NORTH CAROLINA REPORTS

VOL. 234

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1951

FALL TERM, 1951

REPORTED BY

JOHN M. STRONG

RALEIGH
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PRINTERS TO THE SUPREME COURT
1952

CITATION OF REPORTS

Rule 46 of the Supreme Court is as follows:

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

Reports		N. C.
1 and 2 Martin, Taylor & Conf.	as	1 N. C.
1 Haywood	"	2 "
2 "	"	3 "
1 and 2 Car. Law Repository & N. C. Term	"	4 "
1 Murphey	"	5 "
2 "	"	6 "
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2 " "	"	17 "
1 Dev. & Bat. Law	"	18 "
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3 & 4 " "	"	20 "
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2 " "	"	22 "
1 Iredell Law	"	23 "
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3 " "	"	25 "
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5 " "	"	27 "
6 " "	"	28 "
7 " "	"	29 "
8 " "	"	30 "
9 Iredell Law	as	31 N. C.
10 " "	"	32 "
11 " "	"	33 "
12 " "	"	34 "
13 " "	"	35 "
1 " Eq.	"	36 "
2 " "	"	37 "
3 " "	"	38 "
4 " "	"	39 "
5 " "	"	40 "
6 " "	"	41 "
7 " "	"	42 "
8 " "	"	43 "
Busbee Law	"	44 "
" Eq.	"	45 "
1 Jones Law	"	46 "
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3 " "	"	48 "
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8 " "	"	53 "
1 " Eq.	"	54 "
2 " "	"	55 "
3 " "	"	56 "
4 " "	"	57 "
5 " "	"	58 "
6 " "	"	59 "
1 and 2 Winston	"	60 "
Phillips Law	"	61 "
" Eq.	"	62 "

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

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

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1951—FALL TERM, 1951

CHIEF JUSTICE:

WALTER P. STACY.[1]

ASSOCIATE JUSTICES:

WILLIAM A. DEVIN,[2]
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,
RALPH MOODY,
CLAUDE L. LOVE,
JAMES E. TUCKER,[3]
PEYTON B., ABBOTT,[4]
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 13 September, 1951. Succeeded as Chief Justice by W. A. Devin.
[2]Appointed Chief Justice 17 September, 1951. Succeeded as Associate Justice by Itimous T. Valentine.
[3]Resigned 31 December, 1951. Succeeded by I. Beverly Lake 1 January, 1952.
[4]Resigned 16 October, 1951. Succeeded by Harry W. McGalliard 17 October, 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

Name	Address
W. H. S. BURGWYN	Woodland.
WILLIAM I. HALSTEAD	South Mills.
WILLIAM T. HATCH	Raleigh.
HOWARD G. GODWIN	Dunn.

WESTERN DIVISION

Name	District	Address
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

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

EMERGENCY JUDGES

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

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
WALTER L. 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

Name	*District*	*Address*
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	Figteenth	Concord.
JAMES C. FARTHING	Sixteenth	Lenoir.
J. ALLIE HAYES	Seventeenth	North Wilkesboro.
C. O. RIDINGS	Fifteenth	Forest City.
W. K. MCLEAN	Nineteenth	Asheville.
THADDEUS D. BRYSON, JR.	Twentieth	Bryson City.
R. J. SCOTT	Twenty-first	Danbury.

SUPERIOR COURTS, FALL TERM, 1951

(Revised through 1 October, 1951.)

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

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

Judge Frizzelle

Beaufort—Sept. 17* (A); Sept. 24†; Oct. 8†; Nov. 5* (A); Dec. 3†.
Camden—Aug. 27.
Chowan—Sept. 10; Nov. 26.
Currituck—July 16† (s); Sept. 3.
Dare—Oct. 22.
Gates—Nov. 19.
Hyde—Aug. 20†; Oct. 15.
Pasquotank—Sept. 17†; Oct. 15† (A); Nov. 5†; Nov. 12*.
Perquimans—Oct. 29.
Tyrrell—Oct. 1.

SECOND JUDICIAL DISTRICT

Judge Stevens

Edgecombe—Aug. 20* (s); Sept. 10; Oct. 15; Nov. 12† (2).
Martin—Sept. 17 (2); Nov. 19† (A) (2); Dec. 10.
Nash—Aug. 27; Sept. 17† (A) (2); Oct. 8* (s); Nov. 26*; Dec. 3†.
Washington—July 9; Oct. 22†.
Wilson—Aug. 27† (A); Sept. 3; Sept. 24* (A); Oct. 1†; Oct. 22* (A); Oct. 29† (2); Dec. 3 (A).

THIRD JUDICIAL DISTRICT

Judge Harris

Bertie—August 27 (2); Nov. 12 (2).
Halifax—Aug. 13 (2); Oct. 8† (A); Oct. 15† (s); Oct. 22* (A); Nov. 26 (2).
Hertford—July 30; Oct. 15 (2).
Northampton—Aug. 6; Oct. 29 (2).
Vance—Sept. 24*; Oct. 8†.
Warren—Sept. 10*; Oct. 1†.

FOURTH JUDICIAL DISTRICT

Judge Burney

Chatham—July 30† (2); Oct. 22.
Harnett—Sept. 3* (A); Sept. 17†; Oct. 8† (A); Nov. 12*; Nov. 19† (s).
Johnston—Aug. 13*; Sept. 24† (2); Oct. 15 (A); Nov. 5†; Nov. 12† (A); Dec. 10 (2).
Lee—July 16*; July 23* (s); Sept. 10†; Oct. 29*; Nov. 12† (s); Dec. 10† (A).
Wayne—Aug. 20; Aug. 27† (2); Oct. 8† (2); Nov. 26 (2).

FIFTH JUDICIAL DISTRICT

Judge Nimocks

Carteret—Oct. 15; Dec. 3†.
Craven—Sept. 3; Sept. 10 (A); Oct. 1†; Nov. 12 (A); Nov. 19† (2).
Greene—Dec. 10; Dec. 17.
Jones—Sept. 17; Dec. 10 (A).
Pamlico—Nov. 5 (2).
Pitt—Aug. 27; Sept. 10†; Sept. 24†; Oct. 8 (A); Oct. 22†; Oct. 29; Nov. 19† (A).

SIXTH JUDICIAL DISTRICT

Judge Carr

Duplin—Aug. 27 (2); Oct. 8; Oct. 15†; Dec. 3† (2).
Lenoir—Aug. 20*; Sept. 10 (A); Sept. 24†; Oct. 29 (A); Nov. 5†; Nov. 12†; Nov. 26 (A).
Onslow—Oct. 1; Nov. 19†.
Sampson—Aug. 6 (2); Sept. 17†; Oct. 22; Oct. 29†.

SEVENTH JUDICIAL DISTRICT

Judge Morris

Franklin—Sept. 24†; Oct. 8*; Nov. 26† (2).
Wake—July 9*; Sept. 3* (2); Sept. 17† (A) (2); Oct. 1*; Oct. 8† (s); Oct. 15† (3); Nov. 5*; Nov. 12† (2); Dec. 3* (A); Dec. 10*; Dec. 17†.

EIGHTH JUDICIAL DISTRICT

Judge Bone

Brunswick—Sept. 17; Oct. 1† (A).
Columbus—Sept. 3* (2); Sept. 24† (2); Oct. 8* (A); Oct. 29† (A) (2); Nov. 19* (2).
New Hanover—July 16* (s); July 23*; July 30* (s); Aug. 13*; Aug. 20† (2); Oct. 1* (A); Oct. 15†; Oct. 22† (s); Nov. 5* (2); Dec. 3† (2).
Pender—Sept. 24 (A); Oct. 22† (2).

NINTH JUDICIAL DISTRICT

Judge Parker

Bladen—Sept. 17*.
Cumberland—Aug. 27*; Sept. 24† (2); Oct. 8* (A); Oct. 22† (2); Nov. 19* (2).
Hoke—Aug. 20; Nov. 12.
Robeson—July 9* (2); Aug. 13*; Aug. 27† (A); Sept. 3* (2); Sept. 24* (A); Oct. 8† (2); Oct. 22* (A); Nov. 5*; Dec. 3† (2); Dec. 17*.

TENTH JUDICIAL DISTRICT

Judge Williams

Alamance—Aug. 13*; Sept. 3†; Sept. 10†; Oct. 15* (A); Oct. 22* (A); Nov. 5† (A); Nov. 26*.
Durham—July 16*; July 30 (2); Aug. 27* (A); Sept. 10* (A); Sept. 17† (2); Oct. 1 (A); Oct. 8*; Oct. 22† (A); Oct. 29†; Nov. 5; Nov. 26* (A); Dec. 3*; Dec. 10* (A).
Granville—July 23; Nov. 12 (2).
Orange—Aug. 27†; Oct. 1†; Dec. 10.
Person—Oct. 15; Nov. 5† (s).

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Judge Pless

Ashe—Oct. 22*.
Alleghany—Aug. 13; Oct. 1.
Forsyth—July 2* (2); Aug. 27* (s); Sept. 10; Sept. 17† (2); Oct. 8* (2); Oct. 29†; Nov. 12*; Nov. 19† (2); Dec. 3* (2).

TWELFTH JUDICIAL DISTRICT

Judge Nettles

Davidson—Aug. 20; Sept. 10† (2); Oct. 1† (A) (2); Nov. 19 (A) (2).
Guilford, Greensboro Division—July 9*; July 9† (A) (2); July 23* (2); Aug. 27*; Sept. 10* (A) (2); Sept. 10† (A) (2); Sept. 24†; Oct. 8* (A) (2); Oct. 8† (2); Oct. 22† (A) (2); Nov. 5* (2); Nov. 19† (2); Dec. 3* (A); Dec. 17*.
Guilford, High Point Division—July 16*; Sept. 24* (A) (2); Oct. 22* (2); Nov. 5† (A) (2); Dec. 3†; Dec. 10*.

THIRTEENTH JUDICIAL DISTRICT

Judge Moore

Anson—Sept. 10†; Sept. 24*; Nov. 12†.
Moore—Aug. 13*; Sept. 17†; Nov. 5† (A).
Richmond—July 16†; Sept. 3†; Oct. 1*; Nov. 5†.
Scotland—July 9† (s); Aug. 6; Oct. 29†; Nov. 26 (2).
Stanly—July 9; Sept. 3† (A); Oct. 8†; Nov. 19.
Union—Aug. 20 (2); Oct. 15 (2).

FOURTEENTH JUDICIAL DISTRICT

Judge Clement

Gaston—July 23*; July 30† (2); Sept. 10* (A); Sept. 17†; Oct. 22*; Oct. 29† (A); Nov. 26* (A); Dec. 3† (2).
Mecklenburg—July 9* (2); July 30* (A); Aug. 6† (s); Aug. 6* (A); Aug. 13* (2); Aug. 27*; Sept. 3† (2); Sept. 3† (A); Sept. 17* (A) (2); Sept. 17† (A) (2); Oct. 1*; Oct. 1† (A); Oct. 8† (2); Oct. 15† (A) (2); Oct. 29† (A) (2); Oct. 29† (2); Nov. 12† (A) (2); Nov. 12*; Nov. 19† (2); Nov. 26† (A) (2); Dec. 3* (A) (2); Dec. 10† (A); Dec. 17†.

FIFTEENTH JUDICIAL DISTRICT

Judge Sink

Alexander—Sept. 24.
Cabarrus—Aug. 20*; Aug. 27†; Oct. 15 (2); Nov. 12† (A); Dec. 3† (A).
Iredell—July 30 (2); Nov. 5 (2).
Montgomery—July 9; Oct. 1 (A); Oct. 29†.
Randolph—July 16†; July 23; Sept. 3*; Oct. 22† (A) (2); Dec. 3 (2).
Rowan—Sept. 10 (2); Oct. 8†; Nov. 19 (2).

SIXTEENTH JUDICIAL DISTRICT

Judge Phillips

Burke—Aug. 6 (2); Sept. 24 (2); Dec. 10 (2).
Caldwell—Aug. 20 (2); Sept. 3† (A); Oct. 8† (A); Nov. 26 (2).
Catawba—July 2 (2); Sept. 3† (2); Nov. 12 (2).
Cleveland—July 23 (2); Oct. 29 (2).
Lincoln—Oct. 15; Oct. 22†.
Watauga—Sept. 17*.

SEVENTEENTH JUDICIAL DISTRICT

Judge Gwyn

Avery—July 2 (2); Oct. 15 (2).
Davie—Aug. 27; Dec. 3†.
Mitchell—July 23† (2); Sept. 24.
Wilkes—July 16†; Aug. 6 (3); Sept. 10†; Oct. 1†; Oct. 8† (s); Oct. 29† (2); Dec. 10 (2).
Yadkin—Sept. 3* (s); Nov. 12†; Nov. 19†; Nov. 26.

EIGHTEENTH JUDICIAL DISTRICT

Judge Bobbitt

Henderson—Oct. 8 (2); Nov. 19† (2).
McDowell—July 9† (2); Sept. 3 (2).
Polk—Aug. 20 (2).
Rutherford—Sept. 24† (2); Nov. 5 (2).
Transylvania—July 23 (2); Dec. 3 (2).
Yancey—Aug. 6 (2); Oct. 22† (2).

NINETEENTH JUDICIAL DISTRICT

Judge Armstrong

Buncombe—July 9 (2); July 16 (A) (2); July 23; July 30; Aug. 6 (2); Aug. 20; Aug. 20 (A) (2); Sept. 3 (2); Sept. 17; Sept. 24; Oct. 1 (2); Oct. 15; Oct. 15 (A); Oct. 22; Oct. 29; Nov. 5 (2); Nov. 19; Nov. 19 (A) (2); Dec. 3 (2); Dec. 17; Dec. 17 (A); Dec. 24.
Madison—Aug. 6† (2) (s); Aug. 27; Oct. 1 (A) (2); Nov. 26.

TWENTIETH JUDICIAL DISTRICT

Judge Rudisill

Cherokee—Aug. 6 (2); Nov. 5 (2).
Clay—Oct. 1.
Graham—Sept. 3 (2).
Haywood—July 9 (2); Sept. 17†; Nov. 19 (2).
Jackson—Oct. 8 (2).
Macon—Aug. 20 (2); Dec. 3 (2).
Swain—July 23 (2); Oct. 22 (2).

TWENTY-FIRST JUDICIAL DISTRICT

Judge Rousseau

Caswell—Oct. 1† (A); Nov. 12*.
Rockingham—Aug. 6* (2); Sept. 3† (2); Oct. 22†; Oct. 29* (2); Nov. 26† (2); Dec. 10*.
Stokes—Oct. 8*; Oct. 15†.
Surry—Sept. 17; Sept. 24; Nov. 19; Dec. 17.

*For criminal cases.
†For civil cases.
‡For Jail and Civil Cases.
(A) Special or Emergency Judge to be assigned.
(s) Special Term.

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

Fayetteville, third Monday in March and September. MRS. LILA C. HON, Deputy Clerk, Fayetteville.

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

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

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

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

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

OFFICERS

CHARLES P. GREEN, U. S. Attorney, Raleigh, N. C.
CICERO P. YOW, 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 fourth Monday in March. 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; MRS. RUTH STARR, Deputy Clerk.

Rockingham, second 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.
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. E. ADRIAN PARRISH, Deputy Clerk, Charlotte.

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

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

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

OFFICERS

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

LICENSED ATTORNEYS

FALL TERM, 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 11th day of August, 1951.

BAILEY, GARRETT DIXON............Burnsville.
BARFIELD, JAMES ROY............Pikeville.
BODDIE, GRACE COLLINS............Durham.
BURNEY, JOHN JAY, JR. ....Wilmington.
BURWELL, JAMES HORACE, JR. ....Rutherfordton.

CLARK, WALTER CALVIN............Canton.
CLAYCOMB, CHARLES PERCIVAL, JR. ....Durham.
COINER, FRANCIS MARION............Zebulon.
COWARD, ORVILLE DILLARD............Sylva.
CRUSE, KENNETH BOLAND............Concord.

DAILEY, RUBEN JASPER............Asheville.

ERVIN, SAMUEL JAMES, III............Morganton.
ERWIN, RICHARD CANNON, SR. ....Winston-Salem.
EVERETT, NED PURVIS............Robersonville.

FLYNN, ALVAH WALLAND, JR. ....Henderson.
FOSTER, ROBERT WATSON............Durham.
FOWLER, EARL JUSTICE............Asheville.

GAMBILL, BRICE BELMONT............Jefferson.
GLASS, ROBERT DAVIS............Durham.
GREEN, JOHN LAZARUS, JR. ....Charlotte.
GREENE, WILLIAM EDGAR............Salisbury.
GRIST, WILLIAM TAYLOR............Durham.

HARRINGTON, JOHN ALLEN............Merry Oaks.
HARRIS, CLAUDE WAYLAND............Kinston.
HART, HOWARD VERNON............Greensboro.
HEGGIE, HUNTER DALTON............East Flat Rock.
HORTON, MARVIN VALE, JR. ....Farmville.
HOWE, STANDISH STURTEVANT............Durham.
HUNT, MORADA ALICE............Oxford.

JOHNSON, GEORGE HENRY, JR. ....Charlotte.
JOHNSON, RIVERS DUNN, JR. ....Warsaw.
JONES, JOHN POWELL............High Point.
JONES, THOMAS LEE............Winton.

KELLEY, GORDON BENNETT............Raleigh.
KENION, EDMUND OLIVER............Hillsboro.

LANGLEY, ROBERT SCOTT............Kinston.
LEE, HARRY MCCAULEY............Newton Grove.
LILLY, GEORGE MOSES............Charlotte.
LOMAX, CHARLES ELI............Wilkesboro.

MABRY, CLEGG WAYNE............Albemarle.
MILLAR, WILLIAM IMBER............Waynesville.
MORRISEY, JOHN THOMAS............Kinston.
MORTON, MARION BILLY............Albemarle.

MULL, JOE FORREST....Shelby.

McCOY, JOHN PHILIP....Durham.
McGHEE, KARL WILKERSON....Wilmington.
McKINNON, ARNOLD BORDEN....Lumberton.

NIMOCKS, STEPHEN HALE....Fayetteville.

OLIVER, MARY WILHELMINA....Chapel Hill.

PARKER, ERNEST ELBERT, JR. ....Wilmington.
PERRY, JAMES FRANKLIN....Durham.
POWELL, RICHARD....Maysville.

REDDEN, MONROE MINOR, JR. ....Hendersonville.
ROBINSON, SANKEY WRIGHT....Whiteville.

SCHENCK, JOSEPH SAMUEL....Canton.
SCOTT, JESSE BRIAN....Rocky Mount.
SEYMOUR, HUBERT ELMO, JR. ....Greensboro.
SIMPSON, DANIEL REID....Glen Alpine.
SMITH, KEITH....Greensboro.
STENGEL, MARY LORETTA....Asheville.
STOKER, LAWRENCE CHARLES....High Point.
STYERS, ROBERT LEE....Winston-Salem.
SUDDARTH, THOMAS HENRY, JR. ....Oxford.

THOMAS, MASON PAGE, JR. ....Siler City.

VANN, ARTHUR....Durham.
VON DREHLE, VERNON PAUL....High Point.

WALKER, JAMES EDWARD....Marion.
WARREN, LINDSAY CARTER, JR. ....Washington.
WEAVER, GILBERT EARL....Raleigh.
WEBSTER, JAMES ALDEAN, JR. ....Leaksville.
WEEKS, JAMES ALBERT....Clinton.
WILEY, ROBERT MASON....Charlotte.
WILLIAMS, DONALD ALAN....Chapel Hill.
WILLIAMS, HENRY SMITH....Yadkinville.
WILLIAMS, JAMES ELLIS....La Grange.
WILLIFORD, LEMUEL MABON....Fayetteville.
WOLFF, HERMAN, JR. ....Raleigh.

ZWANETZ, DAVID....Durham.

BY COMITY:

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Given over my hand and the seal of the Board of Law Examiners, this 8th day of April, 1952.

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EDWARD L. CANNON, *Secretary,*
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

SPRING TERM, 1951

EMMA D. CUNNINGHAM v. WILLIAM JAMES CUNNINGHAM.

(Filed 7 June, 1951.)

Divorce § 14—

Where plaintiff states the existence of a cause for divorce on the ground of adultery, G.S. 50-5 (1), she may maintain her action for alimony without divorce without waiting until she could institute an action for absolute divorce on that ground, and it is not required that she file the affidavit provided in G.S. 50-8. G.S. 50-16.

APPEAL by defendant from *Clement, Resident Judge,* in Chambers, 10 March, 1951, of FORSYTH.

Civil action for alimony without divorce and for counsel fees to enable plaintiff to prosecute cause of action against defendant, her husband.

Plaintiff alleges in her complaint substantially these facts: That she and defendant, both residents of Forsyth County, North Carolina, were married to each other on 29 December, 1920, and lived together as husband and wife for many years; that in the year 1941 defendant left plaintiff and moved to the city of Washington, District of Columbia, where he was employed for a number of years, and where he established, without the knowledge of plaintiff, a clandestine relationship with a woman, and lived with her, as plaintiff is informed and believes, as husband and wife, having two children by her; that during the said time defendant also established a similar relationship with a woman from Reidsville, N. C., who bore him one child; that in the Fall of 1950, defendant, having been transferred to Salisbury, N. C., by his employer, returned to Winston-

Salem to live and moved into the home which plaintiff has kept all during his absence; that in January, 1951, plaintiff, receiving information concerning the unfaithfulness of defendant and his clandestine relationship with the above mentioned women, which conduct on his part rendered plaintiff's condition intolerable, and life burdensome, separated herself from defendant and has lived separate and apart from him since said date; that during the absence of defendant plaintiff took care of and protected the home in Winston-Salem, etc.; "that on account of the misconduct of the defendant, it became necessary for this plaintiff to separate herself from him in order to be able under the law, to maintain a cause of action for absolute divorce; to have continued to live with him would have amounted to a condonation of his misconduct and would have prevented this plaintiff from asserting her legal right to a divorce"; that notwithstanding that defendant is an able-bodied man, and experienced builder, earning substantial salary, as detailed, he has neglected, failed and refused to support plaintiff and has not contributed anything to her support since 1947, etc.

Plaintiff thereupon prays judgment for alimony *pendente lite*, etc. The complaint is verified in form specified for ordinary civil action.

Defendant demurred *ore tenus* to complaint, on the grounds that it appears upon the face thereof that: "(1) The court has no jurisdiction of the person of defendant or of the subject of the action; (2) The complaint does not state facts sufficient to constitute a cause of action."

The cause coming on for hearing, after notice to defendant, before the Resident Judge of the 11th Judicial District, the court (1) considered and overruled the demurrer; and (2) found facts substantially in accordance with allegation of complaint, and thereupon, and in the exercise of sound discretion, ordered defendant to pay a specified sum monthly to plaintiff *pendente lite* for use and benefit of plaintiff, and a specified sum for attorneys' fees.

Defendant appeals therefrom to Supreme Court, and assigns error.

Johnson & Parrish for plaintiff, appellee.
W. Scott Buck for defendant, appellant.

WINBORNE, J. If the husband be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board, his wife may institute an action, under the provisions of G.S. 50-16, in the Superior Court of the county in which the cause of action arose to have reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of her husband.

Pending the trial and final determination of the issues involved in such action, and also after they are determined, if in her favor, such wife may

make application to the resident judge, or to the judge holding the Superior Courts of the district, for such subsistence and counsel fees, and it shall be lawful for such judge to cause the husband to pay or secure same. *McFetters v. McFetters,* 219 N.C. 731, 14 S.E. 2d 833; *Oldham v. Oldham,* 225 N.C. 476, 35 S.E. 2d 332; *Brooks v. Brooks,* 226 N.C. 280, 37 S.E. 2d 909; *Best v. Best,* 228 N.C. 9, 44 S.E. 2d 214.

In the light of these provisions, a reading of the complaint in the present action clearly reveals the purpose of the action to be for alimony without divorce under G.S. 50-16. The purpose is misunderstood, apparently, due to the fact that the relief asked by plaintiff is for "alimony *pendente lite.*" It is sought in truth pending this action, and in that sense it is "*pendente lite.*" *McFetters v. McFetters, supra; Oldham v. Oldham, supra.* The pleader manifestly so intended.

The complaint alleges that defendant has committed adultery, and that it has not been condoned by plaintiff. Adultery is a cause for absolute divorce. G.S. 50-5 (1).

In actions brought under G.S. 50-16 the wife is not required to file the affidavit provided in G.S. 50-8. The verification of the complaint shall be the same as prescribed in the case of ordinary civil actions. See latter part of G.S. 50-16.

Hence, we hold that the complaint states a cause of action for alimony without divorce, and that the action is properly instituted. Plaintiff is not required to wait until she can maintain an action for divorce on ground of adultery. G.S. 50-16.

Moreover, in *Oldham v. Oldham, supra, Denny, J.,* speaking of provision of G.S. 50-16, had this to say: "The amounts allowed to a plaintiff for subsistence *pendente lite* and for counsel fees are determined by the trial judge in his discretion and are not reviewable."

For reasons stated the demurrer of defendant was properly overruled.

Affirmed.

FRED J. HANSLEY, ADMINISTRATOR OF HUBERT HANSLEY, DECEASED, v. JACK TILTON AND FORSYTH COUNTY BOARD OF EDUCATION, AND P. L. TILTON, GUARDIAN AD LITEM OF JACK TILTON.

(Filed 7 June, 1951.)

1. **Automobiles §§ 12b, 18h (2)—Evidence of negligence in operation of a school bus on narrow bridge held sufficient for jury.**

Evidence favorable to plaintiff tending to show that defendant drove a school bus after dark on the approaches to a narrow bridge at thirty-seven miles per hour without clearance lights indicating the width of the bus.

and that, in attempting to clear the bridge ahead of a vehicle approaching from the opposite direction, defendant pressed his accelerator to the floor and met the other vehicle near his end of the bridge, failed to keep the bus to its right so as to give such other vehicle one-half the traveled portion of the bridge as near as possible, and struck the car, *is held* sufficient to be submitted to the jury on the questions of defendant's negligence and proximate cause. G.S. 20-141 (a), G.S. 20-129 (a) (e), G.S. 20-148.

2. Automobiles § 18h (3)—

Defendants' evidence of negligence on the part of plaintiff's intestate in the operation of his car upon a narrow bridge, causing the collision between intestate's car and the bus driven by defendant, cannot justify nonsuit when in conflict with plaintiff's evidence.

3. Trial § 22b—

Defendant's evidence in conflict with that of plaintiff is rightly ignored in ruling on defendant's motion to nonsuit.

4. Schools § 5½: Public Officers § 8—

A driver of a school bus in carrying out a mission for the county board of education owning the bus, is not immune from liability for the negligent operation of the bus notwithstanding that the county board of education, as an agency of the State, enjoys such immunity, since immunity of a public officer does not extend to a mere employee in the performance of a mechanical task.

5. Evidence § 26—

The exclusion of testimony that clearance lights were seen burning on the bus in question three nights before the collision, offered to obtain the inference that they were in working order on the night in question, will not be held prejudicial when there is evidence that at the time in question the lights were neither burning nor were capable of burning because not connected with any electric circuit, since such evidence rebuts any possible inference of the continuance of the prior state.

6. Schools § 5½: Automobiles § 9b—

An instruction that the driver of a school bus with a width in excess of eighty inches would be chargeable with negligence if he drove same on the highway at nighttime without displaying burning clearance lights, is without error, G.S. 20-120 (e), notwithstanding that the duty of keeping the lighting system of the bus in good working order may have rested upon the county board of education.

7. Appeal and Error § 39f—

The use of the word "plaintiff" instead of the technically correct term "plaintiff's intestate" in several portions of the charge will not be held for prejudicial error when the charge construed contextually could not have confused or misled the jury.

APPEAL by defendant, Jack Tilton, from *Clement, J.*, and a jury, at the October Term, 1950, of FORSYTH.

Civil action by administrator to recover damages for death of his intestate and for injury to his intestate's automobile occurring in a collision between such automobile and a school bus.

The accident happened soon after dark on 19 September, 1949, upon a narrow bridge in Forsyth County, North Carolina, where a public highway known as the Old Rural Hall Road crosses Muddy Creek. The automobile was driven by the plaintiff's intestate, Hubert Hansley, and the school bus was operated by the defendant, Jack Tilton, its regular driver, who was carrying out a mission for its owner, the Forsyth County Board of Education. Although it was originally made a party defendant, the Forsyth County Board of Education was dismissed from the action upon a voluntary judgment of nonsuit, and the case proceeded to trial as against the defendant, Jack Tilton, an infant defending by his guardian *ad litem,* P. L. Tilton. Whenever the term "defendant" is hereinafter used, it refers to Jack Tilton only. Both sides offered evidence at the trial.

These issues arose on the pleadings, and were submitted to the jury:

1. Was the death of plaintiff's intestate and the damage to his automobile caused by the negligence of the defendant Jack Tilton, as alleged in the complaint?

2. Did the plaintiff's intestate contribute to his death and to the damage to his car by his own negligence, as alleged in the answer?

3. What amount of damages, if any, is the plaintiff entitled to recover of the defendant Jack Tilton on account of the death of his intestate?

4. What amount of damages, if any, is the plaintiff entitled to recover of the defendant Jack Tilton on account of the damage to the automobile of plaintiff's intestate?

The jury answered the first issue "Yes," the second issue "No," the third issue "$7,500.00," and the fourth issue "$400.00." The court entered judgment for plaintiff on the verdict, and the defendant appealed, assigning errors.

Deal, Hutchins & Minor for plaintiff, appellee.

Hastings & Booe and Womble, Carlyle, Martin & Sandridge for defendant, Jack Tilton, 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 excluding the testimony of James Malcolm, a witness for the defense, that the clearance lights on the school bus were burning three nights before the collision?

3. Did the court commit prejudicial error in the charge to the jury?

We consider these questions in their numerical order.

The testimony offered by plaintiff consisted of circumstances observed at the scene of the collision immediately after its occurrence, and of extrajudicial admissions made by the defendant at that time and place. When this evidence is interpreted most favorably for plaintiff, it makes out this case:

1. The Old Rural Hall Road courses northwardly and southwardly where it crosses Muddy Creek, a natural watercourse, upon a bridge having side railings and an inside width of only 15 feet and 4 inches. Both approaches to the bridge, which is approximately 76 feet long, are relatively straight for substantial distances, and are marked by warning signs bearing the lettering "narrow bridge."

2. The intestate's automobile, which was about 66 inches wide, was proceeding south, and the school bus, which was 95 inches wide, was traveling north. The headlights of both vehicles were burning as they neared the bridge in the darkness, but the school bus was not displaying any clearance lights indicating its character or extreme width. For this reason, the intestate, who reached and entered the bridge first, had no reason to anticipate that the two vehicles would experience any difficulty in passing each other in case they met on the bridge.

3. Meanwhile, the defendant, who had full knowledge of the narrowness of the bridge and of the character and abnormal width of the school bus, approached the bridge from the south at a speed of 37 miles an hour, observed the intestate's automobile nearing the bridge from the north, and "thought he could beat him (*i.e.*, the intestate) across the bridge." The defendant thereupon "pressed his accelerator down to the floor, and tried to get across."

4. After the school bus entered the bridge, the intestate was able to observe its character and extreme width for the first time by his own headlights. He forthwith undertook to avoid the oncoming school bus by driving his automobile so close to the railing on his right as to rub the right side of his automobile against such railing. Notwithstanding the abnormal width of the school bus and the narrowness of the bridge, the defendant could still have averted any collision by yielding to the intestate's automobile its proportionate part of the available passageway. This he failed to do. As a consequence, the two vehicles collided at a point 15 feet and 6 inches from the south end of the bridge. The northbound school bus knocked the southbound automobile 12 inches northward, and continued on its way for about 375 feet before coming to rest. The automobile was demolished, and the intestate suffered instant death. The lighting system of the school bus was not damaged by the collision. An examination of such system, which was made at the scene immediately

after the accident, revealed that the clearance lights were not even connected with any available electric current.

This evidence suffices to show that the defendant was negligent in the operation of the school bus in these respects: (1) That he failed to keep a reasonably careful lookout, *Register v. Gibbs,* 233 N.C. 456, 64 S.E. 2d 280; (2) that he failed to keep the school bus under reasonable control, *Register v. Gibbs, supra;* (3) that he drove the school bus on the highway at a speed greater than was reasonable and prudent under the conditions then existing, G.S. 20-141 (a); (4) that he drove the school bus, which had a width in excess of eighty inches, on the highway during the nighttime without displaying burning clearance lights thereon as required by statute, G.S. 20-129 (a) (e), *Thomas v. Motor Lines,* 230 N.C. 122, 52 S.E. 2d 377; (5) that he failed to yield the right of way on the bridge to the intestate's automobile, the vehicle entering the bridge first, when he knew, or by the exercise of reasonable care would have known, that the bridge was too narrow for both of the vehicles to pass safely, *Brown v. Products Co., Inc.,* 222 N.C. 626, 24 S.E. 2d 334, 60 C.J.S., Motor Vehicles, section 315; and (6) that on meeting the intestate's automobile proceeding in the opposite direction on the bridge, he failed to pass the automobile to the right, giving it "at least one-half of the main-traveled portion of the roadway as nearly as possible." G.S. 20-148. This evidence likewise warrants a finding that such negligence on the part of the defendant was the sole proximate cause of the death of the intestate and of the damage to his automobile. These things being true, the question whether the defendant was guilty of actionable negligence, and the question whether the plaintiff's intestate was guilty of contributory negligence were for the jury.

To be sure, the defendant offered testimony tending to show that the school bus entered the bridge first; that notwithstanding this, the plaintiff's intestate drove onto the bridge at a speed of 60 or 65 miles an hour; and that on meeting the school bus on the bridge, the intestate suddenly turned his automobile to the left at unabated speed into the pathway of the oncoming school bus, causing the two vehicles to collide. While this evidence would have justified the jury in answering either the first issue or the second issue in favor of the defendant had the jury accepted it, the trial judge rightly ignored it in ruling on the motion to nonsuit. This testimony was presented by the defense, and merely contradicted that offered by plaintiff. *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307.

The defendant insists, however, that the action ought to have been nonsuited in the court below even if the testimony adduced by the administrator was sufficient to show actionable negligence on his part, and freedom from contributory negligence on the part of the intestate. These arguments are advanced by him to sustain this position: The county

board of education is an agency or instrumentality of the State. As such, it is not liable for injury or loss resulting from the negligence of its officers, agents, or employees. Inasmuch as the defendant was driving the school bus for the county board of education, he is clothed with the governmental immunity of the board, and in consequence, is exempt from liability to the plaintiff in the instant action.

This contention is not tenable. Undoubtedly the county board of education, as an agency or instrumentality of the State, enjoys immunity to liability for injury or loss resulting from the negligence of the driver of its school bus. *Benton v. Board of Education,* 201 N.C. 653, 161 S.E. 96. But the driver of the school bus, who is a mere employee performing a mechanical task, is personally liable for his own actionable negligence.

This question was decided in principle adversely to the defendant in *Miller v. Jones,* 224 N.C. 783, 32 S.E. 2d 594, where the late *Justice Seawell* said: "The suggested immunity has never been extended to a mere employee of a governmental agency upon this principle, although employed upon public works, since the compelling reasons for the nonliability of a public officer, clothed with discretion, are entirely absent. Of course, a mere employee, doing a mechanical job, as were the defendants here, must exercise some sort of judgment in plying his shovel or driving his truck—but he is in no sense invested with a discretion which attends a public officer in the discharge of public or governmental duties, not ministerial in their character. In short, the defendants were not public officers, nor were they in the performance of any discretionary act. The mere fact that a person charged with negligence is an employee of others to whom immunity from liability is extended on grounds of public policy does not thereby excuse him from liability for negligence in the manner in which his duties are performed, or for performing a lawful act in an unlawful manner. The authorities generally hold the employee individually liable for negligence in the performance of his duties, notwithstanding the immunity of his employer, although such negligence may not be imputed to the employer on the principle of *respondeat superior,* when such employer is clothed with a governmental immunity under the rule."

This brings us to the question whether the court erred in excluding the proffered testimony of the defense witness, James Malcolm, to the effect that he saw "the clearance lights . . . burning on the bus" three nights before the collision, to wit, on the night of 16 September, 1949. This testimony was tendered by the defense as a basis for invoking the evidential rule that "proof of the existence at a particular time of a fact of a continuous nature gives rise to an inference, within logical limits, that it exists at a subsequent time." 31 C.J.S., Evidence, section 124. It may be argued with much reason that this rule does not apply in the

instant case because there is nothing of a continuous nature in the fact that the clearance lights on a school bus are turned on and burning on a particular occasion. *Fanelty v. Jewelers,* 230 N.C. 694, 55 S.E. 2d 493. Be this as it may, we are constrained to hold on the present record that the defendant has failed to demonstrate on this appeal that he has suffered any prejudice on account of the exclusion of this testimony, for the very simple reason that all the evidence relating to the matter at the trial indicated strongly that the clearance lights on the school bus were neither burning nor capable of burning at the time of the collision. Such evidence certainly disclosed a change in the mechanical condition of the clearance lights, and in that way rebutted any possible inference of any continuance of their former state.

The defense reserved an exception to a portion of the charge in which the court instructed the jury in specific detail that the defendant would be chargeable with negligence if he drove a school bus having a width in excess of eighty inches on the highway during the nighttime without displaying burning clearance lights thereon as required by the statute codified as G.S. 20-129. This instruction was correct, even though the duty to keep the lighting system on the school bus in good working order may have rested on the county board of education and not on the defendant. The latter was not empowered to set a positive statute at naught merely because his employer, the county board of education, may have furnished him a school bus with a defective lighting system.

The court used the word "plaintiff" instead of the technically correct term "plaintiff's intestate" on several occasions during the course of the charge. When the instructions of the judge to the jury are read contextually, however, it is evident that these slips of the tongue did not confuse or mislead the jury.

For the reasons given, there is in law

No error.

E. M. HERNDON, ADMINISTRATOR OF THE ESTATE OF MARVIN O. HOCKETT, DECEASED, v. THE NORTH CAROLINA RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY.

(Filed 7 June, 1951.)

Railroads § 4—

Evidence tending to show that forty-five feet from the tracks at a grade crossing the headlight of a train approaching from the right could be seen several hundred feet, with greater vision up the track as one came closer to the rails, and that intestate stopped three or four feet from the first rail and then drove upon the track and was hit by an engine a second

thereafter, *is held* to show contributory negligence on the part of intestate constituting a proximate cause of the accident as a matter of law, and nonsuit was proper.

APPEAL by the plaintiff from *Grady, Emergency Judge,* at October Term, 1950, of DURHAM. Affirmed.

Civil action by plaintiff to recover damages for the alleged wrongful death of his intestate, resulting from a grade-crossing collision between a Blue Bird taxicab driven by the intestate and a train operated by the defendant Southern Railway Company. The collision occurred on the night of 19 December, 1944, about 10:30 o'clock, at a street crossing in the suburbs of the City of Durham, beyond Erwin Cotton Mills, in what is known as West Durham, where 14th Street crosses the railroad track.

The usual issues of negligence and contributory negligence were raised by the pleadings. The plaintiff, in a carefully prepared complaint, alleges, in substance, that the intestate's death was due to the defendants' negligence in causing and permitting a train to approach the crossing at a high, unlawful, and careless rate of speed, without due regard for the safety of those using the crossing and without giving any notice or warning whatsoever of the approach of the train, with the engineer failing to keep a proper lookout. The defendants' answer admits the intestate was driving the taxicab and was killed in the collision, but denies all allegations of negligence. By way of further defense, the defendants allege that the intestate's death was proximately caused by his own negligence in failing properly to control the taxicab; in failing to heed the warning signals at the crossing; in failing to keep a proper lookout for his own safety; and in heedlessly driving the taxicab upon the crossing in front of an approaching train when he had an unobstructed view of approximately 700 feet down and along the railroad track in the direction from which the train was coming.

The evidence adduced at the trial developed the following background facts: The railroad runs through the City of Durham in a general easterly and westerly direction. 14th Street runs generally north and south, and crosses the railroad at about right angles. Mulberry Street runs alongside of and parallel with the track on the north side thereof. 14th Street is a connecting street about 1,300 feet in length, running from Hillsboro Road on the north down to and across Mulberry Street and the railroad track,—continuing on southwardly to the road which leads from the West Durham 9th Street underpass to the vicinity of Duke Hospital, this road being known as Erwin Road. The Erwin Cotton Mills property is located at the northeast corner of 14th and Mulberry Streets.

Just before the fatal collision, the taxicab driven by the intestate was traveling southwardly on 14th Street. It was seen moving forward

through the intersection of Mulberry Street (which parallels the railroad on the north). The cab moved up to within 3 or 4 feet of the north rail and stopped momentarily. It then moved forward and stopped again, this time between the tracks, as though "stalled or something," with the train then approaching from the west at a speed estimated by plaintiff's witness David Sloan of from 50 to 60 miles per hour. In the ensuing collision, the pilot (or cowcatcher) of the locomotive became embedded in the metal of the taxicab and carried it down the track about 1,200 feet. Plaintiff's intestate was fatally injured and thrown out of the cab about 175 feet east of the crossing.

The evidence further tends to show that west of the crossing the railroad track curves slightly toward the north, so that, looking west from the crossing in the direction from which the train approached, the railroad curves to the right. It also appears in evidence that at the crossing the railroad track bed was about 4 or 5 feet higher than the surface of the approach from Mulberry Street, thus requiring a motorist traveling southwardly on 14th Street to drive uphill 4 or 5 feet in crossing the railroad. It further appears that the crossing was much used by pedestrians and vehicles; that, being in close proximity to Erwin Mills, it was a noisy crossing; that it was a narrow, one-way crossing, unpaved, rough, and rutted, with the railroad T-irons projecting some 3 or 4 inches above the surface of the street; that there were no blinker lights, bells or gates at the crossing, nor was a watchman maintained thereat.

The evidence fails to sustain the plaintiff's contention that the intestate's vision was obscured by a row of mulberry trees north of the railroad right of way, west of the crossing. The evidence discloses that these trees were not on the railroad right of way proper. They were located on the north side of Mulberry Street (which parallels the railroad), that is, the trees were on the far side of the parallel street from the railroad. This parallel street is about 24 or 25 feet wide. From a point 100 feet west of the crossing, it is 40 feet from the center of the railroad to the south side of the parallel street, and a little less than 60 feet to the north side of that street. The first of these "mulberry trees was about 75 feet from the north side of the track and about 68 feet west of the center of 14th Street." The second tree was approximately the same distance from the track and about 150 feet west of the center of 14th Street, and the third tree about 210 feet from the center of 14th Street. Traveling southwardly on 14th Street, toward the railroad, it is about 85 feet from the track to the mouth of Mulberry Street. The distance from the center of the intersection of 14th and Mulberry Streets to the track is 45 feet.

Plaintiff's witness, S. M. Credle, who made the map and explained the distances and measurements, said when a person is at this point, "45 feet from the railroad track, there are no obstructions there and I think he

could see the headlight of a train for at least 700 feet." He further said: "When you get there in the center of the intersection of 14th and Mulberry there will be no trees that would interfere with a person's vision up the track. . . . a person looking up the railroad track could see 700 feet, I think. . . . As you get nearer to the track . . . you could see a considerable distance beyond 700 feet . . ."

Another witness, J. F. Thrift, called by the plaintiff, testified: . . . "I could see a headlight on a train for 600 or 700 feet up the track."

Plaintiff's eyewitness, David Sloan, said he was sitting in his parked car on Mulberry Street about 125 feet east of 14th Street, approximately 200 feet from the crossing, headed in the direction of the crossing. He testified, in part: "After I saw the automobile it never stopped from the time I saw it until it got in about 3 or 4 feet of the railroad track and then it stopped. It then started on across the track and got up on the track. The train hit the car. No, sir, the train did not hit him exactly right after he drove up on the track, it was about a second after. I heard the train blow and from where I was sitting I could see the train and the headlight from the train some distance up here west of the crossing. It didn't start blowing until about 125 feet down the track, and that is just an estimate on my part. . . . On this particular night it was cloudy and dark. . . . It was not exactly cold and my window was all the way down. . . . There were no obstructions, no buildings in the way to keep me from seeing it. I could see that engine I would say 300 feet before it ever got to the crossing. I could hear the train. And I heard the whistle blow. The train was making the ordinary noise of a train as it comes along the track. . . . There was a street light over the intersection of 14th Street and Mulberry Street and it was burning there that night. There was a North Carolina stop sign on the right-hand side of 14th Street as you come up to the railroad and that was there that night. There was also a North Carolina stop sign on the south side of 14th Street as you approach the railroad. I don't know what the sign had on it, I know it was to stop. There was a sign at the railroad crossing to stop, which said North Carolina Law Stop. And that was on both sides of the crossing, but I am not sure whether there was another sign that had a crossing bar on it."

At the close of the plaintiff's evidence, defendants moved for judgment of nonsuit. The motion was allowed, and from judgment based on such ruling the plaintiff appealed, assigning errors.

Claude V. Jones and Egbert L. Haywood for plaintiff, appellant.

W. T. Joyner, Spears & Hall, H. E. Powers, and Marshall T. Spears, Jr., for defendants, appellees.

JOHNSON, J. Assuming but not deciding that the evidence offered below made out a *prima facie* case of actionable negligence against the defendants, nevertheless, it is manifest from the evidence adduced that plaintiff's intestate failed to exercise due care under the surrounding circumstances for his own safety and that such failure contributed to, and was a proximate cause of, his death. The case is controlled by the principles explained and applied in *Carruthers v. R. R.,* 232 N.C. 183, 59 S.E. 2d 782; *Bailey v. R. R.,* 223 N.C. 244, 25 S.E. 2d 833; *McCrimmon v. Powell,* 221 N.C. 216, 19 S.E. 2d 880; *Godwin v. R. R.,* 220 N.C. 281, 17 S.E. 2d 137; *Miller v. R. R.,* 220 N.C. 562, 18 S.E. 2d 232. See notes and comments: 29 N.C.L.R., p. 301 *et seq.*

In *Godwin v. R. R., supra* (220 N.C. 281, p. 285 *et seq.*), a nonsuit was sustained where it appeared from the plaintiff's testimony that she started her car and drove a distance of about 20 feet across two tracks and onto a third track in front of an approaching train. In delivering the opinion for the Court, *Stacy, C. J.,* had this to say: "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. . . . The plaintiff thus proves himself out of court. . . . In the application of this rule it is recognized that 'a railroad crossing is itself a notice of danger, and all persons approaching it are bound to exercise care and prudence, and when the 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.' . . . We have said that a traveler has the right to expect timely warning, . . . but the failure to give such warning would not justify the traveler in relying upon such failure or in assuming that no train was approaching. It is still his duty to keep a proper lookout. . . . 'A traveler on the highway, before crossing a railroad track, as a general rule, is required to look and listen to ascertain whether a train is approaching; and the mere omission of the trainmen to give the ordinary or statutory signals will not relieve him of this duty.' "

In *Carruthers v. R. R., supra* (232 N.C. 183), a nonsuit was affirmed where it appeared that at a point about 24 feet from the track the plaintiff's intestate had an unobstructed view up the railroad for 700 feet and that the train approached the crossing without giving any signal or warning.

In *Miller v. R. R., supra* (220 N.C. 562, bot. p. 564 *et seq.*), *Stacy, C. J.,* again speaking for the Court, said: "It is well established by all the evidence that the plaintiff started his car and drove a distance of eight or ten feet onto the crossing in front of an oncoming train, which he

should have seen in the exercise of reasonable care. This was negligence on his part which contributed to the injury." . . .

In *Bailey v. R. R., supra* (223 N.C. 244), it was held that even though it appeared that the defendant was negligent in failing to give warning of the approach of its train, in exceeding the speed limit fixed by municipal ordinance and in allowing the railroad bed to become rough by reason of holes therein and rails protruding 2½ to 3 inches above the roadbed, judgment of nonsuit was proper, since the evidence disclosed that plaintiff's intestate drove on the track in front of a train when he had an unobstructed view down the track for several hundred yards.

In the instant case, the evidence shows unmistakably that the intestate had a clear, unobstructed view of several hundred feet along the track in the direction of the approaching train. The only reasonable inferences deducible from the evidence are that he either (1) looked, saw the train, and gambled on his chance of crossing in safety; (2) looked and failed to see the train; or (3) failed to look before proceeding forward onto the track. In either of these events, he is chargeable as a matter of law with negligence proximately causing or contributing to his death. *Carruthers v. R. R., supra.*

It was a tragic, regrettable occurrence, but this record impels the conclusion that the defendants should not be required to respond in damages.

The judgment below is

Affirmed.

ODELL B. DOUB AND WIFE, BERNICE H. DOUB; ESTELLE G. HARPER, INDIVIDUALLY AND AS EXECUTRIX OF THE WILL OF W. L. HARPER, DECEASED; EMILY HARPER OGBURN AND HUSBAND, CARL D. OGBURN; EMILY C. OGBURN, UNMARRIED, AND CARL D. OGBURN, JR., UNMARRIED, v. ANDREW BLAINE HARPER, WIDOWER; ELIZABETH SIMPSON HARPER, WIDOW; ELIZABETH SHANNON HARPER, AN INFANT 13 YEARS OF AGE; LEAH ELIZABETH HARPER, AN INFANT 7 YEARS OF AGE; AND ANY AND ALL PERSONS NOT NOW IN BEING, AND ANY AND ALL PERSONS UNDER ANY DISABILITY, AND ANY AND ALL PERSONS WHOSE NAMES AND RESIDENCES ARE NOT KNOWN, WHO, BECAUSE OF OR IN ANY CONTINGENCY MAY, TO ANY DEGREE OR EXTENT BECOME INTERESTED IN THE LANDS INVOLVED IN THIS ACTION WHICH WAS BROUGHT TO QUIET TITLE TO SAID LANDS.

