the trustee is made solely a depositary of title for the benefit of the *cestui* with a personal discretionary power to sell and hold the proceeds for her benefit, the extinguishment of the personal discretionary power of sale by the death of the trustee transforms the trust to a passive one, and by operation of our Statute of Uses the legal as well as the equitable estate becomes vested solely in the *cestui*. *Pippin v. Barker*, 549.

§ 14a. Duties and Authority of Trustee in General.

Trustees may not profit individually from a trust estate to the detriment of the *cestuis*, and are required to exercise their control of the trust corporation and subsidiaries controlled by it for the benefit of the *cestuis* and not for their personal profit. *Erickson v. Starling*, 539.

§ 20a. Power of Trustee to Sell.

Where land is conveyed to a person as trustee for his daughter with power to the trustee to sell upon such terms as may seem reasonable and fit and hold the proceeds in the manner as may seem fit and reasonable to him, all for the care and well being of the *cestui*, with further provision that the exercise of such power should be solely within the discretion of the named trustee, *held* the power of the trustee to sell was a special personal discretionary power and the death of the trustee without having exercised the power extinguishes it. *Pippin v. Barker*, 549.

TRUSTS—*Continued.*

§ 24. Rights and Remedies of Beneficiaries.

Plaintiffs alleged that they were beneficiaries in a trust consisting of the controlling stock in a corporation, which corporation owned or controlled two subsidiary corporations. Plaintiffs instituted this action to remove the trustees and for an accounting, alleging dereliction of the trustees and maladministration of the trust, including the transfer to one of the trustees personally for an inadequate consideration stock in one of the subsidiaries, so that control of the subsidiary passed from the trustees in their fiduciary capacity. *Held:* Plaintiffs are entitled to investigate in a single action the entire ramifications of the alleged maladministration and maintain the action against the trustees and their confederates, corporate and individual, with a view to an accounting from all who knowingly participated in the derelictions and maladministration or profited therefrom, and defendants' demurrer thereto on the ground of misjoinder of parties and causes was correctly overruled. *Erickson v. Starling*, 539.

§ 27. Modification of Trust by Courts Under Equitable Jurisdiction.

The power of courts of equity to modify a trust created by will is exercised to preserve the trust estate and effectuate the intent of testator by making modifications in accordance with the spirit of the instrument to provide for exigencies relating to and growing out of the trust itself which were not foreseen by testator and which make action by the courts indispensable to the preservation of the trust and the protection of the infant beneficiaries. Modification will not be made at the will of the beneficiaries or for their welfare or merely because they find the terms of the trust objectionable. *Carter v. Kempton*, 1.

Equity will not modify trust merely to avoid controversy between trustees and one of the beneficiaries. *Ibid.*

UTILITIES COMMISSION.

§ 3. Hearings, Judgments and Orders.

The holder of a certificate operating buses serving communities included in the application of another company may intervene and protest the granting of the application. *Utilities Com. v. Coach Co.*, 119.

Jurisdiction to grant application for duplication of service to territories and points therein. *Utilities Com. v. Coach Co.*, 119.

Property owners are not parties to hearing before Utilities Commission for certificate of public convenience and necessity for housing project, the sole jurisdiction of the Commission being to determine the necessity of public housing in the area and its judgment not transferring title to any particular property. *In re Housing Authority*, 649.

§ 5. Appeals from Utilities Commission.

Appeals from the Utilities Commission are confined to questions of law upon grounds specifically set forth in appellant's petition for rehearing by the Commission. G.S. 62-26.10. *Utilities Com. v. Coach Co.*, 119.

While the orders of the Utilities Commission must be considered on appeal as *prima facie* just and reasonable, appellant nevertheless may show that the order appealed from was not supported by competent, material and substantial evidence upon the entire record, and thus rebut the *prima facie* effect of the order. *Utilities Com. v. R. R.*, 365.

VENDOR AND PURCHASER.

§ 25. Rights of Vendor—Damages for Breach of Contract by Purchaser.

Where the vendor makes a deposit on the purchase price under agreement that the balance should be paid upon tender of deed upon completion of the house by a stipulated time, evidence that the vendor complied with his contract and tendered deed on the day specified and demanded payment of the balance of the purchase price, and that such tender was refused, is sufficient to take the case to the jury on vendor's counterclaim for damages resulting from breach of the contract by the purchaser set up in the purchaser's action to recover the advance deposit. *Aiken v. Andrews*, 303.

Where deed is to be delivered upon payment of the balance of the purchase price, actual and timely tender of deed by the vendor and demand by him for the balance of the purchase price is necessary to cut off the purchaser's right to treat the contract as still subsisting and entitle the vendor, in event of the purchaser's refusal, to recover the damages suffered by reason of the purchaser's breach. *Ibid.*

VENUE.

§ 1c. Actions Against Public Officers.

Defendant corporation *held* not a municipality and therefore was not entitled to have an action instituted against it in the county of plaintiff's residence (G.S. 1-82) removed to the county in which the cause of action arose. G.S. 1-77. *Lee v. Poston*, 546.

§ 1b. Actions Against Executors and Administrators.

The statutory requirement that an action against an administrator in his official capacity must be instituted in the county in which the administrator qualified, G.S. 1-78, does not preclude an administrator from being joined as an additional defendant in an action pending in a county other than the one of his qualification upon a finding that the administrator is a necessary party to the action. G.S. 1-78 provides that such actions "must be instituted" in the county of qualification, whereas G.S. 1-76, dealing with venue, uses the phrase "must be tried." *Evans v. Morrow*, 562.

WILLS.

§ 3½. Requisites and Validity in General—Definiteness.

Testator owned but one tract of land and directed that it be divided among the beneficiaries in a stipulated manner. *Held:* The fact that the total acreage owned by testator is a few acres short of the acreage necessary for the division as stipulated, requiring some adjustment in the acreage to be apportioned each of the beneficiaries, does not render the will void. *Burchett v. Mason*, 306.

§ 20. Laches and Limitations on Caveat Proceedings.

A will is not subject to caveat or collateral attack 27 years after it has been probated in common form, G.S. 31-32; but if the will is void for vagueness and uncertainty it is a nullity and may be attacked directly or collaterally or treated as ineffective, anywhere at any time. *Burchett v. Mason*, 306.

§ 21b. Grounds of Attack—Mental Capacity.

Mental capacity to make a will is not a question of fact but is a conclusion of law to be drawn from the essential factual elements as to his capacity to know what property he has, the natural objects of his bounty and his understanding of the nature and effect of the testamentary disposition of his prop-

erty, each of which is essential to support the conclusion. *In re Will of Tatum*, 723.

§ 23b. Competency of Evidence on Issue of Mental Capacity.

A nonexpert witness who has shown that he has had opportunity to form a reasonably reliable appraisal of the mental powers of testator, while he may not testify as to whether testator had sufficient mental capacity to make a will, may give his opinion as to whether testator had sufficient mental capacity to know the nature of his property, the natural objects of his bounty, and the nature and effect of a testamentary disposition of his property, and he may also state facts observed about the conduct of testator upon which the opinion is based. *In re Will of Tatum*, 723.

In response to a question as to whether the witness had an opinion satisfactory to herself as to whether testator possessed sufficient mental capacity to know what property he had, who his relatives were and what claims they had upon him, and whether he understood the nature and effect of the disposition of his property by will, the witness narrated facts relevant to the inquiry concerning testator's conduct as she had observed it. *Held:* It is error to strike out the answer as not responsive to the question, since observed facts constituting a basis for an opinion as to the mental capacity are competent. Often the better practice would be for counsel to limit the scope of each question and move through the zone of opinion-inquiry step by step. *Ibid.*

§ 25. Instructions in Caveat Proceedings.

A charge to the effect that named witnesses had testified that in their opinion testator did not have mental capacity to make a will must be held for reversible error as expressing an opinion in evaluating the opinion testimony. *In re Will of Tatum*, 723.

§ 30. Operation and Effect of Judgment Setting Aside Will.