(Filed 7 June, 1951.)

1. Executors and Administrators § 12b—

A testator may confer on his executor by his will the power to sell his real property for any lawful purpose to which the testator wishes the proceeds of his real property to be applied.

2. Same—

A testamentary power to sell real property generally continues as long as there remains an unfulfilled object or purpose of testator in aid of which it was intended that the power should or might be exercised.

3. Same—

Whether a testamentary power to sell real property extends beyond the period that the executor is to perform his ordinary legal duties in settling the personal estate depends on the intention of the testator as expressed in the will.

4. Wills § 31—

A phrase in a will should not be given a significance which clearly conflicts with the evident intent and purpose of the testator as gathered from the four corners of the instrument.

5. Executors and Administrators § 12b—Power of disposition held not terminated upon completion of administration of personalty and the filing and approval of final account.

Testator made his wife his executrix and devised his real property to his wife for life and then to his children, with provision that should she remarry the realty should be equally divided between her and the children, with further provision giving the executrix power to sell "any and all property of my estate during its administration or confirmation," immediately followed by power to sell at public or private sale and transfer legal title thereto. *Held:* The power to sell does not terminate upon the completion of the administration of the personalty, and the filing and approval of the final account, but such power continues during the life of the widow or until her remarriage so she may sell and reinvest in order to effectuate the purpose of testator that the property bring in an income for the use of the widow.

6. Executors and Administrators § 26—

An executor does not abrogate a testamentary provision giving him power to sell the realty after the completion of the administration of the personal estate by making a final settlement, but neither the final account nor its approval by the clerk and discharge of the executor can affect matters not included or necessarily involved in the account.

APPEAL by plaintiffs from *Nettles, J.*, at the March Term, 1951, of FORSYTH.

Civil action under G.S. 41-10 to quiet title to realty.

The controlling facts are not in dispute. They are summarized in the numbered paragraphs set forth below.

1. W. L. Harper, a resident of Forsyth County, North Carolina, died intestate on 15 December, 1936, survived by his widow, Estelle G. Harper; his son, James Lewis Harper; and his daughter, Emily Harper Ogburn. The daughter is married to Carl D. Ogburn, and has two children, Emily C. Ogburn and Carl D. Ogburn, Jr. W. L. Harper left a small personal

estate, and an undivided one-third interest in 190 acres of land situate in Lewisville Township, Forsyth County, North Carolina.

2. The will of W. L. Harper was admitted to probate before the Clerk of the Superior Court of Forsyth County on 8 January, 1937. The will contains these provisions:

First. After the payment of my just debts, including my funeral expenses, I bequeath and devise all my real estate, or any interest therein to my wife, Estelle G. Harper, during her lifetime and then absolutely to my two children, Emily Ogburn and James Lewis Harper, share and share alike in fee simple. Should my wife, Estelle G. Harper, remarry, then this real estate shall vest immediately in three equal parts in Estelle G. Harper, Emily Ogburn and James Lewis Harper in fee simple. Should either Emily Ogburn or James L. Harper predecease their mother, Estelle G. Harper, then their children shall share in the estate *per stirpes.*

Second. I devise and bequeath all of the residue of my property, both personal and mixed of whatsoever kind or nature to my wife, Estelle G. Harper during her lifetime and after her death to my two children, Emily Ogburn and James L. Harper absolutely. Should my wife, Estelle G. Harper, remarry, then all my personal property shall be divided equally between my wife, Estelle G. Harper and my two children, Emily Ogburn and James Lewis Harper share and share alike absolutely and in case of the death of either of my two children before my wife, then their children shall share in the property *per stirpes.*

Third. I nominate and appoint Estelle G. Harper as Executrix of this my last will and testament, and designate that the said Executrix shall not be required to give bond by the court administering this will and I give unto my said Executrix full power to sell, mortgage, hypothecate, invest, re-invest, exchange, manage, control and in any way deal with any and all property of my estate during its administration or confirmation and the said Executrix is hereby given authority to sell real estate or personal property at public or private sale and convey the same by such Deeds or other instruments of conveyances as may be necessary to transfer legal title thereto.

3. Letters testamentary were issued to Estelle G. Harper as executrix of the will of W. L. Harper by the Clerk of the Superior Court of Forsyth County on 8 January, 1937.

4. Estelle G. Harper, Executrix of the Will of W. L. Harper, filed an *ex parte* final account in the office of the Clerk of the Superior Court of Forsyth County on 5 May, 1938, showing that she had fully administered upon the personal estate of her testate. The Clerk thereupon entered an order approving the final account and purporting to discharge the executrix.

5. James Lewis Harper, a resident of Forsyth County, died intestate on 13 January, 1946, survived by his widow, Elizabeth Simpson Harper, and his two daughters, Elizabeth Shannon Harper and Leah Elizabeth Harper.

6. Estelle G. Harper filed an *ex parte* petition before the Clerk of the Superior Court of Forsyth County on 4 January, 1950, alleging the matters set forth above and praying "that the estate of . . . W. L. Harper be . . . reopened to the end . . . that . . . Estelle G. Harper, Executrix named in the will of the said W. L. Harper, may exercise the power of sale of real property contained in said will, and that she may in all other respects take such steps as may be deemed necessary to effectuate the terms of said will and to fully administer the estate of the said W. L. Harper." The Clerk entered an order on the same day, granting the prayer of the petition.

7. Estelle G. Harper, Executrix of the will of W. L. Harper, executed a deed on 5 January, 1950, sufficient in form to convey the undivided one-third interest in the 190 acre tract to the plaintiff, Odell B. Doub, in fee simple. The deed was made pursuant to a private sale, and the consideration for it was $3,333.33.

8. The plaintiffs brought this action against the defendants on 27 December, 1950, alleging in specific detail that the plaintiff Odell B. Doub acquired an indefeasible title to the undivided one-third interest in the 190 acres under the deed of 5 January, 1950, and that the defendants make unfounded claims to estates in such property adverse to him. The plaintiffs pray judgment quieting the title of the plaintiff, Odell B. Doub, as against such unfounded adverse claims. The defendants, Andrew Blaine Harper and Elizabeth Simpson Harper, suffered judgment to be taken against them without answer. But the other defendants filed an answer through their guardian *ad litem*, William S. Mitchell, admitting that they claim estates in the property in question adverse to the plaintiff, Odell B. Doub, under the will of W. L. Harper, and alleging in specific detail that the deed of 5 January, 1950, is void because the testamentary power of sale conferred on Estelle G. Harper, Executrix, by the will of W. L. Harper terminated on 5 May, 1938, when the personal estate of the testator was finally settled. The answering defendants seek a cancellation of the deed.

When the cause came on for hearing, the plaintiffs and the answering defendants waived trial by jury under G.S. 1-184. After hearing the testimony presented by the parties, the presiding judge made findings conforming to the facts set forth above, concluded as a matter of law thereon that Estelle G. Harper, as Executrix, had no power under the will of W. L. Harper to convey the property in controversy to the plaintiff, Odell B. Doub, and entered judgment canceling the deed of 5 Janu-

ary, 1950. The plaintiffs excepted and appealed, assigning the conclusion of law and judgment as error.

E. M. Whitman for plaintiffs, appellants.

William S. Mitchell for answering defendants, appellees.

ERVIN, J. The appeal presents this single question for determination: Did Estelle G. Harper, Executrix of the Will of W. L. Harper, have testamentary authority on 5 January, 1950, to sell the undivided one-third interest in the 190 acre tract to the plaintiff, Odell E. Doub?

These legal principals are pertinent to this inquiry:

1. A testator may confer on his executor by his will the power to sell his real property for any lawful purpose to which the testator wishes the proceeds of his real property to be applied. *Powell v. Timber Corp.,* 193 N.C. 794, 138 S.E. 161; *Trogden v. Williams,* 144 N.C. 192, 56 S.E. 865, 10 L.R.A. (N.S.) 867; *Johnson v. Johnson,* 108 N.C. 619, 13 S.E. 183; *Beam v. Jennings,* 89 N.C. 451; *Ferebee v. Procter,* 19 N.C. 439.

2. A testamentary power to sell real property generally continues as long as there remains an unfulfilled object or purpose of the testator in aid of which it was intended that the power should or might be exercised. 33 C.J.S., Executors and Administrators, section 278; *Foley v. Devine,* 95 N. J. Eq. 473, 123 A. 248; *Crozer v. Green,* 298 Pa. 438, 148 A. 506.

3. Whether a testamentary power to sell real property extends beyond the period that the executor is to perform his ordinary legal duties in settling the personal estate depends on the intention of the testator as expressed in the will. 33 C.J.S., Executors and Administrators, section 278; *Sharpe v. Ogle,* 138 Md. 10, 113 A. 340.

The court below adjudged that Estelle G. Harper, Executrix of the Will of W. L. Harper, did not have testamentary authority to make the sale in controversy. Although the judgment does not ascribe any reason for this decision, it is evident that the trial court concluded that the testator conferred the power of sale on his executrix by the third item of his will merely to facilitate her performance of her ordinary legal duties in collecting his assets, paying his debts and settling his personal estate, and that consequently the power of sale terminated on 5 May, 1938, when she filed a final account showing the completion of these ordinary legal tasks.

Candor compels the confession that the provision of the third item giving the executrix power to sell "any and all property" of the testator "during its administration or confirmation" undoubtedly lends color to this construction of the will. Nevertheless, such construction clearly conflicts with the evident intent and purpose of the testator when due heed is

paid to everything within the "four corners of the instrument." *Williams v. Rand,* 223 N.C. 734, 28 S.E. 2d 247; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356. When this is done, it becomes apparent that the testator did not use the words "during its administration or confirmation" to indicate the time required by his executrix to discharge her ordinary legal duties of collecting his assets, paying his debts, and settling his personal estate, but that he employed them to define the period in which his will committed the management of his entire property to his widow, Estelle G. Harper, either in her fiduciary capacity as executrix or in her individual character as the primary object of his bounty.

A consideration of all the provisions of the will discloses the dominant purpose of the testator to devote the entire income from all his property to the support of his widow until she dies or remarries. To this end, he gives her all of his estate, both real and personal, for life or during widowhood. Moreover, he confers on his executrix the express power to sell, exchange, invest, and reinvest "any and all property" of his estate. Even the caviler cannot contend that the power to exchange, invest, and reinvest the real property of the testator is related in any way to the ordinary duties of his executrix to collect his assets, pay his debts, and settle his personal estate. The grant of such power by the testator to his executrix manifests the deliberate intention on his part to have his estate actually yield an income to his widow during the time she is entitled to enjoy it.

These things being true, it necessarily follows that the testator intended that the power of his executrix to sell, exchange, invest, and reinvest his property should not terminate at the settlement of his personal estate, but should continue until the death or remarriage of his widow. Inasmuch as the object or purpose of the testator to have his estate yield income to his widow throughout her life or widowhood had not been fulfilled on 5 January, 1950, his executrix had authority under his will to sell the property in question to the plaintiff, Odell B. Doub, and to invest the proceeds of the sale in other property, so that the widow might use such other property or the income arising thereon until her death or remarriage. It is noted here that the will explicitly empowers the executrix "to sell real estate . . . at private sale and to convey the same by such deeds or other instruments of conveyance as may be necessary to transfer legal title thereto."

In reaching the conclusion that the executrix had power to make a valid sale of the realty in question on 5 January, 1950, we have not overlooked the fact that she filed a final account on 5 May, 1938, showing that she had fully administered upon the personal estate, or the further fact that the Clerk of the Superior Court entered an order on that day approving such final account and purporting to discharge the executrix.

Manifestly, an executor does not abrogate a testamentary provision giving him power to sell the realty of his testator after completion of the administration of the personal estate by making a final settlement of the personal estate. *Sharpe v. Ogle, supra.* Moreover, neither the final account of an executor nor an order of the probate court approving it is operative as to matters not included or necessarily involved in the account. *Edwards v. McLawhorn,* 218 N.C. 543, 11 S.E. 2d 562. Furthermore, an order of discharge made by the probate court on a final accounting by an executor cannot do more in any event than discharge the executor from liability for the past. It does not destroy the executorship, or revoke an unexecuted power of sale conferred on the executor by the will. *Starr v. Willoughby,* 218 Ill. 485, 75 N.E. 1029, 2 L.R.A. (N.S.) 623. Hence, neither the final account nor the order of the Clerk deprived the executrix of the power conferred upon her by the will to sell the real estate in question.

There is no impropriety in the order made by the Clerk on 4 January, 1950. *In re Trust Co.,* 210 N.C. 385, 186 S.E. 510.

For the reasons given, the judgment canceling the deed of 5 January, 1950, is set aside, and the cause is remanded to the Superior Court of Forsyth County with directions that it enter a decree on the facts found adjudging such deed to be valid and quieting the title of the plaintiff, Odell B. Doub, to the property in controversy as against the adverse claims of the answering defendants.

Error and remanded.

MILLER'S MUTUAL FIRE INSURANCE ASSOCIATION OF ALTON, ILLINOIS, v. ROBERT W. PARKER, T/A PARKER'S ESSO SERVICE No. 2.

(Filed 7 June, 1951.)

1. Contracts § 7e—

Under the fundamental freedom to contract, a party may stipulate against liability for his own negligence provided such provision is not violative of law or contrary to some rule of public policy.

2. Bailment § 4—

Ordinarily a bailee is not liable for loss or damage to the property bailed unless he is at fault, and therefore a provision of the contract that the bailee should not be liable for theft or destruction of the property by fire is a provision relieving the bailee from liability for his own negligence.

3. Same—

The duty of a bailee to exercise due care to protect the property bailed against loss, damage or destruction, is a duty imposed by law from the

relationship of the parties and not a duty implied under the bailment contract, and a breach of this duty gives rise to an action in tort for negligence rather than one on the contract.

4. Same: Contracts § 7e—

While the bailee may contract against liability for his own negligence where there is no great disparity of bargaining power and where the contract of bailment concerns only the private affairs of the parties, the operation of a public parking lot at which the public is dealt with on a uniform basis and prospective bailors must accept conditions imposed or go without the service, is a matter in which the public has an interest, and a contractual provision that such bailor should not be liable for a loss of vehicles by fire or theft is contrary to public policy and is unenforceable. Contracts in which the owner of the car is a mere licensee or lessee, distinguished.

APPEAL by plaintiff from *Bennett, Special Judge,* January Special Term, 1951, MECKLENBURG. New trial.

Civil action to recover the value of a stolen automobile.

Defendant operates an automobile parking lot in Charlotte in connection with one of his filling stations. A Mrs. Jenkins contracted for the parking of her automobile on said lot on a monthly basis under an agreement that the defendant should not be liable for the loss of said vehicle by fire or theft.

The automobile was stolen while parked on defendant's lot. Plaintiff, insurance carrier, paid Mrs. Jenkins the loss sustained, took an assignment, and now sues under the doctrine of subrogation. In its complaint it alleges want of due care on the part of the defendant in protecting the automobile against theft and particularizes the acts of alleged negligence on his part. The defendant, answering, denies negligence or want of due care on his part and pleads the contract with the owner in bar of plaintiff's right to recover.

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

"1. Did Mrs. Jenkins agree that the defendant was not to be liable for the loss of her car by fire or theft?

"Answer: YES.

"2. Was Mrs. Jenkins' automobile lost as the proximate result of the negligence of the defendant?

"Answer:

"3. What damages, if any, is the plaintiff entitled to recover of the defendant?

"Answer: . . ."

On the verdict rendered the court entered judgment against the plaintiff and it excepted and appealed.

Taliaferro, Clarkson & Grier for plaintiff appellant.
J. M. Scarborough for defendant appellee.

BARNHILL, J. A provision in a contract seeking to relieve a party to the contract from liability for his own negligence may or may not be enforceable. It depends upon the nature and the subject matter of the contract, the relation of the parties, the presence or absence of equality of bargaining power and the attendant circumstances.

Under our system of government, freedom of contract is a fundamental, basic right of every citizen. Even so, the public interest is paramount. If the provision is violative of law or contrary to some rule of public policy, it is void and unenforceable.

Under this limitation the courts are in complete accord in holding that a public service corporation or a public utility cannot contract against its negligence in the regular course of its business or in performing one of its duties of public service. The limitation is likewise uniformly applied to certain relationships such as that of master and servant.

Here complete accord ceases to exist. Some courts go so far as to hold, without qualification, that under no circumstances may a person validly contract against liability for his own negligence. Anno. 175 A.L.R. 14. However, the decided weight of authority limits the rule against such contracts to the principle that a party cannot protect himself by contract against liability for negligence in the performance of a duty of public service, or where a public duty is owed, or public interest is involved, or where public interest requires the performance of a private duty. Anno. 175 A.L.R. 14.

On this question the decisions of this Court are in accord with the majority view. We hold that even a public service corporation is protected by such an exculpatory clause when the contract is casual and private, in no way connected with its public service and concerning private property in which the public has no interest. *Singleton v. R. R.,* 203 N.C. 462, 166 S.E. 305; *Slocumb v. R. R.,* 165 N.C. 338, 81 S.E. 335.

But here we are interested primarily in a contract of bailment containing a clause or provision protecting or attempting to protect the bailee against liability for his own negligence.

We may note in the beginning that the contention of the plaintiff that the contract relied on by the defendant does not specifically exempt the defendant from liability for his own negligence and the language used is of such doubtful import that it should not be so construed is untenable. Ordinarily the bailee is not liable for loss of or damage to the property bailed if he is without fault. *Whitlock v. Lumber Co.,* 145 N.C. 120; *Beck v. Wilkins,* 179 N.C. 231, 102 S.E. 313; *Hanes v. Shapiro,* 168 N.C. 24, 84 S.E. 33; *Falls v. Goforth,* 216 N.C. 501, 5 S.E. 2d 554. Speaking

to the subject in the *Falls case, Stacy, C. J.*, says: "Ordinarily, the liability of a bailee for the safe return of the thing bailed is made to depend on the presence or absence of negligence." If, therefore, the contract at issue was not intended to protect the defendant against his own negligence, it is devoid of any real substance. So then, we are dealing with a contract which presents squarely the question debated on this appeal.

At first blush it would seem that the duty of a bailee to exercise due care to protect the thing bailed against loss, damage, or destruction is an obligation imposed by the contract, and that a breach thereof gives rise to an action on the contract rather than in tort for negligence. *Council v. Dickerson's, Inc.*, 233 N.C. 472. But the courts uniformly hold that it is a legal duty arising out of the relationship created by the contract. If a person accepts and receives the property of another for safe keeping or other purpose under a contract of bailment, the law requires of him due care by reason of the semitrust relation he thus assumes. *Hanes v. Shapiro, supra; Trustees v. Banking Co.*, 182 N.C. 298, 109 S.E. 6. The obligation to use due care in contracts of this type arises from the relation created by the contract and is independent, rather than a part of it. 6 A.J. (Rev.) 343. That the obligation arises from the relation and not as an implied term of the contract is shown by the refusal of the law under certain circumstances to give effect to provisions in the contract undertaking to nullify the effect of the obligation. *Kenney v. Wong Len*, 128 A. 343.

It is a well-recognized rule of law that in an ordinary mutual benefit bailment, where there is no great disparity of bargaining power, the bailee may relieve himself from the liability imposed on him by the common law so long as the provisions of such contract do not run counter to the public interest. *Hanes v. Shapiro, supra; Cooke v. Veneer Co.*, 169 N.C. 493, 86 S.E. 289; *Sams v. Cochran*, 188 N.C. 731, 125 S.E. 626; *Singleton v. R. R., supra;* Anno. 175 A.L.R. 117. This rule is applied with practical unanimity where the public neither has nor could have any interest whatsoever in the subject matter of the contract, considered either as a whole or as to the incidental covenant in question, and the agreement between the parties concerns their private affairs only. In respect to such contracts the public policy of freedom of contract is controlling.

Respecting other types of bailment, there are various shades of opinion. Many courts hold that where the bailee makes it his business to act as bailee for hire, on a uniform and not an individual basis, it is against the public interest to permit him to exculpate himself from his own negligence. And the decided trend of modern decisions is against the validity of such exculpatory clauses or provisions in behalf of proprietors of parking lots, garages, parcel check rooms, and warehouses, who undertake to protect themselves against their own negligence by posting signs or

printing limitations on the receipts or identification tokens delivered to the bailor-owner at the time of the bailment. In such cases, the difference is the difference between ordinary bailees, on the one hand, and what may be called professional bailees, on the other. They hold themselves out to the public as being possessed of convenient means and special facilities to furnish the service offered for a price. They deal with the public on a uniform basis and at the same time impose or seek to impose predetermined conditions which rob the customer of any equality of bargaining power.

While there is authority *contra,* we are persuaded this rule is founded on reason and common sense and should prevail in respect to contracts such as the one relied on by the defendant.

The complexity of today's commercial relations and the constantly increasing number of automobiles render the question of parking a matter of public concern which is taxing the ingenuity of our municipal officials. People who work in the business sections of our cities and towns and who rely on automobiles for transportation find it difficult—sometimes impossible—to locate a place on the public streets where daily parking is permitted. They are driven to seek accommodation in some parking lot maintained for the service of the public. There they are met by predetermined conditions which create a marked disparity of bargaining power and place them in the position where they must either accede to the conditions or else forego the desired service.

Such was the case here. The defendant was engaged in the business of accepting automobiles for parking for hire, both on a daily and a monthly basis. He required the owner-bailor to surrender the keys to his automobile so that he or his employee could park it at any place of his choosing and move it from time to time during the day as occasion might require. He had "a pretty good-sized sign," "very prominently displayed" saying "Not responsible for loss by fire or theft." He told Mrs. Jenkins "we would not be responsible for loss by fire or theft." "I told her if there was any loss from fire or theft, it would be her responsibility. She left the car. She did not make any statement." This same provision was printed on the identification tokens furnished those who parked by the day only. Under these circumstances it is against the public interest to give force and effect to the exculpatory agreement which would relieve defendant from all liability for his own negligence.

We do not mean to say that this rule applies to all parking arrangements. Under the contract of the parties, the owner may be a mere licensee or a lessee. See *Freeman v. Service Co.,* 226 N.C. 736, 40 S.E. 2d 365; 7 Blashfield, sec. 4668.

We have not cited any considerable number of authorities for the reason those interested may find a comprehensive annotation of the whole

subject in 175 A.L.R. at page 1 *et seq.* where some authority to sustain almost any shade of opinion may be found. See also Restatement of the Law of Contracts, Vol. II, sections 574 and 575; 7 Blashfield, sec. 4668; 7A Blashfield, sec. 5022 *et seq.;* 6 A.J. (Rev.) 176 *et seq.*

The verdict rendered is not sufficient to sustain the judgment entered. For that reason there must be a

New trial.

J. A. JOHNSON v. NEW AMSTERDAM CASUALTY COMPANY.

(Filed 7 June, 1951.)

1. **Insurance § 43b—**

   The fact that the franchise permitting the operation of a truck in the carriage of goods for hire is limited to the jurisdiction of the issuing authority, does not of itself limit the coverage of a liability policy to use of the truck in such territory.

2. **Insurance § 13a—**

   Unambiguous insurance contracts will be construed according to the meaning of the terms used, interpreted according to their usual, ordinary and commonly accepted meaning, but when an ambiguous term is reasonably susceptible to two interpretations, the courts will adopt that construction imposing liability.

3. **Insurance § 43b—**

   Where a policy of liability insurance stipulates that the customary use of the vehicle is confined to a stipulated radius, coverage is not affected by an occasional use beyond the radius specified; but an agreement that the vehicle is to be operated entirely or exclusively within a specified radius confines the coverage to the radius stipulated.

4. **Same—**

   The policy in suit provided that the vehicle insured was customarily used within a fifty mile radius of the city where the vehicle was principally garaged and that no trips were customarily made beyond such radius or "within the area of cities and towns designated herein. Cities and towns excluded: State of North Carolina." *Held:* The policy covers liability for a collision occurring in a rural section of North Carolina within a fifty mile radius of where the vehicle was principally garaged, notwithstanding that at the time the vehicle was returning from a trip beyond this radius.

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

APPEAL by defendant from *Sink, J.*, August Term, 1950, of GUILFORD (High Point Division).

This is an action to recover from the defendant the amount of an unsatisfied judgment and costs, which the plaintiff obtained in the Superior Court of Guilford County (High Point Division), on 22 March, 1949, against one Darling Carroll Woodall, referred to hereinafter as Woodall.

When this cause came on for hearing, the parties stipulated and agreed the Judge should hear the evidence, find the facts, make the necessary conclusions of law and render judgment thereon.

A summary of the pertinent facts found is as follows:

1. Sometime prior to 2 June, 1948, Woodall decided to enter the trucking business and to do general hauling in and around Martinsville, Virginia. He acquired a 1948, one and a half ton Chevrolet truck for use in this business. In order to obtain a license or permit to operate this truck as a carrier for hire, it was necessary for him to obtain public liability and property damage insurance and to file the policy therefor with the State Corporation Commission of Virginia.

2. Woodall applied to the defendant for such insurance, covering the above described truck, the application being made through its duly authorized local agent in Martinsville, Virginia. The local agent and Woodall discussed various premium rates, and the agent advised Woodall that the premiums varied according to the territories in which motor vehicle operations were conducted.

3. The defendant issued the policy, effective from and after 2 June, 1948, for a period of one year, and forwarded it to the State Corporation Commission of Virginia. The required annual premium was paid by Woodall.

4. The policy contained an endorsement in the following language: "(1) The customary use of the automobile is confined to the area within a fifty mile radius of the limits of the city or town where the automobile is principally garaged as stated in the declaration, excluding the area within cities and towns designated herein; and (2) No trips are customarily made by the automobile to any location beyond such radius or within the area of cities and towns designated herein. Cities and towns excluded: State of North Carolina."

5. On 17 June, 1948, Woodall began a trip in said Chevrolet truck from Martinsville to Columbia, South Carolina, for the purpose of obtaining a load of watermelons, when he had a collision with an automobile owned and operated by the plaintiff, J. A. Johnson, resulting in extensive damage to the plaintiff's automobile. The collision occurred in a rural area in North Carolina, on State Highway No. 220, thirty-three miles from Martinsville, Virginia.

6. This collision was reported to the local agent of the defendant, in Martinsville, on 18 June, 1948. The defendant immediately gave notice

of cancellation of the policy, effective as of 21 July, 1948. The unearned portion of the premium was returned to Woodall, the defendant retaining the premium for the period from 2 June, 1948, to 21 July, 1948.

7. The plaintiff herein instituted suit on 3 February, 1949, in the Superior Court of Guilford County (High Point Division), against Woodall, for the recovery of damages to the plaintiff's Buick automobile resulting from the collision above mentioned. The summons and complaint in said action were duly served on Woodall. He notified the defendant of the institution of the action and made demand on it to defend the action on his behalf. This the defendant refused to do, and denied liability under the terms of its policy of insurance.

8. Plaintiff obtained a judgment in the aforesaid court at the March Term, 1949, for $1,500.00 and costs in the sum of $15.60. Demand for payment of the judgment was made on Woodall and the defendant, neither of whom has paid the judgment and costs or any part thereof. Hence, this action to recover the amount of said judgment and costs, together with interest upon the judgment from 22 March, 1949, until paid.

Upon the facts found his Honor held as a matter of law (1) that the endorsement, on the policy of insurance, involved herein, did not exclude coverage of the insured vehicle while operated within a radius of fifty miles of Martinsville, Virginia, and outside of locations within cities and towns in North Carolina; (2) that the aforesaid policy of insurance covered the motor vehicle collision hereinbefore mentioned, which occurred on 17 June, 1948, and the defendant was legally obligated to defend the action brought against Woodall as a result of said collision; and (3) the plaintiff is entitled to recover of the defendant the sum of $1,500.00, together with interest from 22 March, 1949, until paid, $15.60 court costs for the use of the Clerk of the Superior Court of Guilford County, and the costs of this action.

Judgment was entered accordingly, and the defendant appeals and assigns error.

Welch Jordan for plaintiff.
Smith, Sapp, Moore & Smith for defendant.

DENNY, J. The defendant has brought forward numerous exceptions and assignments of error to the findings of fact by the court below. However, there is evidence to support such findings and the exceptions thereto will not be upheld.

Moreover, this appeal turns on the interpretation placed upon the endorsement attached to and made a part of Woodall's policy of insurance.

It is apparent that Woodall applied for a license or permit from the State Corporation Commission of Virginia to operate a truck for hire in

Virginia. Such Commission would have no authority to issue a license or permit to be used in interstate commerce. Even so, this would have no bearing on the right of the defendant to issue a policy of insurance on Woodall's truck, which would remain in full force and effect if and when the truck was operated outside the State of Virginia. *Utilities Insurance Co. v. Potter,* 188 Okla. 145, 105 P. 2d 259, 154 A.L.R. 512; *certiorari* dismissed 312 U.S. 662, 85 L. Ed. 1109; *Couk v. Ocean Accident & Guarantee Corp.,* 138 Ohio St. 110, 33 N.E. 2d 9; *Utilities Insurance Co. v. Smith* (C.C.A. 10th Cir.), 129 F. 2d 798. There is nothing in the defendant's insurance contract which limits its liability to damages incurred only within that portion of the radius of fifty miles of Martinsville, Virginia, which lies within the State of Virginia.

If by attaching the endorsement set out herein to Woodall's policy of insurance, it was the purpose of the defendant to exclude the State of North Carolina, or that portion of it which lies within a radius of fifty miles of Martinsville, Virginia, as a part of the area in which the truck was customarily used, it did not do so by the language used.

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. *Motor Co. v. Insurance Co.,* 233 N.C. 251, 63 S.E. 2d 538; *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; *Roberts v. Insurance Co.,* 212 N.C. 1, 192 S.E. 873; *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.,* 169 N.C. 35, 85 S.E. 37; *Penn v. Insurance Co.,* 158 N.C. 29, 73 S.E. 99. "But if they are reasonably susceptible of two interpretations, the one imposing liability, the other excluding it, the former is to be adopted and the latter rejected, because the policies having been prepared by the insurers, or by persons skilled in insurance law and acting in the exclusive interest of the insurance company, it is but meet that such policies should be construed liberally in respect of the persons injured, and strictly against the insurance company." *Electric Co. v. Insurance Co.,* 229 N.C. 518, 50 S.E. 2d 295, and cases cited.

We hold that the language used in the endorsemnt simply means that the usual, or customary use of the truck, covered by the policy of insurance, was limited to an area within a radius of fifty miles of Martinsville, Virginia, exclusive of the area within cities and towns in North Carolina within that radius. And it is an indisputable fact that Martinsville, Virginia, is located not more than twelve or fifteen miles from the North Carolina State line.

And when the customary or regular use of the insured vehicle is confined during the policy period to the territory within a fifty-mile radius

of the limits of the city or town where the motor vehicle is principally garaged, it refers to the principal use, and the coverage is not affected by an occasional use beyond the specified radius. Blashfield's Cyclopedia of Automobile Law and Practice, Vol. 6, Insurance, Sec. 3974.5, p. 687; Appleman's Insurance Law and Practice, Vol. 7, Sec. 4294, p. 61; *Kindred v. Pacific Automobile Ins. Co.,* 10 Cal. 2d 463, 75 P. 2d 69; *Bandy v. East & West Insurance Co.,* Mo. App. (1942), 163 S.W. 2d 350; *Car & General Insurance Corp. v. Novodoczky,* 101 Ind. App. 509, 200 N.E. 83. *Cf. Crowell v. Insurance Co., supra; Farm Bureau Mutual Automobile Insurance Co. v. Manson,* 94 N.H. 389, 54 A. 2d 580; and *Birnbaum v. Jamestown Mutual Insurance Co.,* 298 N.Y. 305, 83 N.E. 2d 128.

It is different, however, where it is agreed that the insured motor vehicle is to be operated entirely or exclusively within a specified radius or territory. In such cases the policy is ordinarily construed as not covering the vehicle on any trip outside or beyond the limited area. *Lummus v. Insurance Co.,* 167 N.C. 654, 83 S.E. 688; *Person v. Tyson,* 215 N.C. 127, 1 S.E. 2d 367; *Wallace v. Virginia Surety Co.,* 80 Ga. App. 50, 55 S.E. 2d 259.

The appellant is relying on the last cited cases in support of its position, each of which was decided on a factual situation substantially different from that before us.

In the *Lummus case, supra,* in consideration of a reduced rate, a private garage warranty was attached to the policy, in which it was agreed that the automobile would be kept in a private garage, at the residence of the insured, in Columbus, Georgia, with the "privilege, however, to operate car and to house in any other building or buildings for a period of not exceeding fifteen days at any one location at any one time, providing the car is en route, visiting, or being cleaned or repaired." The car was removed to Charlotte, North Carolina, not for the purpose of visiting, nor for having the car cleaned or repaired, but, on the contrary, its removal was permanent. It remained in Charlotte for five or six months, when it was placed in a machine shop in Columbia, South Carolina, in December, 1911, where it was destroyed by fire 10 January, 1912. The court held the permanent removal of the car from Columbus, Georgia, by reason of the provisions of the policy with respect to storage, rendered the contract of insurance void.

In *Person v. Tyson, supra,* the collision occurred outside the city limits of Rocky Mount, whereas the policy of insurance covering the defendant's taxicab expressly stated that the policy did not cover any loss resulting or arising from an accident while the taxi was being operated elsewhere than within the territorial limits of the City of Rocky Mount.

It is true that in the case of *Wallace v. Virginia Surety Co., supra,* the collision occurred within the 500-mile radius specified in the policy, while

the truck was returning from a trip which extended 225 miles beyond the radius in which all operations were to be confined. However, we do not consider this authority as controlling or persuasive on the question before us, for the reason, as pointed out in the dissenting opinion thereto, the endorsement further provided that the insurer "shall not be liable for nor will it pay any loss or claim whatsoever that results from any accident or loss occurring while the automobile or automobiles described in the policy are being operated outside of the radius of 500 miles of the place where such automobile or automobiles described in the policy are principally garaged." In light of this provision, it is difficult to understand how any operation within the area was excluded from coverage.

In the instant case the collision occurred within the area in which it was agreed the truck was customarily used, and there was not sufficient evidence to warrant a finding of fact to the effect that it was not so used. Furthermore, if it should be conceded that all of North Carolina was excluded from the confined area, the agent of the defendant testified that the endorsement on Woodall's policy permitted occasional trips beyond such area.

The judgment of the court below is

Affirmed.

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

STATE v. VERN MARK SHERIAN AND WILLIAM PEDEN.

(Filed 7 June, 1951.)

Criminal Law §§ 9, 53d—

Where defendants admit that they aided a person who had committed a felonious assault in their presence to escape and avoid arrest and punishment, but contend that they acted under compulsion and through fear of death or great bodily harm at the hands of the felon, it is reversible error for the court to fail to charge the jury adequately upon this defense arising upon their testimony, G.S. 1-180, and a charge to the effect that such aid must have been willful and with a felonious intent to aid the felon to escape arrest and punishment without specific instructions on the question of compulsion, is insufficient.

APPEAL by defendants from *Sink, J.*, October Term, 1950, of RICHMOND.

Criminal action tried upon a bill of indictment charging that the defendants willfully and feloniously, after a felonious assault with a

deadly weapon with intent to kill, inflicting serious injuries not resulting in death, had been made by one James Diggs upon one Rex Howell, with full knowledge that said felonious assault had been made, did render personal assistance and aid to the said James Diggs, aiding and assisting him to escape and avoid arrest and punishment.

The evidence tended to show that the defendants and a man named James Diggs, who was known to the defendants and who was wanted for murder in Norfolk, Virginia, drove from Norfolk to Hamlet, North Carolina, on the night of 30 May, 1949. Sherian was driving a 1949 Chevrolet car, Peden was in the front seat with him, and Diggs was in the back seat. As they approached the intersection of Highways 74 and 77, in the western part of Hamlet, about 5:30 a.m., on 31 May, 1949, Rex Howell, a member of the Hamlet Police Department, recognized Diggs, and followed the car. The car was driven eastward through Hamlet. When the car had gotten past the corporate limits, traveling toward Laurinburg, Howell signaled the driver of the car to stop and asked the defendants to identify themselves, and they did so. Diggs was then asked if he had any identification and he replied he did not. When asked what his name was he said it was "Smitty." The defendants told the officer all they ever heard him called was "Smitty." The officer then requested Diggs to get out of the car. He searched him finding a small address book, and as he looked in it Diggs shot him in the face with a pistol. Diggs got in the car and Sherian drove him away.

The evidence for the defendants tends to show that the defendant Peden went to visit the defendant Sherian at his home in South Norfolk on Sunday night, 30 May, 1949; that when he got ready to leave around ten o'clock, Sherian offered to take him home. His car was parked in front of his house. The defendants got in the car and after Sherian drove off, Diggs raised up in the back seat and said, "Drive me out of town." Sherian tried to reason with him, but he said "No time for talk, drive on." According to the defendants' evidence, Diggs was armed with a pistol and they carried him to Hamlet, where his father lived, because of fear of bodily harm.

When Diggs saw the officer following them in Hamlet, he said: "If he stops us, you know me only as "Smitty." And when they were stopped by the officer Diggs said, "Everybody sit tight."

After Diggs shot Howell, the defendants testified, Diggs got back in the car and gave the command to "drive on." Sherian drove his car down the highway for about a mile and a quarter, at which point Diggs directed him to stop. When Sherian stopped the car Diggs got out and said, "I'm going to take to the woods."

The defendants further testified that after Diggs left the car, Sherian turned the car around to go to the aid of the officer, but found the officer

had gone; that they then drove to Hamlet to report what had happened, and parked their car beside the Chevrolet place. They first decided the best thing to do was to report what had happened to the police. Then they got to thinking and decided the best thing to do was to return to Norfolk and report it to the police there. They caught a bus to Charlotte, then caught a ride to Greensboro, and went by bus from Greensboro to Portsmouth and on to Norfolk, where they immediately reported what had happened to the Norfolk Police Department. They were delivered to North Carolina officers at the State line that same day.

The evidence tends to show these defendants were never in trouble before this time and were men of good character.

From a verdict of guilty and the judgment entered upon the verdict, the defendants appeal and assign error.

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

John Kerr, Jr., and *Jones & Jones for defendants.*

DENNY, J. The defendants based their defense solely upon their contention that whatever assistance they rendered to James Diggs, after he feloniously assaulted Rex Howell, was done under compulsion and through fear of death or great bodily harm at the hands of Diggs, and not with the intention or for the purpose of enabling him to escape arrest and punishment.

In the charge in chief, the court instructed the jury that "the crime charged against the defendants . . . consists of the following elements: 1. The felony charged must have been committed; 2. The accused must have known that the felony had been committed by the person received, relieved or assisted; 3. The alleged accessory or accessories must render assistance to the felon."

Later in the charge the court instructed the jury on the 3rd element of the crime of accessory after the fact, as follows: "The accessory, which the State contends applies to the cases of these defendants, and each of them, must render assistance to the felon named in the bill of indictment, meaning James Diggs, in this case. Did these defendants, or either of them, render assistance to the felon personally?"

The contentions of the defendants were adequately given and the general principles of law with respect to the crime charged were correctly stated as ordinarily applicable to the crime of accessory after the fact, where the question of the voluntariness or involuntariness of the assistance rendered to the felon is not raised. *S. v. Williams,* 229 N.C. 348, 49 S.E. 2d 617; *S. v. Potter,* 221 N.C. 153, 19 S.E. 2d 257. But the court did not expressly instruct the jury as to the law applicable to the

specific evidence offered by the defendants in support of their defense, in the event it should find the facts to be as testified to by them. G.S. 1-180; *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. And it is apparent from the request made by the jury, for additional instruction, that it desired to be instructed on this precise question. The request being in the following language: "We request instruction on the last part. In other words, from the time the shooting took place, from that point under fear or otherwise."

In response to this request, the court proceeded to give the following instruction: "The defendants, or either of them, if found beyond a reasonable doubt to have been present at the time the alleged felony was committed, to wit, the assault upon Officer Howell, Rex Howell, received, relieved, comforted, or assisted the person committing such felony, who is alleged to be one James Diggs, or in any manner aided him to escape arrest or punishment, willfully and feloniously, it would be your duty upon such findings beyond a reasonable doubt, to return a verdict of guilty as to such defendant or defendants. The question of what motivated these defendants, or either of them, subsequent to that time is a question of fact for you to determine. The court calls your attention to the fact that as a matter of law, these defendants are not being tried here for any relationship, if any they had, with the alleged crime committed by Diggs in the State of Virginia. The testimony relating to their conduct and their relationship in the State of Virginia and to their relationship to Diggs was competent in this case, and is competent for you to consider as bearing upon the alleged intent of the defendants after the alleged assault upon the officer in Richmond County."

The court then proceeded to recapitulate the contentions of the State and of the defendants. And after giving the contentions of the defendants, which included those with respect to the trip from Virginia, the court then concluded its charge in the following language: "On the contrary, if you find beyond a reasonable doubt that these acts, or any of them, were done for the purpose of relieving, protecting or assisting negatively or positively, the alleged felon, Diggs, then it would be your duty to return for your verdict one of guilty as to such defendant or defendants as you find as to. The guilt or innocence of these and each of them in this case is a question that you gentlemen are sworn to determine from all the testimony and all the circumstances in the light of the law as given you by the court."

It must be kept in mind that the only question before the jury, that was in dispute, was whether the assistance given by these defendants to James Diggs, after he feloniously assaulted Rex Howell, was done under compulsion and through fear of death or great bodily harm at the hands of

James Diggs, as contended by them, or with the willful and felonious intent and purpose to aid him to escape arrest and punishment. This was not only a substantial feature of the case, it was the crux of it. The testimony of the defendants themselves established every other element of the crime of accessory after the fact.

The defendants were entitled to have the court instruct the jury to the effect that if, upon a consideration of all the evidence, it failed to find beyond a reasonable doubt, that the assistance rendered to James Diggs, after he committed the felonious assault upon officer Howell, was rendered with the willful and felonious intent to aid Diggs to escape arrest and punishment, and not under compulsion or through fear of death or great bodily harm, it should return a verdict of not guilty.

We do not think the charge given was adequate in this respect.

The defendants are entitled to a new trial, and it is so ordered.

New trial.

WACHOVIA BANK & TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF DUNCAN CAMERON WADDELL, JR., DECEASED, v. VAUGHN A. WADDELL, WIDOW, MARY WADDELL JORDAN, WIDOW, KATE WADDELL, UNMARRIED, FRANCIS C. JORDAN, MARY JORDAN, UNMARRIED, JANET JORDAN, UNMARRIED, BETTY JORDAN JACOBS AND HER HUSBAND, R. L. JACOBS, THORNTON JORDAN, A MINOR, RALPH LEE, STEPHEN R. ADAMS AND THE UNIVERSITY OF NORTH CAROLINA.

(Filed 7 June, 1951.)

1. Wills § 33c—

Where there is a devise in trust to testator's nephew and niece, with limitation over to their "bodily heirs" surviving upon the death of the last surviving life beneficiary, the roll must be called as of the date of the death of the last surviving life beneficiary, G.S. 41-4, and the persons who can answer the roll as of that date take as devisees under the will and not by representation.

2. Wills § 34c—

Upon a devise in trust with direction that the trustee pay the income to testator's sister for life and then pay the income to his named nephew and niece, with further provision that upon the death of the survivor of the life beneficiaries the fund should be distributed *per capita* among the "bodily heirs" of the said nephew and niece then surviving, *held*, the term "bodily heirs" is used as *descriptio personarum* and embraces children, grandchildren and other lineal descendants who must be represented in order to be bound by a decree involving the estate.

3. Wills § 39: Taxation § 28—

Liability for inheritance taxes must be decided in the first instance by the State and Federal collectors, subject to the right of review provided

by law, and therefore where neither collector is a party to an action to obtain the advice and instruction of the court in respect to the administration of the estate, the question of liability for inheritance taxes cannot be determined therein.

APPEAL by plaintiff from *Nettles, J.*, at Chambers, 26 April 1951, BUNCOMBE.

The plaintiff instituted this proceeding to obtain the advice and instruction of the court in respect of certain questions which have arisen in the administration of the estate of its testator.

Duncan Cameron Waddell, Jr., died seized and possessed of a large estate. After making certain specific devises, he disposed of the residue of his estate as follows:

"ITEM ELEVEN: I give, devise and bequeath (1/3) one-third of all the rest and remainder of my estate, real and personal in kind, absolutely, to my wife, Vaughn Andrews Waddell.

"ITEM TWELVE: I give, devise and bequeath (1/3) one-third of the rest, residue and remainder of my estate to the Wachovia Bank & Trust Company as Trustees for the following uses, purposes and trusts, to-wit: My Trustee is to pay all necessary expenses incident to the management and handling of same, including taxes. The net income received by said Trustee after all expenses and taxes are defrayed, but from which no deduction for depreciation is to be made, is to be paid to my sister, Mary W. Jordan, formerly of Greensboro, N. C., now residing in Los Angeles, California, for and during the term of her life; and after her death the same shall be paid to my nephew, Francis C. Jordan and my niece Mary Jordan, share and share alike for and during the term of their lives; upon the death of either, this income shall be paid to the survivor during his or her life and upon his or her death (the remaining one), this trust shall terminate and the trust estate shall be divided per capita among the bodily heirs of my said nephew and niece then surviving, and if none, then to the University of North Carolina."

ITEM THIRTEEN: In this section he devised the remaining one-third to the same trustee in language identical with that contained in ITEM TWELVE except that the income is to be paid to his sister Kate Waddell for and during her natural life, that is, in ITEM TWELVE the primary object of his bounty is his sister Mary W. Jordan and in ITEM THIRTEEN it is his sister Kate Waddell.

The widow dissented. The parties have agreed, subject to the approval of the court, to convey certain real property to the widow in fee in settlement of her claims for dower and a year's allowance. One object of the proceeding is to obtain authority to perfect this proposed settlement.

Mary W. Jordan and Kate Waddell are 75 and 73 years of age respectively. Mary Jordan, now 49 years of age, has never married. Francis C. Jordan, named in ITEM TWELVE and ITEM THIRTEEN of the will, has four children now living and one grandchild, Lynn Barnard Jacobs, born 29 August 1950.

On 23 March 1951, a guardian *ad litem* was appointed for Thornton Jordan, infant son of Francis C. Jordan, and for the bodily heirs of Francis C. Jordan and Mary Jordan not now *in esse*. Lynn Barnard Jacobs, grandson of Francis C. Jordan, has never been made a party to this proceeding and is not represented by a guardian *ad litem*.

The court below adjudged that upon the termination of the trust created by the will, the trust property shall go to the children of Francis C. Jordan and Mary Jordan then living; if there are no children, then to the University of North Carolina; "and Lynn Barnard Jacobs, son of defendants Betty Jordan Jacobs and R. L. Jacobs, does not now and cannot ever have any interest in the property or estate of Duncan Cameron Waddell, Jr., as beneficiary under his said will, and, therefore, is not a necessary or proper party to this action." The judgment contains other adjudications and directions not material at this stage of the proceeding. Plaintiff excepted and appealed.

Francis J. Heazel for plaintiff appellant.

Kingsland Van Winkle, guardian ad litem for Thornton Jordan and all the bodily heirs of Francis C. Jordan and Mary Jordan not in esse.

Tench C. Coxe, Jr., and Adams & Adams for Ralph E. Lee and Stephen R. Adams.

John Y. Jordan, Jr., for Mary W. Jordan, Francis C. Jordan, Mary Jordan, Janet Jordan, and Betty Jordan Jacobs and husband, R. L. Jacobs.

Woodson & Woodson for Vaughn A. Waddell.

Andrew Joyner, Jr., for Kate Waddell.

BARNHILL, J. The judgment of the court below attempts to preclude the infant grandson of Francis C. Jordan, without notice and without a hearing. If, in fact, said infant "does not now and cannot ever have" any interest in the trust property, no harm is done by the decree. But such is not the case. The only disposition of the trust estate, at the termination of the trust, is contained in the direction that the property be then divided among the bodily heirs of testator's nephew and niece, then surviving. To ascertain who are the ultimate takers, the roll must be called as of the day of the death of the last surviving life beneficiary. G.S. 41-4; *Turpin v. Jarrett*, 226 N.C. 135, 37 S.E. 2d 124;

Conrad v. Goss, 227 N.C. 470, 42 S.E. 2d 609; *House v. House,* 231 N.C. 218, 56 S.E. 2d 695. Title vests in the ultimate takers at that time. *Carter v. Kempton,* 233 N.C. 1.

The term "bodily heirs," when used as *descriptio personarum,* as here, means issue and embraces children, grandchildren, and other lineal descendants. *Matthews v. Matthews,* 214 N.C. 204, 198 S.E. 663; *Turpin v. Jarrett, supra,* and cases cited.

So then, the Jacobs infant is one of those who may take under the limitation over. Indeed, it is in the realm of possibility that he may be the one and only person capable of answering when the roll is called. Any decree entered herein at this time is not binding on him. Therefore, the title of the widow to the property to be conveyed to her under the agreement would remain in doubt during the continuance of the trust and eventually might be defeated by the superior right of the ultimate taker.

If, at the time of the division, the Jacobs infant is entitled to answer the roll call, he will take his share of the estate in his own right as a devisee under the will and not by representation. No living person in his class is a party to this proceeding. Therefore, we may not hold that he is bound by the decree herein under the doctrine of class representation. He must be made a party defendant and given an opportunity to be heard through a duly appointed guardian *ad litem.* To that end the cause must be remanded.

There is, however, one question posed which we may as well consider and dispose of at this time. In its petition the plaintiff seeks a judicial answer to this question: "(f) Shall plaintiff as Executor report for Federal Estate of (*sic*) North Carolina Inheritance taxes the United States Treasury Bonds and the annuity insurance policies referred to in paragraph 22 above?"

The bonds referred to are U. S. Treasury Series E, F, and G Bonds and the annuity policies are annuity policies in which the widow is named as beneficiary entitled to the amounts payable thereunder after the death of her husband. The court below directed:

"L. That plaintiff shall report as a part of the taxable estate of Duncan Cameron Waddell, Jr., deceased, for the purpose of determining the amount of Federal Estate Tax and North Carolina Inheritance Taxes payable, the value of United States Treasury bonds and annuity insurance policies referred to and described in Paragraph 20 (22) of the complaint, the value of the 160 shares of stock of Waddell, Sluder, Adams & Company, given to defendant Stephen R. Adams as set forth in Paragraph J, hereinabove of this judgment, and the value of all of the real and personal property included in the estate of said Duncan Cameron Waddell, Jr."

The Collector of Internal Revenue for the Federal Government and the North Carolina Commissioner of Revenue for the State are the officials who must decide what assets are to be reported for Federal Estate Tax and State Inheritance Tax respectively, subject to the right of review provided by law. Neither is a party to this proceeding and therefore neither is bound by the decree herein. If the plaintiff is not satisfied with the rulings of the proper taxing authorities, it may, after exhausting all other statutory remedies, appeal to the court for relief. But the court, in the meantime, will not act as its advisory counsel in respect of these questions which must, in the first instance, be presented to and decided by governmental administrative agents. The order entered, in this respect, was premature.

The cause must be remanded for further proceedings accordant with this opinion.

Error and remanded.

W. A. HALL, FOR HIMSELF AND OTHER CREDITORS WHO MAY MAKE THEMSELVES PARTIES AND JOIN IN THIS SUIT, v. SHIPPERS EXPRESS, INC., J. S. GAUL AND R. W. MOSELEY, RECEIVER AND INDIVIDUALLY.

(Filed 7 June, 1951.)

1. Courts § 5: Judgments § 25: Receivers § 13—

An order appointing a receiver by a court of competent jurisdiction in a proceeding regular upon its face may not be interfered with by order of another Superior Court judge, and an independent action instituted to have the receivership proceeding declared void is properly dismissed as being a collateral attack upon the order of receivership.

2. Receivers § 8—

The fact that the debtor admits the allegations of the complaint and joins in the prayer for the appointment of a receiver, if done in good faith, is insufficient in itself to show fraud or collusion and does not deprive the proceeding of its adversary character.

3. Attorney and Client § 7—

An attorney, since he occupies a fiduciary relationship, will not be allowed, as a matter of public policy, to represent both parties in an adversary proceeding, and a judgment or decree so affected will be set aside upon motion in the cause.

4. Receivers § 8: Attorney and Client § 7: Judgments § 25—

A judgment appointing a receiver may not be collaterally attacked on the ground that the same attorney represented both the plaintiff and the debtor in the action in which the receiver was appointed, but the proper

remedy is by motion in the cause to have the judgment vacated, in which case the court would have the power to make such further orders as might be necessary to protect the interests of the respective parties.

APPEAL by plaintiff from *Burney, J.*, 18 January, 1951, of NEW HANOVER.

This is an action instituted for the purpose of obtaining a judgment against each of the defendants, on an open account due the plaintiff by the defendant Shippers Express, Inc., and to have a receivership proceeding theretofore instituted in the Superior Court of Mecklenburg County declared null and void, and for the appointment of a Receiver of the Shippers Express, Inc., to take over its assets, and to have the court declare the plaintiff's debt a first lien on the assets of the corporate defendant.

The plaintiff alleges the receivership proceeding in the Superior Court of Mecklenburg County is null and void, for the reason that counsel who had represented Shippers Express, Inc., "for a good while" brought the action against the defendant corporation, and prepared the answer filed on behalf of said corporation, in which it admitted the allegations of the complaint and joined in the prayer for the appointment of a Receiver. The answer was verified by all the stockholders of the corporation except one, who owns only two shares of its capital stock. No counsel appeared of record for the defendant in the proceeding in Mecklenburg County. The plaintiff further alleges upon information and belief, that the proceeding in the Superior Court of Mecklenburg County was fraudulent and void and instituted for the purpose of defrauding creditors of the defendant corporation.

The defendant corporation and its Receiver, R. W. Moseley, through their counsel, entered a special appearance and moved to dismiss the action on the following grounds:

"1. Shippers Express, Inc., was a North Carolina corporation with principal office in Charlotte, North Carolina, and was engaged in the business of motor transportation.

"2. On 13 December, 1950, R. W. Moseley was appointed Receiver of Shippers Express, Inc., by order of Hon. A. R. Crisp, Judge presiding, in an action entitled 'J. S. Gaul *v.* Shippers Express, Inc.,' and the said R. W. Moseley . . . is now acting as Receiver of Shippers Express, Inc. A true copy of the order appointing said Receiver is attached and made a part hereof.

"3. The summons, complaint and order to show cause in the above entitled action were served upon the defendants above named in Mecklenburg County on 28 December, 1950."

The defendant J. S. Gaul demurred *ore tenus* to the complaint.

The plaintiff offered in evidence, for the purpose of attack, a certified copy of the proceedings in the Superior Court of Mecklenburg County. It was admitted by the defendants that the same counsel appeared for the plaintiff and defendant in the action of *J. S. Gaul v. Shippers Express, Inc.*, and that thereafter the court appointed the same attorney as counsel for the Receiver.

The court below held that the plaintiff is not entitled to maintain an independent action, but his remedy, if any, is by motion in the cause in the Superior Court of Mecklenburg County, in the action in which R. W. Moseley was appointed, and is now acting, as Receiver of the corporate defendant, and dismissed the action.

Plaintiff appeals to the Supreme Court and assigns error.

Isaac C. Wright for plaintiff.
John H. Small for defendants.

DENNY, J. The plaintiff does not allege that the complaint in the action of *J. S. Gaul v. Shippers Express, Inc.*, filed in the Superior Court of Mecklenburg County, 13 December, 1950, or the answer thereto contains any allegation that is not true or that the pleadings filed therein were insufficient to justify the court in granting the relief sought.

The proceeding in the Superior Court of Mecklenburg County appears to be regular on its face, and the court being one of competent jurisdiction in receivership proceedings, and having acquired jurisdiction of the parties and the subject matter in controversy, it may not be interfered with by any other court of co-ordinate authority. 14 Am. Jur., Courts, Sec. 243, p. 435 *et seq.* "That court which first takes cognizance of the controversy is entitled to retain jurisdiction until the end of the litigation, to the exclusion of all interference by other courts of concurrent jurisdiction," Gluck & Becker on Rec., Sec. 430, and quoted with approval by *Clark, J.* (later *Chief Justice*) in the case of *Worth v. Bank,* 121 N.C. 343, 28 S.E. 2d 488.

The mere fact that in a proceeding for the appointment of a Receiver for a debtor, the debtor admits the allegations of the complaint and joins in the prayer for the appointment of a Receiver, if done in good faith, such admissions are insufficient to show fraud or collusion, nor does it deprive the proceeding of its adversary character, or the court of its jurisdiction. In many instances the owner of property for which a Receiver is sought cannot in good faith deny the allegations of the complaint, and the best interests of such defendant may require acquiescence in the request for a Receiver. *In re Reisenberg,* 208 U.S. 90, 52 L. Ed. 403; *First Nat. Bank v. U. S. Encaustic Tile Co.,* 105 Ind. 227, 4 N.E. 846; 45 Am. Jur., Receivers, Sec. 119, p. 101.

The appointment of a Receiver under a consent decree does not render his authority subject to collateral attack. 45 Am. Jur., Receivers, Sec. 117, p. 99.

In the case of *Rousseau v. Call,* 169 N.C. 173, 85 S.E. 414, where the Receiver instituted an action and the legality of his appointment was challenged, *Hoke, J.,* in speaking for the Court, said: "The court, in the exercise of its jurisdiction, having entered judgment appointing plaintiff receiver, its judgment is not open to collateral attack, and, even if the order was improvidently made, its propriety is not open to question in this suit."

Where there is just ground for it, a Receiver can always be removed upon application to the proper judge. *Mitchell v. Realty Co.,* 169 N.C. 516, 86 S.E. 358; *Fisher v. Trust Co.,* 138 N.C. 90, 50 S.E. 592.

This Court, in *Surety Corp. v. Sharpe,* 232 N.C. 98, 59 S.E. 2d 593, speaking through *Ervin, J.,* said: "The law contemplates the settlement of all claims against the insolvent debtor in the original action in which the receiver is appointed, except in the infrequent instances where the appointing court, for good cause shown, grants leave to a claimant to bring an independent action against the receiver," citing *Black v. Power Co.,* 158 N.C. 468, 74 S.E. 468.

It is well settled, however, in this jurisdiction, that "the law does not tolerate that the same counsel may appear on both sides of an adversary proceeding, even colorably; and in general will not permit a judgment or decree so affected to stand if made the subject of exception in due time by parties injured thereby." *Moore v. Gidney,* 75 N.C. 34; *Molyneux v. Huey,* 81 N.C. 106; *Arrington v. Arrington,* 116 N.C. 170, 21 S.E. 181; *Marcom v. Wyatt,* 117 N.C. 129, 23 S.E. 169; *Patrick v. Bryan,* 202 N.C. 62, 162 S.E. 207.

In each of the last cited cases, except *Marcom v. Wyatt,* the injured party or parties filed a motion in the cause to set aside the judgment theretofore entered in said cause, on the ground that counsel represented conflicting interests. In *Marcom v. Wyatt, supra,* the guardian *ad litem* interposed an objection to the confirmation of the sale of real estate, in which the infant was interested, on the ground that the attorney for the administrator who instituted the proceeding was also the legal adviser of the defendant guardian *ad litem* and prepared the answer.

The rule which forbids the same attorney from representing both parties in an adversary proceeding is based upon the broad principle of public policy, which precludes persons occupying fiduciary relations from representing conflicting interests. *Arrington v. Arrington, supra.* See also *Cotton Mills v. Cotton Mills,* 116 N.C. 647, 21 S.E. 431, and *cf. Moseley v. Deans,* 222 N.C. 731, 24 S.E. 2d 630.

And while there is nothing to indicate that the able counsel who brought the original action against his corporate client, and prepared the answer for it, intended to do anything prejudicial to either party, if it can be shown that in the proceeding, adversary in form, there were conflicting or antagonistic interests to be litigated between the parties, and that the plaintiff has been injured thereby, it would seem that upon such showing he would be entitled to have the judgment vacated. This, however, would not prevent the court from making such further orders as might be necessary in order to protect the interests of the respective parties. *Marcom v. Wyatt, supra.*

The ruling of the court below to the effect that plaintiff's remedy, if any, is a motion in the cause in the Superior Court of Mecklenburg County, where the original action is pending, will be upheld.

The judgment of the court below is

Affirmed.

STATE v. C. C. ELLERS.

(Filed 7 June, 1951.)

1. Receiving Stolen Goods § 6—

Evidence to the effect that after the commission of a larceny the perpetrators of the offense told defendant about it and gave him a dollar, but that when asked if he gave defendant a dollar that had been stolen, the witness stated that he had other money of his own, *is held* insufficient to be submitted to the jury on a charge of receiving stolen goods with knowledge that they had been stolen.

2. Criminal Law § 52a (2)—

Evidence which raises a mere conjecture or suspicion of guilt, or a mere possibility of the existence of an essential element of the offense, is insufficient to be submitted to the jury.

3. Receiving Stolen Goods § 6—

Evidence to the effect that after committing a larceny the perpetrators of the offense told defendant about it, counted the stolen money in his presence and agreed to divide it among themselves, that thereafter one of them hid the money in defendant's yard, and that defendant in company with several officers went to search for it and found it in defendant's yard, *is held* sufficient to be submitted to the jury on the charge of receiving stolen goods with knowledge that they had been stolen, since constructive possession as well as actual possession, is sufficient predicate for the offense.

4. Criminal Law § 57b—

Where after verdict but before judgment a State's witness makes a repudiation of his testimony upon which the State relied for conviction and without which there would have been insufficient evidence to be submitted to the jury, the court should allow defendant's motion to set verdict aside.

APPEAL by defendant from *Sharp, Special Judge,* November Term, 1950, of GRANVILLE.

The defendant was tried upon three bills of indictment. Bill No. 26968 charged the defendant with aiding and abetting James Cockrell and Clarence Bell in the felonious and unlawful breaking, entering and larceny of money from W. B. Taylor's Store and the Blind Shop at Butner, North Carolina. No. 26968-(a) charged the defendant with breaking and entering W. B. Taylor's Store, and with larceny and receiving, and No. 26968-(b) charged the defendant with breaking and entering the Blind Shop, and with larceny and receiving.

The State offered little or no evidence in support of the charge of aiding and abetting or breaking and entering and larceny, and a motion interposed for judgment as of nonsuit, at the close of the State's evidence, was allowed as to these counts, but overruled as to receiving.

James Cockrell and his step-father, Clarence Bell, were rooming and boarding at the home of the defendant Ellers. Ellers and his wife were employed at the State Hospital at Butner. Cockrell was employed by a wholesale house in Durham as a traveling salesman and used Ellers' automobile in his work.

The evidence as to receiving tends to show that on 17 February, 1950, in the early morning hours, Cockrell and Bell broke into and entered W. B. Taylor's Store and took some cigarettes and two or three dollars in cash from the cash register. Cockrell testified that sometime later he went to the hospital and told Ellers what he had done and gave him a dollar. When asked if he gave Ellers a dollar that was stolen from Taylor's Store, he stated he had other money of his own.

On 21 February, 1950, Cockrell and Bell broke into the Blind Shop at Butner, and took approximately $120.00 from the cash register. Cockrell testified: "After we broke into the Blind Shop we counted the money in Ellers' front room. Ellers was there at the time. We were going to divide the money three ways. We wanted to get enough money to open up a cafe." Cockrell also testified that he smoked the cigarettes taken from Taylor's Store and that the two or three dollars in change taken from Taylor's Store was hid with the other money by Bell. Bell told the officers that he hid the money in Ellers' yard. Ellers and several officers went to search for it, and Ellers found $122.00 tied up in a pocket hand-

kerchief about fifty feet from his steps under some broomstraw. According to the State's evidence, neither Cockrell nor Bell discussed either the larceny and breaking and entering of Taylor's Store or the breaking and entering of the Blind Shop with Ellers, and he knew nothing about it until they told it at a later date.

According to the record, subsequent to breaking into Taylor's Store and the Blind Shop at Butner, North Carolina, James Cockrell was convicted of breaking and entering twenty-one places in Rocky Mount, North Carolina.

No evidence was offered by the defendant.

The jury returned a verdict of guilty of receiving stolen property, knowing it to have been stolen, as charged.

After verdict, but before sentences were imposed, James Cockrell requested permission to return to the stand and correct the misstatements made in his testimony at the time of the trial. He was permitted to do so, and testified: "Ellers was in bed in another room and did not see him and Bell when they counted the money."

Whereupon, counsel for defendant moved to set the verdict aside. Motion denied, and the defendant excepted.

From the judgments entered on the respective counts, the defendant appeals and assigns error.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Charles G. Powell, Jr., Member of Staff, for the State.

T. S. Royster for defendant.

DENNY, J. The only evidence that tends to show that Ellers may have gotten any of the money taken from Taylor's Store, is found in Cockrell's testimony. And his testimony in this respect is to the effect that he gave Ellers a dollar, but in response to a direct question as to whether he gave him a dollar that he had stolen from Taylor's Store, he stated that he had other money of his own. Moreover, he testified that he smoked the cigarettes and that the two or three dollars in change taken from Taylor's Store was hid with the other money.

The burden being upon the State to show beyond a reasonable doubt that the defendant was guilty of the crime charged, it is our opinion that the State's evidence with respect to receiving under that count, in bill No. 26968-(a), was insufficient to justify its submission to the jury. "Evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict and should not be left to the jury." *S. v. Vinson,* 63 N.C. 335; *S. v. Carter,* 204 N.C. 304, 168 S.E. 204; *S. v. Madden,* 212 N.C. 56, 192 S.E. 859; *S. v. Adams,* 213 N.C. 243, 195 S.E. 822;

S. v. Todd, 222 N.C. 346, 23 S.E. 2d 47; *S. v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472; *S. v. Webb,* 233 N.C. 382, 64 S.E. 2d 268; *S. v. Jarrell,* 233 N. C., 741.

The ruling of the court below on the motion for judgment as of nonsuit on the count charging the defendant with receiving stolen goods, knowing them to have been stolen, in bill No. 26968-(a), is reversed.

As to the ruling of the court on the motion for judgment as of nonsuit on the count in bill No. 26968-(b), charging the defendant with receiving, we think the evidence offered by the State was sufficient to warrant its submission to the jury. *S. v. Stathos,* 208 N.C. 456, 181 S.E. 273; *S. v. Wilson,* 176 N.C. 751, 97 S.E. 496. "To constitute the crime of receiving it is not necessary that the stolen goods should be traced to the actual personal possession of the person charged." *S. v. Stroud,* 95 N.C. 626. Actual or constructive possession of property, knowing or having reasonable grounds to believe that it has been stolen, is sufficient to support a conviction of the crime of receiving. 53 C.C.J., Sec. 8, p. 505; *S. v. Anthony,* 206 N.C. 120, 173 S.E. 47; *Longman v. Commonwealth,* 167 Va. 461, 188 S.E. 144. In the last cited case the court held that "while reception of the stolen goods by the accused must be substantially proven, actual physical handling by him is not necessary. It is well settled that constructive possession is sufficient."

However, when the jury returned its verdict of guilty under bill No. 26968-(b), and the court then permitted the witness, on whose testimony the State relied for the conviction of defendant, to take the stand and repudiate his testimony as to the presence of the defendant when the witness and Bell counted the money stolen from the Blind Shop, in the front room of defendant's home, the court should have allowed the motion of defendant to set the verdict aside.

This evidence did not merely tend to contradict a former witness or to impeach or discredit him, *S. v. Casey,* 201 N.C. 620, 161 S.E. 81, but it was a repudiation of his own testimony, without which the State did not offer sufficient evidence to support a conviction of the crime of receiving. Therefore, the decisions ordinarily applicable to newly discovered evidence will not be held as controlling upon a factual situation like that disclosed by the present record.

The verdict will be set aside and a new trial is ordered.

Bill No. 26968-(a)—Reversed.

Bill No. 26968-(b)—New trial.

CITY OF WILMINGTON, NORTH CAROLINA, NEW HANOVER COUNTY, AND C. R. MORSE, CITY-COUNTY TAX COLLECTOR, v. LIZZIE WRIGHT MERRICK, LILLY WRIGHT, ONLY CHILDREN AND HEIRS AT LAW OF TITUS WRIGHT, DECEASED, AND THEIR HUSBANDS, EDWARD WRIGHT AND WIFE, ... WRIGHT, AND ANY AND ALL HEIRS AND/OR DEVISEES, AND ANY AND ALL PERSONS, FIRMS OR CORPORATIONS WHO MIGHT IN ANY CONTINGENCY CLAIM AN INTEREST IN THE PROPERTY INVOLVED IN THIS ACTION, KNOWN OR UNKNOWN, SUI JURIS OR NON SUI JURIS, INCLUDING ANY NOT IN ESSE WHO MIGHT BY POSSIBILITY HEREAFTER SET UP A CLAIM.

(Filed 7 June, 1951.)

1. Taxation § 42—

A prospective purchaser at a tax foreclosure is under duty to investigate the records, and the principle of *caveat emptor* applies to his purchase of the land, the tax deed being in effect a quitclaim deed without warranty, and therefore upon adjudication that a tax deed failed to pass the interest of certain owners who were not served with process, the purchaser at the tax sale is not entitled to a refund of his purchase money from the taxing units but is remitted to his right to enforce, as equitable assignee of the taxing units, such tax liens as he may have acquired. G.S. 105-414.

2. Judgments § 9—

The contention that petitioners are entitled to recover *pro confesso* against plaintiffs because of their failure to answer the petition within thirty days after it was filed, is not presented when it appears that the petition and notice were not served upon plaintiffs and that plaintiffs filed answer before the return date designated in the notice.

APPEAL by plaintiffs from *Williams, J.*, at December Civil Term, 1950, of NEW HANOVER. Reversed.

Motion in the cause by R. L. Lewis, purchaser at tax foreclosure sale, asking for refund of purchase money because of failure of title.

This is a tax foreclosure suit brought under G.S. 105-414 against the heirs at law of Titus Wright, deceased. R. L. Lewis, who purchased at the commissioner's sale, being unable to obtain possession, caused writ of possession to issue. Thereafter, Isabella Merrick Womack and Luberta Merrick Williams, granddaughters and heirs at law of Titus Wright, claiming that they were never properly joined as parties nor served with process as required by law, came in and moved the court to vacate the judgment of foreclosure and the deed made thereunder. The motion was allowed below and it was adjudged that the foreclosure judgment and the deed executed thereunder are void as to the movants Isabella Merrick Womack and Luberta Merrick Williams. The plaintiffs excepted and appealed to this Court. The purchaser, R. L. Lewis, joined in the appeal, which was heard at the Fall Term, 1949, Decision affirming the lower court and holding that the foreclosure judgment and deed are void as to

Isabella Merrick Womack and Luberta Merrick Williams, heirs at law of Titus Wright, is reported in 231 N.C. 297, 56 S.E. 2d 643. The facts are there stated in detail.

After the decision was certified to the lower court, the purchaser, R. L. Lewis, filed petition in the cause and moved the court for an order requiring a refund of the purchase money paid for the deed. When the motion came on for hearing below, the court entered an order finding, in part: (1) that R. L. Lewis in good faith bid off the land "under the belief that the court had full jurisdiction of the cause(s) and parties," and that he was receiving "marketable title in fee simple"; (2) that "the plaintiffs City of Wilmington, New Hanover County, and C. R. Morse, City-County Tax Collector, were negligent in not having made all persons entitled to an interest in the property . . . parties to said cause of action"; and (3) that of the $1,067 purchase money paid, the City and County received the sum of $945.19, with the residue of $121.81 being paid out in court costs and expenses of sale.

The judgment entered by the court below directs: (1) that R. L. Lewis quitclaim to the plaintiffs all of his right, title and interest in the lands described in the commissioner's deed; (2) that the plaintiffs immediately refund to R. L. Lewis the sum of $945.19, with interest thereon at the rate of six per centum per annum from 16 June, 1948, together with his costs in the action to be determined by the Clerk, and (3) that the balance of $121.81 "is reserved to be deducted from and paid over to the said R. L. Lewis from the proceeds of any further sale of said lot or parcel of land."

The plaintiffs, in apt time, filed exceptions to the findings of fact and conclusions of law set out in the judgment and appealed to this Court, assigning errors.

G. C. McIntire for plaintiffs, appellants.
Thomas W. Davis for R. L. Lewis, movant, appellee.

JOHNSON, J. The principle of *caveat emptor* applies with all its rigor to the purchase of real estate at a tax sale. Ordinarily, the holder of a tax deed executed pursuant to an invalid commissioner's sale in a tax foreclosure suit may not obtain reimbursement from the taxing authorities.

The fundamental fairness and soundness of this rule is apparent. One who purchases at a tax sale does so without warranty,—and usually with the expectation of substantial profit. He is chargeable with knowledge that a commissioner's deed is no more than a quitclaim deed. There "are no implied covenants with respect to title, quantity, or encumbrance in the sale of real estate." (*Guy v. Bank,* 205 N.C. 357, 171 S.E. 341). The tax records, as well as the court papers in a foreclosure suit, are open

to inspection by prospective purchasers. It is the duty of one who would purchase a tax title to investigate, or cause to be investigated, all sources of title, "and if he fail to do so, it is his folly, against which the law, that encourages no negligence, will give him no relief." (*Foy v. Haughton*, 85 N.C. 169). Besides, it would seem to be unsound public policy to require local taxing units to underwrite the validity of these tax titles. Any such requirement would tend to render uncertain, if not to imperil, public finances.

Therefore, in the instant case, the plaintiffs may not be required to make reimbursement. Our decision here is in accord with the principles applied in *Turpin v. Jackson County*, 225 N.C. 389, 35 S.E. 2d 180, and cases there cited. Decision is also in harmony with the decided weight of authority in other jurisdictions. See Annotations: 77 A.L.R. 824; 116 A.L.R. 1408.

The authorities cited by appellee are not controlling here. Most of them deal with rights and remedies of an innocent purchaser at an irregular sale and relate to questions of title. These questions were resolved against the movant Lewis on the first appeal. (231 N.C. 297.)

The status of movant's title is not revealed by the record. However, it is indicated that he may have acquired the outstanding interest of at least one of the heirs of Titus Wright, deceased. In any event, since the purchase money has been applied in exoneration of the land, whatever enforceable tax liens the plaintiffs may have had against the land would seem to have passed by subrogation to the movant Lewis, and any such liens may be fully enforced by him as equitable assignee of the plaintiff taxing units. *Perry v. Adams*, 98 N.C. 167, 73 S.E. 729; *Lanier v. Heilig*, 149 N.C. 384, 63 S.E. 69; Anno.: 73 A.L.R. 612, p. 630 *et seq.* See also G.S. 105-414.

There is no merit in the suggestion made in the court below that the movant Lewis was entitled *pro confesso* to the reimbursement demanded because his petition in the cause was not answered within thirty days after it was filed. It is enough to say that the petition and notice of motion were not served upon either the plaintiffs or their attorney (*State ex rel. Utilities Commission v. Martel Mills Corporation*, 232 N.C. 690, 62 S.E. 2d 80), and it appears that the plaintiffs filed answer before the return date designated in the notice. Therefore, we do not reach for decision the effect of failure to answer a petition in the cause duly served upon the adversary parties.

Reversed.

ALTON G. SADLER v. ALICE McCRAW SADLER.

(Filed 7 June, 1951.)

1. **Divorce § 21: Constitutional Law § 28—Husband invoking jurisdiction of sister state is bound by its decree awarding custody of children.**

Where, after agreement that neither party would remove the children from the State without notice to the other, the wife takes the children and goes to live with them in another state, and plaintiff institutes proceedings in such other state to regain their custody, *held*, the husband, having invoked the jurisdiction of a court of a sister state in respect to matters within its authority, is bound by its decree awarding their custody to the mother, at least so long as the children remain in that state, and such judgment will be given full faith and credit here.

2. **Husband and Wife § 4c: Divorce § 3—**

Where husband and wife separate and she establishes residence in another state, he may not in his suit thereafter instituted against her in this State, maintain that her residence is in this State upon his contention that her domicile is here under the fiction of the unity of persons of husband and wife.

3. **Appeal and Error § 2—**

An order *in personam* directing defendant wife to bring the children of the marriage into this jurisdiction, entered in an action for divorce and for custody of the children, is appealable, since if the wife delay her appeal until the final determination of the action she would have no election but to comply with the order or subject herself to contempt proceedings.

APPEAL by defendant from *Hatch, Special Judge,* June Term, 1950, ORANGE. Reversed.

Civil action for divorce *a mensa* and for custody of the children of the marriage, heard on motion of defendant for alimony; for support of the two minor children of the marriage; and for counsel fees, *pendente lite.*

In September 1949, plaintiff and defendant separated. Prior thereto, on 19 August, plaintiff instituted an action to restrain defendant from taking the children of the marriage out of the State. On the return day of the rule to show cause, the parties agreed that neither would remove the children without notice to the other. Plaintiff then took a voluntary nonsuit. On 29 September, plaintiff instituted another action to restrain defendant from removing the children from the State. A judgment of nonsuit was entered therein on 14 October 1949. In the meantime, on 30 September 1949, defendant took her son, six years of age, and returned to Milledgeville, Ga., where she has since resided.

In October 1949, plaintiff went to Georgia and sued out a writ of *habeas corpus* in an attempt to gain custody of his son. On 31 October, pending the hearing, defendant came to North Carolina and took her

daughter, nine years of age, back to Georgia. On the hearing had on the return of the writ, the court found that by the pleadings in the cause and the evidence offered, the questions of the welfare of said children and the fitness of the parties to have their custody were at issue and awarded the custody of said infants to the defendant with the right of the father to visit them at any time and have them with him at his home in Chapel Hill during the month of August of each year, on condition he give a specified bond. Judgment was entered 8 November 1949.

On 17 February 1950, plaintiff instituted this action. When the cause came on for hearing on the defendant's motion, the court found as a fact "that it would be for the best interests of the two minor children involved in this controversy that they be brought within the jurisdiction of this Court and be made wards of this Court and subject to the jurisdiction of this court;" and ordered:

"(a) That the defendant, Alice McCraw Sadler, bring the two minor children of the plaintiff and defendant, to wit, Virginia Ruth Sadler and Alton McCraw Sadler, into the jurisdiction of this court;"

(b) That defendant be allowed $500 as payment on counsel fees; and

(c) That the cause be continued.

Defendant excepted to paragraph (a) of the order and appealed.

Victor S. Bryant and Robert I. Lipton for plaintiff appellee.

J. M. Watts, Jr., J. J. Fyne, and Douglass & McMillan for defendant appellant.

BARNHILL, J. The parties to this action are now living separate and apart. Each charges the other with abandonment. After the separation, defendant returned to the State of Georgia where she has since maintained her residence. Under these circumstances the plaintiff may not now assert the fictional unity of man and wife for the purpose of maintaining that his domicile is the domicile of his wife and children. *Coble v. Coble,* 229 N.C. 81, 47 S.E. 2d 798.

Plaintiff is a nonresident of the State of Georgia. Even so, he invoked the jurisdiction of a court of that State. He sought relief in that forum. He was present and voluntarily submitted himself to the jurisdiction of that court with respect of matters within the scope of its power and authority. He, as well as the court below, is bound by the judgment therein entered, at least so long as the children remain in that State. *In re Prevatt,* 223 N.C. 833, 28 S.E. 2d 564; *Commissioners v. Scales,* 171 N.C. 523, 88 S.E. 868.

The decree entered in the proceeding in Georgia instituted by plaintiff must be accorded full faith and credit in this jurisdiction. *Allman v. Register,* 233 N.C. 531.

The court below was without authority to enter any valid order affecting the custody of infants in the State of Georgia. *Coble v. Coble, supra,* and cases cited.

So then, the effect of the order entered in the court below is to compel the defendant, under threat of citation for contempt, deliberately to attempt to defeat the jurisdiction of the Georgia court, already assumed, and bring the children within the jurisdiction of the court below so that it may reconsider the question of custody of the children and, possibly, reverse the decree of a sister State. It is true the courts, to further the ends of justice, may in a proper case, by a decree *in personam,* require a party to an action to do some act in respect to property outside its jurisdiction and to enforce its order through its coercive authority. *McRary v. McRary,* 228 N.C. 714, 47 S.E. 2d 27. But occasion for exercising that authority is not made to appear on this record. It is our duty and privilege to honor and respect the lawful decrees of sister States. It is not the way of courts of this State to attempt to evade or defeat them. That part of the order to which defendant excepts was improvidently entered.

Had the defendant removed the children of the marriage from this State, after the summons and complaint in this cause were served upon her, for the purpose of defeating the jurisdiction of a court of this State, we might take a somewhat different view of the situation.

The appeal here is not, as contended by plaintiff, fragmentary and premature. The defendant was ordered to commit a positive act which would defeat her rights under the Georgia decree. Had she been content merely to enter her exception and delay her appeal until the final determination of the action, she would have had no election other than to comply with the order or else subject herself to the coercive authority of the court.

The quoted paragraph (a) of the order entered to which the defendant excepts must be vacated. The decree, to that extent, is

Reversed.

ELBERT HERRING v. QUEEN CITY COACH COMPANY AND MRS. MABEL SPIVEY, ADMINISTRATRIX OF PAUL SPIVEY, DECEASED.

(Filed 7 June, 1951.)

1. Judgments § 33b—

A consent judgment, as well as a judgment on trial of issues, is *res judicata* as between the parties upon all matters embraced therein.

2. Same: Torts § 6: Pleadings § 31—Consent judgment adjudicating contributing negligence may be pleaded in bar to right of contribution.

In an action against a bus company, consent judgment was entered in favor of the administratrix of the driver of the car involved in the collision, in which action the issue of intestate's contributory negligence was raised by the pleadings. Consent judgments were also entered in her favor individually and as next friend of a passenger in the car. In a later action involving the same collision instituted by a passenger in the bus against the bus company, it sought to join the administratrix on the theory that her intestate was a joint tort-feasor. *Held:* The administratrix was entitled to plead the consent judgment in her favor as administratrix in bar to the right of contribution, since it adjudicated the question of intestate's contributing negligence as between the parties, but the other consent judgments have no proper relation to the bus passenger's action, and the administratrix' allegations setting them up should have been stricken on motion.

APPEAL by defendant Coach Company from *Stevens, J.*, September Term, 1950, of DURHAM. Modified and affirmed.

Plaintiff instituted this action to recover damages for injury sustained while a passenger on the bus of the defendant Coach Company. The injury was alleged to have resulted from the negligence of the defendant Coach Company in driving its bus into the automobile of Paul Spivey.

Defendant Coach Company in its answer denied negligence on its part, and alleged that the negligence of Paul Spivey was the sole proximate cause of the collision and consequent injury to plaintiff. It further alleged that if the answering defendant be held negligent in any respect then Paul Spivey's negligence, operating jointly and concurrently, was a contributing cause of the injury, and defendant prayed in event of recovery against it that it have judgment against Mabel Spivey, Administratrix of Paul Spivey (now made an additional party defendant) for contribution under G.S. 1-240.

In answer to the allegations of the cross-action against her, Mabel Spivey, Administratrix of Paul Spivey, denied that Paul Spivey was negligent as alleged, and as a further defense alleged that she as administratrix of Paul Spivey, had instituted suit against defendant Coach Company for damages for his wrongful death resulting from the collision described in the complaint, and that defendant Coach Company had answered in that suit denying its negligence and setting up as a defense contributory negligence on the part of Paul Spivey; that thereafter judgment by consent was rendered against the defendant adjudging that Mabel Spivey, Administratrix of Paul Spivey, recover of defendant $4,000 damages in that suit.

Mabel Spivey, Administratrix, alleged also that as growing out of the collision referred to she individually and as next friend of Linda Darnell

Spivey had sued the defendant Coach Company for damages for personal injuries caused by the negligence of the defendant Coach Company, and judgment in each case was rendered against the defendant. She pleads these judgments as *res judicata* and a bar to defendant's cross-action against her for contribution on allegations that Paul Spivey was a joint tort-feasor.

Defendant Coach Company moved to strike from the further answer of Mabel Spivey, Administratrix, such portions as referred to these judgments, particularly paragraphs 1, 2, 3 and 4 and exhibits A, B and C. This motion was denied and defendant Coach Company appealed.

Fuller, Reade, Umstead & Fuller, A. H. Graham, Jr., for defendant Mrs. Mabel Spivey, Administratrix, appellee.

R. M. Gantt for defendant Queen City Coach Company, appellant.

DEVIN, J. The question presented by the appeal is the propriety of the ruling below denying the motion of the defendant Coach Company to strike from the answer of the additional defendant Mabel Spivey the allegations which refer to a previous judgment rendered in her favor as administratrix of Paul Spivey and against defendant Coach Company for damages for the wrongful death of Paul Spivey as result of the collision between his automobile and defendant's bus. This judgment is pleaded now as *res judicata* and determinative of the question of the negligence of Paul Spivey in causing the collision, for the reason that the question of his contributory negligence having been an issue in that suit and by the judgment decided adversely to the defendant, could not again be set up in a cross-action for contribution between the same parties.

The rule seems to have been established that when in a cross-action by the defendant against an additional defendant for contribution as joint tort-feasor, it appears that in a previous action between them it had been determined that the additional defendant had not been contributorily negligent, the question could not again be raised in a suit between the same parties. *Tarkington v. Printing Co.*, 230 N.C. 354, 53 S.E. 2d 269; *Cannon v. Cannon*, 223 N.C. 664, 28 S.E. 2d 240; *Current v. Webb*, 220 N.C. 425, 17 S.E. 2d 614; 2 Freeman on Judgments, sec. 670. In the opinion in the *Tarkington case*, where the facts were similar, *Chief Justice Stacy* stated the applicable rule as follows: "The prior suit as between the then parties litigant determined the question whether the driver of the automobile was contributorily negligent or a joint tort-feasor with the owner and driver of the truck in bringing about the collision. Hence, as between the parties there litigant, this matter would seem to be *res judicata.*"

The defendant Coach Company, however, contends the rule stated in *Tarkington v. Printing Company, supra,* was predicated on a finding by the jury on issue submitted that the driver of the automobile was not guilty of contributory negligence, and this rule should not be applied when the judgment was by consent. True, the judgment set up here was a consent judgment, but it does appear that in the former suit this defendant pleaded as an affirmative defense the contributory negligence of Paul Spivey, and the judgment adjudged that plaintiff recover of the defendant the sum of $4,000 in the suit for the wrongful death of Paul Spivey. There were no reservations in the judgment, and, nothing else appearing, this judgment constitutes a final determination of the issues raised by the pleadings. *Jenkins v. Jenkins,* 225 N.C. 681 (684), 36 S.E. 2d 233; *Jefferson v. Sales Corp.,* 220 N.C. 76, 16 S.E. 2d 462; *Stancil v. Wilder,* 222 N.C. 706, 24 S.E. 2d 527. A judgment for the plaintiff under these circumstances without qualification or reservation would necessarily dispose adversely of an affirmative defense pleaded in bar by the defendant. 31 A.J. 107.

The general rule is stated in an elaborate note in 2 A.L.R. 2d 511, as follows: "As a general proposition, it is well settled that a valid judgment or decree entered by agreement or consent operates as *res judicata,* to the same extent as a judgment or decree rendered after answer and contest, and is binding and conclusive upon the parties, and those in privity with them." It was said in *Law v. Cleveland,* 213 N.C. 289, 195 S.E. 809, "It is well settled that a consent judgment is just as valid and binding as a judgment rendered after trial of a cause." *Simmons v. McCullin,* 163 N.C. 409, 79 S.E. 625; *Lalonde v. Hubbard,* 202 N.C. 771, 164 S.E. 359; *Gibson v. Gordon,* 213 N.C. 666, 197 S.E. 135.

This rule, however, would not apply here to the consent judgments entered in the suits against the defendant by Mabel Spivey individually, or as next friend of Linda Darnell Spivey, as it does not appear that they were parties to the suit by the personal representative of Paul Spivey, or that his contributory negligence was at issue in those suits; nor is contribution now sought from them as joint tort-feasors. Those suits do not seem to have any proper relation to the present action.

The court properly declined to allow the motion of defendant Coach Company to strike the first paragraph of the further answer and defense of Mabel Spivey, Administratrix, but the judgment should be modified to sustain this defendant's motion to strike paragraph 2 thereof and exhibits B and C which were made parts of this paragraph.

As thus modified the judgment is

Affirmed.

STATE v. MRS. JESSIE MOBLEY.

(Filed 17 July, 1951.)

1. Constitutional Law § 29—

The solicitation of orders by an agent in this State is an integral part of interstate commerce when the filling of the orders and the delivery of the goods require their transportation to this State from another state, especially where the orders are subject to acceptance or rejection by the out of state principal.

2. Same—

Where agents solicited business in this State, taking a dollar deposit entitling the customer to one unmounted photograph subject to the right of the photographer to accept or reject orders, and the pictures are taken here but the processing of the pictures is done at the photographers out of state plant, the proofs returned here and delivered to the customer by another agent who takes any orders for additional photographs, which are mailed to the customer direct from the out of state plant, *held:* The solicitation of such orders is an integral part of interstate commerce.

3. Constitutional Law §§ 11, 31—

The constitutional inhibition on the part of the several states to regulate interstate commerce is subject to exception where the regulations are in the exercise of the police power reserved to the several states, but in order to come within the exception it is necessary that the exercise of the police power be real and *bona fide* and accomplished in some plain, appreciable and appropriate manner an objective within the police power, and that its bearing upon interstate commerce be incidental thereto. Art. I, Sec. 8, clause 3, of the Constitution of the United States.

4. Constitutional Law § 31—

The fact that a statute applies alike to all the people whether within or without the boundaries of the State is not determinative of whether it places an undue or discriminatory burden upon interstate commerce, but such statute may be discriminatory in applying to only one branch of a business or in imposing sanctions having no relationship to the volume of business transacted.

5. Same—Statute requiring bond of photographers soliciting business through agents held void as to interstate business as discriminatory burden on interstate commerce.

A statute requiring photographers soliciting business by agents and issuing any coupon redeemable in whole or in part for photographic products, to file a bond with the clerk of the Superior Court in each and every county in which their business is to be conducted, which bond should be conditioned upon the discharge by the principal of all contracts, representations and other obligations made by the principal or any solicitor of such principal, *is held* unconstitutional and void in regard to interstate business as discriminatory in applying only to the branch of the business operating through canvassers, solicitors or salesmen, in having no reason-

able relationship between the amount of business done and the sanctions imposed, and in making the bond liable for all representations and other obligations of the soliciting agents beyond the settled rules of law governing liability upon the doctrine of *respondeat superior.* Art. 12, Chap. 66, of the General Statutes.

6. Same: Constitutional Law § 11—

A statute requiring the posting of bond in each and every county in which a photographer does business in this State through canvassers, solicitors or agents who issue coupons for photographic products, which bond should be liable for any loss or damage by reason of the failure of the photographer or its soliciting agent to fully perform any contract, representation or obligation in connection with the sale of any coupon, cannot be upheld as a burden on interstate commerce incidental to the exercise of a police regulation designed to prevent frauds, since the bonding requirement has no substantial relation to the prevention of frauds, but places a direct and unwarranted burden upon interstate commerce.

APPEAL by defendant from *Burgwyn, Special Judge,* and a jury, at Special November Term, 1950, of EDGECOMBE.

Criminal prosecution under warrant charging the defendant with selling coupons while taking orders for photographs without having filed with the Clerk of the Superior Court of Edgecombe County a bond as required by Chapter 25, Session Laws of 1943, now codified as Article 12 of Chapter 66 of the General Statutes of North Carolina (G.S. 66-59 through 66-64). The pertinent parts of this statute are as follows:

"Section 1. The title of this Act shall be 'An Act to Prevent the Perpetration of Certain Fraudulent Practices by Photographers within the State of North Carolina.'

"Sec. 2. Definitions:

"The term 'Solicitor' as used herein shall mean any agent, salesman, employee, solicitor, canvasser, or any other person acting for or on behalf of a photographer.

"Sec. 3. No photographer or solicitor shall sell or issue any coupon, whether for a consideration or otherwise, purporting to be exchangeable, redeemable, or payable, in whole or in part, for any product of photography, including photographs, coloring, tinting, frames, mounts, folders, copying or the reproduction of photographs, and all other products of photography, unless the principal for which said business is conducted shall first file with the clerk of the Superior Court in each and every county in which said business is to be conducted a good and sufficient bond in the principal sum of two thousand dollars ($2,000.00), the condition of such bond being that the principal shall well and truly discharge all contracts, representations and other obligations made by said principal and all contracts, representations and other obligations made by any solicitor of such principal.

"Sec. 4. The coupons, as above defined, issued in any county shall be serially numbered, and before any bond, herein required to be filed, can be withdrawn, the principal on said bond shall file a sworn statement with the clerk, showing the lowest and highest serial number of the coupon, the total number issued, and the total number that has been redeemed. On the unredeemed coupons, the said principal shall show the name and address of the person to whom the said coupon was issued; that each of said persons have been notified, in writing, at the address shown, at least thirty (30) days prior thereto, to redeem said coupon, or otherwise that said coupon would become void on a day certain stated in said notice.

"Sec. 5. Any person sustaining any loss or damage by reason of any photographer or solicitor failing to fully perform and discharge any contract, representation or other obligation in connection with the sale of any coupon purporting to be exchangeable, redeemable or payable, in whole or in part, for any product of photography, whether such contract, promise or representation be made by the photographer or solicitor, may recover in any court of competent jurisdiction against the principal and his, her or its surety, the sum of twenty-five dollars ($25.00), in addition to any actual loss or damage sustained, and any amount so recovered shall be a specific lien on the bond filed as herein required.

"Sec. 6. Any person violating the provisions of this Act, including the make (making) of any false statement in the affidavit required under Section four of this Act, shall be guilty of a misdemeanor and, upon conviction, be fined or imprisoned, or both, in the discretion of the court."

The case was first heard in the Recorder's Court of the City of Rocky Mount, whence from a judgment of guilty the defendant appealed to the Superior Court of Edgecombe County, where the case was heard, upon defendant's plea of not guilty, on the original warrant. The jury returned a special verdict finding, among other things, these pertinent facts:

1. On 24 July, 1950, Olan Mills, Inc., having its principal office and place of business in Chattanooga, Tennessee, was engaged in the business of photography, and the defendant was one of its solicitors of business.

2. The defendant on that date in the City of Rocky Mount, Edgecombe County, North Carolina, solicited orders for photographs, and received a deposit of $1.00 on one such order and gave the customer a coupon-receipt.

3. The solicitation was made by the defendant under the corporation's usual plan of operation, which is:

(a) The initial orders for photographs are solicited in a municipality by a sales unit of from two to five solicitors.

(b) An advance deposit of $1.00 is collected from each customer, who is given a coupon-receipt entitling him to one unmounted photograph.

However, the corporation reserves the right to accept or reject any order accepted by its salesman.

(c) At the time the coupon-receipt is issued, the customer is notified where and when to appear later for the sitting within the municipality, at some location rented on a temporary basis.

(d) At the appointed time and place, a cameraman of the corporation takes the sitting or exposure.

(e) The exposed negatives are then sent by mail to the corporation's plant in Chattanooga, Tennessee. There the negatives are developed, processed, and the proofs are made.

(f) The proofs are then mailed back into the State to another representative of the corporation (herein referred to as the proof-passer).

(g) And the customer is notified by mail when and where he may contact the proof-passer, select the proof, and order additional pictures if desired.

(h) For the $1.00 initial deposit made to the solicitor, the customer is entitled to receive one unmounted photograph.

(i) These final orders are sent by mail to the corporation's plant in Chattanooga, where the finished photographs are processed or manufactured and mailed direct to the customer. No part of the processing or manufacturing is done within the City of Rocky Mount or the State of North Carolina.

(j) If additional photographs are ordered, the balance due on the order is paid cash-on-delivery.

4. No bond was filed with the clerk of the Superior Court of Edgecombe County as required by the statute.

Upon the coming in of the special verdict, the defendant moved for judgment of acquittal on the ground that the statute violated by the defendant is unconstitutional and void. The court overruled the motion and held that the defendant was "guilty as charged in the warrant," to which ruling the defendant excepted. The defendant then moved in arrest of judgment on the ground that the statute under which the warrant was drawn is violative of and repugnant to Article I, Sections 1, 17 and 31 of the Constitution of North Carolina, and is an unwarranted and invalid restraint of trade in interstate commerce and violative of Article I, Section 8, Clause 3 of the Constitution of the United States. The motion was overruled and the defendant excepted. The court then entered judgment adjudging the defendant guilty and decreeing that she pay a fine of $1.00 and the costs. Thereupon, the defendant renewed her motion in arrest of judgment. The motion was overruled and the defendant excepted.

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

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

Battle, Winslow, Merrell & Taylor for defendant, appellant.

Of Counsel: Joe Van Derveer, Chattanooga, Tennessee.

JOHNSON, J. Decision here rests on the Commerce Clause of the Federal Constitution. In disposing of the appeal on that ground, these two questions are posed: (1) Was the defendant, in soliciting orders for photographs, engaged in interstate commerce? (2) If so, does the challenged statute place an undue or discriminatory burden upon such interstate commerce in violation of the Federal Constitution?

1. *The question of whether the defendant was engaged in interstate commerce.*—The defendant insists that in soliciting orders for photographs to be processed and manufactured in the State of Tennessee she was engaged in interstate commerce. It is her contention that the series of connected in-and-out-of-state events necessary to consummate each sale, beginning with the solicitation of the order, constitutes an integrated chain of interstate commerce. She insists that the act of soliciting the order in this State and the work of processing the negatives and that of first making the proofs and later manufacturing and finishing the photographs in the out-of-state studio, is each an essential, component part of the series of events making up one composite transaction in interstate commerce. She therefore claims the protective benefits of the Commerce Clause of the Federal Constitution, Article I, Section 8, Clause 3, which provides that:

"The Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . ."

In support of her position, the defendant cites and relies upon the long line of "drummer" decisions of the Supreme Court of the United States beginning with *Robbins v. Shelby County Taxing District,* 120 U.S. 489, 30 L. Ed. 694, and running through the decision in *Nippert v. Richmond,* 327 U.S. 416, 90 L. Ed. 760.

The defendant's position appears to be well taken. It is firmly established by the "drummer" decisions that where an order is solicited by an agent and the filling of the order and delivery of the goods require their transportation from one state to another, the solicitation transaction is one of interstate commerce. *Nippert v. Richmond, supra* (327 U.S. 416, 90 L. Ed. 760); *Real Silk Hosiery Mills v. Portland,* 268 U.S. 325, 69 L. Ed. 982; *Sonneborn Bros. v. Cureton,* 262 U.S. 506, 67 L. Ed. 1095; *Cheney Bros. v. Massachusetts,* 246 U.S. 147, 62 L. Ed. 632; *Crenshaw v. Arkansas,* 227 U.S. 389, 57 L. Ed. 565; *Dozier v. Alabama,* 218 U.S. 124, 54 L. Ed. 965; *Rearick v. Pennsylvania,* 203 U.S. 507, 51 L. Ed. 295; *Caldwell v. North Carolina,* 187 U.S. 622, 47 L. Ed 336; *Stockard*

v. Morgan, 185 U.S. 27, 46 L. Ed. 785; *Brennan v. Titusville,* 153 U.S. 289, 38 L. Ed. 719; *Asher v. Texas,* 128 U.S. 129, 32 L. Ed. 368; *Corson v. Maryland,* 120 U.S. 502, 30 L. Ed. 699; *Robbins v. Taxing Dist.,* 120 U.S. 489, 30 L. Ed. 694. See Annotations: 60 A.L.R. 994; 101 A.L.R. 126; 146 A.L.R. 941.