An executor is charged with the preservation of the estate pending final determination of the issue of *devisavit vel non* in favor of caveator upon appeal, unless and until he be removed, G.S. 28-32, and therefore upon the answer of the issue in favor of caveators it is error for the court to appoint commissioners with direction that they give bond and handle the estate. *In re Will of Tatum*, 723.

§ 31. General Rules of Construction.

The intention of testator as gathered from the entire instrument considered with regard to its general purpose, giving significance to its various expressions considered in the light of such intent, is the will, and to this end the court should place itself as nearly as practical in the position of testator, having regard to the kind, character and extent of his properties, the need for business experience in their management, and the difficulties likely to be encountered in the settlement of the estate. *In re Will of Johnson*, 570.

The intent of testator as gathered from the entire instrument, either in express terms or by clear inference from particular provisions of the will and from its general scope and import, must be given effect, since the intention of testator is his will. *Seawell v. Seawell*, 735.

§ 32. Presumption Against Partial Intestacy.

It will be presumed that a person who makes a will does not intend to die intestate as to any part of his property, and where a will is susceptible to two

interpretations, one resulting in complete testacy and the other in partial intestacy, the former will be adopted. *Renn v. Williams*, 490.

The presumption against intestacy will be used as an aid in ascertaining the intent of testator. *Seawell v. Seawell*, 735.

§ 33c. Vested and Contingent Remainders.

Where the beneficiaries of an active trust are given all or part of the income pending final division, or the language of the instrument discloses a clear intent that the beneficial interest should vest upon death of testator, the interest of the beneficiaries is vested, with full enjoyment merely postponed until the termination of the trust. *Carter v. Kempton*, 1.

Where there is no gift of the estate or of the income therefrom during the life of the trust, provision for equal distribution among the beneficiaries at the termination of the stated period of the trust is of the essence of the donation and constitutes a condition precedent, so that the *corpus* of the trust does not vest until that time, and the distributees take a transmissible interest contingent upon their capacity to answer at the time the roll is called. *Ibid.*

The will in suit set up a trust estate with provision that the *corpus* be divided among testator's children and their heirs at the expiration of twenty years. There was no provision for the payment of the income from the estate other than payment of a small sum per month to one beneficiary not made a distributee of the *corpus* of the estate, and provision giving the trustees discretionary authority to alleviate any emergency in the affairs of testator's children or the issue of a deceased child, and provision that if the interest of any beneficiary should be forfeited under provisions of the instrument, such interest should go to the other beneficiaries. *Held:* The *corpus* of the estate does not vest until the termination of the trust, and the minor children of the named distributees have a contingent interest therein sufficient to invoke the protective jurisdiction of a court of equity. *Ibid.*

§ 34e. Designation of Amount or Share of Beneficiaries.

The will in suit devised the residue of the estate in trust with provision that "the entire net income" be "paid monthly, or quarterly, after the expiration of three years from the date of my death" to named beneficiaries. *Held:* The income from the trust for the first three years should not be added to the *corpus* of the estate, but the beneficiaries named are entitled thereto with payment merely postponed until three years after testator's death, both under the general rule that the beneficiary of income is entitled thereto from the date of testator's death, and also in accordance with testator's intent as expressed in the instrument, since the word "entire" used in the bequest of the income imports all the income undiminished and unimpaired. *Trust Co. v. Grubb*, 22.

Where description of share of each beneficiary is too indefinite to be given effect, court will nevertheless seek division of land in accordance with intent of testator. *Seawell v. Seawell*, 735.

§ 38. Residuary Estate.

The *corpus* of the estate remaining after payment of specific legacies, taxes, debts, and costs of the administration, is the residue, and while the amount cannot be determined until the administration is complete, it is then to be determined as of the date of the testator's death. *Trust Co. v. Grubb*, 22.

In the absence of an apparent intention to the contrary, a residuary clause will be construed to pass not only all interests in land not otherwise specifi-

WILLS—*Continued.*

cally devised or provided for, but also any interest included in a devise which lapses or becomes void or incapable of taking effect, G.S. 31-42, so as to prevent intestacy as to any part of the estate. *Renn v. Williams*, 490.

Property included in a devise to a person who attested the execution of a will so that the devise is void under G.S. 31-10 passes under the residuary clause of the will, there being nothing in the instrument to indicate a contrary intention. *Ibid.*

GENERAL STATUTES CONSTRUED.

(For convenience in annotating.)

G.S.

1-25. Where second action is commenced within 12 months after dismissal of prior action for want of service but after expiration of statutory limitation, second action is barred. *Hodges v. Ins. Co.*, 289.

1-47; 1-234; 47-18. Decree of foreclosure *held* to estop attack on commissioner's deed. *McCollum v. Smith*, 10.

1-47 (2); 1-52. Action on indemnity contract under seal is governed by ten and not three year statute. *Casualty Co. v. Waller*, 536.

1-47 (4). Where no action to redeem or foreclose is instituted within 10 years after possession by mortgagee, right to redeem or to an accounting is barred; but institution of suit to foreclose tolls statute so long as such suit is pending. *Anderson v. Moore*, 299.

1-52 (9). Facts constituting fraud *held* not discoverable in exercise of due diligence and cause not barred. *Vail v. Vail*, 109.

1-53. Whether statute is limited to claims founded on contract or applies equally to those sounding in tort, *quærre*. *Rivers v. Wilson*, 272.

1-69; 1-71; 1-123 (1); 1-132. Where one of causes is solely against one of several defendants, demurrer for misjoinder must be allowed. *Sellers v. Ins. Corp.*, 590.

1-78; 1-76. Administrator may be joined as defendant in proper cases in action instituted in county other than one of his qualification. *Evans v. Morrow*, 562.

1-82; 1-77. Defendant *held* not municipal corporation and therefore not entitled to have action removed from county of plaintiff's residence to place where cause of action arose. *Lee v. Poston*, 546.

1-88. Defendant's rights are unaffected by pendency of action until he is brought into court by service. *Hodges v. Ins. Co.*, 289.

1-89. When summons is not served in ten days, service thereafter is void. *Atwood v. Atwood*, 208.

1-95. Service and return of summons more than ten days after issuance is sufficient evidence of nonservice to enable plaintiff to sue out alias summons. *Atwood v. Atwood*, 208. *Alias* and *pluries* summons necessary to prevent discontinuance when summons is not served. *Hodges v. Ins. Co.*, 289.

1-97. (1). Process agent is not limited to agent authorized to collect money; but question is to be determined in accordance with agent's authority. *Lumber Co. v. Sewing Machine Co.*, 407.

1-98. Affidavit must state cause with sufficient certainty to disclose nature of action. *Comrs. of Roxboro v. Bumpass*, 190.

1-99. Order for service by publication *held* to conform to statutory requirements. *McLean v. McLean*, 139.

1-103. Jurisdiction of the person can be acquired only by service of process or general appearance. *In re Blalock*, 493.

1-105. Evidence *held* sufficient to support finding that truck was under control of nonresident within purview of statute. *Davis v. Martini*, 351. Resident of Canada is "non-resident" within meaning of statute; may be served under the statute when liable under family purpose doctrine. *Ewing v. Thompson*, 564.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

1-108. Statute does not apply to actions for divorce. *McLean v. McLean*, 139.

1-121; 1-125. Where defendant has been duly served with summons action may not be dismissed for failure to serve copy of complaint. *Braswell v. R. R.*, 640.

1-122. Plaintiff must choose cause of action and state same in concise manner so that defendant will not be left in doubt as to how to answer and what defense to make. *Bowen v. Darden*, 443.

1-122. Retailer sued for breach of implied warranty that salt substitute was fit for human consumption *held* entitled to joinder of wholesaler. *Davis v. Radford*, 283.

1-123. *Cestuis* may join in one action trustees and all parties knowingly participating in alleged maladministration of trust. *Erickson v. Starling*, 539.

1-123; 62-121.47; 62-121.72 (2). Action against separate defendants to enjoin them from committing separate and unconnected proscribed acts should be dismissed for misjoinder. *Utilities Com. v. Johnson*, 588.