All the more is the act of solicitation an integral part of interstate commerce where, as in the instant case, the order obtained is subject to acceptance or rejection by the out-of-state principal. *Stockard v. Morgan, supra* (185 U.S. 27, 46 L. Ed. 785). See Annotations: 60 A.L.R. 994, p. 1000 *et seq.*

The State, in urging that the defendant's activities in soliciting the orders for photographs may be treated as a purely local incident having no substantial relation to interstate commerce, cites and relies upon *Lucas v. City of Charlotte,* 86 F. 2d 394, 109 A.L.R. 297. That case, however, is not controlling. There the plaintiffs owned a studio in St. Paul, Minnesota, and were engaged in operating a transient photographic business, with salesmen and photographers operating in North Carolina under a plan of operations similar to that in the instant case. The plaintiffs brought suit in the United States District Court asking for injunctive relief against the collection of state and municipal license taxes sought to be collected as against both the canvassers and photographers, alleging that their dual-state operations amounted to interstate commerce and that the taxes complained of were unduly burdensome and discriminatory. The district court dismissed the bill. On appeal, the Circuit Court in its opinion stated: "We do not think that the fact that the negatives of the photographs, after the taking, are sent away to Minnesota to be finished, makes the transaction one of interstate commerce. The actual work of the photographer is done in the state and the mechanical finishing of the negative does not change the fact that the photographer is carrying on his business in the City of Charlotte and the State of North Carolina." The Court then, on finding that the amount of taxes involved did not exceed $75.00 per annum, held that "this amount was inadequate to confer jurisdiction upon the court," and thereupon affirmed the action of the lower court in dismissing the bill. It may be significant that the lower district court in dismissing the bill had rested its decision, in part at least, on the ground that the plaintiffs had an adequate remedy at law, and also that the bill was defective for misjoinder of parties, it appearing that both municipal and state taxing authorities had been joined in one action. Consequently, in the light of these background facts, it may well be that the Circuit Court in reaching its decision gave only oblique consideration to the interstate commerce phase of the case. Also, in the cited *Lucas case* it appears that the facts in respect to the details of the out-of-state processing and finishing work may not have been developed before

the court so as to show, as in the instant case, the importance of these phases of the picture making business. Hence, the facts there may have been treated as being different from those in the instant case. But be that as it may, on the evidence disclosed by this record we are constrained to treat the out-of-state activities of processing the negatives and the actual making of the photographs of sufficient importance to make the composite transaction one of interstate commerce. Here it has been made to appear that the details of the work surrounding the development of the negatives, the processing of the proofs, and the manufacturing of the portraits in the studio, after developing the raw negatives, are among the most vital phases of the picture making business. To appraise these out-of-state events other than as essential parts of an interstate commercial transaction would be to ignore natural logic and the practical import of these essential phases of picture making.

While *Lucas v. City of Charlotte, supra* (86 F. 2d 394, 109 A.L.R. 297), was decided in 1936, according to Shepard's Citation Service it has been cited with approval in only one case,—*Craig v. Mills,* 203 Miss. 692, 33 So. 2d 801 (decided in January, 1948), which is a photography case involving substantially the same plan of in-and-out-of-state operations as the instant case. The *Craig case* is also cited and relied upon by the State in support of its contention that the incident of solicitation should be treated as a purely local activity, not involving interstate commerce. A study of the *Craig case* reveals, however, that while it cites and approves the *Lucas case* on the principle of dissecting integrated interstate commercial transactions, nevertheless the court declined to enforce the Mississippi license tax against the studio's solicitors. In the cited *Craig case,* the State of Mississippi had levied a license tax as follows:

"Upon each person engaged in the business of selling, delivering or handling photographic coupons, certificates, or other devices used as or in exchange on photographs, or making or developing such photographs so procured to be made, the word person herein meaning, or limited to, an individual human being or person taking photographs in this state and developing same outside this state, as follows:" (Rates, $10.00 to $25.00, depending on size of municipality in which operations were conducted.)

The partnership of Olan Mills brought suit against the state tax collector to restrain the attempted collection of license taxes from each of its canvassers, photographers, and proof-passers. It was the contention of the plaintiff Studio that the collection of a separate tax from each of the members of these three groups of its employees would unduly burden the business. The Mississippi Court, acknowledging that there was "considerable merit in the contention," interpreted the taxing statute as being inoperative as to the canvassers and proof-passers, thus leaving the statute

to apply only to the photographers. It follows, therefore, that since the canvassers were relieved of the tax, the decision is only collaterally relevant to the question involved in the instant case dealing only with canvassers. The decision in the *Craig case* concedes that the plaintiff's business operations were of an interstate character. However, in sustaining the tax on the photographers, the court held that "The interstate commerce does not begin until after the work of the photographer in taking the negative is completed."

Thus, the two decisions, *Lucas v. City of Charlotte, supra,* and *Craig v. Mills, supra,* relied upon by the State, are fundamentally inconsistent. The *Lucas case* treats the out-of-state processing of negatives into proofs and the subsequent manufacturing of photographs as incidental, immaterial contributions to a purely local business activity, not amounting in any aspect to interstate commerce. Whereas, the *Craig case* recognizes that the operation of a between-states photographic business, like the one involved in the instant case, is interstate commerce, but holds that the business does not take on its interstate character until the work of both the salesman taking the orders and that of the photographer in making the exposure is over. It follows, therefore, that these two cases may not be reconciled, and both cases being at variance with the long line of determinative decisions of the Supreme Court of the United States and state courts of last resort repudiating or refusing to follow these suggested principles of dissecting and isolating integrated interstate commercial transactions, neither case may be treated here as authoritative. *Nippert v. Richmond, supra* (327 U.S. 416, 90 L. Ed. 760); *Real Silk Hosiery Mills v. Portland, supra* (268 U.S. 325, 69 L. Ed. 982); *Studio v. Portsmouth,* 95 N.H. 171, 59 A. 2d 475; *Graves v. City of Gainesville,* 78 Ga. App. 186, 51 S.E. 2d 58; *Olan Mills, Inc. v. Tallahassee,* ...... Fla. ......, 43 So. 2d 521; *Nicholson v. Forrest City,* 216 Ark. 808, 228 S.W. 2d 53. See also collection of decisions, Annotation 60 A.L.R. 996, p. 1000; and 11 Am. Jur., Commerce, Sec. 46, p. 45.

The recent decision of the Supreme Court of the United States in *Nippert v. Richmond, supra* (327 U.S. 416, 90 L. Ed. 760), seems to be decisive of the question here presented. There the appellant was engaged in soliciting orders in Richmond for a $2.98 ladies garment made by a Washington, D. C., manufacturer. Under the manufacturer's plan of operations, the defendant on taking an order received from the purchaser a small down payment which paid her commission. The order was then mailed to the home office in Washington from whence the garment was sent through the mails, C.O.D. for the balance, to the purchaser. The orders were taken subject to out-of-state confirmation. The appellant had not complied with an ordinance of the City of Richmond which required a solicitor like her to pay a fixed-sum annual license fee of

$50.00. There, as here, it was urged that the incident of solicitation was a purely local transaction, which might be singled out and treated for local tax purposes "as separate and distinct from transportation or intercourse" in interstate commerce. There the attempt to isolate from an integrated chain of interstate transactions the important event of soliciting the order was disposed of by *Mr. Justice Rutledge* in this summary manner:

"If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place(s) within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result." (90 L. Ed. 764.)

Lucas v. City of Charlotte, supra, was decided in the Circuit Court of Appeals in 1936. *Nippert v. Richmond, supra,* was decided by the Supreme Court of the United States in 1945. Yet, in the *Nippert* decision the Court refused to treat the incident of solicitation as a purely local event and made no reference to the *Lucas case,* either in the opinion proper or in any of the footnotes.

It is also significant that a number of state courts, in dealing with in-and-out-of-state photographic transactions like those here involved, have followed the *Nippert case* in applying the principle that the incident of solicitation is an integral part of interstate commerce which may not be isolated and segregated:

In *Studio v. Portsmouth, supra* (95 N.H. 171, 59 A. 2d 475, decided 1 June, 1948), solicitors were canvassing high school graduating classes in the State of New Hampshire for a Massachusetts studio. The exposures were to be made by cameramen in New Hampshire, the negatives to be processed and developed and the photographs made in Massachusetts. There a fixed-sum license tax on both the solicitors and the cameramen was challenged as being violative of the Commerce Clause. It was there held, with the Court citing the *Nippert case,* that the work

of the solicitors, as well as that of the cameramen, was interstate commerce, and the tax statute was declared inoperative.

In *Graves v. City of Gainesville, supra* (78 Ga. App. 186, 51 S.E. 2d 58, decided 3 December, 1948), canvassers and cameramen were operating in the State of Georgia as agents of an Alabama studio. The plan of operations was substantially the same as in the instant case. There the statute imposed a fixed-sum tax on itinerant photographers. The statute was challenged as being violative of the Commerce Clause. The challenge was sustained, with the *Nippert case* being cited with approval.

Olan Mills Inc. of Alabama v. City of Tallahassee, supra (...... Fla. ......, 43 So. 2d 521, decided 23 December, 1949), is another photography case. It involves facts substantially similar to those in the instant case. There a city ordinance levied a fixed-sum license tax on the solicitors, the photographers, and the proof-passers, as in the Mississippi case of *Craig v. Olan Mills, supra* (203 Miss. 692, 33 So. 2d 801). There, as here, it was urged that the whole business should be treated as local, intrastate commerce, with the State relying upon the *Lucas case.* However, the Florida Court treated the *Lucas case* as not being authoritative, and held that the complainant's business was properly classified as interstate commerce. Accordingly, the challenged ordinance, as applicable to complainant, was held inoperative as being unduly burdensome and discriminatory. The opinion cites and follows *Nippert v. Richmond, supra* (327 U.S. 416, 90 L. Ed. 760); *Graves v. Gainesville, supra* (78 Ga. App. 186, 51 S.E. 2d 58); and *Studio v. City of Portsmouth, supra* (95 N.H. 171, 59 A. 2d 475).

Nicholson v. Forrest City, supra (216 Ark. 808, 228 S.W. 2d 53, decided 6 March, 1950), is also a photography case. The plan of operations was practically the same as in the instant case. There the solicitors, the photographers, and the proof-passers, like the defendant in the case at bar, were agents of Olan Mills, Inc., of Chattanooga, Tennessee. There, as in the Florida case of *Olan Mills, Inc. v. Tallahassee, supra* (...... Fla. ......, 43 So. 2d 521), the city ordinance levied a fixed-sum tax on the three groups of field representatives, namely: the solicitors, the photographers, and the proof-passers. The activities of these three groups of field representatives were treated as being integrated parts of a series of acts constituting interstate commerce. The decision turns on the *Nippert case,* which is cited with approval. The challenged ordinance was declared inoperative as to all three groups, as being violative of the Commerce Clause.

Such has been the thread of authoritative decision since the first "drummer" case in 1886 (*Robbins v. Shelby County Taxing District, supra*). It is in line with the observation of *Mr. Justice Van Devanter* in commenting upon the bounds and limits of the Commerce Clause in

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 66 L. Ed. 239, top p. 244, when he said that interstate commerce "comprehends all commercial intercourse between different states and all the component parts of that intercourse."

That the bounds and limits of "interstate commerce" should so encompass "all the component parts" of commercial intercourse "among . . . the several states," is in harmony with the purpose of the Founding Fathers in delegating to Congress the power to regulate interstate commerce, as aptly expressed by *Mr. Justice Daniel* in delivering the opinion in *Veazie v. Moor,* 14 How. (U.S.) 568, 14 L. Ed. 543, top p. 548: "The design and object of that power, as evinced in the history of the Constitution, was to establish a perfect equality amongst the several states as to commercial rights, and to prevent unjust and invidious distinctions, which local jealousies or local and partial interests might be disposed to introduce and maintain."

We hold, therefore, that the defendant in soliciting orders for photographs was engaged in interstate commerce.

2. *The question of undue burden on interstate commerce.*—The Commerce Clause of the Federal Constitution, Article I, Section 8, Clause 3, "expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among" the states. *Dahnke-Walker Milling Co. v. Bondurant, supra* (257 U.S. 282, 66 L. Ed. 239, bot. p. 243). See also *Pennsylvania v. West Virginia,* 262 U.S. 553, 67 L. Ed. 1117, p. 1132.

This is not to say, however, that the constitutional grant to Congress of the power to regulate interstate commerce forestalls all state actions affecting such commerce. *Carolina State Highway Dept. v. Barnwell Brothers,* 303 U.S. 177, 82 L. Ed. 734. The states in the exercise of the reserved police power may enact statutes in furtherance of the public health, the public morals, the public safety, and the public convenience, which may burden and bear upon interstate commerce,—provided such statutes are local in character and bear upon interstate commerce incidentally only. *Boston & M. R. Co. v. Armburg,* 285 U.S. 233, 76 L. Ed. 729; *Hannibal, etc. R. R. Co. v. Husen,* 95 U.S. 465, 24 L. Ed. 527.

"To render applicable the rule upholding state police regulations incidentally affecting interstate commerce, the legislation in question must be a real and *bona fide* exercise of the police power; such power may not be used as a mere cover for what amounts essentially to a regulation of interstate commerce or the imposition of a direct burden thereon." 15 C.J.S., Commerce, Sec. 11, p. 268.

While it may be conceded that regulations designed to prevent frauds are embraced within the scope of the police power (11 Am. Jur., p. 1027; *Merrick v. Halsey & Co.,* 242 U.S. 568, 61 L. Ed. 498), nevertheless an

express purpose to prevent possible frauds does not justify state legislation which really goes beyond the legitimate pale of regulation and interferes with the free flow of interstate commerce. *Real Silk Hosiery Co. v. Portland, supra* (268 U.S. 325, 69 L. Ed. 982).

It must appear that there is "some clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do in some plain, appreciable and appropriate manner tend toward the accomplishment of the object for which the power is exercised." 16 C.J.S., Constitutional Law, Sec. 195, pp. 563 and 564.

Since the range of a state's police power "comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigorously against any needless intrusion." *Hannibal, etc. R. R. Co. v. Husen, supra* (95 U.S. 465, 24 L. Ed. 527, bot. p. 531).

It is also fundamental that a burden imposed upon interstate commerce may not be sustained simply because the statute imposing it applies alike to the people of all states, including the people of the state enacting such statute. *Nippert v. Richmond, supra; Brennan v. Titusville, supra* (153 U.S. 289, 38 L. Ed. 719; *Minnesota v. Barber,* 136 U.S. 313, 34 L. Ed. 455; *Robbins v. Taxing Dist., supra* (120 U.S. 489, 30 L. Ed. 694); 15 C.J.S., Commerce, Sec. 60, p. 378. See also *Dean Milk Co. v. Madison,* 340 U.S. 349, 95 L. Ed. (Adv. Op.) 228.

The challenged statute is an innovation in the field of commercial regulation in this State. It singles out for regulation one branch of photography,—the branch which gathers its business through the medium of canvassers and salesmen. The statute requires the posting of an indemnity bond as a condition precedent to engaging in this branch of photography. Anyone who would operate this type of business, before canvassing for an order, must "file with the clerk of the Superior Court in each and every county in which business is to be conducted a good and sufficient bond in the . . . sum of Two Thousand ($2,000.00) Dollars," conditioned that the "principal shall . . . discharge all contracts, representations, and other obligations" made either by the principal or by "any solicitor of such principal."

This bonding requirement, it would seem, reaches beyond the justifiable purpose of the statute, which is, as expressed in the Act: "to prevent the perpetration of certain fraudulent practices by photographers within the State of North Carolina." Here it is significant that the burdens imposed by the bonding requirement are not limited to protecting or indemnifying purchasers of articles of photography against fraudulent practices. The bond is made liable for all "representations, and other obligations" of any solicitor. Hence, this requirement engrafts upon the bond

unlimited liability for any and all representations and obligations of any solicitor, without regard for the presence or absence of elements of fraud.

Also, in burdening the bond with unlimited liability for any "representation, or other obligation" of any solicitor, the statute in effect suspends settled rules of law governing the relation of principal and agent, under which ordinarily the principal may not be held liable for acts and conduct of the agent beyond the scope of the agent's authority, actual or apparent. In one stroke, the challenged statute strikes down these fixed rules of substantive law and substitutes in lieu thereof an arbitrary rule of unlimited liability,—all under the pretext of preventing fraud in respect to an occupation heretofore treated as one of the lawful callings of life. (*S. v. Ballance,* 229 N.C. 764, p. 770, 51 S.E. 2d 731.)

The bonding requirement, in attempting to extend liability to the outermost limits of simple contractual liability, without reference to fraudulent practices, and in attempting to suspend the doctrine of *respondeat superior,* goes beyond the limits of legitimate regulation. These conditions engrafted by the statute upon the bonding requirement, when interpreted in the light of common knowledge, would seem so to fetter the bond with contingent liabilities as to make compliance onerously difficult, if not prohibitory. Here the statute moves close to, if not beyond, the permissive bounds of the due process and equal protection clauses of the Constitutions.

The challenged statute is also discriminatory and unduly burdensome because of the fixed-sum nature of the bonding requirement. Obviously there should be a direct relation between the volume of business transacted by a studio engaged in this type of business and the frequency in which the sanctions imposed by the statute may reasonably be expected to be called into play. However, the statute makes no provision by which the amount of the bond may be varied to fit the size or volume of business. It bears alike upon the large and the small operator. The studio whose salesmen collect deposits of $1.00 is required to post the same bond as the studio whose salesmen may collect larger or smaller sums. Whether the number of canvassers sent out from a studio into a given county may be one or a dozen, the same bond of $2,000 is required. Whether the county be one of large or small population, bond in the same amount is required. For canvassing a county for only a few days, the same bond is required as for a year.

The fixed-sum bonding requirement, in failing to provide flexibility in reasonable relation to the volume of sales, is inherently discriminatory and unduly burdensome on interstate commerce, and violative of the principle applied in *Nippert v. Richmond, supra.* There, the fixed-sum license tax sought to be collected from the appellant Nippert, who was canvassing orders for garments to be shipped by an out-of-state manufac-

turer, was held inoperative as to her as being an undue burden on interstate commerce. In that case the essence of the burden which was declared unduly oppressive sprung from the discrimination that was inherent in the fixed-sum license tax which bore no flexible relation to the volume of business. There it was said: "So far as appears a single act of unlicensed solicitation would bring the sanction into play. The tax thus inherently bore no relation to the volume of business done or returns from it." (90 L. Ed., top p. 767.)

The principle applied in the *Nippert case* is applicable here. It makes no material difference that in the *Nippert case* the fixed-sum burden imposed on the incident of solicitation took the form of a license tax. Whereas, in the instant case the fixed-sum burden stems from a bonding requirement imposed under colorable exercise of the police power. It is the ultimate effect of the fixed-sum burden that controls. Where sanctions imposed by a regulatory measure bear no substantial relation to the legitimate objects sought to be obtained, and impose direct burdens and stifling restrictions upon interstate commerce, it matters not that such burdens be imposed under guise of the police power, rather than the taxing power.

We are constrained to the view that the bonding requirement here imposed bears no substantial relation to the legitimate purpose of the statute, *i.e.*, the prevention of fraud. It is obvious that this requirement places more than an incidental burden on interstate commerce. It places a direct, unwarranted burden thereon. All the more is this so in the light of the multiple nature of the requirement which makes it necessary for a separate bond to be filed in each and every county in which business is to be conducted.

The decision in *Town of Green River v. Bunger,* 50 Wyo. 52, 58 P. 2d 456 (appeal dismissed in 300 U.S. 637, 81 L. Ed. 854), relied upon by the appellee, is distinguishable, as pointed out in the recent decision in *Breard v. Alexandria* (341 U.S. 622, 95 L. Ed. 838, filed 4 June, 1951). The *Breard case* is also distinguishable from the instant case: there the police power was invoked by the City of Alexandria to give protection against a type of house-to-house canvassing which was treated in the challenged city ordinance as a social evil amounting to a public nuisance to be summarily suppressed as being subversive of the rights of citizens in the enjoyment of the privacy and quiet of their homes.

See also *Studio v. Portsmouth, supra* (95 N.H. 171, 59 A. 2d 475); *Graves v. City of Gainesville, supra* (78 Ga. App. 186, 51 S.E. 2d 58); *Olan Mills, Inc. v. Tallahassee, supra* (.... Fla. .... , 43 So. 2d 521); *Nicholson v. Forrest City, supra* (216 Ark. 808, 228 S.W. 2d 53).

For the reasons given, Chapter 25, Session Laws of 1943, now codified as Article 12, Chapter 66, of the General Statutes of North Carolina (G.S. 66-59 through 66-64) is repugnant to the Commerce Clause,—

Article I, Section 8, Clause 3, of the Constitution of the United States. Therefore, the statute is declared invalid and inoperative as applied to the appellant herein.

With decision here resting on the Commerce Clause, it is not necessary for us to discuss, and we refrain from further expressing an opinion as to, the appellant's remaining exceptions which challenge the statute as being violative of the Constitution of North Carolina, Article I, Sections 1, 17, and 31. It is enough to say that these protective safeguards,—counterparts of the Federal due process and equal protection clauses,—still stand as sentinels in the marketplace, ever vigilant and ready to lift stifling burdens from the portals of those who in fair competition make the better mouse traps.

The judgment below is
Reversed.

STATE OF NORTH CAROLINA ON RELATIONSHIP OF THE EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA v. C. R. MONSEES, SOUTHMONT, NORTH CAROLINA.

(Filed 17 July, 1951.)

1. Master and Servant § 58—

What is an employing unit within the meaning of the Employment Security Act is not predicated upon the common law definition of master and servant or employer and independent contractor, but is determinable by the definitions set out in the statute.

2. Same—

Where the owner of sawmills contracts with the owner of timber to deliver to him lumber cut in accordance with specifications furnished, and thereafter contracts with individuals to operate the sawmills and other individuals as loggers upon an agreed price per thousand board feet, which individuals employ others to assist them in their work to the knowledge of the owner of the sawmills, who testifies that cutting and delivering lumber under the contracts is a part of his usual business, *held:* the sawmill owner is an employing unit within the meaning of the Employment Security Act. G.S. 96-8 (e), prior to the amendment of Session Laws of 1949. (G.S. 96-8 (g) (1)).

3. Master and Servant § 62—

The findings of fact of the Employment Security Commission are binding upon appeal when supported by competent evidence. G.S. 96-4 (m).

APPEAL by plaintiff from *Clement, J.,* September Term, 1950, of DAVIDSON.

This is a proceeding to determine whether the defendant is liable as an employer for contributions on the remuneration received by certain individuals who performed services under contracts for the said defendant during the third and fourth quarters of 1943, the years of 1944, 1945, 1946, and 1947, and the first and second quarters of 1948.

A summary of the facts found by the Employment Security Commission, which facts are supported by the evidence, is as follows:

1. C. M. Wall and Son, Inc. (referred to hereinafter as Wall), of Lexington, North Carolina, is an employer under the Employment Security Law of North Carolina and is engaged in manufacturing boxes from rough lumber. It has obtained its chief supply of rough lumber by purchasing timber tracts and contracting with sawmill operators to go on these tracts of standing timber to fell the trees, cut them into logs and saw the logs according to specifications given by Wall, and to deliver the lumber at its plant in Thomasville, North Carolina.

2. C. R. Monsees, a sawmill operator, of Southmont, North Carolina, began contracting with Wall in 1937, and has continued since that time to contract with Wall except for a short period during the latter part of 1942 and the early part of 1943. He became a covered and liable employer within the meaning of the Employment Security Law (formerly the Unemployment Compensation Law) during 1941 and such coverage was placed in suspense 1 October, 1942, but has never been terminated in accordance with the provisions of the law.

3. Under all the contracts between C. R. Monsees and Wall, Monsees has contracted to furnish Wall, at its factory in Thomasville, North Carolina, rough lumber cut according to specifications furnished by Wall, and at stipulated prices per thousand board feet, from tracts of timber belonging to Wall.

4. Since 1937, the services performed under contracts with Wall by Monsees have constituted approximately ninety per cent of the entire lumber operations of the said C. R. Monsees. During this time C. R. Monsees has purchased a few small tracts of timber, cut it, sawed it, and sold it to Wall, and on one or two occasions he purchased timber and sold the rough lumber to others.

5. Prior to 1 October, 1942, the said C. R. Monsees operated one sawmill and employed directly all the labor necessary to fell the trees, cut them into logs, transport the logs to his sawmill, saw them according to specifications set out in his contracts with Wall, and to transport and deliver the lumber to Wall's plant in Thomasville. Clay Carrick was employed by C. R. Monsees as a timber cutter, or tree feller, and was paid by Monsees on a board foot basis. During this period, Vestal Monsees, a brother of C. R. Monsees, was employed on an hourly basis as

a sawyer at the mill operated by C. R. Monsees. John Arville Cross also worked for C. R. Monsees occasionally and was paid by the hour.

6. On or about 1 April, 1943, C. R. Monsees resumed his business of furnishing rough lumber to Wall. He entered into an agreement with his brother, Vestal Monsees, whereby Vestal Monsees agreed to take the mill belonging to C. R. Monsees and operate it on tracts of timber belonging to Wall, and to saw the logs brought to the mill into rough lumber according to specifications furnished by C. R. Monsees. Vestal Monsees has received an agreed price per thousand board feet for all lumber sawed by him since 1 April, 1943, and has employed his own help. C. R. Monsees received no rent for his mill and made all major repairs to it. Vestal Monsees was not permitted to use the mill for any purpose other than sawing logs on the premises owned or controlled by Wall, without the express permission of C. R. Monsees. Vestal Monsees has at no time had the right to move the mill from one boundary of timber to another without specific permission and authorization of C. R. Monsees.

7. In 1946, C. R. Monsees purchased a new sawmill and entered into an agreement with John Arville Cross to operate it under the same contractual arrangements that Vestal Monsees operated the old mill.

8. Prior to 1 October, 1942, and subsequent thereto, Clay Carrick employed such individuals as he needed to assist him in felling the trees and cutting them into logs according to specifications, on premises under the control of C. R. Monsees, at a specified price per thousand.

9. Beginning in April, 1943, and continuing to the date of the hearing below, Joe Young, a logger, had an agreement with C. R. Monsees to log the mill operated by Vestal Monsees and was paid on a board foot basis.

10. On or about 1 January, 1948, C. R. Monsees entered into an agreement with Mozelle Tysinger to log the mill operated by Cross, from tracts of timber owned by Wall and under the control of C. R. Monsees.

11. C. R. Monsees knew that Vestal Monsees, John Arville Cross, Clay Carrick, Joe Young, and Mozelle Tysinger employed others to assist them in their work.

12. Subsequent to resumption of operations in 1943, there was no relationship between the respective individuals with whom C. R. Monsees entered into agreements hereinbefore mentioned. In each instance the agreement was by and between Monsees and the sawmill operator, the logger, and the timber cutter. The timber cutter was in no way responsible to the logger, and the logger was in no way responsible to the sawmill operator, but each was responsible only to C. R. Monsees in order to assist him in the performance of his contract with Wall.

Upon the facts found the Commission held that C. R. Monsees shall make reports and pay contributions to the Employment Security Commission of North Carolina on the earnings of Vestal Monsees, John

Arville Cross, Clay Carrick, Joe Young, and Mozelle Tysinger, as well as on the individuals employed by them and the individuals employed directly by C. R. Monsees from 1 April, 1943, and thereafter until such coverage is terminated in accordance with the provisions of the law.

Upon appeal to the Superior Court by the defendant, the order of the Commission was reversed. The Commission appealed to the Supreme Court and assigns error.

W. D. Holoman, R. B. Overton, and R. B. Billings for Employment Security Commission, appellant.

T. S. Wall, Jr., and Charles W. Mauzé for C. R. Monsees, appellee.

DENNY, J. As we interpret the record before us, there is no controversy between the plaintiff and the defendant as to the amount of contributions due the Employment Security Commission, if it is determined the defendant is liable for contributions under the Employment Security Law. Likewise, if it is determined that Vestal Monsees, John Arville Cross, Clay Carrick, Joe Young, and Mozelle Tysinger were employees of C. R. Monsees within the meaning of the Employment Security Law, then it is conceded that the defendant had in his employ in each of twenty different weeks in the years involved, eight or more individuals. G.S. 96-8 (f) (1).

Therefore, the sole question for our determination is whether the above-named individuals were employees of C. R. Monsees within the meaning of the Employment Security Law.

G.S. 96-8 (e), in pertinent part, reads as follows: "'Employing unit' means any individual or type of organization . . . which has, on or subsequent to January 1st, 1936, had in its employ one or more individuals performing services for it within this state . . . Whenever any employing unit contracts with or has under it any contractor or subcontractor for any employment which is part of its usual trade, occupation, profession, or business, unless the employing unit as well as each such contractor or subcontractor is an employer by reason of subsection (f) of this section, or section 96-11 (c), the employing unit shall . . . be deemed to employ each individual in the employ of each such contractor or subcontractor . . . Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit, shall be deemed to be employed by such employing unit for all the purposes of this chapter whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of such work: . . ."

The defendant knew that his subcontractors were employing individuals to aid them in carrying out their respective contracts with him in order

that he might fulfill his contractual obligations to Wall. In fact, according to the record, C. R. Monsees kept the pay rolls for each of the individuals with whom he contracted to perform services for him and reported and paid the Federal old age and survival benefit insurance taxes to the Federal Government on the earnings of Vestal Monsees, Joe Young, Clay Carrick, and on the earnings of those employed to assist them in the performance of their agreements. All the taxes so paid were later deducted from the amounts due the respective individuals under their agreements which, in effect, placed the tax burden upon Vestal Monsees, Joe Young and Clay Carrick. The defendant also advanced wages to the employees of the above men and deducted such advances in his settlement with their employers.

In 1946, the Internal Revenue Collector called upon the defendant to pay the Federal unemployment tax whereupon amended social security returns were made accompanied by affidavits to the effect that Vestal Monsees, Joe Young and Clay Carrick were subcontractors and should file separate returns under the terms of the Social Security Act. The amended returns were accepted by the Federal Government.

The defendant contends that from and after 1 April, 1943, until the date of the hearing below, he was not a sawmill operator but merely a jobber, and that Vestal Monsees, Joe Young, Clay Carrick, John Arville Cross and Mozelle Tysinger were independent contractors, and that their work was not a part of his usual trade, occupation, profession, or business. This contention cannot be upheld in the light of the defendant's own testimony, which is as follows: "From 1937 up until the present time I have had several contracts with C. M. Wall and Son to fell trees from their property, have them logged and sawed into rough lumber, and delivered to their plant at Thomasville. I had individual contracts from time to time. The cutting and delivering of rough lumber under these contracts was part of my usual business whether I employed folks to process the lumber or whether I made contracts like I have since 1943. I placed the sawmills on the lands on which standing timber was, and on which C. M. Wall owned the timber rights, for the purpose of carrying out my contract with the company. I went on these lands from time to time and made the repairs to my sawmills. The property was under my control while I was carrying out this contract. I had my trucks to go out there and take this rough lumber and haul it from the sawmill on this property to Wall's plant. . . . I did not require my brother, Vestal Monsees, to pay any rent on the sawmill unless he did some custom sawing. I didn't make any arrangements about renting the sawmill to Vestal Monsees. I just told him to go out there, and that I would furnish the sawmill and would give him so much a thousand."

In determining the employer-employee relationship within the meaning of the Employment Security Law prior to its amendment by Chapter 424, Section 5, subsection (1), of the 1949 Session Laws of North Carolina, now codified as G.S. 96-8 (g) (1), we cannot be governed by the usual definition of what constitutes the master and servant relationship or the status of an independent contractor. The Act itself fixes the status of the employment and includes many individuals who would be excluded under the definition of master and servant, and principal and agent at common law. *Unemployment Compensation Com. v. Jefferson Standard Life Insurance Company,* 215 N.C. 479, 2 S.E. 2d 584; *Unemployment Compensation Com. v. Insurance Co.,* 219 N.C. 576, 14 S.E. 2d 689; *Young v. Bureau of Unemployment Compensation,* 63 Ga. App. 130, 10 S.E. 2d 412.

The individuals involved herein, according to the record, were subcontractors under C. R. Monsees and engaged in doing work which constituted part of his usual trade or business in felling trees, having them logged and sawed into rough lumber in accordance with the terms of his contract with Wall, and the services performed by these subcontractors were performed on premises under the control of C. R. Monsees, and were services which he had contracted with Wall to perform. He merely farmed out part of the work to Vestal Monsees, Joe Young, Clay Carrick, John Arville Cross, and Mozelle Tysinger, who were not independent contractors but employees of C. R. Monsees within the meaning of the provisions of the Employment Security Law. G.S. 96-8 (e).

Moreover, the Commission found the pertinent facts in its hearing below, which facts are supported by competent evidence and are binding upon review. G.S. 96-4 (m); *Employment Security Com. v. Kermon,* 232 N.C. 342, 60 S.E. 2d 580; *Employment Security Com. v. Distributing Company,* 230 N.C. 464, 53 S.E. 2d 674; *Employment Security Com. v. Roberts,* 230 N.C. 262, 52 S.E. 2d 890; *Unemployment Compensation Com. v. Harvey & Son Co.,* 227 N.C. 291, 42 S.E. 2d 86; *Unemployment Compensation Com. v. Willis,* 219 N.C. 709, 15 S.E. 2d 4. Furthermore, the facts found by the Commission support its judgment. *Cf. Employment Security Com. v. Tinnin, post,* 75, where the relationship was that of consignor and consignee and the contract was merely one for the sale of goods by a method well recognized and widely used in the sale of merchandise.

In our opinion, on the record before us, the plaintiff was entitled to an affirmance of the findings and conclusions reached by the Commission. *Employment Security Com. v. Kermon, supra; Employment Security Com. v. Distributing Co., supra; Unemployment Compensation Com. v. Harvey & Son Co., supra.* The judgment of the court below is

Reversed.

STATE OF NORTH CAROLINA ON RELATIONSHIP OF THE EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA v. GEORGE W. TINNIN, C. C. SPIVEY, C. W. BANNERMAN, C. E. HODGIN, J. HALL REABEN, McALLISTER OIL COMPANY, INC., AND R. P. ALLEN.

(Filed 17 July, 1951.)

Master and Servant § 58—Consignee held not employing unit under Employment Security Act.

Under a contract by which consignor agrees to deliver such quantity of its products as consignee might desire for sale at consignee's place of business at the price stipulated by the consignor, but which does not require consignee to devote all of his efforts to the sale of consignor's products or to sell any specific amount thereof, nor restrict consignee's right to sell other products which are noncompetitive with the products of consignor, *held:* the consignee is engaged in an individual business of his own free from control by the consignor and conducted outside consignor's places of business, and therefore the consignee, having in his employ less than eight individuals, cannot be held an employing unit as an independent contractor under the consignor. G.S. 96-8 (f) (8) prior to its repeal 18 March, 1947.

APPEAL by defendants from *Frizzelle, J.*, October Term, 1950, of CUMBERLAND.

This is a proceeding brought by the Employment Security Commission of North Carolina against George W. Tinnin and others, to determine the liability of the defendants under G.S. 96-8 (f) (8) of the Employment Security Law, which subsection became effective 13 March, 1945, and was repealed 18 March, 1947.

When this cause came on for hearing before the Deputy Commissioner of the Employment Security Commission of North Carolina, certain stipulations were entered into, which summarily stated were as follows:

It was agreed by and between counsel representing the plaintiff and the respective defendants (1) that a record should be made only in the case against the defendant George W. Tinnin, and that the decision based upon the record in his case would be binding on the other defendants; (2) that The Texas Company, a corporation, is and was an employer under the provisions of the Unemployment Compensation Law during the years 1945, 1946 and 1947, and that said corporation was required to pay taxes or contributions upon wages paid its employees in the State of North Carolina during said years; (3) that The Texas Company was engaged in the business of distributing, at wholesale, petroleum products in the State of North Carolina through its own facilities and by means of salaried employees carried upon its pay roll during the years 1945, 1946 and 1947; (4) that none of the consignee defendants had in his or its employ as many as eight individuals during the calendar years 1945,

1946 and 1947; and (5) that there is no dispute as to the amount of taxes assessed if it is determined that the various employing units are covered under the provisions of the Unemployment Compensation Law, now the Employment Security Law.

The facts are not in dispute. The agreement between The Texas Company, the consignor, and George W. Tinnin, the consignee, called for the delivery of such quantity of the consignor's products as the consignee might desire for sale at his place of business in Fayetteville, North Carolina. The consignee was obligated to sell the petroleum and other products consigned to him, at prices fixed by the consignor to such customers as the consignee might select, either for cash, or on credit properly authorized, except the consignee was authorized to extend credit (a) to any customer he chose on his own account and (b) to consignor's customers in excess of credit limits approved by the consignor; provided that, in either instance, the consignee should pay the consignor cash, on demand, for sales of products so made. The consignee was paid specified commissions on all sales of consigned products. Title to unsold goods remained in the consignor. The consignee leased the bulk plant used in the operation of his business from the consignor, but he was obligated to bear all expenses, furnish trucks and any other equipment which he might require in the conduct of his business, furnish all help and assume full direction and control over all his employees, and to pay all contributions for workmen's compensation and unemployment insurance respecting such employees. The agreement which was subject to cancellation upon five (5) days written notice by either party, did not bind the consignee to devote all his efforts to the sale of the products of the consignor; nor was there any restriction upon the consignee's right to sell other products that were noncompetitive with the consignor's products, nor was the consignee obligated to sell any specified quantity of the consignor's goods. In fact, the consignee could not obtain fuel oil from the consignor during the period involved, and purchased such oil from various companies and distributed the same in his territory.

Upon these facts, the hearing commissioner found as a fact that during the period involved the consignor distributed gasoline, oil and other petroleum products as a part of its usual trade or business, and concluded as a matter of law that the defendant consignee was an employer within the meaning of Section 96-8 (f) (8) of the Employment Security Law (during the period from 13 March, 1945, through 17 March, 1947), by reason of the terms of the consignee's agreement referred to herein, under the consignor, and entered an order directing the defendant Tinnin and the other defendants to pay the contributions assessed on wages paid their respective employees during the period involved herein.

The defendant, Tinnin, duly filed exceptions to the pertinent findings of fact which were overruled. He appealed to the full Commission, which likewise overruled the exceptions and adopted the opinion of the hearing Commissioner as the opinion of the Commission. Upon appeal to the Superior Court, the trial Judge upheld the ruling of the Commission on each of the defendant's exceptions and affirmed the opinion of the Commission, and accordant therewith, entered judgment against each of the defendants.

The defendants appealed to the Supreme Court, assigning error.

Rose & Sanford for appellants.

W. D. Holoman, R. B. Billings, and D. G. Ball for Employment Security Commission, appellee.

DENNY, J. The statute under which the plaintiff seeks to collect certain contributions from the defendant, which it contends are due under the so-called contractor's clause, formerly known as G.S. 96-8 (f) (8), now repealed, reads as follows: " 'Employer' means (8) Any employing unit, which contracts with or has under it any contractor or subcontractor for any employment which is part of its usual trade, occupation, profession, or business, and each such contractor or subcontractor irrespective of the place of performance of contract; provided, the employing unit would be an employer by reason of any other paragraph of this subsection if it were deemed to employ each individual in the employ of each such contractor or subcontractor for each day during which such individual is engaged in performing such employment . . ."

The Supreme Court of New Jersey in the case of *Texas Company v. New Jersey Unemployment Compensation Commission,* 132 N.J.L. 362, 40 A. 2d 574, in considering the precise point that is before us, under a statute identical with ours, pointed out that the statute does not include within its provisions every contract that may be entered into by and between individuals, firms and corporations. It applies only to contracts with "any contractor or subcontractor for any employment which is part of its usual trade, occupation, profession, or business." It will be noted that our statute, G.S. 96-8 (g) (1), defines the term "employment" as "service, including service in interstate commerce . . . performed for remuneration under any contract of hire, written or oral, expressed or implied." Thus it would seem that the employment contemplated by the statute was to be one for personal services rendered for remuneration. And the term "wages" is defined in the statute G.S. 96-8, subsection (n), as "all remuneration payable for personal services, including commissions and bonuses . . ."

In the above New Jersey case the Court said: "It seems to us, therefore, that the kind of a contract contemplated and meant by the statute must be one for work or services which would ordinarily be performed by an employee, but which is being farmed or contracted out. The contract between prosecutor and the Heights was for their mutual advantage in the sale and distribution of the produce of prosecutor and was not intended to be, nor was it in fact, a contract 'for any employment' as intended or defined by the statute. It was selling goods by a certain method well recognized and customary in merchandising businesses. It provided for the payment of commissions for the sale of goods but was not a contract for 'personal' services as meant by the statute. Prosecutor was not interested in whom the Heights employed, what wages were paid or hours or conditions of employment, nor did it control or supervise its business in any way or have any right to do so."

We find that consignment agreements, identical or similar to the one before us, have been construed by numerous courts and in no case has it been held that such contracts create the relationship of employer and employee between the consignor and consignee within the meaning of the Unemployment Compensation Law, now the Employment Security Law. *Texas Company v. New Jersey Unemployment Compensation Commission, supra; Indian Refining Company v. Dallman* (D. C. Ill.), 31 Fed. Supp. 455, affirmed by C.C.A. 119 F. 2d 417; *Orange State Oil Company v. Fahs* (D. C. Fla.), 52 Fed. Supp. 509, affirmed by C.C.A. 138 F. 2d 743; *Texas Company v. Wheeless,* 185 Miss. 799, 187 So. 880; *Barnes v. Indian Refining Company,* 280 Ky. 811, 134 S.W. 2d 620; *Texas Company v. Bryant,* 178 Tenn. 1, 152 S.W. 2d 627. As to the liability of the consignor for social security taxes under consignment agreements, see *Texas Company v. Higgins,* 118 F. 2d 636; *American Oil Company v. Fly,* 135 F. 2d 491; *Standard Oil Company v. Glenn,* 52 Fed. Supp. 755; and as to liability for torts thereunder, see *Inman v. Refining Company,* 194 N.C. 566, 140 S.E. 289; *Rothrock v. Roberson,* 214 N.C. 26, 197 S.E. 568; *Hudson v. Oil Company,* 215 N.C. 422, 2 S.E. 2d 26; *Jones v. Standerfer,* 296 Ill. App. 145, 15 N.E. 2d 924; *Gulf Refining Company v. Wilkinson,* 94 Fla. 664, 114 So. 503; *Darner v. Colby,* 305 Ill. App. 163, 26 N.E. 2d 1001; *Gordy v. Pan American Petroleum Corporation,* 188 Miss. 313, 193 So. 29.

In our opinion, the facts found below do not support the conclusions of law upon which the judgment was entered. The consignee was engaged in an individual business of his own, financed and operated by him free from the control of the consignor, and conducted outside of the places of business of the consignor.

The facts in the cases of *Unemployment Compensation Commission v. Harvey & Son,* 227 N.C. 291, 42 S.E. 2d 86, and *Employment Security*

Commission v. Kermon, 232 N.C. 342, 60 S.E. 2d 580, relied upon by the plaintiff, are distinguishable from those in the instant case.

The judgment of the court below is

Reversed.

MARY G. BRUCE, ADMINISTRATRIX OF THE ESTATE OF WALTER B. BRUCE, DECEASED, v. O'NEAL FLYING SERVICE, INC.

(Filed 17 July, 1951.)

1. Appeal and Error § 51a—

Where it is determined on appeal that the evidence was sufficient to overrule nonsuit, the decision is the law of the case, and upon a subsequent trial nonsuit is correctly denied upon evidence which, though varying in minor details, is substantially the same as that upon the first hearing.

2. Evidence § 49: Aviation § 7—Expert may be allowed to invade jury's province as to ultimate facts in regard to matters of science, art, or skill.

In an action to recover for death of a gratuitous passenger in an airplane killed as a result of an accident allegedly caused by the negligence of the pilot, it is competent for expert witnesses who saw the accident and were personally familiar with the type of plane used, to testify that in their opinion the accident was caused by the pilot's attempt to make more turns in the spin than were safe from the altitude attained, since the testimony relates to composite facts based upon the witnesses' knowledge, skill and experience as experts from observation of the movements and actions of the airplane, and comes within an exception to the rule that opinion evidence may not invade the province of the jury.

3. Appeal and Error § 39e—

The fact that expert testimony is technically in excess of the permissive bounds of such evidence will not be held for reversible error when it could not have prejudiced appellant.

4. Appeal and Error § 39b—

Where there is insufficient evidence to justify the issue of contributory negligence, any error in the charge relating to this issue cannot be held prejudicial on defendant's appeal.

5. Negligence § 16—

Contributory negligence must be pleaded by alleging facts to which the law attaches contributory negligence as a conclusion.

6. Negligence § 17—

A defendant relying on contributory negligence must prove facts from which the inference of contributory negligence may be drawn by men of ordinary reason, and evidence which raises a mere conjecture is insufficient.

7. Aviation § 7: Negligence § 21—

In an action to recover for the death of a gratuitous passenger in an airplane upon allegations that the fatal accident was caused by negligence of the pilot, defendant's allegations that the fatal maneuver was inherently dangerous and that intestate acquiesced in the operation of the plane cannot justify the submission of the issue of contributory negligence to the jury when all the evidence is to the effect that the maneuver was not dangerous when properly done and that under the circumstances even an experienced pilot should not have attempted, while a passenger, to have interfered with the controls during the maneuver by the pilot in command.

BARNHILL, J., concurs in result.

APPEAL by defendant from *Parker, J.*, and a jury, at November Civil Term, 1950, of WAKE.

Civil action by plaintiff to recover damages for the alleged wrongful death of her intestate husband resulting from an airplane crash which occurred during an air show staged by the defendant in dedicating its new airport near Raleigh. The intestate was a guest passenger in an airplane operated by one of defendant's pilots. The airplane crashed while engaged in a stunt-maneuver.

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

"1. Was H. L. Bobbitt an employee or agent of the defendant, O'Neal Flying Service, Incorporated, at the time he permitted plaintiff's intestate, Walter B. Bruce, to enter the airplane? Answer: 'Yes.'

"2. If so, was H. L. Bobbitt acting within the scope of his authority? Answer: 'Yes.'

"3. Was the plaintiff's intestate, Walter B. Bruce, killed by the negligence of the defendant, as alleged in the complaint? Answer: 'Yes.'

"4. Did the plaintiff's intestate, Walter B. Bruce, by his own negligence contribute to his death? Answer: 'No.'

"5. What amount, if any, is the plaintiff entitled to recover? Answer: '$15,600.00.' "

From judgment on the verdict, the defendant appealed to this Court, assigning errors.

Simms & Simms and Douglass & McMillan for plaintiff, appellee.
Murray Allen for defendant, appellant.

JOHNSON, J. The defendant's exceptive assignments of error relate to: (1) the refusal to nonsuit; (2) the admission of evidence; and (3) the charge of the court.

1. *The refusal to nonsuit.*—This case was here at the Fall Term, 1949, on appeal by the plaintiff from judgment of nonsuit at the close of the

evidence. The decision, reversing the lower court for failure to submit the case to the jury, is reported in 231 N.C. 181, 56 S.E. 2d 560, where the background facts are stated in pertinent detail.

"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." *Maddox v. Brown,* 233 N.C. 519, top p. 521, 64 S.E. 2d 864. Where the question of nonsuit has been decided in favor of the plaintiff on a prior appeal, as in the instant case, it suffices for the plaintiff on retrial to offer substantially the same evidence, and a motion to nonsuit may not be resolved against the plaintiff unless the evidence on retrial varies in a material aspect from that offered on the first trial. *Maddox v. Brown, supra.*

An examination of the record on each appeal discloses that the defendant offered no evidence at either trial. The same witnesses testified at both hearings. Some variations are disclosed in the details of the testimony, but not in matters of substance. The evidence on the retrial was substantially the same as at the first hearing. This made it a case for the jury. *Maddox v. Brown, supra.*

2. *The admission of evidence.*—The gravamen of plaintiff's cause of action as alleged in the complaint and developed by the evidence is: that the defendant Flying Service was giving a "demonstration of safe flying"; that as part of the demonstration three airplanes were to go up in formation to an altitude of about 2,000 feet. Then each airplane was to descend, one after another, in an oscillating, spiral movement, make three turns or "spins," and then pull out into normal flight at a height of about 500 feet above the ground; that the airplane in which the intestate was riding as a guest passenger, piloted by H. L. Bobbitt, was the lead airplane in the formation; that the pilot ascended to an altitude of about 1,800 feet and then nosed into the spin; that instead of pulling out into normal flight after completing three spins, allegedly he negligently attempted to make five or more spins and in doing so crashed on the ground.

Plaintiff's cause of action is grounded upon the theory that the spin-maneuver in which the parties were engaged is an ordinarily "safe maneuver for an airplane when properly done," but that the pilot Bobbitt failed to exercise due care in controlling the airplane, in that he failed to pull out of the spin at a safe height.