1-127; 1-132. Where there is only one party plaintiff there can be no misjoinder of parties plaintiff. *Mills Co. v. Earle*, 74.

1-128. Demurrer on ground that pleading "does not state cause of action" is insufficient. *Duke v. Campbell*, 262.

1-132. Where there is misjoinder of parties and causes the court must dismiss and has no power to order severance. *Erickson v. Starling*, 539.

1-135. Answer should contain general or specific denial of each fact controverted, and may contain new matter constituting defense or counterclaim. *Chandler v. Mashburn*, 277.

1-139. Contributory negligence is affirmative defendant upon which defendant has burden of proof. *James v. R. R.*, 592.

1-151. Demurrer will not be sustained unless pleading is fatally defective. *King v. Motley*, 42; *Bryant v. Ice Co.*, 266.

1-153. Movant may preserve exception to refusal to strike and present same on appeal from final judgment. *Sprinkle v. Ponder*, 312. Supreme Court will not chart course of trial on appeal from an order upon motion to strike. *Trucking Co. v. Payne*, 637. Narration of evidence sustaining denial of controverted fact *held* properly stricken on motion. *Chandler v. Mashburn*, 277. In action by motorist injured in traversing highway under construction, allegation that defendant was performing work under contract with Highway Commission is proper; but allegation of defendant's failure to take precautions required by such contract is properly stricken on motion. *Council v. Dickerson's, Inc.*, 472.

1-163. Court may not allow amendment stating new matter constituting wholly different cause of action. *Perkins v. Langdon*, 240. Trial court may allow amendment to correct misnomer if it does not amount to substitution or entire change of parties. *Bailey v. McPherson*, 231. Trial court may allow amendment even after verdict to make pleadings conform to evidence when amendment does not change cause. *Chaffin v. Brame*, 377.

1-172; 1-184. Where parties do not waive jury trial, court may not determine controverted issues of fact. *Icenhour v. Bowman*, 434.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

1-180. Court is required to state evidence to extent necessary to explain law and to give equal stress to contentions of parties. *Flying Service v. Martin*, 17. Reading of pertinent statutes without applying law to evidence is insufficent. *Chambers v. Allen*, 195. Charge *held* for error as being misleading. *Fish Co. v. Snowden*, 269. Misstatement of evidence and manner and language in stating State's contentions *held* error as expression of opinion upon evidence. *S. v. Simpson*, 438. Charge to effect that named witnesses had testified that in their opinion testator did not have mental capacity to make will *held* for error as expression of opinion. *In re Will of Tatum*, 724. Expression of opinion if harmless when on his own statement the defendant is guilty of charge. *S. v. Russell*, 487. Remarks of trial court *held* not prejudicial as expressing opinion on evidence. *S. v. Carter*, 581.

1-189. Where defendants plead 20 and 7 year statutes of limitation the action is not subject to compulsory reference. *Alston v. Robertson*, 309.

1-193; 1-195. Trial court may not vacate *ex mero motu* referee's report. *Keith v. Silvia*, 328.

1-120. Withdrawal of defendant's attorney by leave of court upon call of case constitutes "surprise" within meaning of statute. *Perkins v. Sykes*, 147. Showing of meritorious defense in answer and record is sufficient. *Ibid.*

1-222. Owner of property sued for damage to adjacent property caused by excavation may join his contractor on ground that contractor's negligence was primary. *Clothing Store v. Ellis Stone & Co.*, 126.

5-9. In contempt proceedings, judge should recuse himself upon petition alleging in good faith that affiant believes he cannot obtain fair and impartial hearing before such judge. *Ponder v. Davis*, 699.

7-50; 7-51. Special judge retired for disability is not emergency judge. *Motors Corp. v. Hagwood*, 57.

7-103; 110-21. Where domestic relations court acquires jurisdiction of child upon adjudication that child is ward of State, such jurisdiction continues until child becomes of age or issuance of valid order to contrary, notwithstanding later interlocutory order of adoption; and domestic relations court may modify its order even though neither the child nor its purported adoptive parents are before the court. *In re Blalock*, 493.

7-149 (12). Indictment charging defendant with being father of prosecutrix' unborn illegitimate child may not be amended after birth of child to charge wilful refusal to support. *S. v. Thompson*, 345.

8-35. Record *held* not to show that weather report was excluded from evidence. *S. v. Bovender*, 683.

8-51. Does not render incompetent testimony is for and not against person deriving title or interest from or through such deceased person. *Sprinkle v. Ponder*, 312. Test of personal tranaction or communication with decedent within purview of statute. *Peck v. Shook*, 259.

9-1. Failure of commissioners to include list of persons not on tax list does not render jury list void or tend to show racial discrimination. *S. v. Brown*, 202.

14-4; 7-63. Prosecution for violation of parking meter ordinance is in exclusive jurisdiction of justice of the peace. *S. v. Wilkes*, 645.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

14-17. Jury's right to recommend life imprisonment is unconditional. *S. v. McMillan*, 630.

14-32. Circumstantial evidence *held* insufficient to be submitted to jury. *S. v. Jarrell*, 741.

14-34. Pointing loaded pistol at another person, killing such other by accident, is sufficient to constitute involuntary manslaughter. *S. v. Hovis*, 360.

14-62. It is reversible error to admit opinion testimony that fire was of incendiary origin. *S. v. Cuthrell*, 274.

14-127. Evidence of conspiracy to injure personal property *held* sufficient. *S. v. Hicks*, 511.

15-27; 18-13. Where warrant and supporting affidavit recite compliance with statutory requirements, it will be so presumed. *S. v. Rhodes*, 453.

15-152. Indictment charging conspiracy and operation of butter-and-egg lottery and horse-race lottery *held* not objectionable for duplicity or multifariousness. *S. v. Gibson*, 691.

15-169. Conviction of assault on female with intent to rape will not support nonsuit for variance for that all evidence tended to show crime of rape. *S. v. Roy*, 558.

15-173. Evidence must be taken in light most favorable to State. *S. v. Webb*, 382; *S. v. Jarrell*, 741. Where State's uncontradicted evidence establishes defense, nonsuit is proper. *S. v. Jarrell*, 741. Sustaining of nonsuit by Supreme Court has force of verdict of not guilty. *S. v. Hill*, 61.

15-197; 15-200. Court may not suspend sentence for period exceeding five years. *S. v. Gibson*, 691.

18-2; 18-4. Possession may be either actual or constructive. *S. v. Webb*, 382.

18-32. Possession may be actual or constructive; proof of possession of more than gallon constitutes *prima facie* evidence of possession for sale. *S. v. Buchanan*, 477.

18-124 (d) (f). County may not hold beer and wine election within 60 days from such election by municipality of county. *Ferguson v. Riddle*, 54.

20-129 (d); 20-134; 20-161; 20-181. Evidence *held* not to show contributory negligence on part of motorist striking unlighted vehicle on highway at nighttime. *Chaffin v. Brame*, 377.

20-138. Direct and positive testimony that defendant was driving and was drunk takes case to jury on charge of drunken driving. *S. v. Simpson*, 438.

20-141. Motorist must reduce speed below statutory maximum when special hazards exist. *Rollison v. Hicks*, 99.

20-141 (a) (c). Sudden appearance doctrine *held* not to justify nonsuit in action for death of child struck on highway when there is evidence of violation of statutes. *Butler v. Allen*, 484.

20-141 (a); 20-174 (e). Sudden appearance doctrine *held* not to warrant nonsuit in action for death of child struck on highway when there is evidence of negligence in violation of statutes. *Register v. Gibbs*, 456.

20-141 (b); 20-146; 20-148; 20-150 (d). Evidence of culpable negligence *held* sufficient in this manslaughter prosecution. *S. v. Goins*, 460.

20-149. Does not apply in business district of city. *Ervin v. Mills Co.*, 415.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

20-153. Motorist turning left into intersection is required to pass beyond center of intersection before turning. *Ervin v. Mills Co.*, 415.

20-154. Motorist is not only required to give signal, but also to first determine that movement can be made in safety. *Grimm v. Watson*, 65; *Ervin v. Mills Co.*, 415.