Against the foregoing background we come to consider the defendant's exceptions to certain portions of the testimony of R. H. Edwards, Jr., and W. S. O'Neal, who saw the fatal maneuver and crash and, as qualified experts, described the movements of the airplane and gave opinions as to the cause of the crash. Here follows the pertinent parts of the testimony

(admitted over objections and exceptions duly made and preserved),—first the testimony of the witness R. H. Edwards, Jr.:

"Q. What is your opinion, Mr. Edwards, as to the safety of that maneuver known as a spin?

"A. My opinion is that in a proper aircraft with a properly trained pilot at a proper altitude it is a safe maneuver because I have done it hundreds of times.

"Q. Do you have an opinion satisfactory to yourself as to the number of turns that could be made in a spin with safety from an altitude of 1800 feet?

"A. Yes, sir, I have an opinion.

"Q. How many turns could be made with the Aeronca 'plane, a 'plane of this type that is in question?

"The Court: You mean in a spin?

"Mr. Douglass: Yes, sir.

"Q. From 1800 feet in a spin?

"A. Three turns would be the limit, sir, with safety,—and that would be the absolute limit.

"Q. I wish you would state whether or not there was anything in the appearance of the maneuver that was then being made with the spin that indicated to you that there was anything mechanically wrong with the 'plane.

"A. I do not think there was anything mechanically wrong.

"Q. State whether or not the turns that were made in this spin were normal turns.

"The Court: I think he can express his opinion as an expert.

"A. Yes, sir, they were normal turns.

"Q. Based upon your knowledge and experience with 'planes of this type and with that particular 'plane and your observation at the time this spin was being made, state whether or not you have an opinion satisfactory to yourself as to what caused this 'plane to strike the ground?

"A. Yes, sir, I have an opinion.

"Q. What is your opinion?

"A. My opinion is that Mr. Bobbitt attempted to do too many turns before he recovered."

The challenged testimony of the witness W. S. O'Neal:

"Q. Mr. O'Neal, do you have an opinion satisfactory to yourself as to how many turns in the spin could have been safely made by Mr. Bobbitt from the altitude from which he started, 1800 feet?

"A. Yes, I do.

"Q. What is your opinion?

"A. In my opinion, from the altitude that the maneuver was started, I would say that three turns were all that should have—that three turns would have been safe enough.

"Q. From your observation of this airplane crash and from your knowledge and experience have you an opinion satisfactory to yourself as to the cause of this crash?

"A. I have an opinion, yes, sir.

"Q. What is that opinion?

"A. My opinion is that the pilot of the airplane, Mr. Bobbitt, just tried to overdo it.

"Q. What do you mean by overdoing it?

"A. Well, he was trying to give the public a thrill or what you might say he was trying to give them their money's worth, as you might say."

The defendant insists that the foregoing testimony, embodying opinions as to the cause of the crash, should have been excluded as being expressive of opinions as to the very issue of fact before the jury, *i.e.*, the cause of the crash. The defendant cites and relies upon *Patrick v. Treadwell,* 222 N.C. 1, 21 S.E. 2d 818. However, the basic facts in that case are different and the decision is distinguishable from the instant case. Indeed, the law as laid down in the *Patrick case* supports the challenged rulings of the court below in the case at bar. We quote from the *Patrick case:*

"It has been frequently stated by the courts that the testimony of an expert witness should be excluded when it invades the province of the jury, or when it expresses an opinion on the very issue before the jury. . . ." (222 N.C. mid. p. 4.)

"But this rule is not inflexible, is subject to many exceptions, and is open to criticism." (222 N.C. mid. p. 4.)

". . . and it is frequently relaxed in the admission of evidence as to ultimate facts in regard to matters of science, art, or skill, as may be seen by reference to *Holder v. Lumber Co.,* 161 N.C. 177; *Ferebee v. R. R.,* 167 N.C. 290; *Barrow v. Ins. Co.,* 169 N.C. 572; *Moore v. Assurance Corp.,* 173 N.C. 532, and to many other cases." (222 N.C. top p. 5.)

Also, in *Patrick v. Treadwell, supra,* the Court recognizes the propriety of permitting experts, in the light of their professional skill, to draw inferences from facts personally observed by them, and cites in support thereof *George v. R. R.,* 215 N.C. 773, 3 S.E. 2d 286, and *McManus v. R. R.,* 174 N.C. 735, 94 S.E. 455. In the *George case* it is stated:

"It will be noted that this witness, admitted to be an expert, spoke from professional and personal examination of the intestate, and the answer, to our minds, was clearly within the domain of expert opinion."

In the instant case, the witnesses were duly qualified experts, testifying from actual observation of an airplane with which they were personally

familiar. They testified to composite facts based upon their knowledge, skill, and experience as experts from observation of the movements and actions of the airplane itself at the very time of the occurrence. The challenged testimony may not be held for error. It has the sanction of well considered authorities on the subject. Wigmore on Evidence, Third Edition, Vol. VII, Sections 1919 through 1923, p. 14 *et seq.* See also: *Watson v. Durham,* 207 N.C. 624, 178 S.E. 218; *Pyatt v. R. R.,* 199 N.C. 397, 154 S.E. 847; *Barnes v. R. R.,* 178 N.C. 264, 100 S.E. 519; and *Brewer v. Ring and Valk,* 177 N.C. 476, 99 S.E. 358.

The last answer of the witness O'Neal in which he expressed the opinion that the pilot "was trying to give the public a thrill or what you might say he was trying to give them their money's worth, as you might say," may exceed the permissive bounds of expert testimony, but upon this record it is deemed insufficient to upset the result reached below. *In re Will of Efird,* 195 N.C. 76, 141 S.E. 460.

3. *The charge of the court.*—The defendant's principal exceptions to the charge relate to the issue of contributory negligence. An analysis of the record leads us to the conclusion that the evidence offered below was insufficient to support the issue of contributory negligence. It follows, therefore, that any error which may have been committed in the charge on the issue of contributory negligence may be treated as harmless.

The pertinent allegations of contributory negligence set out in the defendant's further defense are as follows:

"1. That if plaintiff's intestate was killed as alleged in the complaint, which is again denied, said intestate in entering and remaining in the airplane which was to be operated by H. L. Bobbitt in the performance of a flying operation which was not a normal operation failed to exercise ordinary care for his safety.

"2. That if the 'plane referred to in the complaint was being operated in a negligent manner, which is again denied, this was fully known to plaintiff's intestate and was acquiesced in by him and by such acquiescence he contributed to his death.

"3. That if the 'plane referred to in the complaint was in a negligent and bad state of repair, as alleged in the complaint, which is again denied, plaintiff's intestate knew or, in the exercise of ordinary care, could have ascertained the condition of said 'plane and in entering into said 'plane for the purpose of flight and flying therein, plaintiff's intestate contributed to his death. (This theory of contributory negligence was neither developed at the trial nor urged as being relevant on appeal.)

"4. The contributory negligence of plaintiff's intestate is pleaded in bar of plaintiff's right to recover in this action."

Contributory negligence must be pleaded and proved by the defendant. G.S. 1-139. *Moore v. Iron Works,* 183 N.C. 438, 111 S.E. 776; *Ramsey*

v. Furniture Co., 209 N.C. 165, 183 S.E. 536. To be sufficient, a plea of contributory negligence must aver a state of facts to which the law attaches negligence as a conclusion. *Watson v. Farmer,* 141 N.C. 452, 54 S.E. 419; *Cogdell v. Railroad Co.,* 132 N.C. 852, p. 855, 44 S.E. 618. One relying on contributory negligence must prove facts from which the inference of contributory negligence may be drawn by men of ordinary reason. *Boney v. R. R.,* 155 N.C. 95, 71 S.E. 87; *Farris v. R. R.,* 151 N.C. 483, bot. p. 489, 66 S.E. 457. Evidence which raises a mere conjecture is insufficient for the jury. *White v. R. R.,* 121 N.C. 484, 27 S.E. 1002.

The gist of paragraph one of the further defense is that the intestate was contributorily negligent for participating in an airplane maneuver which "was not a normal operation." There is no specific allegation as to how and wherein the maneuver was dangerous. Indeed, there is no allegation that the maneuver was in fact dangerous. But, conceding without deciding, that by implication the allegations may be broad enough to support a showing that the fatal maneuver was inherently dangerous, as contended by the defendant, nevertheless the record discloses no evidence to that effect. All the evidence tends to show that, as stated by the witness W. S. O'Neal, "The spin is a perfectly safe maneuver for an airplane when properly done." And as the witness R. H. Edwards, Jr., put it, "My opinion is that in a proper aircraft with a properly trained pilot at a proper altitude it is a safe maneuver because I have done it hundreds of times." There is no evidence to the contrary. And all the evidence tends to show that the pilot Bobbitt was a properly trained pilot and that the airplane was in good mechanical condition and of suitable design for this particular operation. We attach no probative force of substance to the evidence, stressed by the defendant, tending to show that the intestate stated to a friend at the time he entered the 'plane: "Take my automobile key in case I do not come back."

The gist of the defendant's second allegation of contributory negligence is simply that if the pilot operated the airplane in a negligent manner, the intestate was contributorily negligent in that he acquiesced in such negligent operation. Here, again, the allegation is general, with no specific allegations as to how or wherein the intestate in the exercise of due care might have averted the consequences of the pilot's negligence. There is no allegation that in the emergency he might or should have taken over control of the airplane. But be that as it may, should we concede, without deciding, that the general allegation is sufficient to support the theory urged by the defendant to the effect that the intestate, himself being a pilot of some training and experience, in the exercise of due care should have so taken control of the airplane and pulled it out of the spin and into normal flight before the crash occurred,—even so, the record contains no evidence to support any such finding by the jury.

True, the defendant on cross-examination of some of the witnesses showed that the airplane was a pilot-training type of airplane with tandem seating arrangement and dual controls available to the occupant of the rear seat. However, all of the evidence tends to show that any attempt on the part of the intestate to have wrested control of the 'plane from the pilot would not have been in keeping with approved and accepted flying practices. On this question the evidence below tends to show: that under Civil Aeronautics regulations, "The pilot in command of an aircraft shall be directly responsible for its safe operation." And the witness O'Neal testified: "It is not customary or proper for a passenger in a 'plane to take over the controls from the pilot in command"; and the witness Edwards testified in effect that the person in the rear seat would have to overcome the strength of the other person on the controls and that in his opinion "it is not safe for a person to interfere with the pilot in charge of a 'plane" in making a spin as in the instant case; and the witness Edwards further testified that ordinarily "A passenger is not permitted to interfere with the controls when a maneuver is being made by the pilot in command of the ship."

From the foregoing, it follows that on the issue of contributory negligence the trial court might well have directed a verdict in favor of the plaintiff. This being so, any errors that may have been committed on the trial of this issue are harmless. See *Gray v. Power Co.*, 231 N.C. 423, 57 S.E. 2d 316; *White v. R. R., supra* (121 N.C. 484, 27 S.E. 1002). Accordingly we refrain from reviewing this group of exceptions.

The defendant's remaining exceptions have been examined. They are without substantial merit. Therefore in the trial below, we find

No error.

BARNHILL, J., concurs in result.

MRS. ELSIE PEARL DUNCAN (OR MRS. MARVIN WASHINGTON DUNCAN), WIDOW OF MARVIN W. DUNCAN, DECEASED, EMPLOYEE, v. CITY OF CHARLOTTE, SELF-INSURER, CHARLOTTE, NORTH CAROLINA.

(Filed 17 July, 1951.)

1. Master and Servant § 40e—

The rule that there must be a causal relation between the employment and the injury in order for the injury to be compensable under the Workmen's Compensation Act is fundamental and necessary to effectuate the intent of the Act to provide benefits for industrial injuries rather than to set up general health insurance benefits.

2. **Master and Servant § 40f—**

The 1935 Amendment to the Workmen's Compensation Act which provides for compensation for occupational diseases does not obviate the necessity of claimant showing that the disease resulted from the employment. Indeed, the definition of an occupational disease is one which is the natural result of the particular employment.

3. **Same—**

Heart disease is not ordinarily considered either an occupational disease or as one arising out of and in the course of the employment, and recovery therefor must be based upon evidence that it resulted from some unusual exertion or strain undergone in the discharge of the duties of the employment. G.S. 97-2 (f).

4. **Same: Constitutional Law § 17—**

Ch. 1078, Session Laws of 1949 (G.S. 97-53 (26)), which provides that as to active firemen of cities and towns of the State heart disease is an occupational disease *per se* and thus dispenses with the necessity of proof of a causal connection between heart disease and the employment, *is held* unconstitutional as providing separate and exclusive emoluments or privileges to the group specified not accorded to other municipal employees or to employees in private industry, in controvention of Art. I, sec. 7, of the State Constitution.

APPEAL by defendant from *Bennett, Special Judge,* at 8 January Extra Civil Term, 1951, of MECKLENBURG.

Proceeding under Workmen's Compensation Act for compensation claimed by the widow of Marvin W. Duncan, deceased, who was a member of the fire department of the City of Charlotte, self-insurer. The deceased died 25 September, 1949, as a result of coronary occlusion while on annual vacation at the home of a relative near Quakertown, Pennsylvania. The Commission made an award under the provisions of the 1949 amendment to the Act (Chapter 1078, Session Laws of 1949, now codified as G.S. 97-53 (26)), which provides that certain classified heart diseases, including coronary occlusion, shall be deemed and treated as compensable occupational diseases as to active members of city fire departments. The pertinent parts of the 1949 amendment are as follows:

"In case of members of fire departments of cities, counties or municipal corporations or political subdivisions of the State, whether such members are voluntary, partly paid or fully paid, coronary thrombosis, coronary occlusion, angina-pectoris or acute coronary insufficiency shall each be deemed to be an occupational disease within the meaning of this Article, provided:" (Here follow certain limitations as to length of the employment, and so forth, which do not materially affect the instant case.)

The evidence discloses these facts: Marvin W. Duncan, plaintiff's intestate, at the time of his death was captain of an engine company of the fire department of the City of Charlotte. He was forty-eight years

of age, five feet eight and one-half inches in height, and weighed approximately two hundred ten pounds. He had been employed by the fire department since 20 January, 1923. Later that year he underwent a physical examination which failed to disclose the presence of heart disease. The deceased, with the consent of his superior officer, began a two-weeks vacation with pay on 16 September, 1949. That day the deceased, with his wife and two friends, left Charlotte by automobile on a vacation trip that was to take them into the New England States, with the deceased doing most of the driving. The first day the party made five hundred miles, with a short stop at Gettysburg, and were tired when they went to bed. The second day they by-passed New York, made a short stop at Hyde Park, and spent the night in Springfield, Massachusetts, where again they went to bed tired. The next day they visited a friend in Worcester, Massachusetts, and drove on to Boston, arriving there before dark. They stored the automobile and spent the next day in sight-seeing around Boston in public conveyances. In the evening they attended a show and went to bed about midnight. The next day the deceased visited a fire station and in the afternoon went to a ball game; after supper the party again went to the theatre, and to bed about midnight. The next morning they toured Boston and vicinity in their automobile, with a friend driving, and after lunch started for New York City, eating supper in New Haven and arriving in New York about 10:40 o'clock that night. They went to bed about midnight. The next morning the deceased visited with another fireman, saw Radio City Music Hall in the afternoon, went to the theatre that night, and again went to bed about midnight. The next two days and nights were spent in New York City under a routine of activity similar to that of the first day. Each night the deceased went to bed about midnight. The party left New York about noon 25 September, to visit a cousin in Quakertown, Pennsylvania. They arrived there about 4:40 o'clock in the afternoon. During the last fourteen miles of the trip the deceased complained of gas pains, and immediately on arriving tried unsuccessfully to relieve himself by taking a dose of soda. His pains grew worse. Dr. W. F. Ort was called and came immediately, arriving about 5:04 o'clock. The deceased went into convulsions and died a few minutes later. All of the medical experts pronounced the cause of death as coronary occlusion.

The deceased had suffered "dizzy spells" in 1947, after which he was checked by a physician and "given a clean bill of health." Again in February, 1949, he suffered "dizzy spells," after which he underwent a complete physical examination by Dr. C. L. Stuckey, who stated that he found "no cardio-vascular symptoms." Dr. Stuckey said it was his "impression that the patient was in excellent general health" except for

"prostatic" and "appendix" conditions which cleared under treatment and "when seen three weeks later . . . he felt entirely well."

The evidence further shows that the deceased had been attached to one of the more active fire stations in the City of Charlotte for about nine years; that his company was on alternate day and night shifts; that when on night duty he and his men would dress and clear the station in less than a minute after an alarm; that his duties involved handling of hose and other equipment, climbing ladders, fighting fires in basements, attics, roofs, and wherever there was fire and smoke.

The medical testimony, mainly that of Dr. R. L. McMillan, an expert in cardio-vascular medicine, discloses that coronary thrombosis is a blood clot that forms in a coronary artery. Dr. McMillan stated that "The symptoms may be anything from no symptoms at all up to the severest symptoms, which are severe pains in the chest, generally located in the midline of the chest and center portion and spreading into one or both shoulders, and frequently into the jaws, and associated often with nausea and vomiting. Commonly, there is cold sweating, and of course it is well known for it to terminate in one minute and in death, or it may go on to recovery. The pain usually continues anywhere from two to twenty-four hours, and commonly requires a strong sedative for relief. The clot occurs in one or more of the coronary arteries that feed the heart. A coronary occlusion is synonymous with coronary thrombosis. If a thrombosis occurs, the vessels will be occluded and that would be an occlusion."

Dr. McMillan further stated that "Angina pectoris is actually a symptom complexion which occurs as a result of an inadequate amount of blood flowing through the coronary vessels into the heart muscles, or it may be brought on by some other factors, such as a reduced oxygen intake through the lungs or very low blood sugar. Angina pectoris is generally produced by exertion and manifests itself by pain which is milder as a rule than the pain of coronary thrombosis and which is of temporary duration rather than of long duration. Angina pectoris is relieved by rest or certain drugs, such as nitroglycerine. Acute coronary insufficiency embodies both of the conditions of thrombosis or angina pectoris. The pain in both thrombosis and angina pectoris comes on suddenly as a rule. Coronary thrombosis, coronary occlusion, angina pectoris and acute coronary thrombosis are in a general classification in that they are all coronary artery diseases, but they are of a different nature and of a difference significance. Arteriosclerosis would not embrace all of these diseases, this lesion is present when these disorders occur. Arteriosclerosis in lay terms means a hardening or thickening of the walls of the arteries. The hardening and thickening of the walls of the arteries would be likened to a pipe used to transport a liquid, the smaller the lumen, the less blood could flow through the vessels without a great increase in pressure."

Dr. McMillan further stated in effect that a person suffering from coronary thrombosis, coronary occlusion, angina pectoris, or acute coronary insufficiency would not be capable of prolonged physical effort; that sudden physical exertion by a person suffering from one of the four types of heart diseases would produce pain in the chest; that if the person already had a coronary thrombosis sudden exertion might dilate the heart to the point where the person would have heart failure and expire; that tension is a contributing factor toward the development of these diseases; that the greater stress and strain an individual is under the earlier in life he will develop coronary artery diseases.

Dr. McMillan further stated that a heart may become dilated for any number of reasons, and gave as his opinion that Marvin W. Duncan died of coronary occlusion. However, he further stated that he had no opinion as to whether or not the heart attack of plaintiff's intestate was brought about by his employment as a fireman, and the record contains no testimony tending to show that the deceased's heart attack was caused by his employment as a fireman.

However, the Commission, applying the 1949 amendment, found and concluded that the duties of the deceased as a fireman, performed by him over a long period of time, subjected him "to unusual exertion, strain, and emotion; that the coronary occlusion from which (he) died is a direct result of, and bears a causal connection with, the hazards of his employment as a fireman . . . and (that) he died on 25 September, 1949, under circumstances which amount to death by accident arising out of and in connection with his employment within the meaning of the 1949 amendment.

The defendant, pursuing its challenge to the constitutional validity of the 1949 amendment under which the award was made, appealed to the Superior Court. There the award was affirmed.

The defendant excepted and appealed to this Court.

Henry E. Fisher, Taliaferro, Clarkson & Grier, and J. C. B. Ehringhaus, Jr., for plaintiff, appellee.

John D. Shaw for defendant, appellant.

JOHNSON, J. Since the enactment of the Workmen's Compensation Act in 1929, no rule has proved more essential to its sound and orderly administration than the one which requires that an injury to be compensable must be shown to have resulted from an accident arising out of and in the course of the employment. *Brown v. Aluminum Co.,* 224 N.C. 766, 32 S.E. 2d 320; *Wilson v. Mooresville,* 222 N.C. 283, 22 S.E. 2d 907; *Neely v. Statesville,* 212 N.C. 365, 193 S.E. 664; and *Rewis v. Ins. Co.,* 226 N.C. 325, 38 S.E. 2d 97; G.S. 97-2 (f). This principle has

come to be known and referred to as the rule of causal relation, *i.e.*, that injury to be compensable must spring from the employment. *Plemmons v. White's Service, Inc.*, 213 N.C. 148, 195 S.E. 370; *Bolling v. Belk-White Co.*, 228 N.C. 749, 46 S.E. 2d 838. This rule of causal relation is the very sheet anchor of the Workmen's Compensation Act. It has kept the Act within the limits of its intended scope,—that of providing compensation benefits for industrial injuries, rather than branching out into the field of general health insurance benefits. *Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173; *Conrad v. Foundry Co.*, 198 N.C. 723, 153 S.E. 266.

True, the General Assembly by amendment in 1935 (following the decision of this Court in *McNeely v. Asbestos Co.*, 206 N.C. 568, 174 S.E. 509), extended the scope of the Act by including a specified list of twenty-five occupational diseases which are the usual and natural incidents of particular types of employment. Chapter 123, Public Laws of 1935, now codified as G.S. 97-52 and G.S. 97-53.

The amendment of 1935, however, in nowise relaxed the fundamental principle which requires proof of causal relation between injury and employment. And nonetheless, since the adoption of the amendment, may an award for an occupational disease be sanctioned unless it be shown that the disease was incident to or the result of the particular employment in which the workman was engaged. *Tindall v. Furniture Co.*, 216 N.C. 306, 4 S.E. 2d 894; *Blassingame v. Asbestos Co.*, 217 N.C. 223, 7 S.E. 2d 478.

Aside from statutory definitions, an occupational disease has a well-defined meaning. Before the adoption of the 1935 amendment, this Court in *McNeely v. Asbestos Co.*, *supra* (206 N.C. 568, at p. 572), defined an occupational disease as follows:

"A disease contracted in the usual and ordinary course of events, which from the common experience of humanity is known to be incidental to a particular employment, is an occupational disease, . . ."

"An 'occupational disease' suffered by a servant or employee, if it means anything as distinguished from a disease caused or superinduced by an actionable wrong or injury, is neither more nor less than a disease which is the usual incident or result of the particular employment in which the workman is engaged, as distinguished from one which is caused or brought about by the employer's failure in his duty to furnish him a safe place to work."

If a disease is not a natural result of a particular employment, but is produced by some extrinsic or independent agency, it is in no real sense an occupational disease, and ordinarily may not be imputed to the occupation or employment. 58 Am. Jur., Workmen's Compensation, Section

246, p. 748. See also Schneider, Workmen's Compensation, Third Edition, Text Vol. 3, Sec. 502 *et seq.*

The record in the instant case reflects no evidence that the fatal heart attack suffered by the deceased was in fact an occupational disease or that it was produced by his employment as a fireman. And ordinarily, a heart disease is not deemed an "injury by accident arising out of and in the course of the employment" (G.S. 97-2 (f); *Neely v. Statesville, supra*), nor an occupational disease. *West v. Dept. of Conservation,* 229 N.C. 232, 49 S.E. 2d 398. See also *Industrial Commission v. Betleyoun,* 31 Ohio A. 430, 166 N.E. 380.

It is significant that claimant's principal witness, Dr. McMillan, in reply to a direct question, said he had no opinion as to whether or not the heart attack was brought on by deceased's employment as a fireman. And the award below is unsupported by evidence showing causal relation between the fatal disease and the employment out of which it supposedly arose.

Nor does the evidence bring the case within the principle applied in *Gabriel v. Newton,* 227 N.C. 314, 42 S.E. 2d 96, where an unusual exertion strained and stretched the muscles of the heart and blood vessels, causing acute dilation of the heart, which was deemed a compensable injury on the theory of accident.

Here, however, the claimant insists that the award may be sustained under the 1949 amendment (Chapter 1078, Session Laws of 1949, now codified as G.S. 97-53 (26)), which designates certain heart diseases as occupational diseases as to firemen. This amendment singles out active members of fire departments of cities, towns, and other political subdivisions of the State, and as to such firemen makes each of certain classified heart diseases an occupational disease *per se,* and by legislative fiat dispenses with the necessity of proving causal relation between the heart disease and the employment.

The defendant challenges the constitutional validity of the 1949 amendment on the ground that it provides in effect for a gift or gratuity from the public treasury in direct violation of Article I, Section 7, of the Constitution of North Carolina, which provides that:

"No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

The defendant's challenge is well taken. In reality, the statute seeks to confer upon firemen a special privilege not accorded other municipal employees, nor to employees in private industry. It places on the taxpayers a burden which the Constitution declares it was not intended for them to bear. It creates for firemen substantial financial benefits, to be paid from the public treasury under the guise of workmen's compensation benefits, without establishing an occupational disease as the usual incident

or result of the particular employment. Any such payment is in direct conflict with the foregoing constitutional prohibition against separate emoluments and special privileges, and the Legislature has no power to authorize a municipal corporation to pay any such gratuity to a particular class of its employees. Our decision here is in accord with a long line of previous decisions of this Court reflecting a consistent interpretation of this constitutional limitation in striking down legislative grants of separate emoluments and special privileges. *Simonton v. Lanier,* 71 N.C. 498; *Motley v. Warehouse Co.,* 122 N.C. 347, 30 S.E. 3 (petition for rehearing denied, 124 N.C. 232, 32 S.E. 555); *S. v. Fowler,* 193 N.C. 290, 136 S.E. 709; *Plott v. Ferguson,* 202 N.C. 446, 163 S.E. 688; *Edgerton v. Hood, Comr. of Banks,* 205 N.C. 816, 172 S.E. 481; *S. v. Sasseen,* 206 N.C. 644, 175 S.E. 142; *Brown v. Comrs. of Richmond County,* 223 N.C. 744, 28 S.E. 2d 104. See also: *Cowan v. Trust Co.,* 211 N.C. 18, 188 S.E. 812; *S. v. Warren,* 211 N.C. 75, 189 S.E. 108; *S. v. Harris,* 216 N.C. 746, 6 S.E. 2d 854.

In *Simonton v. Lanier, supra,* it was contended that the charter of the Bank of Statesville, incorporated by private-local act of the Legislature, was given the special privilege to lend money at a rate of interest in excess of that allowed by general state law. There the Court held that the charter of the bank created no such special privilege. *Bynum, J.,* delivering the opinion, in referring to Article I, Sections 7 and 31, of the Constitution of North Carolina, said: "The wisdom and foresight of our ancestors is nowhere more clearly shown than in providing these fundamental safeguards against partial and class legislation, the insidious and ever-working foes of free and equal government." (71 N.C. mid. p. 503.)

S. v. Fowler, supra, involves a conflict between the provisions of a general and a public-local statute. There, under the general statute a violation of the state prohibition law was made punishable by fine and imprisonment within the discretion of the court; whereas the public-local act, applying to only five counties, restricted the punishment to a fine in certain instances. It was held that the public-local act attempted to confer upon residents of the five counties privileges or immunities not enjoyed by other residents of the State in violation of Article I, Section 7, of the State Constitution. In a well considered opinion by *Adams, J.,* it is stated that the public-local act grants "a special exemption from punishment or an exclusive or separate privilege which is forbidden by the cited provision. . . . It follows that the provision limiting the punishment for the first offense to a fine must be regarded as an arbitrary class distinction which cannot be sustained because forbidden by the fundamental law . . ." (193 N.C. at pp. 293 and 294.)

In *Edgerton v. Hood, Comr. of Banks, supra,* a public-local statute provided that deposit claims of certain closed banks might be sold to

persons indebted to such banks on the date of closing, and that any such purchased claim might be set off against a debt owed by the purchaser to the same closed bank. *Connor, J.*, speaking for the Court, said: "The statute contravenes this sound and just principle, and violates both the letter and spirit of the provision, because (1) it attempts to confer an exclusive and separate privilege on one class of creditors and debtors of a closed bank, which it denies to another class, with no just or reasonable ground for the classification; . . ." (205 N.C. bot. p. 821.)

In *S. v. Sasseen, supra,* an ordinance of the City of Charlotte required operators of for-hire motor vehicles within the city to post policies of liability insurance written by responsible companies authorized to do business in the State of North Carolina. The ordinance was held void as class legislation, violative of Article I, Sections 7 and 31, of the State Constitution, in that it failed to provide that the security required might be furnished by solvent individual sureties as well as corporate ones. (206 N.C. 644.)

In *Brown v. Comrs. of Richmond County, supra,* a local recorder's court was abolished by act of the General Assembly before expiration of the term to which the presiding judge had been elected. Thereafter a special county court was organized under general statute, with another person being appointed judge. Later an act of the Legislature directed that the county pay the judge of the abolished court his salary for the unexpired term. It was held that the statute was violative of Article I, Section 7, of the State Constitution. In a well considered opinion written by *Justice Barnhill* it is stated (referring to Article I, Section 7, of the Constitution): "This constitutes a specific constitutional prohibition against gifts of public money, and the Legislature has no power to compel or even to authorize a municipal corporation to pay a gratuity to an individual to adjust a claim which the municipality is under no legal obligation to pay (citation of authorities). Nor may it lawfully authorize a municipal corporation to pay gifts or gratuities out of public funds. . . ." (223 N.C. p. 746.)

It follows that Chapter 1078, Session Laws of 1949, is repugnant to Article I, Section 7, of the Constitution of North Carolina. Therefore the statute is declared invalid and inoperative, and the award below being unsupported by the requisite proof of causal relation between the deceased's employment and his death (*Plemmons v. White's Service, Inc., supra* (213 N.C. 148), the judgment below is

Reversed.

WALTER PENN DAVIS, EMPLOYEE, v. CITY OF WINSTON-SALEM, SELF-INSURER, EMPLOYER.

(Filed 17 July, 1951.)

APPEAL by defendant from *Crisp, Special Judge,* at April Term, 1951, of FORSYTH.

Proceeding under Workmen's Compensation Act to determine claim of Walter Penn Davis for disability due to heart disease (angina pectoris resulting from coronary arteriosclerosis) alleged to have developed as an occupational disease while he was serving as a member of the Fire Department of the City of Winston-Salem, self-insurer.

The Industrial Commission awarded compensation. This was affirmed on appeal to the Superior Court. From the latter ruling, the defendant appeals, assigning errors.

W. Scott Buck and J. C. B. Ehringhaus, Jr., for plaintiff, appellee.

Grover H. Jones and Womble, Carlyle, Martin & Sandridge for defendant, appellant.

JOHNSON, J. The award and judgment below rest solely on the 1949 amendment to the Workmen's Compensation Act, Chapter 1078, Session Laws of 1949, now codified as G.S. 97-53 (26), which provides that certain classified heart diseases, including angina pectoris, shall be deemed and treated as compensable occupational diseases as to active members of fire departments of cities, towns, and other political subdivisions of the State.

The award below is unsupported by evidence showing causal relation between the claimant's heart disease and the employment out of which it supposedly arose. And the 1949 amendment under which the award was made having been declared repugnant to Article I, Section 7, of the Constitution of North Carolina, by decision filed simultaneously herewith in *Duncan v. City of Charlotte, ante,* 86, which is precisely decisive of the question raised by the instant appeal, the judgment below is

Reversed.

MRS. LETTIE M. WATKINS AND MRS. LETTIE M. WATKINS, ADMINISTRATRIX OF THE ESTATE OF DR. GEORGE T. WATKINS, JR., v. EUGENE G. SHAW, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 17 July, 1951.)

1. **Courts § 12—**

Under the power of the Federal Government to borrow money, its regulations control title and succession by survivorship of Federal Savings bonds irrespective of the succession laws of the State. Federal Constitution, Art. I, Sec. 8, Clauses 2 and 18.

2. **Taxation § 28—**

A law imposing an inheritance tax is to be liberally construed to effectuate the intent of the Legislature, and all property fairly and reasonably coming within the provisions of such law may be taxed.

3. **Taxation § 18—**

An inheritance or succession tax is a burden imposed by government upon all gifts, legacies, inheritances and successions passing by will, intestate law, or deed or instrument *inter vivos* intended to take effect at or after the death of the grantor, and is not a tax on the property itself.

4. **Gifts § 1—**

The fact that the wife has access to United States Savings Bonds, Series E, made payable to either her or her husband, but bought with the husband's funds, is insufficient delivery to establish a gift to her *inter vivos*.

5. **Taxation § 28—**

United States Savings Bonds, Series E, bought with the funds of the purchaser and made payable to the purchaser or his wife as co-owners, and kept in a place accessible to both, but without a gift *inter vivos* of the bonds to the wife, are subject to state inheritance taxes upon the death of the husband, G.S. 105-2, since the wife acquires title to the bonds by succession as survivor under the Treasury regulations.

APPEAL by plaintiff from *Hatch, Special Judge,* April Term, 1951, of DURHAM.

This is a civil action to recover from the defendant, Eugene G. Shaw, Commissioner of Revenue of the State of North Carolina, the sum of $863.76, paid to the defendant on 9 May, 1950, under protest, in payment of inheritance taxes assessed upon United States Savings Bonds, Series E, together with interest thereon.

According to the allegations of the complaint, from time to time during the period beginning in October, 1942, and ending in December, 1945, Dr. George T. Watkins, Jr., purchased thirty-four United States Savings Bonds, Series E, of various denominations, having a cash surrender value at the time of his death on 11 May, 1948, of $19,884.00. Twenty-two of

these bonds, having a cash value on the date of his death of $10,409.00, were issued to Dr. George T. Watkins, Jr., or Mrs. Lettie May Watkins. The remaining twelve bonds having a cash value of $9,475.00, were issued to Mrs. Lettie May Watkins or Dr. George T. Watkins, Jr.

Dr. Watkins died intestate. All the bonds referred to herein were purchased by him out of his own funds and issued as directed by him. The bonds were kept in a place accessible to both Dr. Watkins and his wife, Mrs. Lettie May Watkins.

The defendant demurred to the complaint on the ground that it did not state a cause of action. The demurrer was sustained and the plaintiff appeals, assigning error.

Basil M. Watkins and White & White for plaintiff.

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

DENNY, J. This Court held in the case of *Ervin v. Conn,* 225 N.C. 267, 34 S.E. 2d 402, that the Federal Government has the power, pursuant to Article I, sec. 8, clauses 2 and 18, of the Constitution of the United States, to borrow money and to regulate and adjust its contracts within the compass of that power, so that title to its bonds may be subject to succession by survivorship, according to the terms of the contract, irrespective of the succession laws of the State.

All of the bonds involved herein contain certain provisions on their face, among them being the following: "This bond is issued pursuant to Treasury Department Circular No. 653, Second Revision, and is subject to the terms and conditions thereof and the regulations prescribed thereunder as fully as if herein set forth." And an examination of Treasury Department Circular No. 653, Second Revision, Part II, Section 4, reveals that it contains, among other things, the following provision: "The bonds shall be subject to estate, inheritance, gift or other excise taxes, whether Federal or State . . ."

The regulations issued by the Treasury Department of the United States governing payment or reissue of United States Savings Bonds registered in the name of two persons as co-owners, being Treasury Department Circular No. 530, defining the rights of the parties, and referred to in Circular No. 653, Second Revision, hereinabove referred to, contains these pertinent provisions: "(a) . . . During the lives of both co-owners the bonds will be paid to either co-owner upon his separate request without requiring the signature of the other co-owner. . . .(c) . . . If either co-owner dies without the bond having been presented and surrendered for payment or authorized reissue, the surviving owner will be recognized as the sole and absolute owner of the bond and payment or

reissue, as though the bond were registered in his name alone, will be made only to such survivor. . . ."

While, according to the plaintiff's complaint, the bonds which are the subject of this controversy, were kept in a place which was accessible to both Dr. Watkins and his wife, prior to his death, there is no allegation in the complaint to support the view that there was an *inter vivos* gift of the bonds by Dr. Watkins to his wife. On the contrary, it is quite clear from the plaintiff's pleadings that the absolute title to these bonds passed by succession, on the death of Dr. Watkins, co-owner, to his wife, Mrs. Lettie M. Watkins, as the sole and absolute owner thereof by survivorship, under the terms of the contract pursuant to which the bonds were issued.

Therefore, the question for us to determine is simply this: Should the cash value of United States Savings Bonds, Series E, issued and made payable to the purchaser or his wife, as co-owners, be included in the estate of the purchaser for inheritance tax purposes, where the purchaser expended his own funds in the acquisition of the bonds and kept them in a place accessible to both the purchaser and his wife, but made no *inter vivos* gift of the bonds to his wife? We think this question must be answered in the affirmative.

The defendant, Commissioner of Revenue of the State of North Carolina, is relying upon the provisions contained in G.S. 105-2, which levies an inheritance tax on property, real and personal, tangible and intangible, transferred "by deed, grant, bargain, sale, or gift made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death, including a transfer under which the transferor has retained for his life or a period not ending before his death (a) possession or enjoyment of, or the income from, the property or (b) the right to designate the persons who shall possess or enjoy the property or the income therefrom."

A law imposing an inheritance tax is to be liberally construed to effectuate the intention of the Legislature, and all property fairly and reasonably coming within the provision of such law may be taxed. *Reynolds v. Reynolds,* 208 N.C. 578, 182 S.E. 341; *Corporation Com. v. Dunn,* 174 N.C. 679, 94 S.E. 481; *S. v. Scales,* 172 N.C. 915, 90 S.E. 439; *Norris v. Durfey,* 168 N.C. 321, 84 S.E. 687. An inheritance or succession tax is defined as " 'A burden imposed by government upon all gifts, legacies, inheritances, and successions, whether of real or personal property, or both, or any interest therein, passing to certain persons . . . by will, by intestate law, or by deed or instrument made *inter vivos* intended to take effect at or after the death of the grantor.' Dos Passos (2 Ed.), sec. 2. . . . A succession tax is a tax on the right of succession to prop

erty, and not on the property itself." *In re Morris Estate,* 138 N.C. 259, 50 S.E. 682.

In our opinion the bonds involved herein were properly included in the estate of Dr. Watkins for inheritance tax purposes. The mere fact that his wife had access to the bonds prior to his death was insufficient evidence of their delivery to her to establish a gift *inter vivos.* We think the provision in the bonds with respect to ownership, constitutes a gift or transfer from Dr. Watkins to his wife, intended to take effect in possession or enjoyment at or after his death, in the event the bonds were not surrendered prior thereto. And since the bonds were not surrendered for payment or reissue prior to the death of Dr. Watkins, upon his death the title to the bonds passed by succession to Mrs. Watkins under the terms of the contract pursuant to which they were issued.

Other jurisdictions, having passed upon the precise question now before us, under statutes similar to or exactly like ours, have held that bonds transferred under circumstances similar to those in the instant case, are subject to inheritance taxes levied in the respective State. *In re Brown's Estate,* 122 Mont. 451, 206 P. 2d 816; *Succession of Raborn,* 210 La. 1033, 29 So. 2d 53; *Hallett v. Bailey,* 143 Maine 1, 54 A. 2d 533; *In re Myers' Estate,* 359 Pa. 577, 60 A. 2d 50; *Mitchell v. Carson,* 186 Tenn. 228, 209 S.W. 2d 20. We know of no authoritative decisions to the contrary.

The judgment of the court below is

Affirmed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1951

STATE v. EDGAR WOODROW MARSH.

(Filed 19 September, 1951.)

1. Homicide § 10c—

An instruction to the effect that if defendant did not have the mental capacity because of drunkenness to deliberate and premeditate he could not be guilty of murder in the first degree, and that the burden of establishing premeditation and deliberation beyond a reasonable doubt was upon the State, *held* to give defendant the full benefit of his defense of inebriacy.

2. Robbery § 3—

Upon conviction of defendant of robbery and not of robbery with firearms as charged, a judgment of twenty-five to thirty years in the State's Prison is in excess of the statutory maximum. G.S. 14-2, G.S. 14-87.

3. Criminal Law § 33—

The competency of a confession is a primary question for the trial court, and the court's ruling that the confession was voluntary and competent is not subject to review when supported by competent evidence upon the preliminary hearing.

4. Same—

A confession must be taken in its entirety, giving defendant the benefit of that part favorable to him as well as giving to the State the benefit of that part which militates against him.

5. Criminal Law § 52a—

Where motion for nonsuit is not limited to a particular count in the bill of indictment or to any one degree of the crimes charged, but is ad-

dressed to the entire bill or both counts as a whole, the motion cannot be allowed in the face of evidence sufficient to support any count or any degree of any count. G.S. 15-173.

6. **Homicide § 27c—Conduct immediately before and after homicide may be considered on question of premeditation and deliberation.**

An instruction to the effect that the jury might take into consideration defendant's conduct before and after as well as at the time of the homicide and all attendant circumstances in determining the questions of premeditation and deliberation will not be held for error as permitting the jury to consider defendant's flight the morning after the homicide or attempted suicide sometime thereafter in determining the questions when it is apparent from the record that the charge referred to attendant circumstances at the time of the homicide as indicative of the purpose and intent in defendant's mind at that time, which immediate circumstances were sufficient to support an affirmative finding.

7. **Homicide § 27i: Criminal Law § 53n—**

An instruction that the jury "may for any reason and within your discretion" recommend life imprisonment upon conviction of first degree murder will not be held for error as requiring the jury to have a reason for such recommendation when in other portions of the charge the court had placed the matter in the unrestricted discretion of the jury and the charge construed contextually could not have been misleading. G.S. 14-17.

8. **Criminal Law § 81c (2)—**

Where inexact expressions in the charge are readily reconcilable under the rule of contextual construction, they will not be held for reversible error.

9. **Indictment and Warrant § 8—**

The better practice is to try capital cases on single-count bills or bills containing only capital charges.

This opinion was written in accordance with the Court's decision and filed by order of the Court after *Chief Justice Stacy's* death.

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

APPEAL by defendant from *Pless, J.*, April Term, 1951, of SURRY.

Criminal prosecution on two-count bill charging the defendant (1) with robbery with firearms from the person of Allen Phillips certain personal property, to wit, pocketbook, flashlight and more than thirty dollars in money the property of the said Allen Phillips, and (2) with the murder of Allen Phillips contrary to the statutes, G.S. 14-87 and G.S. 14-17, in such cases made and provided.

The record discloses that on Friday, 9 February, 1951, about 8:30 p.m., the defendant engaged a taxicab, with Allen Phillips driving, to take him from Mount Airy to Wes Scott's place in Shoals, Surry County, where he had previously lived. It is in evidence that the defendant first

"got Allen Phillips to take him to get some whiskey," which he did, and "he got nearly ½ gallon of white whiskey." He could not or would not say from whom he bought it. When they reached Wes Scott's place in Shoals, they did not stop but drove on down the road near a turnip patch to turn around. Here a fuss or fight ensued between the two over the amount the defendant was to pay for the trip, the defendant contending the price of the trip was eight dollars, whereas the driver wanted ten.

The defendant cut Phillips about the head and chest with a Scout knife which he had purchased that afternoon, the chest wound being particularly dangerous—about five inches in depth. They seem to have fought in the cab, which was very bloody, and also on the outside. The driver jumped back into the cab and drove away, leaving the defendant standing in the road. The defendant says in his confession that he thus withdrew from the fight and walked to the corner of the house where he lived some three to four hundred yards away and was leaning up against the house when he heard Phillips coming up the road on foot hollering. He "wasn't just hollering . . . but screaming or squalling." Soon he reached the spot where the defendant was and picked up a stick of wood while still hollering; whereupon the defendant picked up an axe lying near the woodpile and struck him with it. Phillips thereupon ran back of the house, across the pasture and through a barbed-wire fence, with the defendant chasing him, axe in hand. The defendant caught up with Phillips in a little road leading to the barn, hit him with the axe which caused him to fall to the ground and he quit hollering. The defendant took Phillips' money, pocketbook and flashlight and went back to the house. He was not certain whether Phillips was dead but thought he was when he left him.

The defendant spent the night at his mother's home and left the next morning about daybreak. He sought safety in flight and attempted suicide by swallowing carbolic acid, both of which proved unsuccessful or unavailing for the purpose. His confession recites the reason he took the carbolic acid was "because he knew he would be caught and he knew he would be killed anyway so he decided to do it himself."

The defendant also, in his confession to the officer, first states that "he was not drunk on Friday night." Later he says, "he was pretty well drunk." The defendant did not offer himself as a witness on the hearing.

Verdict: On the first count: "Guilty of robbery."

On the second count: "Guilty of murder in the first degree."

Judgment: In the robbery case: Imprisonment in the State's Prison for not less than 25 nor more than 30 years. This judgment not to interfere with or to delay the judgment on the second count.

In the homicide case: Death by asphyxiation.

The defendant appeals, assigning errors.

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

Charles M. Neaves and E. C. Bivins for defendant.

STACY, C. J., after stating the facts as above: The defendant states in his confession that, with axe in hand, he pursued Allen Phillips over the snow-covered pasture, across a barbed-wire fence, overtook him in the road leading to the barn, struck him a lethal blow on the head with the axe, felled and silenced him, robbed him and left him for dead. These facts alone, if true, and the jury has accepted them as such, render the legal questions debated on brief, assuming the defendant's sanity, somewhat pedantic or academic. He certainly was not fighting in his own self-protection when his antagonist was trying to get away from him, and he does not so contend. His defense of drunkenness and mental irresponsibility was rejected by the jury. He could not have been very drunk when, with axe in hand, he chased Phillips a distance of some 40 or 50 yards, across the pasture, over a barbed-wire fence, down the road, and slew him. Nevertheless, he was given full benefit of his contention of inebriacy and mental deficiency in the court's charge to the jury. *S. v. Ross,* 193 N.C. 25, 136 S.E. 193, as witness the following: ". . . while the defendant has no burden so far as establishing a lack of premeditation and deliberation—the State has the burden of showing that beyond all reasonable doubt before it can obtain a verdict of guilty of murder in the first degree—at the same time if the defendant has satisfied you that he did not have the mental capacity because of his drunkenness to deliberate and premeditate, he could not be guilty of murder in the first degree." Accordant: *S. v. Swink,* 229 N.C. 123, 47 S.E. 2d 852; *S. v. Harris,* 223 N.C. 697, 28 S.E. 2d 232.

On the first count, however, as the jury convicted the defendant only of robbery and not of robbery with firearms as charged in the bill of indictment, the judgment imposed of from 25 to 30 years in the State's Prison is in excess of that allowed by statute, G.S. 14-2. *S. v. Surles,* 230 N.C. 272, 52 S.E. 2d 880. Hence, the judgment on this count will be vacated and remanded for proper judgment, if for any reason the judgment on the second count is not carried out.

On the second count, that of murder, the defendant challenges (1) the voluntariness of his confession, (2) the sufficiency of the evidence to carry the case to the jury, and (3) the correctness of the charge.

First, The Voluntariness of the Defendant's Confession:

The defendant made several statements to the investigating agent of the State Bureau of Investigation, one on 11 February, another on 12 February, while the defendant was in the hospital recovering from carbolic acid poisoning, and a third on 1 March, 1951, while he was in

jail, all in the nature of confessions. They were the subject of a preliminary investigation, touching their voluntariness, and ruled competent by the court. *S. v. Thompson,* 227 N.C. 19, 40 S.E. 2d 620; *S. v. Biggs,* 224 N.C. 23, 29 S.E. 2d 121. The ruling is supported by the record. *S. v. Brown,* 233 N.C. 202, 63 S.E. 2d 99.

The competency of a confession is a preliminary question for the trial court, *S. v. Andrew,* 61 N.C. 205, to be determined in the manner pointed out in *S. v. Whitener,* 191 N.C. 659, 132 S.E. 603, and the court's ruling thereon is not subject to review, if supported by any competent evidence. *S. v. Alston,* 215 N.C. 713, 3 S.E. 2d 11. The defendant offered no evidence on the preliminary inquiry. His present objection to the confession and the court's ruling thereon must be overruled or held for naught. *S. v. Bennett,* 226 N.C. 82, 36 S.E. 2d 708. Of course, the confession is to be taken as a whole in its entirety, the part which makes in favor of the accused as well as the part which militates against him. *S. v. Edwards,* 211 N.C. 555, 191 S.E. 1. This seems to have been done on the trial.

Second. The Sufficiency of the Evidence:

The demurrer to the evidence was properly overruled. There is no part of the defendant's confession which would seem to warrant an acquittal. The exception appears to have been taken out of the abundance of caution. The motion was "for judgment as of nonsuit on both counts in the bill of indictment." Note, the motion is not limited to a single count or any one degree of the crimes charged, but it is addressed to the entire bill or to both counts as a whole. The motion could not be allowed in the face of testimony to support either count or any degree of either count, of which there was ample evidence in the instant case. G.S. 15-173.

Third. Exceptions to the Charge:

The defendant objects to the following instruction: "In determining the questions of premeditation and deliberation it is proper for the jury to take into consideration the conduct of the defendant before and after, as well as at the time of the homicide and all attending circumstances."