20-155 (a). Right of way at highway intersection. *S. v. Hill*, 61.

20-155; 20-158. Vehicle approaching from right along dominant highway has right of way. *Yost v. Hall*, 463.

20-158. After stopping before intersection, driver along servient highway may not proceed without exercising due care to see that he may enter intersection in safety. *Matheny v. Motor Lines*, 673. Motorist along servient highway first reaching intersection may not enter intersection unless motorist along dominant highway is sufficient distance away to warrant assumption that he can cross in safety. *Yost v. Hall*, 463. State Highway Commission may designate U. S. highway the dominant highway at intersection. *Ibid.*

20-166. Failure to stop after hitting pedestrian is implied admission of negligence. *Edwards v. Cross*, 354.

22-2. Testimony that deed was supported by consideration is competent. *Sprinkle v. Ponder*, 312.

28-22. Trust company "appointed trustee of my estate" by will *held* entitled to administer estate either as executor or administrator c.t.a. *In re Will of Johnson*, 570.

28-32. Court should not appoint commissioners to take control of estate upon affirmative finding upon issue of *devisavit vel non* when there is appeal. *In re Will of Tatum*, 723.

28-149. Administrator has no function in distribution of realty among heirs. *King v. Neese*, 132.

28-150; 29-1 (2). Method of equalizing advancements in personalty and realty. *King v. Neese*, 132.

28-165. Judgment relating solely to advancements in personalty *held* not to bar subsequent proceeding to determine advancements in realty. *King v. Neese*, 132.

31-32. Will is not subject to caveat or collateral attack 27 years after probate, but if will is void it may be attacked at any time. *Burchett v. Mason*, 306.

31-42. Lapse devise goes into residuary estate. *Renn v. Williams*, 490.

40-36; 157-11; 157-50. Selection of site for public housing is in sound discretion of housing authority, but property owners may challenge condemnation on ground that authority acted arbitrarily or fraudulently. *In re Housing Authority*, 649.

40-53; 157-28; 157-45; 157-51. Owners of property are not parties to proceeding before Utilities Commission for certificate of public convenience and necessity. *In re Housing Authority*, 649.

41-7. Where sole discretionary power of trustee is power to sell, upon extinguishment of such power the legal and equitable estates merge. *Pippin v. Barker*, 549.

45-28. Upon upset bid, clerk acquires jurisdiction, and his record constitutes essential part of foreclosure proceeding. *Foust v. Loan Asso.*, 35.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

46-22. Where all parties seek actual partition court may not order sale for partition. *Seawell v. Seawell*, 735.

47-20. Mortgagee in unregistered instrument not entitled to priority as against receiver of corporate mortgagor. *Investment Co. v. Chemicals Laboratory*, 294.

47-26. Evidence *held* not to show consideration moving from wife to husband, and deed was deed of gift. *Sprinkle v. Ponder*, 312.

47-27. Grant of land for garbage dump with covenant not to sue for resulting annoyance *held* to convey easement running with land. *Waldrop v. Brevard*, 26.

50-13. Where decree of divorce awards custody of children, our courts have no jurisdiction to award custody except in conformity with the decree of sister State so long as children are domiciled in such other State, and the child may not change its residence. *Allman v. Register*, 531.

50-15; 50-16. Court may not allow alimony *pendente lite* without hearing evidence of both sides. *Ipock v. Ipock*, 387.

50-16. Affirmative finding that defendant had offered such indiginities to plaintiff's person as to make her life burdensome supports alimony without divorce notwithstanding negative findings to other issues. *Bateman v. Bateman*, 357.

51-3. Marriage may not be annuled on ground that wife was under 14 when there are children of the marriage. *Scarboro v. Morgan*, 449.

66-26.10. Appellant may show that order was not supported by competent evidence on whole record. *Utilities Com. v. R. R.*, 365. Record *held* not to support order denying carrier's application to discontinue agency at station. *Ibid.*

62-121.44; 62-26.10; 62-121.52 (5); 62-121.52 (7). Statutes do not prohibit service to same point by different carriers over separate routes. *Utilities Com. v. Coach Co.*, 120.