The excerpt seems to have been taken from the opinion in *S. v. Evans,* 198 N.C. 82, 150 S.E. 678. The criticism here is, that the "after" conduct of the defendant would include his flight and attempted suicide which may be considered only on the issue of guilt and not as tending to show premeditation or deliberation. *S. v. Payne,* 213 N.C. 719, 197 S.E. 573 (flight); *S. v. Lewis,* 209 N.C. 191, 183 S.E. 357 (flight); *S. v. Mull,* 196 N.C. 351, 145 S.E. 677 (flight); *S. v. Hairston,* 182 N.C. 851, 109 S.E. 45 (flight); *S. v. Lawrence,* 196 N.C. 562, 146 S.E. 395 (attempted suicide); *S. v. Exum,* 213 N.C. 16, 195 S.E. 7 (attempted suicide); *S. v. Steele,* 190 N.C. 506, 130 S.E. 308 (secreting body after killing). The objection appears somewhat strained as the after-attendant circum-

stances would hardly include the defendant's conduct on the following day. The court was here speaking to the purpose and intent in the defendant's mind at the time of the homicide. This, the jury must have understood. Moreover, there is no mention in the court's charge of the defendant's attempted suicide or flight, save the bare recital that the defendant spent the night of the homicide at the home of his mother and stepfather "and left about daybreak the next morning." Nor was there any request to charge on the significance of these circumstances or in what light they should be considered by the jury. Evidently, the defendant's conduct long after the homicide was not a matter of debate on the hearing. The immediate circumstances were apparently sufficient. The contention presently advanced seems to have been an afterthought.

Exception is also taken to the instruction that in case the jury should return a verdict of guilty of murder in the first degree, "You may for any reason and within your discretion add to that the recommendation, if you desire to do so, that he be imprisoned for life, in which event that disposition will be made of the case."

The objection to this instruction is that it requires the jury to have a reason for such recommendation arising perhaps upon the evidence, whereas the statute, G.S. 14-17, as amended by Chap. 299, Session Laws, 1949, commits the matter to the unrestrained discretion of the jury. *S. v. McMillan,* 233 N.C. 630, 65 S.E. 2d 212.

The criticism loses its force when considered with another portion of the charge. The court had previously instructed the jury that if they should render a verdict of murder in the first degree, then "You may, if you so determine, in your own discretion add to that verdict a recommendation of life imprisonment."

Viewing the charge in its entirety and as a whole, as required by the established practice, we reach the conclusion that the exception is insufficient to overthrow the results of the trial.

There are other exceptions appearing on the record, some brought forward and discussed on brief, others not, which have received due attention, but as they appear insufficient to work a new trial we forego further discussion of them in the opinion. The several inexact expressions pointed out by the defendant are readily reconcilable under the rule of contextual construction. *S. v. Bullins,* 226 N.C. 142, 36 S.E. 2d 915; *S. v. Exum,* 138 N.C. 599, 50 S.E. 283; *Speas v. Bank,* 188 N.C. 524, 125 S.E. 398. "The charge must be considered contextually and not disjointedly." *Milling Co. v. Highway Com.,* 190 N.C. 692, 130 S.E. 724.

On the whole, the case appears to have been tried in substantial conformity to the requirements of the decided cases or the pertinent authorities.

While no objection has been interposed to the joinder of the two counts in the same bill, it may be observed that the usual practice, and perhaps the more desirable practice, is to try capital cases on single-count bills, or bills containing only capital charges.

The validity of the trial will be upheld.

The result, then, is:

On the robbery count, Error and remanded (provisionally).

On the murder count, No error.

NOTE: This opinion was written in accordance with the Court's decision and filed by order of the Court after *Chief Justice Stacy's* death.

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

RUTH N. BARBER v. LULA M. WOOTEN, ADMX., ET AL.

(Filed 19 September, 1951.)

1. **Negligence § 6: Torts § 4: Automobiles § 18d: Pleadings § 19b—Drivers successively hitting plaintiff's car may be held liable as joint tort-feasors.**

   A complaint alleging that immediately after a collision caused by the negligence of the intestate of one defendant, and while plaintiff was injured and unable to extricate herself from the car in which she was riding, another defendant negligently ran his truck into the rear of her car causing further injury, and that shortly thereafter the third defendant ran into the side of the car in which she was riding as it was standing immobilized sidewise on the road, causing further injuries to plaintiff, and that the defendants were jointly, concurrently and successively negligent in proximately causing plaintiff's injuries, *is held* good as against demurrer for misjoinder of parties and causes, since the complaint alleges a sequence of events which successively, concurrently and jointly produced plaintiff's injuries, for which defendants may be held liable as joint tort-feasors.

2. **Negligence § 6: Torts § 4—**

   Where the acts or omissions of persons operating independently of each other join and concur in proximately producing the injury complained of, even though originating from separate and distinct sources, the author of each is liable for the resulting injury, and action may be brought against any one or all as joint tort-feasors.

3. **Pleadings § 19b—**

   On demurrer the case will be taken as made by the complaint.

4. **Torts § 6—**

   The rights of defendants as against the plaintiff or as among themselves is not presented by demurrer to the complaint when not appearing on the face thereof. G.S. 1-240.

BARNHILL, J., concurring.

This opinion was written in accordance with the Court's decision and filed by order of the Court after *Chief Justice Stacy's* death.

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

APPEAL by defendants from *Morris, J.*, January Term, 1951, PASQUOTANK—from CAMDEN.

Civil action to recover damages for personal injuries alleged to have been successively inflicted by the joint and concurrent negligence of the defendants.

The complaint alleges:

1. That on 9 April, 1950, the plaintiff was a passenger in a Ford Sedan being operated by Connell McHorney southwardly on Highway 170 in Currituck County in a careful and prudent manner; that another Ford Sedan traveling in the opposite direction and being operated by W. M. Wooten, intestate of the defendant, Lula M. Wooten, Administratrix, carelessly and negligently ran head-on into the McHorney car "and set into sequence a chain of events . . . which proximately resulted in injuries to the plaintiff."

2. That immediately following the collision as above described and while plaintiff was in a seriously injured condition and unable to extricate herself, the defendant, Adam Layden, driving a Dodge pick-up truck, negligently ran his truck into the rear of the McHorney car, knocked it sidewise on the road, and successively and concurrently with the negligence of the driver of the Wooten car inflicted further serious injury to the plaintiff, which, together with the negligence of the defendant, Clyde C. Scaff, hereinafter set forth, proximately resulted in serious and permanent injuries to the plaintiff.

3. That shortly following the Layden collision and while the McHorney car was immobilized in a sidewise position on the right-hand side of the road going south, and with the plaintiff therein in a seriously injured condition, the defendant Scaff driving a 1949 Ford convertible southwardly along said highway, negligently ran into the side of the McHorney car in which plaintiff was helplessly situate, producing further bodily injuries upon her, which, together with the injuries imposed by the two previous drivers, resulted in serious and permanent injuries to the plaintiff.

4. That the defendants were jointly, concurrently and successively negligent in proximately causing the injuries to the plaintiff, wherefore she demands damages.

Separate demurrers were interposed by the defendants for dual misjoinder of parties and causes of action. Demurrers overruled; exception.

The defendants appeal, assigning errors.

McMullan & Aydlett for plaintiff, appellee.
Frank B. Aycock, Jr., for defendant Wooten, appellant.
J. Henry LeRoy for defendant Layden, appellant.
John H. Hall for defendant Scaff, appellant.

STACY, C. J. The case is controlled by what was said in *Hester v. Motor Lines,* 219 N.C. 743, 14 S.E. 2d 794; *Lewis v. Hunter,* 212 N.C. 504, 193 S.E. 814; *West v. Baking Co.,* 208 N.C. 526, 181 S.E. 551. It will be noted the complaint alleges a sequence of events which successively, concurrently and jointly produced the plaintiff's injuries. The defendants are sought to be held liable as joint tort-feasors. *Levins v. Vigne,* 339 Mo. 660, 98 S.W. 2d 737, and 4 Blashfield, Sec. 2552. The plaintiff alleges successive, joint and concurrent torts which in their cumulative effect produced her injuries.

There may be two or more proximate causes of an injury. These may originate from separate and distinct sources or agencies operating independently of each other, yet if they join and concur in producing the result complained of, the author of each cause would be liable for the damages inflicted, and action may be brought against any one or all as joint tort-feasors. *White v. Carolina Realty Co.,* 182 N.C. 536, 109 S.E. 564.

The defendants, on the other hand, take the position that the negligence of Wooten came to an end before the Layden truck struck the McHorney car and that the negligence of both Wooten and Layden had spent themselves before the Scaff car came upon the scene, and that, therefore, the negligence of each defendant was separate and distinct from the negligence of the others, resulting in three separate and distinct injuries and giving rise to three separate and distinct causes of action against three separate and disconnected defendants. This was the theory of the decision in *Atkins v. Steed et al.,* 208 N.C. 245, 179 S.E. 889, cited by appellants, where no allegation of joint or concurrent negligence was made. True, the plaintiff there asked for a "joint" recovery, but not on the ground of successive, joint and concurrent torts as here. On demurrer we take the case as made by the complaint.

The rights of the defendants as against the plaintiff or as among themselves would not arise on demurrer unless made to appear on the face of the complaint, which is not the case here. G.S. 1-240; *Whiteman v. Transportation Co.,* 231 N.C. 701, 58 S.E. 2d 752; *Tarkington v. Printing Co.,* 230 N.C. 354, 53 S.E. 2d 269; *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808.

The complaint appears sufficient to withstand the demurrers.

Affirmed.

NOTE: This opinion was written in accordance with the Court's decision and filed by order of the Court after *Chief Justice Stacy's* death.

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

BARNHILL, J., concurring: It does not appear on the face of the complaint that there was any appreciable interval of time between the three collisions. Hence, the question defendants seek to raise is not presented by the demurrer. *Hodgin v. Public Service Corporation,* 179 N.C. 449, 102 S.E. 748; *Hester v. Motor Lines,* 219 N.C. 743, 14 S.E. 2d 794; *cf. Shaw v. Barnard,* 229 N.C. 713, 51 S.E. 2d 295. The opinions in the wrongful death cases arising out of the same accidents, this day filed, are clearly in accord with our decisions to which we adhere.

CLARENCE McHORNEY, ADMR., v. LULA M. WOOTEN, ADMX., ET AL.

(Filed 19 September, 1951.)

Death § 5b—

Where death is the result of the sum total of the torts, neglects and defaults of several parties, all may be joined in the action for wrongful death. G.S. 28-173.

This opinion was written in accordance with the Court's decision and filed by order of the Court after *Chief Justice Stacy's* death.

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

APPEAL by defendants from *Morris, J.,* January Term, 1951, PASQUOTANK—from CAMDEN.

Civil action to recover damages for the wrongful death of plaintiff's intestate, alleged to have been caused by the successive, joint and concurrent neglect or default of the defendants.

The facts alleged in the instant complaint in respect of the acts of negligence of the defendants are identical with those set out in the companion case of *Barber v. Wooten, Admx.,* concurrently being decided, except here the plaintiff's intestate was the driver of the McHorney car and only two parties defendant have been sued.

Separate demurrers were interposed by the defendants for misjoinder of parties and causes. Demurrers overruled; exceptions.

The defendants appeal, assigning errors.

McMullan & Aydlett for plaintiff, appellee.
Frank B. Aycock, Jr., for defendant Wooten, appellant.
J. Henry LeRoy for defendant Layden, appellant.

STACY, C. J. The judgment overruling the demurrers will be upheld on authority of what is said in the companion case of *Barber v. Wooten, Admx., ante,* 107.

This case affords perhaps a clearer, if not a more pronounced, distinction from the *Atkins case,* 208 N.C. 245, 179 S.E. 889, than does the *Barber case.* Here, the action is for the wrongful death of plaintiff's intestate—the result of the sum total of all the torts, neglects or defaults of the defendants which culminated in the right given by the "Lord Campbell Act." G.S. 28-173.

The demurrers were properly overruled.

Affirmed.

NOTE: This opinion was written in accordance with the Court's decision and filed by order of the Court after *Chief Justice Stacy's* death.

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

C. EARL SNOWDEN, ADMR., v. LULA M. WOOTEN, ADMX., ET AL.

(Filed 19 September, 1951.)

APPEAL by defendants from *Morris, J.,* January Term, 1951, PASQUOTANK—from CAMDEN.

Civil action to recover damages for the wrongful death of plaintiff's intestate, alleged to have been caused by the successive, joint and concurrent neglect or default of the defendants.

The facts alleged in the instant complaint in respect of the acts of negligence of the defendants are identical with those set out in the companion case of *Barber v. Wooten, Admx.,* concurrently being decided, except here plaintiff's intestate died as a result of his injuries giving rise to the present action for damages under G.S. 28-173.

Separate demurrers were interposed by the defendants for misjoinder of parties and causes. Demurrers overruled; exceptions.

The defendants appeal, assigning errors.

McMullan & Aydlett for plaintiff, appellee.
Frank B. Aycock, Jr., for defendant Wooten, appellant.
J. H. LeRoy for defendant Layden, appellant.
John H. Hall for defendant Scaff, appellant.

PER CURIAM. The judgment overruling the demurrer will be upheld on authority of what is said in the companion cases of *Barber v. Wooten, Admx., ante,* 107, and *McHorney, Admr., v. Wooten, Admx., ante,* 110.
Affirmed.

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

STATE v. JAMES ARTHUR JENKINS.

(Filed 19 September, 1951.)

1. **Criminal Law § 77a—**

   On appeal in criminal cases, the indictment and warrant and plea on which the case is tried, the verdict and the judgment appealed from, are all essential parts of the transcript. Rule of Practice 19, Sec. 1.

2. **Criminal Law § 78a—**

   It is the duty of appellant to see that the record is properly made up and transmitted. G.S. 15-180.

3. **Intoxicating Liquor § 9d—**

   Evidence to the effect that officers with search warrant found a half gallon of nontax-paid whiskey in a kettle on the kitchen table in defendant's home is sufficient to sustain conviction of illegal possession of intoxicating liquor in violation of G.S. 18-48.

4. **Criminal Law § 43—**

   Chap. 644, Session Laws of 1951, has no application to evidence obtained by search prior to 9 April, 1951.

5. **Criminal Law § 78d (1)—**

   Where there is no objection to the admission of evidence, a motion to strike is addressed to the sound discretion of the trial court.

6. **Same—**

   Where there is no objection to the admission of evidence, but only a motion to strike, Chap. 150, Session Laws of 1949, is inapplicable.

7. **Criminal Law § 81c (2)—**

   A charge will not be held for reversible error when it is not prejudicial upon a contextual construction.

This opinion was written in accordance with the Court's decision and filed by order of the Court after *Chief Justice Stacy's* death.

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

APPEAL by defendant from *Harris, J.*, March Term, 1951, of EDGECOMBE.

Criminal prosecution on warrant charging the defendant with the "possession of one-half gallon of illicit and nontax-paid whiskey for the purpose of sale."

The record discloses that on 18 November, 1950, two policemen of Rocky Mount went to the home of the defendant with search warrant, found a half-gallon of whiskey in a kettle on the kitchen table, poured it into a bottle or jar which they found behind the stove, then went to the front of the house and there discovered the defendant with "about six more fellows," said to the defendant, "James let's go"; the defendant replies, "That's not my whiskey," whereupon the officer held up the whiskey and asked the rest of the fellows in the room if it were theirs, and they all said "No, it is not." In the meantime someone had knocked on the door and said, "Let me in, James." A taxi driver and three or four more came in. One of the officers directed them to take a seat.

The defendant was arrested and taken to police headquarters. None of the others was arrested.

The kettle and jar and contents were offered in evidence on the hearing. Neither had a State or Federal stamp on it.

The defendant was found guilty in the Recorder's Court and sentenced, from which he appealed, was tried *de novo* in the Superior Court, found guilty by the jury of "possession of nontax-paid whiskey" (as recited in the judgment) and sentenced to twelve months on the roads.

Defendant appeals, assigning errors.

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

Fountain & Fountain for defendant.

STACY, C. J. Since the only reference to the verdict appearing on the record is a recitation in the judgment of what it was, without full incorporation of it therein, it may be doubted whether the case is properly before us for decision. *S. v. May,* 118 N.C. 1204, 24 S.E. 118.

On appeal in criminal cases, the indictment or warrant and plea on which the case is tried, the verdict and the judgment appealed from are essential parts of the transcript. Rule 19, Sec. 1, of the Rules of Practice, 221 N.C. 553; *S. v. Clough,* 226 N.C. 384, 38 S.E. 2d 193 (dismissed for failure to show organization of court, bill, warrant or verdict); *S. v. Dry,*

224 N.C. 234, 29 S.E. 2d 698 (dismissed for failure to show warrant); *S. v. Currie,* 206 N.C. 598, 174 S.E. 447 (dismissed for failure to supply lost indictment); *S. v. Golden,* 203 N.C. 440, 166 S.E. 311 (dismissed for failure to show organization of court, bill, warrant or verdict); *S. v. Lumber Co.,* 207 N.C. 47, 175 S.E. 713 (dismissed for failure to bring up pleadings); *S. v. Wray,* 230 N.C. 271, 52 S.E. 2d 878 (dismissed for failure to show indictment); *S. v. McDraughon,* 168 N.C. 131, 83 S.E. 181 (dismissed for failure to supply lost indictment); *S. v. Cunningham,* 94 N.C. 824 (no plea shown). See, also, *S. v. Farrell,* 223 N.C. 804, 28 S.E. 2d 560, on requirement that arraignment and plea in capital cases be made to appear on the record. A plea of traverse is the *sine qua non* or prerequisite to a jury trial. Without such plea, there is nothing for a jury to try. *S. v. Cunningham, supra.* Criminal appeals are to be perfected and the cases for the Supreme Court settled "as provided in civil cases." G.S. 15-180. It is the duty of appellant to see that the record is properly made up and transmitted. *S. v. Frizell,* 111 N.C. 722, 16 S.E. 409.

However, assuming the sufficiency of the record, as there is no motion to dismiss, *S. v. Patterson,* 222 N.C. 179, 22 S.E. 2d 267, we think the same result or one similar in effect must be reached on the merits of the case. There was ample evidence to require its submission to the jury. *S. v. Buchanan,* 233 N.C. 477, 64 S.E. 2d 549. Indeed, the evidence of illegal possession seems complete. *S. v. Dowell,* 195 N.C. 523, 143 S.E. 133. There is also evidence sufficient to warrant the jury in finding that its possession was for the purpose of sale, G.S. 18-11, albeit they appear to have found the defendant guilty only of illegal possession in violation of G.S. 18-48.

Nor can the defendant's challenge to the validity of the search warrant be sustained. In the first place, it may be doubted whether the defendant properly presents his challenge. The evidence in respect of the validity of the warrant seems to have been offered without objection. The only exception is to the refusal to strike it out. This was a matter addressed to the sound discretion of the trial court. *S. v. Matthews,* 226 N.C. 639, 39 S.E. 2d 819; *S. v. Hunt,* 223 N.C. 173, 25 S.E. 2d 598; *S. v. Herndon,* 223 N.C. 208, 25 S.E. 2d 611. Nevertheless, conceding the sufficiency of the challenge, the evidence was quite sufficient to withstand the motion to strike. *S. v. Elder,* 217 N.C. 111, 6 S.E. 2d 840. Chapter 644, Session Laws 1951, is inapplicable as it has no application to pending litigation or to evidence obtained by search prior to 9 April, 1951, the effective date of the Act. Nor is Chapter 150, Session Laws 1949, purporting to dispense with the necessity of taking an exception to any ruling on objection to the admission of evidence, applicable to the facts of the instant record. There was no ruling on objection to the admission of the evidence.

While the charge may be subject to some criticism, especially the manner in which the State's contentions were given, we think it will do when construed contextually, *i.e.*, in the same connected way in which it was delivered to the jury—the established rule of such construction. *S. v. Marsh, ante,* 101; *Tarkington v. Printing Co.,* 230 N.C. 354, 53 S.E. 2d 269.

The result will not be disturbed on the record as it presently appears.

No error.

NOTE: This opinion was written in accordance with the Court's decision and filed by order of the Court after *Chief Justice Stacy's* death.

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

STATE v. F. D. FITZGERALD HORNE.

(Filed 19 September, 1951.)

1. Criminal Law §§ 17c, 60b—

Where the record discloses that a defendant, appearing *in propria persona,* entered a plea of *nolo contendere* under the impression that it was a conditional plea under which the court would find the facts and determine the question of guilt, and that thereafter defendant was given opportunity to withdraw the plea only upon intimation by the court that he would be charged with another distinct offense which the evidence tended to support, *held* the record does not support sentence upon the adjudication by the court that the defendant was guilty of the offense charged.

2. Criminal Law § 17c—

The law does not sanction a conditional plea of *nolo contendere.*

This opinion was written in accordance with the Court's decision and filed by order of the Court after *Chief Justice Stacy's* death.

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

APPEAL by defendant from *Patton, Special Judge,* April Term, 1951, of BUNCOMBE Superior Court.

Criminal prosecution on indictment charging the defendant (1) with the larceny of a Remington-Rand typewriter, advertising list and pictures of the value of $2500, the property of Benjamin and Mary E. Dixon, and (2) with receiving same knowing it to have been stolen.

When asked how he desired to plead, the defendant, who was not represented by counsel, first stated that he desired to plead not guilty, but later informed the solicitor that "he would enter a plea of *nolo contendere* and let the Judge hear the evidence and render such judgment as the facts might warrant."

After hearing a portion of the evidence, the court observed that "the case appears to be more of a case of embezzlement than of larceny. Therefore, if the defendant chooses, I will permit him to withdraw his plea of *nolo contendere* to the present bill of indictment and I will thereupon direct that he be held and that the solicitor send a bill against him for embezzlement."

The defendant, after conferring with the solicitor, stated that he preferred to proceed with his plea of *nolo contendere* to the present bill. And after all the evidence was in, he again stated that he desired "his plea of *nolo contendere* to the charge of larceny to stand" and made no motion to strike it out.

The court, thereupon, "after hearing the evidence adjudged the defendant guilty and sentenced him to serve a term of four months" on the roads.

The defendant, having retained counsel to represent him, duly served notice of appeal.

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

Geo. M. Pritchard for Defendant.

STACY, C. J. The question for decision is whether the record supports the judgment.

In its essential features, the case is strangely similar to *S. v. Shepherd,* 230 N.C. 605, 55 S.E. 2d 79. There, the defendant contended that his plea of *nolo contendere* was a conditional one with the ultimate issue of his guilt or innocence to be determined by the court. The same contention is made here. There, it was conceded on appeal that such a plea was ill advised or improvident under the case of *S. v. Camby,* 209 N.C. 50, 182 S.E. 715. The same conclusion is made here.

While the court was constrained to uphold the judgment in the *Shepherd case* because of the state of the record, just the opposite seems appropriate here.

The defendant was *inops consilii* during the trial. True, it was made to appear to the court that "the defendant had studied law and had applied to take the examination to be permitted to practice in North Carolina." Nevertheless, he was undertaking to appear for himself which affords some measure of his prudence and sagacity. The opportunity to withdraw his plea was under the shadow of a further charge

of embezzlement. And the defendant seems to have been under the constant impression that his plea of *nolo contendere* was a conditional one. Nowhere on the record does the opposite appear. Herein lies the difference between the present case and the *Shepherd case.* It seems to fall under the *Camby case.* The law does not sanction a conditional plea of *nolo contendere.* The record presents this situation as the defendant views it: The defendant was under the impression that he had entered a conditional plea of *nolo contendere* with the court to pass upon his guilt or innocence. The judge expressed the opinion that it seemed to be more a case of embezzlement than of larceny, and offered the defendant an opportunity to withdraw his plea and later face a charge of embezzlement. The defendant was justified in believing that under his conditional plea the judge would acquit him of the charge of larceny. He therefore chose to let it stand. He evidently acted under a misapprehension.

The State, on the other hand, says that even from the defendant's own conception of the record he simply "took a chance and lost." *Stamey v. R. R.,* 208 N.C. 668, 182 S.E. 130; *Weston v. Ry.,* 194 N.C. 210, 139 S.E. 237. Maybe so, and maybe not. He certainly had a different understanding of what was going on. At least, he was guessing at its meaning.

We think the case is controlled by what was said in *S. v. Gooding,* 194 N.C. 271, 139 S.E. 436. Also obliquely pertinent is the case of *S. v. Calcutt,* 219 N.C. 545, 15 S.E. 2d 9. The matters involved—the enforcement of the criminal law and the liberty of the citizen—are worthy of exactitude and clear understanding. *S. v. Jones,* 227 N.C. 47, 40 S.E. 2d 458; *In re Parker,* 225 N.C. 369, 35 S.E. 2d 169.

Error and remanded.

NOTE: This opinion was written in accordance with the Court's decision and filed by order of the Court after *Chief Justice Stacy's* death.

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

TOWN OF GRIMESLAND, N. C., A MUNICIPAL CORPORATION, v. CITY OF WASHINGTON, N. C., A MUNICIPAL CORPORATION.

(Filed 19 September, 1951.)

1. Municipal Corporations § 8b (2)—

The power of a municipality to own and operate transmission lines for the sale of current to consumers beyond its corporate limits confers no exclusive franchise upon it and it is not entitled to enjoin lawful compe-

tition within the territory outside its limits served by it, there being no contention that the competing line caused physical interference with its lines or created any hazard thereto.

2. Municipal Corporations § 5—

The General Assembly has authority to create municipal corporations, N. C. Constitution, Art. VIII, sec. 4, and municipalities created by it have only such powers as are expressly conferred by statute and those necessarily implied therefrom, which powers the General Assembly may enlarge, diminish or altogether withdraw at its will.

3. Same: Municipal Corporations § 8a—

The General Assembly may confer not only governmental powers upon a municipality but may also grant it corporate powers for a public purpose and for the public benefit; but in the exercise of such corporate powers a municipality is liable in contract and in tort as in case of private corporations and may be made subject to regulations and supervisions imposed by the general law upon other corporations so engaged, but the legislative will to make the municipality subject to such regulations must be expressed and will not be inferred.

4. Statutes § 12—

A local statute is not repealed or affected by the subsequent enactment of a general statute which makes no reference to the local act.

5. Municipal Corporations §§ 5, 8a—

The General Assembly has authority under the Constitution to authorize a municipality to build and operate lines for the transmission of electric current beyond its corporate boundaries within reasonable limits.

6. Same: Utilities Commission § 2: Electricity § 1—

A municipal corporation authorized by general and local statute to maintain transmission lines for the sale of current outside its corporate limits and within reasonable limitations, G.S. 160-255; Ch. 31, Public-Local Laws of 1931, is not amenable to G.S. 62-101 and is not required first to obtain a certificate of public convenience and necessity from the Utilities Commission. G.S. 62-30 (3), G.S. 62-65.

7. Injunctions § 9—

Where a temporary restraining order is issued in an action and the cause comes on to be heard in the Superior Court upon the merits without any further order to continue or dissolve the temporary restraining order, the presiding judge has full power and authority to determine the cause and properly refuses to remand the question of continuing the restraining order to the judge before whom it had been pending.

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

APPEAL by plaintiff from *Burgwyn, Special Judge,* June Special Term, 1951, of BEAUFORT. Affirmed.

Plaintiff alleged that in 1924 plaintiff contracted with defendant City of Washington for a supply of electric current to be utilized by plaintiff in distribution to its citizens and others, and thereupon acquired rights

of way, and erected poles, and strung transmission wires connecting with the power plant of the defendant in Washington and running thence through the village of Chocowinity to Grimesland. This contract was renewed in 1934 and with some modification in 1938, plaintiff continuing to distribute electric current to consumers along its rights of way. The contract of 1938 provided it should continue until December 31, 1948, and thereafter until terminated by 60 days notice by either party.

It was further alleged that the defendant, for reasons not material to this appeal, notified plaintiff of termination of the contract 60 days from January 27, 1949, and that the defendant thereafter began building from north bank of Pamlico River to Chocowinity "and to points beyond and within the radius served by the plaintiff through its transmission lines" other transmission lines parellel with those of plaintiff for the purpose of serving the territory now served by plaintiff, and depriving it of patronage and entering into oppressive competition; and has wrongfully entered on plaintiff's rights of way and crossed its lines in several places. Plaintiff prayed that defendant be restrained.

Plaintiff also alleged a second cause of action for damages for breach of contract, but submitted to a voluntary nonsuit as to that cause of action and the matters therein set up are not now involved in this appeal.

The defendant admitted the execution of the several contracts referred to, and the termination of the last one in accordance with its provisions, and asserted that after the termination of contractual relations with plaintiff, the defendant had constructed transmission lines within the County of Beaufort for the sale of electric current to consumers along its lines, but has not interfered with plaintiff's business, trespassed on its property, or interfered with plaintiff's proper use thereof.

This action was instituted 23 February, 1949, and on the same day, based on plaintiff's complaint, a temporary restraining order was issued, restraining defendant "from selling and distributing electric current within the radius of the territory now served by the plaintiff and from trespassing in and upon the plaintiff's rights of way." No further order to continue or dissolve the restraining order was entered, but the cause came on in due course for trial in the Superior Court at June Special Term 1951. When reached for trial, the following stipulations were agreed to:

"This cause coming on to be heard before his Honor, W. H. S. Burgwyn, Special Judge, at the June 1951 Special Term of Beaufort County Superior Court, it was suggested by counsel that it would expedite the trial if the court would hear the pleadings and determine as a matter of law, if the defendant was required to obtain a certificate of convenience and necessity from the Utilities Commission of North Carolina for constructing the power line complained about in the complaint, and the court

agreed to hear arguments upon said question, and upon hearing argument thereon the court ruled that defendant was not required, before building its line, to obtain such a certificate, and that Section 101, Chapter 62, General Statutes, did not apply to municipal corporations. To which ruling plaintiff excepted.

"Thereupon, the parties waived a jury trial as to the other matters in this controversy, plaintiff reserving its four exceptions aforesaid, and the plaintiff having submitted to a voluntary nonsuit upon its second cause of action, as set forth in the complaint, and agreed that the court should find the facts as follows:

"1. That plaintiff is an incorporated town with a population of 350. 2. That the defendant is a municipal corporation with a population of 9500. 3. That Chocowinity is an unincorporated village with a population of approximately 300. 4. That plaintiff is six miles from Chocowinity and nine miles from Washington. 5. That plaintiff town is two and one-half miles from the Pitt County-Beaufort County line.

"6. That in 1924, plaintiff Town of Grimesland built and constructed at its own expense and is now the sole and absolute owner of a line for the transmission of electric power extending from the north bank of the Pamlico River, in the City of Washington, through the village of Chocowinity into the Town of Grimesland, and is the sole and absolute owner of an easement or right of way over which the said transmission line is constructed and has an investment therein of approximately $____ and an investment of approximately $60,000.00 in its entire electric system.

"7. That said transmission line has been used by plaintiff for the purpose of transmitting electric current which it purchased from the City of Washington between 1924 and January 17, 1949, to the plaintiff town and to its citizens and to persons living along its right of way aforesaid and adjacent thereto, including persons residing in the village of Chocowinity as provided by the contracts of 1924, 1934 and 1938, which contracts are made a part of these stipulations.

"8. That on January 17, 1949, plaintiff ceased to buy current from the City of Washington, negotiations for the renewal of the contract having failed, and on said date entered into a contract with the City of Greenville for the purchase of electric current for distribution and sale within its corporate limits and to the customers to whom it had heretofore sold current purchased from the City of Washington, and is now serving said customers as has been its custom since 1924.

"9. That the City of Washington began construction of the line to Chocowinity in 1948 to serve Aurora, and prior thereto had never owned any easement or right of way for the transmission of electric current between its corporate limits on the north bank of Pamlico River and the village of Chocowinity, but with the consent of plaintiff town and in consideration of defendant's agreement to keep and maintain plaintiff's

right of way, and keep plaintiff's transmission lines in repair between the south bank of Pamlico River and Chocowinity, it did attach to plaintiff's poles on its aforesaid right of way, wires over which it transmitted electric current to the Town of Aurora; connecting with Aurora's line at Chocowinity.

"10. That when defendant City of Washington became aware that the plaintiff had entered into a contract with the City of Greenville to furnish it with electric current for transmission over its aforesaid right of way for distribution to plaintiff's customers, without first securing from the Utilities Commission of North Carolina, a certificate of convenience and necessity, it commenced to build and did build an electric line, paralleling plaintiff's transmission line, and within a short distance thereof, for the purpose of transmitting electric current to the Town of Aurora, and to such of plaintiff's customers as it might secure along the line which it constructed, thereby intending to enter into competition with the plaintiff for the distribution and sale of electricity between its corporate limits and Chocowinity and in the village of Chocowinity and declared its intention of paralleling plaintiff's line from Chocowinity to the Pitt County-Beaufort County line, and to enter into competition with the plaintiff for the patronage of persons and businesses in the area and serve such as might desire to purchase electric current from it. Grimesland has never applied for or obtained a certificate of public convenience and necessity from the North Carolina Utilities Commission and its line was constructed in 1924 prior to the Act of 1931 (now G.S. 62-101). The defendant relies upon Chapter 31, Public Local Laws of 1931 and the applicable provision of the General Statutes.

"11. That in constructing its transmission line between its corporate limits and Chocowinity, the defendant, without first obtaining the consent of the plaintiff, caused its said transmission line to cross plaintiff's right of way and over or under plaintiff's transmission line in three places, and cross plaintiff's service lines in eleven additional places, and has placed and put on plaintiff's right of way one pole.

"If, upon the foregoing facts, the court shall be of the opinion that plaintiff is entitled to the relief prayed for in its complaint, then it shall enter judgment accordingly. If, upon the foregoing facts, the court shall be of the opinion that the plaintiff is not entitled to the relief prayed for, then, it shall deny the same and enter judgment for the defendant, and both the plaintiff and the defendant reserve the right to appeal from any judgment so entered to the Supreme Court."

Upon consideration of the pleadings and the stipulations the court was of opinion that plaintiff was not entitled to injunctive relief, and, plaintiff having submitted to nonsuit on its second cause of action, the court rendered judgment dismissing the action. Plaintiff excepted and appealed.

J. D. Grimes, S. O. Worthington, and Albion Dunn for plaintiff, appellant.

L. E. Mercer, Rodman & Rodman, and Brooks, McLendon, Brim & Holderness for defendant, appellee.

DEVIN, C. J. The right of the Town of Grimesland to construct and maintain an electric system for the distribution and sale of electric current to consumers beyond its corporate limits, and to own and operate transmission lines for that purpose along the highway or over and upon rights of way acquired, is not questioned in this action. G.S. 160-255. But this legislative authority would not be regarded as conferring the right to exclude competition in the territory served. Having the right to engage in this business gives no exclusive franchise, and if from lawful competition its business be curtailed, it would seem that no actionable wrong would result, nor would it be entitled to injunctive relief therefrom. *Alabama Power Co. v. Ickes,* 302 U.S. 464; *Tennessee Elec. Power Co. v. Tennessee Valley Authority,* 306 U.S. 118. There are no allegations or facts shown which would justify the finding that the defendant City of Washington, in the construction and operation of its electric transmission lines, from Washington to Chocowinity and beyond has caused physical interference with plaintiff's lines, or created any hazard thereto or that its operations constitute a continuing trespass. Negligence in the construction of defendant's lines is not alleged. The gravamen of the complaint is unlawful competition, but competition alone would not justify the court in decreeing injunction.

But the plaintiff challenges the right of the defendant to maintain and operate an electric power system for the distribution and sale of electric current to consumers beyond its corporate limits without a certificate of public convenience and necessity from the Utilities Commission. The statute authorizes a municipal corporation engaged in the production and distribution of electric power to extend this service to consumers outside its corporate limits, (Public Laws 1929, Ch. 285, now codified as part of G.S. 160-255). This would confer authority on the defendant to construct and operate transmission lines for the distribution of electric current for the benefit of the public beyond its corporate boundaries within reasonable limitation. *Williamson v. High Point,* 213 N.C. 96, 195 S.E. 90. Also by a local statute (Public Local Laws 1931, Ch. 31) amendatory of the Charter of the City of Washington and creating Washington Electric Service District, power and authority was expressly conferred upon the defendant to build, maintain and operate lines for the transmission of electric current beyond its corporate limits and within Beaufort County for the public benefit.

Having then the power to extend its electric lines and to serve the public in the territory now complained of, was this power by general law

limited and circumscribed by requirement that a certificate of convenience and necessity be obtained from the Utilities Commission?

Municipal corporations are instrumentalities of the State for the administration of local government. They are created by the General Assembly under the general authority conferred by Art. VIII, sec. 4, of the State Constitution. They have such powers as are expressly conferred by statute and those necessarily implied therefrom. *Nash v. Tarboro,* 227 N.C. 283, 42 S.E. 2d 209. A municipal corporation may be empowered not only to perform governmental functions but also authorized to undertake operations in its corporate capacity when for a public purpose and for the public benefit. *Holmes v. Fayetteville,* 197 N.C. 740, 150 S.E. 624; *Williamson v. High Point,* 213 N.C. 96, 195 S.E. 90. The powers conferred upon municipal corporations by statute may be enlarged, diminished, or altogether withdrawn at the will of the Legislature. *Rhodes v. Asheville,* 230 N.C. 134, 52 S.E. 2d 371; *Murphy v. Webb,* 156 N.C. 402, 72 S.E. 460. But when a municipal corporation undertakes functions beyond its governmental and police powers and engages in business in order to render a public service for the benefit of the community for a profit, it becomes subject to liability for contract and in tort as in case of private corporations, *Millar v. Wilson,* 222 N.C. 340, 23 S.E. 2d 42; *Harrington v. Wadesboro,* 153 N.C. 437, 69 S.E. 399, and by legislative act may be made amenable to regulations and supervisions imposed upon other corporations so engaged. Unquestionably the General Assembly would have power to prescribe that municipal corporations exercising corporate functions for public service for profit should be amenable to the laws regulating private corporations similarly engaged. *Harrington v. Wadesboro,* 153 N.C. 437, 69 S.E. 399. Whether it has done so in this case is the question which this appeal presents.

The plaintiff's position is that if it be conceded that the defendant City of Washington in the operation of an electric power plant for the benefit of its citizens was given authority to extend its lines and furnish electric service to consumers beyond its corporate limits, nevertheless when the defendant in doing so undertook to construct and operate a public service system in direct competition, by parallel lines, with the public service system of the plaintiff already established and serving the same territory, it became amenable to the regulatory requirement of the general statute (G.S. 62-101) that it must first obtain a certificate of public convenience and necessity from the Utilities Commission. Plaintiff maintains that considering the purpose of the statutes requiring supervision by the Utilities Commission together with the evils which would result from competition in the same locality between two public service systems, it was in the legislative mind that the same rule should be applied to municipal corporations as that applied to private corporations rendering public service.

The statute relied on by plaintiff as authority for the position that defendant before constructing its transmission lines outside its limits was required to obtain such a certificate reads as follows: "No person, or corporation, their lessees, trustees or receivers shall hereafter begin the construction or operation of any public utility plant or system or acquire ownership or control of, either directly or indirectly, without first obtaining from the Utilities Commission a certificate that public convenience and necessity requires, or will require, such construction, acquisition, or operation: Provided, that this section shall not apply to new construction in progress on May 27, 1931, nor to construction into territory contiguous to that already occupied and not receiving similar service from another utility, nor to construction in the ordinary conduct of business." The statute designates those upon whom the requirement is imposed as "person or corporation, their lessees, trustees or receivers." These descriptive words are not those ordinarily applicable to, or to be thought of as embracing cities and towns. And the business coming within the regulatory provisions of the statute is designated as "the construction or operation of any public utility plant or system." If the Legislature intended this statute to include municipal corporations, no distinction was made between operations within or without their corporate limits. It would not seem to be a reasonable construction of this statute to adopt the view that the Legislature intended to prescribe that no city or town could operate an electric light plant for the service of its citizens without obtaining this certificate from the Utilities Commission. Examining the language of the statute, the implication of a private corporation is unmistakable. Limitation upon the granted power of a municipal corporation to construct and operate for the public benefit an electric distribution system, by requiring such a certificate as a condition precedent, will not be inferred in the absence of definite expression of legislative will.

The effect of the local statute (Public Local Laws 1931, Ch. 31), which purported to empower the City of Washington to extend its electric service beyond its corporate limits "with all the privileges and immunities existing in favor of municipalities operating within the boundaries mentioned," was debated in the argument, but from an examination of this statute, we observe that it makes no reference to supervision by the Utilities Commission, nor does it specifically exempt the City from the requirement of obtaining such a certificate. This statute was ratified 12 February, 1931, and the general statute now codified as G.S. 62-101 was ratified 27 May, 1931. But the former being a local statute relating only to the City of Washington would not be repealed or affected by the subsequent enactment of the general statute which makes no reference to it. *Rogers v. Davis,* 212 N.C. 35, 192 S.E. 872; G.S. 164-7. Plaintiff's objections to this statute on constitutional ground are met by the well

considered opinion of *Justice Adams,* speaking for the Court in *Holmes v. Fayetteville,* 197 N.C. 740, 150 S.E. 624. In any event the defendant was clothed with authority in the premises by the general statute without the aid of the local act of 1931. *Kennerly v. Dallas,* 215 N.C. 532, 2 S.E. 2d 538; *Holmes v. Fayetteville, supra.*

The question here presented whether a municipal corporation in the operation of a municipally owned electric power plant with transmission lines extended to supply consumers beyond its corporate limits is required under G.S. 62-101 to obtain from the Utilities Commission a certificate of public convenience and necessity before it can lawfully operate, does not seem to have been heretofore directly decided by this Court.

In *Light Co. v. Electric Membership Corp.,* 211 N.C. 717, 192 S.E. 105, it was held that a county electric membership corporation, created under G.S. 117-6 *et seq.* was not required to obtain a certificate of public convenience and necessity before beginning operations, for the reason that the statute authorizing the formation of such membership corporation provided that the provisions of other laws should not apply to a corporation formed under this act. G.S. 117-27. Apparently it was thought the provisions of G.S. 62-101 would not be extended by implication.

In *McGuinn v. High Point,* 217 N.C. 449, 8 S.E. 2d 462, it was held that the City of High Point, in undertaking to construct a power plant and issue bonds therefor, had elected to proceed under the Revenue Bond Act of 1938 and was bound by the specific requirement imposed by that act upon those proceeding thereunder to obtain a certificate of convenience and necessity. It may be noted that this act excepted from the requirement an undertaking authorized by any local act heretofore enacted.

In *Williamson v. High Point,* 213 N.C. 96, 195 S.E. 90, it was the holding of this Court that the City's undertaking to construct an electric power plant capable of generating 104 million kilowatt hours of electric power to cost $5,500,000, and to transmit current across three counties for the purpose of engaging in the power business generally was beyond the powers of the City conferred by the Revenue Bond Act of 1935.

It may be noted that the statute defining the powers and duties of the Utilities Commission gives the Commission general supervision over rates and service by electric light, power, water and gas companies, other than such as are municipally owned or conducted; thus expressing legislative purpose to leave municipal corporations free from the supervision of the Commission. G.S. 62-30(3). And in G.S. 62-65 codifying the Public Utilities Act of 1933 it is declared that "The term corporation when used in this article, includes a private corporation, an association, a joint stock association or a business trust." *Expressio unius est exclusio alterius.*

Giving due consideration to all pertinent statutes as well as the decisions of this Court, we reach the conclusion that the court below has ruled correctly, and that the defendant City of Washington was not required to obtain a certificate of public convenience and necessity from the Utilities Commission before engaging in the distribution of electric current to consumers outside its corporate limits within Beaufort County, and that the judgment dismissing plaintiff's action should be affirmed.

Plaintiff's motion to remand the question of continuing the restraining order to the judge before whom it had been pending was properly denied. The cause was regularly reached in the Superior Court of Beaufort County and the judge then presiding had full power and authority to determine the cause. In view of this disposition of the appeal, motion to make Virginia Electric and Power Company a party defendant has become academic.

Judgment affirmed.

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

CHARLES HENRY, EMPLOYEE, v. A. C. LAWRENCE LEATHER COMPANY, EMPLOYER, AND SECURITY MUTUAL CASUALTY COMPANY, CARRIER.

(Filed 19 September, 1951.)

1. **Master and Servant § 40f—**

The provisions of the Workmen's Compensation Act providing for compensation only for injuries resulting by accident arising out of and in the course of the employment has been extended to provide compensation for those occupational diseases which are enumerated in the Act. G.S. 97-2 (f), G.S. 97-52, G.S. 97-53.

2. **Statutes § 5a—**

Ordinarily technical terms of a statute must be given their technical connotation in its interpretation.

3. **Master and Servant § 40f—**

An occupational disease is a disease caused by a series of events of a similar or like nature occurring regularly or at frequent intervals over an extended period of time in the discharge of the duties of the employment.

4. **Same—**

Tenosynovitis attributable to repeated strain or stress on the extensor tendons of claimant's arms incident to the performance of the duties of his employment *is held* "caused by trauma in employment" and is an occupational disease compensable under the provisions of G.S. 97-53 (21), since "trauma" in its technical sense is not limited to injuries resulting from external force or violence.

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

APPEAL by defendants from *Rousseau, J.*, May Term, 1951, HAYWOOD. Affirmed.

Claim for compensation under the Workmen's Compensation Act.

Claimant was an employee of the defendant Leather Company. It was his duty to dip crops. He would take them off a wagon, dip them in a vat, and then load them on another wagon. As he was about to complete the loading of a wagon, it was necessary for him to throw the crops up over his head or shoulder. The constant, repeated strain or stress on the extensor tendons of his arms, resulting from this method of handling the crops, produced a condition known as tenosynovitis, commonly called tennis elbow. By reason of this condition he has suffered a 20% permanent partial disability or loss of use of his right elbow and a 40% permanent partial disability or loss of use of his left elbow.

The medical testimony offered tends to show that claimant's condition is occupational and was produced by the repeated motions in dipping and loading the crops which required a pronation of the hands, causing strain on the extensor tendons of the arms; that a blow or contusion could cause a localized tenosynovitis of short duration but it would be different from the condition found to exist in claimant's arm.

In discharging his duties, claimant received no blow or series of blows against his elbows or arms and suffered no external injury by force or violence of any type or form other than the repeated strain on the extensor tendons of his arms caused by the manner in which he was required to perform the labor for which he was employed.

The Industrial Commission found the facts and upon the facts found concluded that the claimant is suffering from tenosynovitis caused by trauma in his employment which produced his disability, and made an award. Defendants appealed to the Superior Court. The court below affirmed and defendants appealed.

Frank D. Ferguson, Jr., for plaintiff appellee.

Morgan & Ward and Glenn W. Brown for defendant appellants.

BARNHILL, J. The underlying purpose of our Workmen's Compensation Act, G.S. Chap. 97, is to provide compensation for workmen who suffer disability by accident arising out of and in the course of their employment. The Act as originally adopted defined "injury" for which compensation is to be allowed to "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). However, it soon became apparent that

any scheme or plan for the payment of compensation to disabled employees should include those diseases or abnormal conditions of human beings the causative origin of which is occupational in nature. To meet this need the Legislature adopted Chap. 123, P.L. 1935, now G.S. 97-52 and 53. In this amendatory Act it designated the diseases and conditions which "shall be deemed to be occupational diseases within the meaning of this article," G.S. 97-53, and broadened or extended the meaning of the word "accident" as used in the original Act so as to include a disablement or death resulting from an occupational disease described in G.S. 97-53, G.S. 97-52. It provides that "the word 'accident,' as used in the Workmen's Compensation Act, shall not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously or at frequent intervals in the course of such employment, over extended periods of time . . . and disease attributable to such causes shall be compensable only if culminating in an occupational disease mentioned in and compensable under this article." That is to say, when stated in a positive rather than a negative form, disablement or death resulting from any such "series of events" in employment shall be treated as the happening of an injury by accident compensable under the Act when and only when such series of events culminates in one of the occupational diseases mentioned in G.S. 97-53. An occupational disease attributable to such causes must be treated as an injury by accident arising out of and in the course of employment, and compensation must be awarded for any resulting disablement.

Among those diseases or conditions which are classified as occupational and compensable is "tenosynovitis, caused by trauma in employment." G.S. 97-53 (21).

The claimant is now suffering from tenosynovitis in both elbows. This condition is attributable to "a series of events in employment, of a similar or like nature, occurring regularly, continuously or at frequent intervals in the course of employment." The "series of events" was the frequent pronation of the hands in dipping and loading the crops which produced a repeated strain or stress upon the extensor tendons of plaintiff's arms, causing inflammation of the tendons and their protective sheaths. The Commission so found and the findings are fully supported by the evidence.

As we read the record, the defendants do not seriously challenge these facts. They do, however, stressfully contend that the facts so found and the evidence on which they are based do not warrant or support the finding or conclusion that claimant's condition, technically known as tenosynovitis, was caused by trauma in his employment. This is the battleground of the controversy.

The question thus posed for decision is to be resolved by a determination of the meaning of three terms: "'tenosynovitis," "trauma," and "occupational disease," as those terms are used in the statute.

The Legislature, in adopting Chap. 123, P.L. 1935, had under consideration diseases and morbid conditions of the human body. In designating those diseases and conditions which are to be deemed occupational in origin and compensable under the Act, it, for the most part, used technical terms. Anthrax, bursitis, asbestosis, silicosis, nystagmus, synovitis, and tenosynovitis are technical words. In construing the Act we must accord them their technical connotation.

"So far as the interpretation of a statute is concerned, courts have said that there are four kinds of terms: common, technical, legal, and trade or commercial." Southerland, Stat. Const., 3rd Ed., Vol. 2, 424. And "in the absence of a legislative intent to the contrary, technical terms or terms of art when used in a statute are presumed to have been used with their technical meaning." *Id.*, 437; *Hawley v. Diller*, 178 U.S. 476, 44 L. Ed. 1157; *S. v. Domanski*, 190 A. 854 (R.I.); *Bank v. Eelman*, 183 A. 677 (N.J.); *Ry. Co. v. State*, 143 S.W. 913 (Ark.).

Synovitis (G.S. 97-53 (20)) is the inflammation of a synovial membrane and tenosynovitis or tendosynovitis is the inflammation of a synovial membrane which forms the protective sheath that encloses the tendon. It is sometimes used to denote the inflammation of both the sheath and the tendon. Webster, New Int. Dic., 2d Ed.; Dorland, Am. Illus. Med. Dic., 21st Ed.; Reed & Emerson, The Relation between Injury and Disease, p. 500; Maloy, Med. Dic. for Lawyers, 2d Ed.; Gelber, Medico-Legal Text on Traumatic Injuries, p. 117.

The causative origin of tenosynovitis is either infection (usually either gonorrheal or tubercular) or trauma, and traumatic synovitis is caused by (1) contusion of a joint, (2) spraining or twisting of a joint, (3) overuse of a joint, or (4) *stretching of tendons and tendon sheaths by repeated* overflexion or overextension. Gelber, Medico-Legal Text on Traumatic Injuries, 117. "Noninfectious tendosynovitis follows blows which contuse tendons themselves and severe strains which overstretch them." One type of noninfectious tenosynovitis is "that type which follows long-continued, rapidly repeated, movements which create almost continuous overactivity of certain tendons." Reed & Emerson, Relation between Injury and Disease, 502.

"Chronic strains may occur when a worker performs operations with parts of his body that require a repetition of movements over long hours . . . Rapid and often repeated motion of tendons through their sheaths may cause an irritation resulting in a synovitis or tenosynovitis." Reed & Harcourt, The Essentials of Occupational Diseases, p. 115.

The average layman familiar with the term thinks of trauma as external force or violence which causes an injury, such as a cut, abrasion or contusion, to the outer surface of the body, or the condition produced by such force. However, it has a more comprehensive meaning in the field of medicine.

Trauma is an injury or wound or the resulting condition. Webster, New Int. Dic.; Dorland, Am. Illus. Med. Dic. "Trauma can be defined as injury to the body inflicted by some form of outside force. It is divided into four categories: 1. Physical trauma, caused by physical violence; 2. Thermal trauma, caused by heat or cold; 3. Electrical trauma, caused by electrical energy; 4. Chemical trauma, caused by poisons." Gonzales, Vance, Helpern, Legal Medicine and Toxicology, 88. Physical trauma may be either percutaneous or subcutaneous, and subcutaneous injuries are injuries which damage the body but are not associated necessarily with penetrating wounds.

Traumatic tenosynovitis is usually a result of strenuous, oft-repeated, or unaccustomed use of the wrist. Shands, Handbook of Orthopedic Surgery, p. 499. "The synovial membrane which covers the tendon and lines the sheath may be injured either by the trauma of over-use or by a force applied from without." Vol. V, Practitioner's Library of Medicine and Surgery, p. 905.

The expert testimony is to like effect. The expert in orthopedic surgery stated that "wound or injury is trauma, but not all trauma comes under that classification. Wound or injury as the meaning of the word trauma in the medical sense is not all-inclusive . . . Repeatedly putting the elbow through motions, to call that trauma would not be a misuse of the word medically . . . Anything that pushes something down is considered a force." And Dr. Lancaster testified: "I would say that tenosynovitis could not result from repeated external trauma. Tenosynovitis by its very definition results from the repeated pulling and stretching of a particular tendon . . . Tenosynovitis is an inflammation of the sheath in which the tendon moves, this inflammation can come from constant use in strained positions . . . I don't think this condition could result without the intervention of some unusual strain or use of that particular tendon . . . The trauma would be the continuous stretching and pulling of that particular ligament in his occupation."

The Legislature, in listing those diseases which are to be deemed occupational in character, was fully aware of the meaning of the term "occupational disease." Indeed, it in effect, defined the term in G.S. 97-52 as a diseased condition caused by a series of events, of a similar or like nature, occurring regularly or at frequent intervals over an extended period of time, in employment. The term has likewise been defined as a diseased condition arising gradually from the character of the employee's

work. These are the accepted definitions of the term. *Cannella v. Gulf Refining Co. of La.*, 154 So. 406; *Barron v. Texas Employers' Ins. Assoc.*, 36 S.W. 2d 464. See also Words & Phrases, "Occupational Diseases."

An injury by accident, as that term is ordinarily understood, "is distinguished from an occupational disease in that the former rises from a definite event, the time and place of which can be fixed, while the latter develops gradually over a long period of time." 71 C.J. 601 (see cases in note).

A single blow on the arm might bruise the extensor tendons to such an extent as to cause temporary tenosynovitis. The resulting condition would be properly termed an injury by accident caused by trauma. But it would not constitute an occupational disease, for, as stated, an occupational disease is a diseased or morbid condition which develops gradually, and is produced by a series of events in employment occurring over a period of time. It is the cumulative effect of the series of events that causes the disease.

So then, it is apparent that the clause "caused by trauma in employment" was used by the Legislature to modify the word "tenosynovitis" so as to include the occupational and exclude the infectious type—to include the traumatic and exclude the idiopathic. In adopting Chap. 123, P.L. 1935, it was not making provision for compensation for "injuries by accident" as that term is ordinarily understood. Provision for that type of injury had already been made in the original Act. It was considering those diseases the causative origin of which is occupational and designating those which are to be deemed within the new and extended definition of "injury by accident" it was then providing. In using the modifying phrase, "caused by trauma in employment" it necessarily meant a series of events in employment occurring regularly, or at frequent intervals, over an extended period of time, and culminating in the condition technically known as tenosynovitis. This is the nature of the disease or condition from which the plaintiff is suffering. The award of compensation for the resulting disability is required by the statute.

The judgment of the court below is

Affirmed.

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

BETTIE T. BUNTING v. BETTIE ANNA TILLITT COBB AND HUSBAND, JOHN EDWARD COBB, JR., BESS S. TILLITT GREGORY AND HUSBAND, P. P. GREGORY, GIDEON TILLITT GODFREY AND HUSBAND, WILL GODFREY, BESS TILLITT GODFREY, A MINOR, AND ANY UNBORN ISSUE OF BESS S. TILLITT GREGORY AND GIDEON TILLITT GODFREY, P. P. GREGORY, GUARDIAN AD LITEM FOR ANY UNBORN ISSUE OF BESS T. GREGORY, W. S. GODFREY, GUARDIAN AD LITEM FOR BESS T. GODFREY AND ANY UNBORN ISSUE OF GIDEON T. GODFREY, AND R. CLARENCE DOZIER, JR., GUARDIAN AD LITEM FOR ALL PERSONS WHO MAY BECOME REMAINDERMEN IN THE LANDS THE SUBJECT MATTER OF THIS PROCEEDING, WHETHER MINORS OR PERSONS UNDER OTHER DISABILITY, OR PERSONS NOT IN BEING, OR PERSONS WHOSE NAMES AND RESIDENCES ARE NOT KNOWN, OR PERSONS WHO MAY IN ANY CONTINGENCY BE INTERESTED IN SAID LANDS, BUT BECAUSE OF SUCH CONTINGENCY CANNOT BE ASCERTAINED.

(Filed 19 September, 1951.)

1. Partition § 1a—

A vested remainderman in real estate as a joint tenant or tenant in common is entitled to partition of the land provided partition or sale for partition does not interfere with the possession of the life tenants during the existence of their estates. G.S. 46-23.

2. Tenants in Common § 3: Estates § 16—

G.S. 41-2 does not preclude the parties from providing for survivorship in realty by written contract or in personalty by verbal agreement.

3. Wills § 33c—Under terms of this will, children of each life tenant, upon the death of the life tenant, took vested fee in that part of remainder in which life tenant held life estate.

Testatrix devised her lands to her children for life with provision that upon death of any child without leaving lineal descendants such child's share should go to her surviving brother and sisters for life with further provision that upon the death of any child leaving lineal descendants the remainder after the life estate should vest in the deceased child's lineal descendants in fee simple. By later item it was provided that timber from the lands might be sold upon agreement of a majority of the life tenants and the proceeds of sale divided equally among testatrix' children and used by them in their unrestrained discretion, with further provision that unspent proceeds of sale or land purchased with proceeds of sale should descend under the will as realty. *Held:* Upon the death of a life tenant without surviving issue the life estate of each life tenant was increased proportionately, and upon the later death of another life tenant leaving a child him surviving, such surviving child took a vested fee in her father's share which was not subject to the respective life estates of the surviving life tenants, and the right of the surviving life tenants to sell timber is limited to that part of the remainder in which they hold their respective life estates, plus any other unallotted or undivided interest.

4. Partition § 1a—

A child of one life tenant in common who takes vested remainder in fee upon the death of her parent is entitled to partition as against the surviving life tenants and the contingent remaindermen, and the right to such

partition is not affected by the fact that she might later inherit the fee in a part of the remainder in which other life tenants hold their respective life estates.

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

PETITIONER and respondents appeal from *Morris, J.*, March Term, 1951, of CAMDEN.

This is a special proceeding for the partition of certain lands devised in the last will and testament of Mrs. Bettie F. Tillitt, a widow, who died in 1925, leaving surviving her five children, viz.: Arkie Marchant Tillitt Grandy, a daughter, who died 22 July, 1933, leaving no children; D. Howard Tillitt, a son, who died 13 April, 1940, leaving one child, the defendant Bettie Anna Tillitt Cobb; Bruce Martin Tillitt, a son, who died 14 January, 1943, leaving one child, Bettie T. Bunting, the petitioner; the defendant, Bess Tillitt Gregory, a daughter, now about fifty-six years of age, who has no children, and the defendant, Gideon Tillitt Godfrey, a daughter, now about fifty years of age, who has one child, the defendant, Bess T. Godfrey, a minor about fourteen years of age.

It is stated in the judgment of the court below that it was agreed that for the purpose of the hearing and the judgment to be entered, the same should be limited to a proper construction of the will of Bettie F. Tillitt, now deceased, as it affects the right of the petitioner to a present partition of the real estate devised under said will.

The items in the will referred to herein with respect to the disposition of the real property of the testatrix, are as follows:

"ITEM 4: My children are each and all equally dear to me, and it is my desire that each shall have an equal benefit from my estate. I, therefore, will and devise to them my 'Brickhouse Farm,' the school lot and any other land I may own at the time of my death, for an during the term of their several lives, and should any of them die, without leaving lineal descendant, then in that event the portion going to such one, shall go to his or her surviving brother and sisters, during their natural lives, but to those who may leave child or children, I will and devise the remainder after said life estate in said real property to the children of my said deceased child or children in fee simple.

"ITEM 5: And it is my further will, and the foregoing is made subject to this, that during the life estate of my said children or any of them, if a majority of those living should decide that it was necessary for the good of all or any of my children that the timber should be sold from the lands above referred to, or any of them, I hereby give them full power and authority to sell same, or whatever portion thereof, that a majority of them living may think necessary, and I hereby vest them with full power and authority to make and execute all necessary deeds of convey-

ance to pass title to same, and the money arising from such sale or sales I direct to be divided, as above provided for the division of the land, each child having his or her equal share, and the descendants of any dead child to have the portion going to him or her, if living, and it is my will that said money shall descend as land, or as it would had the timber not been severed from the land. And should any of my children die, leaving no child or children, before he or she may have spent the money arising from the sale of said timber, such residue shall descend to his living brother and sisters, just as hereinbefore provided for the land. But if any of my children shall need said money, or shall require the expenditure of the same, during his or her life, this will places no bar to such expenditure, but should said money be invested in land, or other property, then such land or property shall go and descend, as hereinbefore mentioned, in case of the death of any of my said children, leaving no child or children, but in case any of my children die leaving child or children, then in that event, the remainder in all property herein devised to any child shall descend to his or her child or children in fee."

The court below held that under the provisions of the above will, the petitioner is an owner in fee simple of an undivided one-fifth interest in the lands owned by the testatrix, Bettie F. Tillitt, but since it cannot now be ascertained what interest she may have ultimately in the estate, and because of the power of sale vested in the surviving children, of the timber growing on the land, and the life estates of the respondents Bess Tillitt Gregory and Gideon T. Godfrey are still in existence, the petitioner is not entitled to a partition of said lands, and dismissed the proceeding at the cost of the petitioner

The petitioner and respondents appeal and assign error.

John H. Hall and Wilson & Wilson for petitioner, appellant.
J. Henry LeRoy and J. W. Jennette for defendants, appellants.

DENNY, J. Since the enactment of Chapter 214, section 2, of the Public Laws of 1887, now codified as G.S. 46-23, the owner of a fee or vested remainder in real estate as a joint tenant, or tenant in common, is entitled to a partition of the land or sale for partition of the remainder or reversion thereof. But such partition or sale of a vested remainder in real estate shall not interfere with the possession of the life tenant during the existence of his estate. *Moore v. Baker,* 222 N.C. 736, 24 S.E. 2d 749; *Priddy & Co. v. Sanderford,* 221 N.C. 422, 20 S.E. 2d 341; *Baggett v. Jackson,* 160 N.C. 26, 76 S.E. 86.

It is further provided in G.S. 41-2 that: "In all estates, real or personal, held in joint tenancy, the part or share of any tenant dying, shall not descend or go to the surviving tenant, but shall descend or be vested

in the heirs, executors, or administrators, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common . . ." This statute, however, does not operate to prohibit persons from entering into written contracts as to any lands, or verbal agreements as to personalty so as to make the future rights of the parties depend upon survivorship. *Taylor v. Smith,* 116 N.C. 531, 21 S.E. 202; *Jones v. Waldroup,* 217 N.C. 178, 7 S.E. 2d 366; *Wilson v. Ervin,* 227 N.C. 396, 42 S.E. 2d 468.

The testatrix, Bettie F. Tillitt, in Item 4 of her will, devised a life estate to her five children in all her real property, providing, however, that if "any of them shall die without leaving lineal descendant, then in that event the portion going to such one, shall go to his or her surviving brother and sisters, during their natural lives, but to those who may leave child or children, I will and devise the remainder after said life estate in said real property to the children of my said deceased child or children in fee simple."

In view of the above provisions, we hold that the remainder in which each child held a life estate prior to the death of Arkie Marchant Tillitt Grandy, was a one-fifth undivided interest, but, upon her death, without leaving a lineal descendant, the remainder in which each surviving child of the testatrix held a life estate, was increased to a one-fourth undivided interest. But when Bruce Martin Tillitt died after the death of his sister, Arkie Marchant Tillitt Grandy, leaving a lineal descendant, under the terms of the will, a one-fourth undivided interest in the devised lands vested in fee simple in the petitioner, Bettie T. Bunting, the only lineal descendant of Bruce Martin Tillitt, the deceased life tenant.

It follows, therefore, that the surviving life tenants have no estate or interest in that undivided portion of the land which passed to the petitioner under Item 4 of the will upon the death of her father, Bruce Martin Tillitt.

Moreover, since her present interest in the estate of Bettie F. Tillitt is not subject to the respective life estates of the surviving life tenants, the setting aside of her interest by way of partition, and giving her possession thereof, would not constitute an interference with the possession of the life tenants during the existence of their estates.

Furthermore, the mere fact that the petitioner may, under the provisions of the will of the testatrix, become the owner of an additional interest in the devised lands in the event either or both of the surviving life tenants die without leaving any lineal descendant, does not limit or interfere with her right to have her present fee simple interest allotted to her. *Barber v. Barber,* 195 N.C. 711, 143 S.E. 469; *Talley v. Murchison,* 212 N.C. 205, 193 S.E. 148. A base or qualified fee which may be determined on a contingency, is a vested interest in property while it

endures, and the owner of such an estate has the right to the present use and control of the property. *Pendleton v. Williams,* 175 N.C. 248, 95 S.E. 500.

The court below, among other things, assigned as a reason for denying the petitioner the relief she seeks, the fact that the testatrix, in Item 5 of her will, gave the life tenants, or a majority of those living, the right to sell the timber on the lands, or any part thereof, and to execute such deeds of conveyance as might be necessary to convey proper title thereto.

It is true that the provisions in Item 4 of the will are made subject to the right to sell the timber as provided in Item 5 thereof; however, it seems clear to us that it was the intent and purpose of the testatrix to authorize the sale of the timber, or any part thereof, only upon a decision of the majority of those living that it was necessary to do so for the good of all or any of her children. Doubtless, she realized that circumstances and conditions might arise during the existence of the life tenancies which would bring about the need for financial assistance in excess of that her children might be able to obtain from the devised lands as life tenants. In order to meet such contingency, or contingencies, she gave the life tenants the right to sell the timber. Even so, she directed that the proceeds arising from such sale, or sales, should be divided as she had provided for the division of the land, "each child having his or her equal share, and the descendant of any dead child to have the portion going to him or her, if living, and it is my will that said money shall descend as land, or as it would had the timber not been severed from the land."

The testatrix further provided that if any of her children should die, leaving no child or children, before he or she spent the proceeds from the sale of the timber, such residue should descend to his brother and sisters just as she had provided for the land. The need of the child was made the sole test of his or her right to spend the proceeds, and there was no limit on the right to use the money to meet such need. But, should the proceeds be invested in real or personal property, then such property shall go to the surviving brother and sisters upon the same terms as the land is devised if the life tenant dies without leaving a lineal descendant. Then the testatrix added this significant provision, "but in case any of my children die leaving child or children, then in that event, the remainder in all property herein devised to any child shall descend to his or her child or children in fee."

Three of the life tenants are dead. The need for the sale of the timber to aid them no longer exists. One died without leaving issue, the other two died leaving issue. The issue of these deceased life tenants had a vested remainder in the timber prior to the termination of the life estates subject to the power of sale provided in Item 5 of the will, and such

remainder, by the express terms of the will, became vested in them in fee simple upon the expiration or termination of the respective life estates. Hence, we hold that upon a partition of the premises, the right of the life tenants to sell timber would be limited to that part of the remainder in which they hold their respective life estates, plus any other unallotted or undivided interest.

There is nothing on this record to indicate the life tenants, or any of them, have at any time since the probate of the will of the testatrix in 1926, exercised their power to sell any of the timber on the devised premises, or attempted to do so, or that the surviving life tenants contemplate doing so. In any event, the conclusion we have reached does not in any way limit the rights of the surviving life tenants with respect to the timber on any portion of the lands not partitioned or allotted.

The appeal of the respondents is dismissed, and the judgment of the court below is reversed and the cause remanded for further proceeding in accordance with this opinion.

On respondents' appeal—Appeal dismissed.

On petitioner's appeal—Reversed.

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

G. C. CUTHRELL v. MILWAUKEE MECHANICS INSURANCE COMPANY OF MILWAUKEE, WISCONSIN.

(Filed 19 September, 1951.)

1. Insurance § 19a—

The word "completed" as used in describing the term of a builder's risk fire policy must be construed in its plain and ordinary sense, and means brought to an end or to a final and intended condition.

2. Insurance § 23d—

The evidence in this case introduced by plaintiff insured *held* sufficient to show that plaintiff's building had not reached that stage in its construction when it could be put to the use for which it was intended at the time it was destroyed by fire, and therefore was sufficient to withstand insurer's motion to nonsuit based upon the theory that plaintiff's evidence was insufficient to show that at the time of the fire the term of the builder's risk policy sued on had not terminated under its provision that its term should not extend beyond the completion of the building.

3. Insurance § 19a—

The word "occupied" as used in describing the term of a builder's risk fire policy must be construed in its plain and ordinary sense, and means

a continuing tenure for a reasonable time, and does not embrace a mere transient or trivial use.

4. Insurance § 23d—

Plaintiff insured's evidence that he permitted his building covered by the builder's risk policy sued on to be used gratuitously on one occasion for one dance, kegs and building materials being moved to one side of the floor for the occasion, and the roof garden, restaurant, picnic terrace, and other parts of the building not being used prior to the fire which destroyed the building, *is held* sufficient to withstand insurer's motion to nonsuit based upon the theory that insured's evidence was insufficient to show that the policy had not terminated under its provision that the term should not extend beyond the time the building was occupied in whole or in part.

5. Trial § 22b—

On motion to nonsuit, defendant's evidence in conflict with that of plaintiff is not to be considered.

6. Insurance § 25b—

Insurer is not entitled to introduce evidence supporting its contention of cancellation or termination of the policy on any ground not supported by allegation.

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

APPEAL by defendant from *Morris, J.*, and a jury, at February Term, 1951, of PASQUOTANK.

Civil action to recover on a standard fire insurance policy with builder's risk clause attached as a rider.

Certain events antedating the litigation are not in dispute. They are stated in the numbered paragraphs set forth below:

1. On 26 January, 1950, the plaintiff, G. C. Cuthrell, was engaged in constructing a building upon land owned by him at Elizabeth City Beach on the Pasquotank River in Camden County, North Carolina.

2. On that day the defendant, Milwaukee Mechanics Insurance Company of Milwaukee, Wisconsin, a fire insurance corporation, and the plaintiff entered into a contract whereby the defendant issued to the plaintiff its policy No. 319 insuring the building against fire in the sum of $3,000.00, and whereby the plaintiff paid the defendant $34.44 as the premium for the policy.

3. The policy was in the standard form prescribed by G.S. 58-176 for fire insurance policies issued on property in North Carolina. In the body of the policy, it was stated that the term of the policy was one year beginning on 26 January, 1950. Attached to the policy was a rider, called a "builder's risk . . . form," containing this language: "Termination of contract. It is a condition of this insurance that this policy covers the property described herein only while the building is in process of erection

and completion and that the building herein is unoccupied and not completed and that when occupied in whole or in part, this company shall be notified and rate adjusted, except that if the building is to be a manufacturing plant, machinery may be set up and tested."

4. On 5 May, 1950, the plaintiff's building was totally destroyed by fire.

5. The plaintiff forthwith furnished notice and proofs of loss to defendant, which denied liability on the policy and tendered to plaintiff $25.55 as an unearned premium on the policy computed as of 29 April, 1950. The plaintiff declined the tender, and brought this action.

The answer of the defendant denies liability to plaintiff solely upon this ground: "That the building destroyed by fire as alleged by the plaintiff was completed and/or occupied in whole or in part, within the meaning of policy No. 319, on or before April 29, 1950, and the policy then became of no further force and effect."

When the cause was heard in the court below, the plaintiff insisted that the builder's risk clause had the effect of making the provisions of the standard policy form prescribed by G.S. 58-176 more restrictive, and in consequence was expressly invalidated by G.S. 58-177. The defendant countered with the claim that the clause merely defined the duration of the risk, and by reason thereof was consistent with the provisions of the standard policy form.

The presiding judge upheld the defendant's position and adjudged that the builder's risk clause was valid, that it limited the term of one year stated in the body of the policy, and that by its terms the policy became inoperative when the building was completed or when the building was occupied in whole or in part. Moreover, the judge ruled that the burden was on the plaintiff to prove that the policy was in force at the time of the fire, and that such burden obligated him to establish both of these propositions by the greater weight of the evidence: (1) That the building had not been completed; and (2) that the building had not been occupied either in whole or in part by the plaintiff or anyone acting for or under him at any time before its destruction.

Both parties offered evidence for the avowed purpose of establishing their respective contentions as to these matters. The portions of the testimony essential to an understanding of the legal questions arising on the appeal are summarized in the opinion which follows this statement of facts.

These issues arose on the pleadings, and were submitted to the jury:

1. Was the defendant's Policy No. 319 in full force and effect on 5 May, 1950, the date of the fire?

2. What damages, if any, is plaintiff entitled to recover of the defendant?

The jury answered the first issue "Yes," and the second issue "$3,000.00." The trial judge entered judgment for plaintiff for $3,000.00 with interest from 5 July, 1950, and the defendant appealed, assigning errors.

J. Henry LeRoy for plaintiff, appellee.
Wilson & Wilson for defendant, appellant.

ERVIN, J. Diligent search fails to uncover any North Carolina case involving the legality of a builder's risk clause similar to that in suit. Happily no occasion arises on the present record for us to determine the validity of the clause, or to make an independent adjudication as to its precise effect on the provisions of the standard policy form if it be valid. For the purpose of this particular decision only, we shall take it for granted without so adjudging that the builder's risk clause is valid and that the trial judge construed it aright in the court below. Inasmuch as the defendant admitted the issuance of the policy by it and the payment of the premium thereon by the plaintiff, we have grave misgivings as to the soundness of the ruling of the trial judge imposing on plaintiff the burden of showing that the insurance had not been terminated under the provisions of the builder's risk clause at the time of the loss. Notwithstanding this, however, we will assume without so deciding that such ruling was correct

When it is interpreted in the light of these assumptions, the record presents for determination the question whether the evidence offered by the plaintiff at the trial is sufficient to support both of these propositions: (1) That the building had not been completed at the time of the fire; and (2) that the building had not been occupied either in whole or in part by the plaintiff or anyone acting for or under him at any time before its destruction.

The inquiry is raised by assignments of error based on the refusal of the trial judge to dismiss the action upon a compulsory nonsuit, or to grant the defendant's prayers for a directed verdict in its favor.

The terms "completed" and "occupied" are to be taken and understood in their plain and ordinary sense. *Crowell v. Insurance Co.,* 169 N.C. 35, 85 S.E. 37; *Powers v. Insurance Co.,* 186 N.C. 336, 119 S.E. 481.

We shall first consider whether the plaintiff's evidence is sufficient to show that the building had not been completed at the time of the fire. The word "completed" means brought to an end or to a final or intended condition. 15 C.J.S. 665. A building is completed if, and only if, it has reached that stage in its construction when it can be put to the use for which it is intended. *Daniel v. Casualty Co.,* 221 N.C. 75, 18 S.E. 2d

819; *Property Owners' Materials Co. v. Byrne* (Mo. App.), 176 S.W. 2d 650.

When the plaintiff's evidence on this aspect of the case is taken in the light most favorable to him, it tends to show the things stated in the next paragraph.

The building was designed for use for restaurant and recreation purposes. It was to contain a dining room with floor space for dancing; a picnic terrace with built-in tables for dining surmounted by a roof garden with a masonry floor for dancing; a kitchen; a storage room; and a bath house. At the time of the fire, the building as planned was incomplete in these respects: Braces, doors, inside molding, and partitions had not been placed in various parts of the structure; only two-thirds of the building had been covered by the first of two coats of paint; the bath house, the kitchen, the outside of the building, the picnic terrace, and the roof garden lacked electrical wiring; the cabinet work had not been done in the storage room; the cooking fixtures and plumbing "had not been set up" in the kitchen; the lockers, plumbing, and shower equipment had not been installed in the bath house; the walls of the picnic terrace had not been erected, and built-in tables had not been put there; the supports of the roof garden and the banister on the stairway leading to it had not been finished; and the masonry floor had not been laid on the roof garden.

Since this evidence indicates that at the time of the fire the plaintiff's building had not reached that stage in its construction when it could be put to the use for which it was intended, it is sufficient to establish the proposition that the building had not been completed at the time of its destruction.

The term "occupied" implies a continuing tenure for a period of greater or less duration, and does not embrace a mere transient or trivial use. *Society of Cincinnati v. Exeter,* 92 N.H. 348, 31 A. 2d 52; *Lacy v. Green,* 84 Pa. 514. A building is occupied when it is put to a practical and substantial use for the purpose for which it is designed. 67 C.J.S. 84.

When the plaintiff's testimony on this phase of the litigation is interpreted most favorably to him, it tends to show the matters set forth in the next paragraph.

The building was in process of construction at all times between 26 January, 1950, when the policy was issued, and 5 May, 1950, when the fire occurred. It was not used in any way during that entire period except for several hours on the night of 29 April, 1950, when the plaintiff gratuitously permitted Russell Twiford, a college student, to conduct a dance, which was attended by approximately 200 persons, in the portion of the building designed for future use as the dining room. On that

occasion the workmen cleared the floor for dancing by pushing "the lumber, the nail kegs, and different things" out of the room.

As this evidence is indicatory of the fact that the building was never put to anything more than a mere transient or trivial use, it is sufficient to show that the building had not been occupied either in whole or in part by the plaintiff or anyone acting for or under him at any time before the fire.

To be sure, the defendant offered or elicited other testimony in sharp conflict with that summarized above. Such other evidence must be ignored, however, in determining the legal sufficiency of the plaintiff's testimony to overcome a motion for a compulsory nonsuit or to withstand a prayer for a directed verdict in defendant's favor. *Register v. Gibbs,* 233 N.C. 456, 64 S.E. 2d 280.

The defendant's remaining assignments of error are untenable. None of them require discussion except those challenging the exclusion of the testimony of the defendant's witness, Mrs. Brantley McCoy, concerning a statement made to her by the defendant's agent, Jerry Wright, and the subsequent action taken by the Southern Loan and Insurance Company. This evidence was rightly rejected in the absence of any allegation that the policy had been canceled or terminated otherwise than by the completion or occupation of the building. *Aetna Insurance Co. v. Kennedy,* 301 U.S. 389, 57 S. Ct. 809, 81 L. Ed. 1177.

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

No error.

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

GAY ANDERSON v. TALMAN OFFICE SUPPLIES, INC., AND ROY S. DOCKERY.

(Filed 19 September, 1951.)

1. Automobiles § 14—

Where half of a street at an intersection is marked for three lanes of traffic, the left lane for left turns, the center lane for through traffic and the right lane for right turns, a motorist traveling in the center lane may assume that a vehicle standing in the left lane awaiting change of the traffic signal, will turn left, G.S. 20-153, and has the right and duty to pass such vehicle on its right, since G.S. 20-149 does not apply in such circumstance.

2. Automobiles § 8c—

The statutory requirement that a motorist upon hearing a siren must drive his vehicle to the right side of the street and stop, G.S. 20-157, does

not relieve such motorist of the duty to ascertain before turning to his right that such movement can be made in safety or the duty to signal any vehicle approaching from his rear, G.S. 20-154.

3. Evidence § 42d: Automobiles § 24½ (c)—

Where the owner of a vehicle is sought to be held solely on the doctrine of *respondeat superior*, a declaration of the driver immediately after the accident which tends to establish negligence on the part of the driver is competent, and since such negligence will be imputed to the master when the doctrine is applicable, the fact that such declaration is admitted only as against the driver does not affect the result as to the master.

4. Automobiles § 18h (3)—

Evidence in this case tending to show that a police officer, in attempting to control traffic, was driving at a speed up to thirty-five miles per hour with his siren sounding and was injured when a vehicle standing in a lane of traffic for a left turn suddenly turned to its right, causing the collision in suit, *is held* not to show contributory negligence as a matter of law.

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

APPEAL by plaintiff from *Rudisill, J.*, May Term, 1951, BUNCOMBE. Reversed.

Civil action for damages resulting from a truck-motorcycle collision.

On 19 April 1950, plaintiff, a motorcycle traffic police officer of Asheville, was assisting in piloting a convoy of Army vehicles in a north-south direction through Asheville. Some of the vehicles by mistake turned east on College Street. After talking to a military policeman, plaintiff started in pursuit along College Street for the purpose of overtaking the vehicles and steering them back on the right course. He was sounding his siren. The point where Valley Street intersects College Street is five or six blocks from the point where plaintiff turned on College Street and began to sound his siren. College Street is sixty feet wide. As it approaches the Valley Street intersection its southern half used by east-bound traffic is divided into three lanes. The outer lane is for vehicles intending to make a right-hand turn; the center lane is for the use of through traffic; and the inner lane next to the center line of the street is for those who intend to turn left into Valley Street.

As plaintiff approached the intersection of College and Valley Streets he was traveling in the center east-bound lane and the truck of the corporate defendant, being operated by the individual defendant Dockery, was standing at the intersection in the left-turn lane, waiting for the traffic light to turn green. Just as plaintiff was within about ten feet of the rear of the truck, Dockery suddenly cut his truck sharply ("deep") to the right and collided with the motorcycle of plaintiff near the curb. As a result plaintiff suffered certain personal injuries.

Plaintiff's speed was variously estimated at from twenty to thirty or thirty-five miles per hour. When the truck cut to the right, plaintiff slowed to about twenty-five miles per hour. Immediately after the collision the defendant Dockery stated: "It is my fault. I pulled in front of him. I heard the siren but didn't see the motorcycle." This evidence was admitted as against the defendant Dockery only. He also stated that upon hearing the siren he started to drive to the right side of the street.

It is admitted that the individual defendant was an employee of the corporate defendant and was about his master's business at the time of the collision.

Defendants allege that plaintiff was operating his motorcycle at an excessive rate of speed and undertook to pass defendant's truck on its right in violation of law and plead such conduct as contributory negligence on his part. They further allege, however, that the truck was headed east on College Street on its own right-hand side of the street, awaiting the change of the traffic light to the "go" sign, the operator intending to proceed on in an easterly direction.

At the close of plaintiff's evidence in chief the court, on motion of defendants, entered judgment of nonsuit and plaintiff appealed.

James S. Howell and Oscar Stanton for plaintiff appellant.
Smathers & Meekins and J. Y. Jordan, Jr., for defendant appellees.

BARNHILL, J. When a motorist observes signs, signals, or markings upon a street which are in common use by municipalities for the purpose of controlling and directing traffic, he has the right to assume that they were placed there by or under the direction of the municipal authorities. He may operate his automobile in obedience to such signs or signals and presume that other motorists will do likewise. If, in an action to recover damages for injuries inflicted by reason thereof, it is denied by the defendant that such signs, signals, or markings were official, plaintiff, in order to hold defendant guilty of negligence in that he disregarded them, may be required to show that they were placed on the street by direction of the proper authorities. But here there is no such denial. Hence that question is reserved for future consideration.

The rule of the road contained in G.S. 20-149 does not apply where there are three lanes available to the motorist, as here, and the forward vehicle is in the left-turn lane and the overtaking vehicle is in the through-traffic lane. *Maddox v. Brown*, 232 N.C. 542, 61 S.E. 2d 613. As the plaintiff intended to proceed easterly in the center lane across Valley Street, and had the right to assume that defendant's truck, standing in the left-turn lane, would turn to the left upon the change of the

traffic signal, he had the right and it was his duty to pass the truck on its right. This was the plain significance of the traffic-directing markings on the street. G.S. 20-153.

Defendants seek, however, to justify the conduct of the individual defendant by asserting that he heard the siren and turned to the right as required by G.S. 20-157 which provides that:

"(a) Upon the approach of any police or fire department vehicle giving audible signal by bell, siren or exhaust whistle, the driver of every other vehicle shall immediately drive the same to a position as near as possible and parallel to the right-hand edge or curb, clear of any intersection of highways, and shall stop and remain in such position unless otherwise directed by a police or traffic officer until the police or fire department vehicle shall have passed."

But on this record this position is untenable. Regardless of the fact the truck was standing in the left-turn lane and plaintiff was traveling in the center or through-traffic lane and the effect these facts may have on the respective rights and duties of the parties, the approach of a police vehicle giving a signal by siren did not nullify or suspend the provisions of G.S. 20-154, or relieve the defendant Dockery of the duty to ascertain, before turning to his right, that such movement could be made in safety, or to signal any vehicle approaching from the rear. *Williams v. Henderson,* 230 N.C. 707, 55 S.E. 2d 462; *Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355. On this record he cut his truck sharply to the right into another traffic lane immediately in front of a vehicle to his rear at a time and under circumstances which indicate such movement could not be made in safety. This is sufficient to require the submission of appropriate issues to the jury.

That the declarations of Dockery made immediately after the collision were admitted only as against him does not affect the result as to the corporate defendant. It is not alleged that the corporate defendant committed any act of negligence. As to it, plaintiff relies on the doctrine of *respondeat superior.* If, upon consideration of all the evidence, the jury shall find that plaintiff suffered injuries as a proximate result of the negligence of Dockery, then Dockery's negligence will be imputed to the corporate defendant, thus imposing liability upon it for the injuries sustained.

The evidence is insufficient to warrant the conclusion, as a matter of law, that plaintiff was guilty of such negligence as would bar his recovery for the injuries received. Whether there is any evidence of contributory negligence sufficient to require the submission of an issue is reserved for the court below to decide, in the first instance, on the retrial of this cause.

The plaintiff, in his complaint, alleges that the truck was standing in the center lane for east-bound traffic, and defendants, in their answer,

allege it was standing on its own proper right-hand side of the street. If the facts in respect thereto are as the evidence before us tends to show, it may be advisable for the parties to amend their pleadings so as to conform to the facts.

The judgment entered is
Reversed.

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

STATE v. HUDNELL VAUGHN PILLOW.

(Filed 19 September, 1951.)

1. Arrest and Bail § 1b—

When a misdemeanor or other criminal offense is committed in the presence of an officer, he may forthwith arrest the offender without a warrant, and this rule applies to drunken driving. G.S. 20-138.

2. Arrest and Bail § 5: Constitutional Law § 34a—

Where there is evidence that defendant was intoxicated when he was arrested for drunken driving, a delay of some two hours in procuring a warrant and admitting defendant to bail fails to show any infringement of defendant's constitutional rights, the matter being largely in the discretion of the officer and no abuse of discretion being made to appear, and the temporary incarceration in no way depriving defendant of the benefit of any witnesses in his behalf.

3. Automobiles § 30d—

Evidence of defendant's guilt of drunken driving *held* ample to overrule his motion for nonsuit.

4. Criminal Law § 53f—

A charge which, in effect, instructs the jury that the State contended that nonresidents not subject to subpoena were good enough friends of defendant to have appeared in his behalf if he had been wrongfully accused, *held* prejudicial as burdening defendant with the indifference or disloyalty of his friends, nor would such contention have been a proper subject of comment by the solicitor.

5. Same—

A charge which, in effect, instructs the jury that the State contended that the prosecuting attorney talked to defendant about two hours after his arrest and would not have had the warrant for drunken driving issued if he had not been satisfied from his conversation with defendant that defendant was guilty and that from this circumstance alone the jury should infer guilt, must be held for prejudicial error.

6. Same—

It is prejudicial error for the court to charge that the State contended that defendant's character was not so good because he had offered to plead guilty and then changed his mind when he found out the penalty for his offense, and pleaded not guilty.

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

APPEAL by defendant from *Harris, J.,* May Term, 1951, NASH. New trial.

Criminal prosecution on a warrant which charges that defendant unlawfully operated a motor vehicle upon a public highway of the State while under the influence of intoxicating liquor.

At about 2:45 p.m. on 1 July 1950, a State patrolman observed defendant operating a motor vehicle on Highway 301 just north of Rocky Mount. He followed defendant for some time and noted that his automobile crossed over the road onto the left shoulder and then traveled back to the right shoulder. This occurred two or three times. The patrolman sounded his siren and defendant "pulled into the lower entrance" of a motor court. Defendant got out. He had a strong odor of alcohol on his breath and was unsteady on his feet. The patrolman asked him if he did not know he was too much under the influence to be driving. He replied that he had had some liquor early that morning "and did not realize until recently that he had too much and that he wanted to go in there and sleep . . . not to arrest him but to allow him to go in there and sleep a while . . ." He was arrested and imprisoned in the city jail for some time before a warrant was issued or he was allowed bail. Upon being released on bail he told the desk sergeant that he "guessed" he was under the influence of liquor and would not operate a car for a while. He wanted to submit to the charge, pay his fine, and continue on his trip. There was other evidence tending to show that defendant was intoxicated.

Defendant entered a plea of not guilty and testified that he took a drink or two before breakfast with some friends in Petersburg, Va., to celebrate the birth of a child of one of his acquaintances. He denied he was under the influence of liquor at the time he was stopped by the officer, and offered evidence of his good reputation.

There was a verdict of guilty. The court pronounced judgment on the verdict and defendant appealed.

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

James P. Bunn, Jr., for defendant appellant.

BARNHILL, J. When a misdemeanor or other criminal offense is committed in the presence of an officer, he may forthwith arrest the offender without a warrant. *S. v. Rogers,* 166 N.C. 388, 81 S.E. 999, and cases cited; *S. v. Loftin,* 186 N.C. 205, 119 S.E. 209; *Perry v. Hurdle,* 229 N.C. 216, 49 S.E. 2d 400. We have held that this rule applies when the offense committed is the violation of the statute, G.S. 20-138, which forbids the operation of a motor vehicle upon a public street or highway by a person who is at the time under the influence of intoxicating liquor. *S. v. Loftin, supra.* While there may have been some slight unnecessary delay in procuring a warrant and admitting the defendant to bail, it must be remembered that, according to the evidence for the State, the defendant was under the influence of intoxicating liquor even when he was released on bail some two hours later. Under the circumstances the necessities of the case were largely within the discretion of the officer. *S. v. Freeman,* 86 N.C. 683. No abuse of that discretion has been made to appear. It follows that there has been no infringement of any constitutional right of defendant such as would invalidate the trial in the court below and require the dismissal of the action. Certainly there is nothing in the record to indicate that the temporary incarceration of defendant in any way deprived him of the benefit of witnesses in his behalf.

Nor was there any error in the refusal of the court to dismiss the action for want of sufficient evidence to be submitted to a jury. There is substantial evidence tending to show that defendant had committed the offense for which he was on trial.

In the course of its charge to the jury the court reviewed the contentions made by the State. Defendant's exceptions to certain of these contentions contained in the instructions of the court merit our attention. A careful perusal of the charge in this respect compels the conclusion that it must have impressed the jury with the strength of the State's case and left them under the impression the court was of the opinion the defendant should be convicted.

After stating that the State contended the defendant had failed to produce witnesses who live in Virginia to testify in his behalf, the court charged: "and the State contends that if they are good enough friends of his for him to celebrate the christening of their baby, that they are good enough friends to come here and testify if they thought he had been wrongfully accused. And the State contends that they have not done that." Thus the court indicated that the failure of witnesses who were not subject to subpoena voluntarily to come to the aid of defendant warranted the inference that they were of the opinion that the defendant was not wrongfully charged, or, at least, that the State so contended, and thus burdened the defendant with the indifference or disloyalty of his friends.

Their very absence warranted the inference that they thought defendant was under the influence of liquor at the time of his arrest. This is the inference the charge suggests.

And then again: "And the State contends that the warrant would not have been written if the defendant had not been under the influence of intoxicating liquor, and the State contends that the prosecuting attorney wrote this warrant after talking to the defendant about two hours after he was arrested, and the State contends that these facts ought to satisfy you that this defendant was under the influence of intoxicating liquor." That is to say, in effect, the State contends the prosecuting attorney talked to the defendant. He would not have issued a warrant if he had not formed the opinion, from this conversation, that defendant was guilty. From this circumstance alone the jury should infer guilt.

After referring to defendant's evidence of good character and charging that the State contends "that even a man of good character can drink too much and get under the influence," it instructed the jury further that "the State contends that you ought not to say that this defendant's character is so good because of the fact that he offered to plead guilty and then comes in and pleads not guilty; that he changed his mind about it after finding out that the law in this State requires the forfeiture of your driving license for the period of one year."

These contentions placed before the jury matters which they should not take into consideration in arriving at a verdict. *S. v. Wyont,* 218 N.C. 505, 11 S.E. 2d 473; *Curlee v. Scales,* 223 N.C. 788, 28 S.E. 2d 576; *S. v. Isaac,* 225 N.C. 310, 34 S.E. 2d 410; *S. v. Warren,* 227 N.C. 380, 42 S.E. 2d 350; *S. v. Alston,* 228 N.C. 555, 46 S.E. 2d 567; *S. v. Woolard,* 227 N.C. 645, 44 S.E. 2d 29; *S. v. Auston,* 223 N.C. 203, 25 S.E. 2d 613; *S. v. Dee,* 214 N.C. 509, 199 S.E. 730; *S. v. Rhinehart,* 209 N.C. 150, 183 S.E. 388. It would not have been proper for the solicitor to have presented any one of them in his argument to the jury. It was error for the court to do so in its charge. Though the statements were in the form of contentions, the legal inferences and deductions they suggested were such as to mislead the jury and prejudice the cause of the defendant. *S. v. Hedgepeth,* 230 N.C. 33, 51 S.E. 2d 914.

The inadvertence in thus stating the contentions of the State is one of those casualties which sometimes occur in the trial of a cause, notwithstanding the earnest desire of the trial judge to act at all times with complete impartiality. The inadvertence having occurred, however, we cannot avoid taking note thereof.

S. v. Russell, 233 N.C. 487, relied on by the State, is distinguishable.

For the reasons stated, there must be a

New trial.

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

JAMES I. MOORE, MINNIE B. MOORE, MATTIE MOORE TUTEN, WILLIAM THOMAS MOORE, CARNIE MOORE, SYLVESTER MOORE, THEODORE MOORE, DAVID MOORE AND AUDREY MOORE v. T. C. WHITLEY,

and

W. H. BUTT v. JAMES I. MOORE, MINNIE B. MOORE, MATTIE MOORE TUTEN, WILLIAM THOMAS MOORE, CARNIE MOORE, SYLVESTER MOORE, THEODORE MOORE, DAVID MOORE AND AUDREY MOORE.

(Filed 19 September, 1951.)

1. **Reference § 14a—**

   Where a party objects to a compulsory reference and thereafter excepts to numerous findings of the referee, tenders an issue in respect to each, and demands a jury trial thereon, and excepts to various conclusions of law by the referee and tenders an issue arising upon the pleadings, such party has preserved the right to trial by jury. G.S. 1-189.

2. **Reference § 14d—**

   The jury trial upon exceptions to the report of the referee upon the issues of fact arising on the pleadings is solely upon the written evidence taken before the referee, but the findings of fact and conclusions of law of the referee are incompetent as evidence before the jury.

3. **Reference § 14e—**

   The trial court must pass upon exceptions to the admission of evidence by the referee before the question of the competency of such evidence upon the trial is presented for review.

4. **Trespass to Try Title § 3—**

   The fact that the general description of the land as set out in the complaint states that it lies upon the "west side" of a certain creek does not justify demurrer in plaintiff's action to establish title to land on the east side of said creek, since plaintiff may nevertheless claim land on the east side of the creek if it be covered in the specific description as set forth in the complaint.

5. **Boundaries § 2—**

   The specific description in a deed controls the general description and it is only where the specific description is ambiguous or insufficient or reference is made to a fuller and more accurate description, that resort may be had to the general description.

6. **Boundaries § 1—**

   While the location of boundaries is a question of fact for the jury, what are the boundaries is a question of law for the court, it being for the court to construe its terms as to what land the deed intended to cover, and to this end the court may correct an inadvertence when it plainly appears upon the deed itself.

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

APPEAL by defendant Whitley in the first action, and by plaintiff W. H. Butt in the second, as above entitled, consolidated for trial, from *Burgwyn, Special Judge,* at June Special Term, 1951, of BEAUFORT.

These are two civil actions each for the recovery of land, and of damage for trespass thereon, consolidated for trial.

In the first case, *Moore v. Whitley,* instituted 8 January, 1946, plaintiffs allege in their complaint "that they are the owners in fee simple and in possession of the following described tract of land in Richland Township, Beaufort County, on the south side of Pamlico River and west side of Porter's Creek, known as Noah Dixon land: Beginning at the mouth of the east prong of Deep Branch; running various courses of said east prong, to a pine on the south side of the main road; thence to a long leaf pine, the corner of Sam Lee and others; thence with said Sam Lee's line to a pine standing at the foot of Porter's Creek bridge; thence with various courses of Porter's Creek to the Beginning, containing fifty (50) acres, more or less"; and that defendant Whitley has wrongfully and unlawfully entered upon said land and cut and converted to his own use valuable timber to plaintiffs' damage in specified amount.

Defendant Whitley, answering the above allegations in the Moore complaint, alleges that he is the owner and in possession as tenant in common of an undivided interest in and to a certain tract of land, on the east side of and contiguous to Porter's Creek, specifically described; and denies plaintiffs' title to so much, if any, of the land described in the complaint as laps thereon; and further denies any trespass upon any land belonging to plaintiffs.

In the second, *Butt v. Moore, et al.,* instituted 18 February, 1946, plaintiff Butt alleges in his complaint, that he is the owner of a certain 518 acre tract of land, specifically described, and that the Moores, defendants therein, are trespassing thereon, and cutting and removing timber to his damage in specified amount.

The Moores, defendants in this second action, deny the plaintiff Butt's title in so far and to the extent only that the description set out in Butt's complaint may conflict with, cross or lap upon the lands of the defendants Moore, of same description as that set out in their complaint in the first action, to which they assert ownership and possession, and, hence, they deny trespass on any lands owned by Butt.

At September Term, 1950, upon motion of attorney for Whitley, defendant in first action, and for Butt, plaintiff in the second, the presiding judge entered an order consolidating the two actions for trial, and, finding that the actions involve complicated questions of boundary which required "a personal view of the premises," referred same to a referee therein named and appointed, and directed him to hear the evidence,

examine the premises, and submit report of his findings of fact and conclusions of law separately.

To this order of reference the Moores, plaintiffs in the first action, and defendants in the second, excepted and demanded a jury trial.

The case on appeal states that plaintiffs, the Moores, contend that the land described in their complaint in the first action, and in their answer in the second action, actually lies on the "east" side of Porter's Creek, instead of the "west" side thereof. But the referee, reporting to the court, sets forth, among others, findings of fact that the land so claimed by the Moores is located on the west side of Porter's Creek; that defendant Whitley has not trespassed thereon; that defendant Whitley and his cotenants are the owners in fee and in possession of the land described in his answer; and that Butt is the owner in fee and in possession of the land described in his complaint. And thereupon and in accordance therewith rendered conclusions of law.

The Moores, styling themselves as plaintiffs, filed exceptions to numerous findings of fact set forth in the report of the referee, and tendered an issue in respect to each, and demanded a jury trial thereon. They also except to various of the conclusions of law made by the referee. They also tendered the issue, "Are plaintiffs the owners of the land described in the complaint and in the deed from Caroline P. Bonner to S. J. Moore and the prior deeds connecting the title with Noah Dixon?", and state that this issue arises on the pleadings and is proper and necessary, although no specific finding is directed to that particular question.

The Moores further excepted to various parts of the evidence, admitted by the referee, over their objections, all of which they asked to be examined before reading of the evidence to the jury.