84-14; 8-54. Court may warn counsel not to comment upon defendant's failure to testify. *S. v. Bovender*, 684.

97-2 (f); 97-3. Evidence *held* insufficient to show that injury from fall caused by epileptic fit arose out of employment. *Vause v. Equipment Co.*, 88.

97-2 (i). General physical disability not resulting in loss of wages is not compensable. *Dail v. Kellex Corp.*, 446.

97-10. Contributing negligence of employer precludes employer and insurance carrier from reimbursement for amount of compensation paid widow of deceased worker. *Essick v. Lexington*, 600.

97-18 (e). Request for review of award for changed condition some 16 months after employer's notification of final payment under agreement *held* barred, G. S. 97-47. *Tucker v. Lowdermilk*, 185.

97-30. Industrial Commission has no authority to retain jurisdiction on its finding that general disability might later result in future loss of wages. *Dail v. Kellex Corp.*, 446.

97-31; 97-2 (i). Findings *held* to sustain conclusion that injury did not materially accelerate or aggravate pre-existing injury. *Anderson v. Motor Co.*, 372.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

97-54; 97-2 (i). Disablement from asbestosis or silicosis is incapacity to perform normal labor in last occupation rather than incapacity to earn previous wage in same or any other occupation. *Duncan v. Carpenter*, 422.

97-58 (a) (b) (c). Claim for disablement from asbestosis is not barred if filed within one year from date employee is advised by competent medical authority that he has disease. *Duncan v. Carpenter*, 422.

97-86. Findings of Industrial Commission conclusive when supported by evidence. *Anderson v. Motor Co.*, 372.

97-87. Agreement for payment of compensation approved by commission is binding as award. *Tucker v. Lowdermilk*, 185.

105-242 (3); 105-160; 105-163; 105-267. Taxpayer is remitted to statutory remedies to contest assessment of additional income taxes. *Gill v. Smith*, 50.

105-414; 105-393; 105-391. Remainderman who has been served only by publication based upon fatally defective affidavit is not barred from attacking tax foreclosure. *Comrs. of Roxboro v. Bumpass*, 190.

110-52. Persons awarded temporary custody of child under supervision of domestic relations court have no right to take child out of jurisdiction without written consent of State Board of Public Welfare. *In re Blalock*, 493.

115-11; 115-128; 115-129; 115-165; 115-49. Taxpayers may not sue for alleged wrongful diversion of school funds unless responsible units fail or refuse to sue. *Branch v. Board of Education*, 623.

115-45. School board and not members exercise delegated powers. *Kistler v. Board of Education*, 400.

115-48. Board may act at regular or special meeting, and may hold executive sessions. *Kistler v. Board of Education*, 400.

115-85. Selection of school sites is vested in sound discretion of county board of education. *Kistler v. Board of Education*, 400.

143-136. Evidence of negligence *held* sufficient for jury in action by workman's personal representative to recover against municipality for electrocution when worker came in contact with uninsulated wires. *Essick v. Lexington*, 600.

163-10 (11). State Board of Elections and S. B. I. may not be enjoined from investigating election. *Ponder v. Board of Elections*, 707.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.
(For convenience in annotating.)

ART.

I, sec. 11. Constitutional protection does not extend to physical facts, such as foot-prints, *S. v. Rogers*, 390.

I, sec. 17. Notice and opportunity to be heard necessary to due process. *McLean v. McLean*, 139.

I, sec. 19; Art. IV, sec. 13. Where parties do not waive jury trial, court may not determine controverted issues of fact. *Icenhour v. Bowman*, 434.

II, sec. 29. Local act providing for joint city-county board of health is void. *Idol v. Street*, 730.

IV, sec. 27. Prosecution for violation of parking meter ordinance is in exclusive jurisdiction of justice of the peace. *S. v. Wilkes*, 645.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED.
(For convenience in annotating.)

14th Amendment. Notice and opportunity to be heard necessary to due process. *McLean v. McLean*, 139.

14th Amendment. Service on resident of Canada under G.S. 1-105 does not violate due process. *Ewing v. Thompson*, 564.