Thereupon, defendant Whitley in the first action, and plaintiff Butt in the second action, by petition, asked that the exceptions so filed by the Moores be stricken out and the report of the referee confirmed, for that such exceptions and tender of issues are not in compliance with the laws of North Carolina as in such cases made and provided for preservation of right to a jury trial.

The court overruled the motion and held as a matter of law that the exceptions are sufficient, and that the Moores, plaintiffs, are entitled to a jury trial and accordingly the cause was set for trial on the exceptions and issues tendered.

Whitley and Butt excepted and appeal to the Supreme Court, and assign error.

John A. Wilkinson and H. S. Ward for plaintiffs, appellees.

Grimes & Grimes for Whitley and Butt, appellants.

WINBORNE, J. The sole assignment of error presented for consideration on this appeal challenges the ruling of the court below in holding that the Moores, plaintiffs, are entitled to a jury trial. Testing their exceptions to the referee's report, and their tender of issues, particularly the issue of title arising on the pleadings, by rules of procedure for preserving right to jury trial in a compulsory reference case, as enunciated in decisions of this Court, it appears that they meet the requirement sufficiently to withstand successful attack. See *Booker v. Highlands*, 198 N.C. 282, 151 S.E. 635; *Brown v. Clement Co.*, 217 N.C. 47, 6 S.E. 2d 842. See also *Cherry v. Andrews*, 229 N.C. 333, 49 S.E. 2d 641.

A compulsory reference, under provisions of G.S. 1-189, does not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings, but such trial is only upon the written evidence taken before the referee. And the decisions of this Court hold that the report of the referee, consisting of his findings of fact and conclusions of law, are incompetent as evidence before the jury. *Bradshaw v. Lumber Co.*, 172 N.C. 219, 90 S.E. 146; *Booker v. Highlands, supra; Cherry v. Andrews, supra.*

Hence, the Moores having properly excepted to the findings of fact and conclusions of law of the referee and tendered the issue of title raised by the pleadings, the ruling of the court below is proper.

And it is noted that since the exceptions filed by the Moores to various portions of the evidence have not been passed upon by the trial court, the questions as to the competency thereof is not now presented to this Court.

Moreover, the appellants, Whitley and Butt, demur *ore tenus* in this Court to the complaint of the plaintiffs Moore, in the first action, on the ground that "the complaint does not state a cause of action for the ownership of any land on the east side of Porter's Creek." They contend that the description set out in the complaint expressly locates the land on the "west" side of Porter's Creek. On the contrary, the Moores contend that the specific description in their complaint locates the land on the "east" side of Porter's Creek, and that the specific description controls the general description.

In this connection, the rule is that where there is a particular and a general description in a deed, the particular description prevails over the general. See *Whiteheart v. Grubbs*, 232 N.C. 236, 60 S.E. 2d 101, and cases there cited. It is only when the specific description is ambiguous or insufficient, or the reference is to a fuller and more accurate description, that the general clause is allowed to control or is given significance in determining the boundaries—also see *Whiteheart v. Grubbs, supra*, and cases there cited.

Furthermore, what are the boundaries of a deed is a question of law for the court, where they are, is a question of fact for the jury. *Scull*

v. Pruden, 92 N.C. 168; *Davidson v. Shuler,* 119 N.C. 582, 26 S.E. 340; *Rowe v. Lumber Co.,* 128 N.C. 301, 38 S.E. 896; *Gudger v. White,* 141 N.C. 507, 54 S.E. 386; *Sherrod v. Battle,* 154 N.C. 345, 70 S.E. 834; *Rose v. Franklin,* 216 N.C. 289, 4 S.E. 2d 876; *Huffman v. Pearson,* 222 N.C. 193, 22 S.E. 2d 440; *Kelly v. King,* 225 N.C. 709, 36 S.E. 2d 220; *Lee v. McDonald,* 230 N.C. 517, 53 S.E. 2d 845.

In *Reed v. Shenck,* 14 N.C. 65, in concurring opinion by *Ruffin, J.,* it is declared "a deed is construed by the court, not by the jury. What land by its terms it was intended to cover is just as much a matter of law as what estate it conveys." See *Brown v. Hodges,* 232 N.C. 537, 61 S.E. 2d 603.

Also, the principle is established by an unbroken line of decisions of this Court that "mistake or apparent inconsistency in the description shall not be permitted to disappoint the intent of the parties if the intent appear in the deed." *Mitchell v. Heckstall,* 194 N.C. 269, 139 S.E. 438. See also *Ritter v. Barrett,* 20 N.C. 266; *Cooper v. White,* 46 N.C. 389; *Mizell v. Simmons,* 79 N.C. 182; *Davidson v. Shuler, supra; Wiseman v. Green,* 127 N.C. 288, 37 S.E. 272; *Ipock v. Gaskins,* 161 N.C. 673, 77 S.E. 843; *Williams v. Williams,* 175 N.C. 160, 95 S.E. 157; *Seawell v. Hall,* 185 N.C. 80, 116 S.E. 189.

In *Wiseman v. Green, supra,* it is said that "it seems to be well settled that the court has the right to construe a deed, and, in proper cases, to correct an inadvertence—a 'slip of the pen'—when it plainly appears from the deed itself."

In the light of these principles it is clear that the demurrer *ore tenus* to the complaint should be, and it is hereby overruled. And the judgment from which appeal is taken is

Affirmed.

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

STATE v. JAMES WILSON SHARPE.

(Filed 19 September, 1951.)

1. Bastards § 6—

Evidence that defendant acknowledged paternity of prosecutrix' child by paying an obstetrician before the child's birth, and by paying the hospital bill incidental to the child's birth, and by furnishing prosecutrix money for baby clothes, etc.; is sufficient to be submitted to the jury on the issue of paternity.

2. Same—

Evidence tending to show that defendant furnished certain sums to pay the hospital bill incident to the birth of prosecutrix' child and gave prosecutrix money for clothes for the child, without evidence that the amount furnished was inadequate as of that time, and that upon her later statement that she would have to have more money, promised to provide more, *is held* insufficient to support the issue of defendant's willful failure and refusal to support the child, evidence of prosecutrix' demand and defendant's refusal to provide support after the issuance of the warrant being incompetent upon the issue.

3. Bastards § 1—

In a prosecution under G.S. 49-1, 49-2, the State must not only show that defendant is the father of the child and has neglected and refused to support it, but also that such refusal is willful, *i.e.*, intentional and without just cause, excuse or justification, and this element of the offense cannot be supported by evidence of willful failure supervening between the time the charge was laid and the time of trial.

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

APPEAL by defendant from *Patton, Special Judge,* at Special April 1951 "A" Term of BUNCOMBE.

Criminal prosecution upon a warrant issued 22 September, 1950, out of the Domestic Relations Court of Buncombe County, North Carolina, charging that defendant James Wilson Sharpe "did wilfully and unlawfully neglect and fail to provide adequate means of support" for his minor child . . . born July 11, 1950,—an illegitimate child begotten on the body "of a certain named woman to whom he had never been married," etc., heard in Superior Court of said county on appeal thereto by defendant from judgment on finding adverse to him by the Judge of Domestic Relations Court both as to issue of paternity, and as to guilt on the charge set forth in the warrant.

Upon trial in Superior Court, the State offered the testimony of the prosecutrix and several other witnesses which tends to show this state of facts: Defendant, a married man, is the father of a girl child begotten by him upon the body of the unmarried seventeen year old prosecutrix, a scholastic ninth grader, and born 11 July, 1950. When prosecutrix became pregnant in October, 1949, defendant and his sister took her to see a doctor, an obstetrician, for examination. Defendant, upon being informed that the doctor advised that prosecutrix was pregnant, gave to her $50.00 to pay the doctor, and told her he wanted her to go to a hospital where she would be taken care of in the delivery of the child, and to have a private room. Pursuant thereto she made arrangements to go to a certain hospital, and did go there for the delivery of the child. Defendant gave to prosecutrix $25.00 "to get baby clothes." When the child was

born, a sister-in-law of prosecutrix so informed defendant by phone, and told him that the mother of prosecutrix "had to have some money to pay the hospital bill and he promised that he would bring it" the next day. He did come then, and asked her to get in his car and go with him to the hospital. She did so, and he gave to her $80.00 to pay the bill, and $5.00 to give to the prosecutrix, all of which she did. The hospital bill amounted to $75.80, and the sum of $4.20 of the $80.00 was refunded to prosecutrix. Prosecutrix stayed in the hospital five days after the birth of the child, and then in bed at home about two weeks. Defendant did not come to see the baby at the hospital but did do so at the home of prosecutrix. To the question, asked her on cross-examination, "Then, after you got up it was about two months before Wilson Sharpe came by?", she answered "Yes."

On direct examination she was asked these questions, to which she answered as shown:

"Q. State what, if anything, you told him in regard to the support of the baby.

"A. He stopped in front of my house and blowed and I went down there, and I had taken the baby to the doctor and she was two months old. I took her for a check-up and he asked where I had been and I told him that I had took the baby to the doctor for a check-up. I told him that I would have to have some money, that my mother paid the doctor, and he told me that he would be back and give me some money and he asked to see the baby and I asked him to go up to the house to see it and he said 'No' for me to go up and get it, so I went and . . . brought her to the car and he looked at her and he asked me to give him the baby, and I said 'I wouldn't give it to you or anybody else.'

"Q. What contributions has he made for the support of the baby after you made the demand?

"A. Not any.

"Q. Who has been supporting the child?

"A. My mother and daddy. It is a breast baby, but she eats baby food and drinks milk. Mother buys a gallon of milk at a time for her. We get about nine jars of baby food every week."

Prosecutrix, refreshing her recollection by the warrant, testified, and the record shows that the warrant against defendant was signed on 22 September, 1950. She was asked to "State whether or not this defendant saw you after you swore this warrant out for him in the Domestic Relations Court," to which she answered, "Yes, he come out to my house one night and called me down to the steps and he asked me to come up here and release the warrant and if I did he would give me $20.00 a week . . . I told him I couldn't do that."

Defendant moved for judgment as of nonsuit at the close of the State's evidence. The motion was denied, and he excepted. Then defendant rested and renewed motion for judgment as of nonsuit. The motion was denied, and he excepted.

The case was submitted to the jury upon two issues, the first, as to paternity, and the second, as to the guilt of defendant on the charge of willful neglect or refusal to support and maintain his named illegitimate child. The jury answered each issue in the affirmative, and rendered verdict: Guilty as charged in the warrant.

Judgment: Confinement in the common jail of Buncombe County for a term of six (6) months, to be assigned to work on the roads under the supervision of the State Highway and Public Works Commission—the prison sentence being suspended upon stated conditions, until the named child reached the age of fourteen years.

Defendant appeals therefrom to Supreme Court, and assigns error.

Attorney-General McMullan, Assistant Attorney-General Moody, and Charles G. Powell, Jr., Member of the Staff, for the State.

Sanford W. Brown and William V. Burrow for defendant, appellant.

WINBORNE, J. While the evidence offered by the State, as shown in the record of case on appeal in the present prosecution, is sufficient to support the finding of the jury on the issue as to paternity submitted by the court, we are of opinion, and hold that the evidence is insufficient to support the criminal charge preferred against defendant.

The charge against defendant is predicated upon the statute referred to as "An Act Concerning the Support of Children of Parents Not Married to Each Other," G.S. 49-1, which provides that "Any parent who willfully neglects or who refuses to support and maintain his or her illegitimate child shall be guilty of a misdemeanor and subject to such penalties as are hereinafter provided," and that "A child within the meaning of this Article shall be any person less than fourteen years of age and any person whom either parent might be required under the laws of North Carolina to support and maintain as if such child were the legitimate child of such parent." G.S. 49-2.

In order to convict a defendant under this statute, G.S. 49-2, it is held by this Court that the burden is on the State to show not only that he is the father of the child, and that he has neglected or refused to support and maintain it, but further that his neglect or refusal is willful, that is, intentionally done "without just cause, excuse or justification" after notice and request for support. *S. v. Hayden,* 224 N.C. 779, 32 S.E. 2d 333, and cases cited. See also *S. v. Stiles,* 228 N.C. 137, 44 S.E. 2d 728; *S. v. Ellison,* 230 N.C. 59, 52 S.E. 2d 9.

"The charge," as stated in *S. v. Summerlin,* 224 N.C. 178, 29 S.E. 2d 462, opinion by *Seawell, J.,* "must be supported by the facts as they existed at the time it was formally laid in the court, and cannot be supported by evidence of willful failure supervening between the time the charge was made and the time of trial,—at least when the trial is had . . . upon the original warrant." See also *S. v. Thompson,* 233 N.C. 345, 64 S.E. 2d 157.

In the light of the statute, and these decisions of this Court, applied to the evidence offered by the State, it is manifest that at the time the charge was laid, and the warrant sworn out, 22 September, 1950, the evidence fails to show a willful neglect or refusal by defendant to support the child. Indeed, the evidence fails to show that at the time the prosecution was begun the amount contributed by defendant had been insufficient to support and maintain the child. He had not only contributed $25.00 for clothes for the child, but had given to prosecutrix $5.00, and she had received $4.20, the surplus of amount paid to hospital by defendant, a total of $34.20. And there is no evidence that this amount was insufficient to support and maintain the child up to that time. Thus it may be fairly contended by defendant the evidence fails to show, or to support a finding, that at the time the warrant was sworn out, he had neglected or refused to support or maintain his said child.

Thus we hold that the motion of defendant for judgment as of nonsuit is well taken, and should have been granted. This holding is without prejudice to any subsequent events in respect to conduct of defendant in his duty under the law to support his said child.

Reversed.

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

ESTHER B. REVIS v. WILLIAM W. ORR, TRADING AND DOING BUSINESS AS THE RIVERSIDE CLUB.

(Filed 19 September, 1951.)

1. Negligence § 4f—

The proprietor of a dance hall is not an insurer of the safety of its patrons and invitees, but is under legal duty to exercise ordinary care to keep its premises, and all parts thereof to which persons lawfully present may go, in a safe condition for the use for which they are designed and intended, and to give warning of hidden dangers and unsafe conditions in so far as they can be ascertained by reasonable inspection and supervision.

2. Same—

The duty of a proprietor to warn invitees of dangerous conditions or instrumentalities upon the premises is based upon the proprietor's superior knowledge concerning them, and it is only when such dangers are known to proprietor, or should be known to him in the exercise of due care, that the duty to warn obtains.

3. Same—Evidence which fails to show that proprietor knew or should have known of danger is insufficient to withstand nonsuit.

Evidence tending to show that a patron at a dance hall went from the well-lighted rest room into the dimly lit dance hall and, after taking about a step and a half from the rest room door, stumbled over a chair which was overturned on the floor, falling to her injury, is insufficient to be submitted to the jury in the absence of evidence as to how long the chair had been in such position before the rest room door or who had placed or knocked it there, since the evidence fails to show that the proprietor knew or should have known of the danger in the exercise of ordinary care, nor does evidence to the effect that the manager failed to perform his duty of making an inspection of the premises during the evening as he was required to do in the course of his employment, alter this result under the circumstances disclosed by the evidence.

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

APPEAL by plaintiff from *Armstrong, J.*, at Regular July Civil Term, 1951, of BUNCOMBE. Affirmed.

Civil action to recover damages for personal injury sustained by plaintiff as a result of falling over a chair at the defendant's dance hall located in the City of Asheville and known as the Riverside Club. The chair was lying on the floor just outside of the ladies' rest room. The plaintiff fell over the chair immediately after she stepped out of the rest room door into the semi-darkness of the dance hall.

The evidence discloses that the plaintiff and her two companions went to the club early Saturday night, 5 February, 1949, and took seats in the partitioned-off booth section which partially surrounded the dance floor. As the crowd increased, tables were set up next to the wall on the other areas around the dance floor. She stayed at the club the entire evening. About 11:30 o'clock she excused herself and went to the ladies' rest room, where she remained for twenty or thirty minutes. The door to the rest room opened right off the main dance floor. As she stepped out of the rest room to return to the dance floor area, she immediately fell over a chair and fractured her left leg.

There was a table about four or five steps from the door of the rest room, and the chair which she fell over was between the door and the table. She said she took only a step and a half beyond the door before coming into contact with the chair. She further testified: "The chair was not sitting; it was lying down. The chair was turned over in the

floor. I did not see the chair before I hit it. I first saw it when I fell over it." She further said the table and chair were not there when she went in the rest room.

The lights in the rest room were very bright; while the lights on the dance floor were very dim. There were rows of 10-watt bulbs painted different colors,—"six or eight bulbs on each side of the dance floor and maybe a string through the middle." The dance floor is from sixty to eighty feet long and "its width about eighty per cent of its length."

One of plaintiff's witnesses who went to the rest room earlier that night testified that in coming out onto the dance floor "you could not see; you would have to stop and get your bearings before you went on."

There was no evidence indicating who turned the chair over or how long it had been there before the plaintiff struck it.

From judgment of nonsuit entered at the close of plaintiff's evidence, she appeals, assigning errors.

Sanford W. Brown and William V. Burrow for plaintiff, appellant.
Harkins, Van Winkle, Walton & Buck for defendant, appellee.

JOHNSON, J. The single question presented here is whether the court erred in allowing defendant's motion for judgment of nonsuit.

As a general rule, a dance hall proprietor, like the occupant of any building used for ordinary business purposes, who directly or by implication invites others to enter his place of business, is under the legal duty to his patrons to exercise ordinary care to keep his premises, and all parts thereof to which persons lawfully present may go, in a safe condition for the use for which they are designed and intended, and to give warning of hidden dangers or unsafe conditions in so far as can be ascertained by reasonable inspection and supervision. See *Drumwright v. Theatres,* 228 N.C. 325, 45 S.E. 2d 379; *Ross v. Drug Store,* 225 N.C. 226, 34 S.E. 2d 64; *Anderson v. Amusement Co.,* 213 N.C. 130, 195 S.E. 386. However, such occupant is not an insurer of the safety of patrons and invitees who may enter the premises. See *Pratt v. Tea Co.,* 218 N.C. 732, 12 S.E. 2d 242; *Fox v. Tea Co.,* 209 N.C. 115, 182 S.E. 662; *Cooke v. Tea Co.,* 204 N.C. 495, 168 S.E. 679; 38 Am. Jur., Negligence, Sec. 96, pp. 754 and 755.

The liability of an occupant to an invitee for negligence in failing to keep the premises in reasonably safe condition for the invitee, or in failing to warn him of dangers thereon, must be predicated upon the occupant's superior knowledge, over that of the invitee or patron, concerning the dangers of the premises. And, ordinarily, it is only when the dangerous condition or instrumentality is known to the occupant, or in the exercise of due care should have been known to him, and not known

to the person injured, that a recovery may be permitted. *Pratt v. Tea Co., supra* (218 N.C. 732). See also 38 Am. Jur., Negligence, Sec. 97, p. 757.

In *Pratt v. Tea Co., supra, Barnhill, J.*, speaking for the Court, said: "When claim is made on account of injuries caused by some substance on the floor along and upon which customers will be expected to walk, in order to justify recovery, it must be made to appear that the proprietor either placed or permitted the harmful substance to be there, or that he knew, or by the exercise of due care should have known, of its presence in time to have removed the danger or given proper warning of its presence."

Here, the evidence tends to show that when the plaintiff came out of the rest room a table was sitting out on or near the edge of the dance floor, some five or six steps from the rest room door; that the chair over which the plaintiff stumbled was lying between the table and the door,—only about a step and a half from the door. The evidence is silent on when or by whom the chair was knocked or placed there. Hence there is no evidence upon which to predicate a finding that the defendant knew, or in the exercise of ordinary care should have known, that the chair was lying where it was.

Nor is the plaintiff's case strengthened by the evidence of dim lighting in the dance hall. It was customary for the hall to be kept in semi-darkness to suit the wishes of the patrons. The evidence is that they "did not want too much light, they had rather be in a shady place." Anyway, the plaintiff testified that before she went in the rest room there was sufficient light in the dance hall for her to "see the people and objects around on the floor." And one of her companions said "it was light enough to have read a menu." Besides, it appears that the plaintiff was thoroughly familiar with the dance hall. She testified she had been there many times when the lighting conditions were the same. She further said: "I have been going out there three or four times a week for a period of something like four years. I knew quite a bit about the place."

We have not overlooked the statement of the witness Hudgins, manager of the club, to the effect that he made no formal "inspection through the dance hall on the particular evening," followed by his admission that "making an inspection through the dance hall was my duty and my responsibility." This, when considered with the rest of the evidence and circumstances bearing on the issue of negligence, is without material significance.

This record, when interpreted in the light of the controlling principles of law, impels the conclusion that the plaintiff failed to make out a *prima facie* case of actionable negligence against the defendant. Therefore, we

do not reach for consideration the question of contributory negligence. The judgment below is

Affirmed.

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

ROSA LEE BLANKENSHIP; VELDA MAY BLANKENSHIP DUCKER AND EDWARD DUCKER, HER HUSBAND; JAMES FRANCIS BLANKENSHIP AND LOUISE NESBITT BLANKENSHIP, HIS WIFE; HILLIARD H. BLANKENSHIP AND THELMA BUMGARNER BLANKENSHIP, HIS WIFE; HOWARD N. BLANKENSHIP AND RUBY HARVEY BLANKENSHIP, HIS WIFE; AND CLARENCE BLANKENSHIP AND EDITH WRIGHT BLANKENSHIP, HIS WIFE, v. WILLIAM CLAYTON BLANKENSHIP AND MARION McCURRY BLANKENSHIP, HIS WIFE; AND ARTHUR LEE BLANKENSHIP AND OMA OWENBY BLANKENSHIP, HIS WIFE; AND JAMES HENRY BLANKENSHIP, INTERVENER, BY ORDER OF COURT.

(Filed 19 September, 1951.)

1. Curtesy § 1—

The common law right of curtesy is declared and defined by statute in this State. G.S. 52-16.

2. Curtesy § 4—

A husband may forfeit or release his right of curtesy. G.S. 52-13.

3. Same—

Where husband and wife enter into a deed of separation in which she releases all rights in certain lands to him, including her dower right, and he releases "all rights" that he might have "in any estate" in the lands allotted to her or belonging to her at her death, the instrument is sufficient to constitute a valid and effective release of his right of curtesy in her lands, notwithstanding the fact his right of curtesy was not specifically named, the word "estate" as used being comprehensive enough to include lands.

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

APPEAL by respondents and intervener James Henry Blankenship from *Patton, Special Judge,* February Term, 1951, of BUNCOMBE. Affirmed.

Petition for partition of land.

The only question presented by the appeal is whether the intervener James Henry Blankenship was entitled to an estate by the curtesy consummate in the lands described in the petition.

The material facts were not controverted. Six of the petitioners and two of the respondents are the children and only heirs at law of Lanie

Blankenship who died seized of the lands described, 4 December, 1945. James Henry Blankenship was the husband of Lanie Blankenship and the father of her children. The husband and wife separated in 1940 and continuously thereafter lived separate and apart from each other. In 1944 they executed in proper form a deed of separation, each releasing all rights in the property of the other, the husband James Henry Blankenship agreeing that "the party of the first part (the husband) hereby releases all rights that he may have in any estate of the party of the second part which she may have at the time of her death, and he hereby renounces any right of administration thereon." Again in the same instrument the intervener James Henry Blankenship released and quitclaimed to his wife "all his right, title and interest" in and to the property described in the petition.

Upon consideration of the pleadings and the separation agreement the court below adjudged that James Henry Blankenship was not entitled to an estate by the curtesy consummate in the lands described, and remanded the cause to the clerk for further proceedings according to law. Respondents and intervener James Henry Blankenship excepted to the judgment and appealed.

Oscar Stanton and Pangle & Garrison for appellants.

R. R. Williams and Robt. R. Williams, Jr., for appellees.

DEVIN, C. J. Tenancy by the curtesy is a development of the common law and in North Carolina the rights of the husband, and limitations thereon, are declared and defined by statute G.S. 52-16. It is a right which the husband may forfeit by specified acts of misconduct or which he may release by a separation agreement. *Thompson v. Wiggins,* 109 N.C. 508, 14 S.E. 301; *Garrett v. Kirtley,* 97 W. Va. 484; 35 A.L.R. 1526; 49 A.L.R. 148; 15 A.J. 148; 25 C.J.S. 54. A release by the husband of his right of tenancy by the curtesy in his wife's lands by properly executed contract with his wife is expressly authorized by statute, G.S. 52-13, with the added provision that such release may be pleaded in bar of any proceeding to recover the rights released.

The only question here is whether the language in the separation agreement between James Henry Blankenship and his wife Lanie Blankenship is sufficient to constitute a valid release and effective to bar his right to tenancy by the curtesy consummate in the lands described.

The agreement was between husband and wife who had been living separate and apart for several years and was for the final adjustment of their property rights. By it the husband obtained the wife's release to certain lands, and the husband released his rights in other lands to her. There were valuable considerations moving to each. True, the wife's

release specifically mentioned dower while in the release of the husband tenancy by the curtesy was not specifically named, but we cannot conceive it was the intention of the parties in executing this final settlement of property rights that the wife should release all her rights in the lands passing to him while he retained a contingent right or interest in lands conveyed to her. We think the language of the separation agreement that the husband released "all rights" that he might have "in any estate" of his wife at her death is sufficient to support the conclusion that a release of his right of tenancy by the curtesy was intended. The word "estate" as here used is comprehensive enough to include land. Black's Law Dictionary; *Hass v. Hass,* 195 N.C. 734 (740), 143 S.E. 541; *Powell v. Woodcock,* 149 N.C. 235, 62 S.E. 1071; *Foil v. Newsome,* 138 N.C. 115, 50 S.E. 597.

We conclude that the court below has ruled correctly, and that the judgment rendered must be

Affirmed.

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

FAGG SAWYER v. SOUTHERN RAILWAY COMPANY AND JOE SAWYER.

(Filed 19 September, 1951.)

1. Negligence § 19c—

Nonsuit is properly entered when plaintiff by his own testimony makes out a clear case of contributory negligence, and thus proves himself out of court.

2. Railroads § 5—

Plaintiff's testimony was to the effect that he saw the headlight of defendant's train backing toward him, that he knew the train would continue on the sidetrack or turn onto a spur track, that he acted on an assumption that the train would turn aside on the spur and placed his hand on a boxcar or got between boxcars standing on the sidetrack, and was injured when the train crashed into them. *Held:* Plaintiff's testimony clearly establishes contributory negligence barring recovery notwithstanding that there was no light or trainman on the rear of the backing train.

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

APPEAL by plaintiff from *Rousseau, J.,* May Term, 1951, of HAYWOOD. Affirmed.

This was suit to recover damages for a personal injury alleged to have been caused by the negligence of the defendant.

Plaintiff's injuries allegedly resulted from the operation of defendant's engine and cars along one of its tracks in Bryson City on the evening of 21 December, 1949. According to his complaint he was standing with his hand on a boxcar on defendant's sidetrack when it was struck by the train and he was caused to fall under the car and suffered injury. He alleged the train was being backed without warning, or lights, or man on the rear end of the train in the direction in which it was moving.

On the trial the plaintiff testified that on the evening alleged he walked north on Everett Street, across the 3 tracks of the railroad to an unnamed street or road which runs east parallel with the tracks to Greenlee Street (a north-south street parallel with Everett Street), and that he walked east on this road until he came near a spur track branching off from the sidetrack to the north. As he approached this spur track he observed the glare of the headlight of the engine which was backing cars west on the sidetrack in his direction. He said, "I looked and saw this glare of the lights and knew that the engine was above Greenlee Street— . . . I heard no whistle and no noise, but I knew the train was backing in a westerly direction toward me as I moved up this narrow road." Plaintiff stopped when 15 to 25 feet of the spur track uncertain whether the train might be coming in on the spur and block his crossing or continue west on the sidetrack. There the road runs close to the sidetrack. On this sidetrack there were two or three cars standing. He said: "I waited there in the darkness, this road is at the edge of that track, and at that time I started to answer a act of nature, and I reached over and put my hand on the second car, thinking this train would come back on the spur . . . I saw all at once that I had misjudged it and the train shoved and slammed into the first car and shut me in between those two cars, and I reached up and tried to grab on to the coupling and missed and fell between the tracks." Plaintiff said he saw no light and no one on the back of the car as it approached.

On cross-examination plaintiff testified he saw the engine pushing cars in the direction of those three cars on the sidetrack, and that he walked over to the second car to answer a call of nature. "I knew this engine was moving up there then in the direction of the car that I put my hand on." Plaintiff was familiar with the location of the tracks, spur and switch to the spur. Plaintiff admitted he had consumed a small amount of whiskey that afternoon, but was not drunk.

There was other evidence for plaintiff not material to this appeal, and also evidence offered by defendant.

At the close of all the evidence defendant's motion for judgment of nonsuit was allowed, and from judgment dismissing the action plaintiff appealed.

W. R. Francis for plaintiff, appellant.
Joyner & Howison and Jones & Ward for defendants, appellees.

DEVIN, C. J. It has been repeatedly said by this Court that judgment of involuntary nonsuit may properly be entered when the plaintiff by his own testimony makes out a clear case of contributory negligence, and thus proves himself out of court. *Hayes v. Tel. Co.*, 211 N.C. 192, 189 S.E. 499; *Hampton v. Hawkins*, 219 N.C. 205, 13 S.E. 2d 227; *Barlow v. Bus Lines*, 229 N.C. 382, 49 S.E. 2d 793; *Howard v. Bingham*, 231 N.C. 420, 57 S.E. 2d 401; *Carruthers v. R. R.*, 232 N.C. 183, 59 S.E. 2d 782. Here the plaintiff testified he saw the engine and cars backing toward him, and he stopped to see whether the train would continue on the sidetrack on which it was moving or turn into a spur track which crossed plaintiff's path. Instead of waiting to determine the event, plaintiff, according to his own testimony, walked over to some cars standing on the sidetrack on which the train was coming, and laid his hand on one of them or got between two of them, and was injured when the train continuing on the sidetrack pushed into those cars.

The fact that there was no light or trainman on the end of the train approaching would not relieve plaintiff of the duty to exercise ordinary care when he saw the train coming, observed its movement, and knew it must come on either the sidetrack or the spur track. Without waiting, he acted on the mistaken idea that the train would turn aside on the spur, and in some way got between the cars on the sidetrack. Contributory negligence seems to have been clearly established by plaintiff's own testimony.

Judgment affirmed.

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

C. S. LAMB v. ABNER N. STAPLES, JENNIE STAPLES, ALVIN N. STAPLES AND BETTY STAPLES.

(Filed 19 September, 1951.)

1. Venue § 2a—

An action for damages for breach of contract to convey timber upon allegation that defendants had breached the contract by conveyance of a part of the timber to another, without the joinder of the grantee of the timber, *is held* not an action for the recovery of real property within the purview of G.S. 1-76, since specific performance could not be decreed, and defendants' motion to remove to the county in which the timber is situate is properly denied.

2. Pleadings § 5—

The relief to which plaintiff is entitled is to be determined by the allegations of the complaint and not by the specific relief for which he prays.

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

APPEAL by defendants from *Morris, J.*, at Chambers 20 January, 1951. From PASQUOTANK.

This is a civil action instituted in Pasquotank County to recover damages for breach of contract.

The plaintiff alleges he entered into a written contract with the defendants to convey to him approximately 1,200 acres of timber lands in Camden County for a consideration of $45,000; that, in the meantime, he had contracted with one L. E. Collins to sell him 295 acres of the land for the sum of $55,000; that the defendants learned of the plaintiff's contract with Collins and conveyed directly to him the 295-acre tract of land for a consideration of $50,000, retaining the remainder of the land which they had contracted to convey to him.

The plaintiff alleges he has been damaged by the failure of the defendants to carry out their contract with him, in the sum of $10,000 as a result of the sale and conveyance of the 295 acres of land by the defendants to L. E. Collins, and in the sum of $90,000, the alleged value of the remaining 905 acres of the 1,200-acre tract the defendants contracted to convey to the plaintiff. He prays for judgment against the defendants for damages in the sum of $100,000.

In apt time the defendants filed a written motion for change of venue to Camden County on the ground that the plaintiff's action is for the recovery of real property or an interest therein. The motion for removal was denied, and the defendants appeal assigning error.

Howard W. Dobbins and J. W. Jennette for plaintiff, appellee.
J. Henry LeRoy for defendants, appellants.

DENNY, J. The defendants having breached their alleged contract with the plaintiff by conveying a portion of the premises they agreed to convey to him, to L. E. Collins, they are not now in a position to comply with a judgment for specific performance. Moreover, their grantee, L. E. Collins, the present owner of a portion of the 1,200-acre tract of land, is not a party to this action. *White v. Rankin,* 206 N.C. 104, 173 S.E. 282.

The plaintiff in his complaint does not undertake to allege facts to support a decree for specific performance, but on the contrary bottoms his action on the breach of the contract, and seeks to recover damages resulting therefrom. Such an action is not for the recovery of real prop-

erty or any interest therein as contemplated by G.S. 1-76. *White v. Rankin, supra; Warren v. Herrington,* 171 N.C. 165, 88 S.E. 139; *Max v. Harris,* 125 N.C. 345, 34 S.E. 437.

The facts alleged in the complaint in the case of *Mortgage Co. v. Long,* 205 N.C. 533, 172 S.E. 209, upon which the defendants are relying, were held by the court to be sufficient to support a decree of foreclosure although the prayer for relief was for a money judgment only on a note which the plaintiff alleged was secured by a mortgage. The prayer was also for such other and further relief as plaintiff might be entitled in law or equity. Since, under the plaintiff's allegations, it was clearly entitled to a decree of foreclosure, the court held the motion to remove to the county in which the mortgaged premises were situate, should have been allowed.

It is the general rule that a plaintiff may obtain such relief in an action as he is entitled to upon the facts alleged in his complaint and established by his proof. Therefore, the relief to which a plaintiff is entitled must be determined by the allegations in his complaint and not by the specific relief for which he prays. *Mortgage Co. v. Long, supra; Jones v. R. R.,* 193 N.C. 590, 137 S.E. 706; *Shrago v. Gulley,* 174 N.C. 135, 93 S.E. 458; *Warren v. Herrington, supra; Baber v. Hanie,* 163 N.C. 588, 80 S.E. 57; *Councill v. Bailey,* 154 N.C. 54, 69 S.E. 760. In applying this rule to the allegations of plaintiff's complaint, it is clear that the plaintiff is seeking damages only and not specific performance. Consequently, the denial of the defendant's motion to remove this action to Camden County for trial, will be upheld.

Judgment of the court below is
Affirmed.

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

STATE v. HUGH (DOPEY) FUQUA.

(Filed 19 September, 1951.)

1. Intoxicating Liquor § 9c: Criminal Law § 35—

Hearsay evidence to the effect that defendant sold intoxicating liquor at his store and that he employed a certain person as his "runner" is properly considered by the jury when admitted in evidence without objection.

2. Intoxicating Liquor § 4b—

A person has possession of intoxicating liquor within the purview of G.S. 18-2 when he has the power and intent to control its disposition or use, either alone or in combination with others.

3. Intoxicating Liquor § 9d—

Evidence to the effect that defendant's employee went from defendant's store in North Carolina across the road to a barn in Virginia and returned to the store with a cup, that immediately thereafter an officer entered the store, saw the cup on the counter, that a third person, who immediately thereafter disclaimed any interest therein, picked it up, and that the officer took possession of the cup and discovered that it was filled with intoxicating liquor diluted by Coca-Cola, *held* sufficient to sustain defendant's conviction of illegal possession of the intoxicating liquor.

4. Intoxicating Liquor § 4a—

It is illegal for a person to possess in a dry county any intoxicating liquor for any purpose not sanctioned by the Turlington Act of 1923 or by the provisions of the Alcoholic Beverage Control Act of 1937. G.S. 18-2, G.S. 18-11, G.S. 18-49, G.S. 18-58.

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

APPEAL by defendant from *Pless, J.*, and a jury, at March Term, 1951, of CASWELL.

This is a criminal action in which the defendant was originally charged in separate counts with these offenses: (1) Possession of intoxicating liquor for the purpose of sale; and (2) illegal possession of intoxicating liquor. The crimes were allegedly committed in Caswell County, which does not operate county liquor stores under the Alcoholic Beverage Control Act of 1937.

The only testimony at the trial was that of the State's witness, Roy Fowlkes, a deputy sheriff of Caswell County, who made out this case for the prosecution:

For an appreciable period preceding 25 November, 1950, the defendant operated a small grocery store adjacent to a road at a place in Caswell County, North Carolina, just south of the dividing line between the State of North Carolina and the Commonwealth of Virginia. There was a barn in the edge of Virginia "right across the road" from the defendant's place of business. It had been repeatedly reported to law enforcement officers of Caswell County that the defendant sold intoxicating liquor at his store, and that he employed one "Big Head" Ware as a runner to go into Virginia and "bring liquor back." On the night of 25 November, 1950, the defendant, Ware, a man named Straighter, and two women were in the store. Deputy Sheriff Fowlkes, who was nearby, observed Ware carrying a cup from the store to the barn, where he temporarily vanished. After a few seconds, Fowlkes saw Ware return to the store from the barn

"with the same cup." Fowlkes forthwith entered the store. As he did so, he perceived the cup standing on a counter between the defendant and Straighter just an instant before the latter "picked it up off the counter and held it on the side." Fowlkes did not see the defendant touch the cup or "have anything to do with it." Fowlkes took the cup from Straighter, and discovered that it was filled with the intoxicating liquor diluted by Coca-Cola. Straighter immediately disclaimed any interest in the "liquor," but the defendant "didn't say whether it was his or not." Shortly thereafter Fowlkes searched the barn with "the Virginia law" and "found several pieces of pints of liquor, some bottled-in-bond and some white" there.

The jury acquitted the defendant on the count charging possession of intoxicating liquor for the purpose of sale, and convicted him on the count charging illegal possession of intoxicating liquor. Judgment was pronounced against defendant on the last mentioned count, and he appealed.

Attorney-General McMullan, Assistant Attorney-General Moody, and Robert B. Broughton, Member of Staff, for the State.

P. W. Glidewell, Sr., for defendant, appellant.

ERVIN, J. The defendant does not question the propriety of the admission of any of the evidence of the State's witness, Deputy Sheriff Fowlkes. In consequence, the testimony as to reports to law enforcement officers concerning the activities of the accused is governed by the rule which prevails in this jurisdiction that where hearsay is admitted without objection, it may be considered with the other evidence and given any evidentiary value which it may possess. *Maley v. Furniture Co.,* 214 N.C. 589, 200 S.E. 438.

The solitary assignment of error made by the defendant is that the trial judge erred in refusing to dismiss the action upon a compulsory nonsuit. G.S. 15-173.

Inasmuch as the criminal laws of North Carolina have no force beyond the borders of the State and cannot apply to any intoxicating liquor which may have been cached at the barn in the Commonwealth of Virginia, the validity of the conviction of the defendant necessarily hinges on the sufficiency of the State's testimony to establish these two propositions: (1) That the defendant possessed the intoxicating liquor contained in the cup found in his store; and (2) that the defendant's possession of such intoxicating liquor was illegal.

An accused has possession of intoxicating liquor within the meaning of the law when he has both the power and the intent to control its disposition or use. The requisite power to control may reside in the accused

acting alone or in combination with others. *S. v. Meyers,* 190 N.C. 239, 129 S.E. 600.

This being true, the testimony offered by the State at the trial justifies the inference that the defendant had possession of the intoxicating liquor in the cup; for such evidence tends to show that the defendant, acting either alone or in combination with his servant, "Big Head" Ware, had both the power and the intent to control the disposition or use of such liquor.

This brings us to the final inquiry whether the testimony is sufficient to sustain an additional inference that the defendant's possession of the intoxicating liquor in the cup was illegal.

Caswell County has not elected to operate county liquor stores under the Alcoholic Beverage Control Act of 1937. Hence, it is unlawful for any person to possess any intoxicating liquor in Caswell County in any manner or in any place or for any purpose not sanctioned by the Turlington Act of 1923, or by the provisions of the Alcoholic Beverage Control Act of 1937 applicable to counties not engaged in operating county liquor stores. *S. v. Barnhardt,* 230 N.C. 223, 52 S.E. 2d 904; *S. v. Davis,* 214 N.C. 787, 1 S.E. 2d 104.

The evidence presented by the State indicates that the defendant possessed the intoxicating liquor in the cup at his store so that it might be put to use as a beverage at that place. Possession of intoxicating liquor in such a manner and at such a place for such a purpose is not sanctioned by any relevant provision of the Turlington Act or the Alcoholic Beverage Control Act. General Statutes, sections 18-2, 18-11, 18-49, 18-58; Chapter 457 of the Session Laws of 1945. For this reason, the testimony warrants the conclusion that the defendant illegally possessed the intoxicating liquor in question.

No error.

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

SCOTT DILLINGHAM v. BLUE RIDGE MOTORS, INC.

(Filed 19 September, 1951.)

1. Appeal and Error § 6c (3)—

A broadside exception and assignment of error to the findings of fact and conclusions of law as set out in the judgment presents only whether the facts found support the judgment.

2. Judgments § 27a—

The court's findings that plaintiff had failed to establish mistake, surprise, inadvertence or excusable neglect, and that he had failed to show a meritorious defense, sustains the court's judgment denying plaintiff's motion under G.S. 1-220 to set aside the judgment by default against him on defendant's counterclaim.

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

APPEAL by plaintiff from *Rudisill, J.*, at May Term, 1951, of BUNCOMBE.

Civil action in claim and delivery by plaintiff to recover possession of an automobile held by the defendant to preserve its mechanic's lien for repairs under G.S. 44-2. The defendant, after replevying and holding the automobile, filed answer denying the plaintiff's right to possession and by way of counterclaim set up its lien for repairs in the amount of $170.14. The defendant's answer containing the counterclaim was duly served on the plaintiff by the sheriff of Buncombe County. No reply or other pleading was filed within the statutory period therefor and the Clerk of the Superior Court entered judgment by default final on the counterclaim. Thereupon, the plaintiff moved the Clerk to set aside the judgment for mistake, excusable neglect, and so forth, under the provisions of G.S. 1-220. The motion was denied and the plaintiff appealed to the Judge of the Superior Court.

From judgment affirming the action of the Clerk, the plaintiff appeals, assigning errors.

Scott Dillingham, plaintiff, in propria persona, appellant.

J. M. Horner for defendant, appellee.

JOHNSON, J. The plaintiff merely excepted to the judgment below and assigned as error the court's "findings of fact and conclusions of law as set out in said judgment." This assignment of error is broadside. The exception and assignment bring up only the question whether the facts found support the judgment. *Bailey v. McPherson*, 233 N.C. 231, 63 S.E. 2d 559; *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351. The Judge below found as facts that the plaintiff failed to establish either (1) mistake, surprise, inadvertence, or excusable neglect, or (2) that he has a meritorious defense to the counterclaim within the purview of G.S. 1-220. These findings support the judgment. No error appears on the face of the record. Therefore, the judgment below is

Affirmed.

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

E. W. COPPEDGE, ADMINISTRATOR OF J. W. COPPEDGE, DECEASED, v. N. C. COPPEDGE AND WIFE, MARY B. COPPEDGE; E. W. COPPEDGE, UNMARRIED; ERNEST J. WHELESS AND WIFE, MOZELLE Mc. G. WHELESS, BLONNIE BUNN, WIDOW OF P. R. BUNN, DECEASED; LUCILLE W. HARRIS AND HUSBAND, G. H. HARRIS; RUBY W. DOBSON AND HUSBAND, CECIL R. DOBSON; VIVIAN W. TAYLOE AND HUSBAND, GORDON B. TAYLOE; BENJAMIN F. WHELESS, UNMARRIED; CHARLES MARION WHELESS, UNMARRIED; P. C. COPPEDGE AND WIFE, ALVERTA M. COPPEDGE; S. A. COPPEDGE AND WIFE, MAY P. COPPEDGE; DAISY C. WHEELER AND HUSBAND, J. H. WHEELER; BEULAH C. BUNN AND HUSBAND, NORFOLK BUNN; MARY ETTA C. GRIFFIN AND HUSBAND, S. D. GRIFFIN; MYRTLE C. BUNN AND HUSBAND, J. W. BUNN.

(Filed 26 September, 1951.)

1. Wills § 31—

The intent of testator as gathered from the four corners of the instrument is the polar star in its interpretation, and will be given effect unless contrary to some rule of law or to public policy.

2. Same—

In order to effectuate testator's intent, the courts may transpose or supply words, phrases or clauses when the context manifestly requires it, and may disregard or supply punctuation.

3. Same—

In construing a will every word or clause will be given effect if possible, and apparent repugnancies reconciled, and irreconcilable repugnancies resolved by giving effect to the general prevailing purpose of testator.

4. Wills § 34c—

Testator left him surviving a brother, a half brother, children of a deceased sister, children of a deceased brother, and grandchildren of a deceased sister. Testator directed that the remainder of his estate "be divided among my legal heirs, . . . equally, share and share alike as provided by laws of North Carolina . . ." *Held:* The beneficiaries take *per capita* and not *per stirpes*, this result being necessary to give effect to the words "equally, share and share alike" and the phrase "as provided by laws of North Carolina" being given effect as ascertaining who are his legal heirs.

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

JOHNSON, J., dissenting.

APPEAL by defendants Ernest J. Wheless and wife, Mozelle Mc. G. Wheless; Blonnie Bunn, widow of P. R. Bunn, deceased; Lucille W. Harris and husband, G. H. Harris; Ruby W. Dobson and husband, Cecil R. Dobson; Vivian W. Tayloe and husband, Gordon B. Tayloe; Benjamin F. Wheless, unmarried; Charles Marion Wheless, unmarried; and Myrtle

C. Bunn and husband, J. W. Bunn, from *Harris, J.*, February Term, 1951, of NASH.

This is an action instituted pursuant to the provisions of the Uniform Declaratory Judgment Act, to determine the rights of the parties in and to the real and personal estate of J. W. Coppedge who died testate on 12 July, 1949.

The testator never married, but left surviving him the following collateral heirs, or next of kin: A brother, E. W. Coppedge; a half brother, N. C. Coppedge; Ernest J. Wheless, Blonnie Bunn, Lucille W. Harris, Ruby W. Dobson and Vivian W. Tayloe, children of a deceased sister, Mrs. Miley J. Wheless; and Benjamin F. Wheless and Charles Marion Wheless, children of B. J. Wheless, a deceased son of Mrs. Miley J. Wheless; and P. C. Coppedge, S. A. Coppedge, Daisy C. Wheeler, Beulah C. Bunn, Mary Etta C. Griffin, and Myrtle C. Bunn, children of a deceased brother, S. J. Coppedge.

The testator, in Item 1 of his will, bequeathed to his niece, Mrs. Myrtle Coppedge Bunn, the sum of $1,000, and disposed of the residue of his estate in Item 3 of his will which reads as follows:

"3: The remainder of my estate is to be divided among my legal heirs, including said Myrtle Coppedge Bunn, equally, share and share alike as provided by laws of North Carolina, after the said $1,000 mentioned in paragraph 1 has been paid."

The court below held that the residue of the estate was to be divided *per stirpes* and not *per capita.* The appellants hereinbefore named, appeal to the Supreme Court, and assign error.

L. L. Davenport for E. W. Coppedge, plaintiff, appellee.
O. B. Moss and Hill Yarborough for defendants, appellants.
Itimous T. Valentine and Cooley & May for defendants, appellees.

DENNY, J. The intent of the testator is the polar star that must guide the courts in the interpretation of a will. *Buffaloe v. Blalock,* 232 N.C. 105, 59 S.E. 2d 625; *Elmore v. Austin,* 232 N.C. 13, 59 S.E. 2d 205; *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17; *Holland v. Smith,* 224 N.C. 255, 29 S.E. 2d 888. This intent is to be gathered from a consideration of the will from its four corners, and such intent should be given effect unless contrary to some rule of law or at variance with public policy. *House v. House,* 231 N.C. 218, 56 S.E. 2d 695; *Williams v. Rand,* 223 N.C. 734, 28 S.E. 2d 247; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356.

It is permissible, in order to effectuate or ascertain a testator's intention, for the Court to transpose words, phrases, or clauses. *Williams v. Rand, supra; Heyer v. Bulluck, supra; Washburn v. Biggerstaff,* 195

N.C. 624, 143 S.E. 210; *Gordon v. Ehringhaus,* 190 N.C. 147, 129 S.E. 187; *Crouse v. Barham,* 174 N.C. 460, 93 S.E. 979; *Baker v. Pender,* 50 N.C. 351.

Likewise, to effectuate the intention of the testator, the Court may disregard, or supply, punctuation. *Williams v. Rand, supra; Carroll v. Herring,* 180 N.C. 369, 104 S.E. 892; *Bunn v. Wells,* 94 N.C. 67; *Stoddart v. Golden,* 3 A.L.R. 1060, 178 Pac. 707. Even words, phrases, or clauses will be supplied in the construction of a will when the sense of the phrases, or clauses, in question, as collected from the context, manifestly requires it. *Williams v. Rand, supra; Washburn v. Biggerstaff, supra; Gordon v. Ehringhaus, supra; Crouse v. Barham, supra; Howerton v. Henderson,* 88 N.C. 597; *Dew v. Barnes,* 54 N.C. 149; *Sessoms v. Sessoms,* 22 N.C. 453.

The only question involved in this appeal is whether the beneficiaries, under the residuary clause of the will of J. W. Coppedge, take *per capita* or *per stirpes.*

Our Court has experienced considerable difficulty in similar cases. In *Stowe v. Ward,* 10 N.C. 604, the language construed was as follows: "It is my will, and I do allow that all the remaining part of my estate, both real and personal, be equally divided amongst the heirs of my brother, John Ford, the heirs of my sister Nanny Stowe, the heirs of my sister Sally Ward, deceased, and nephew, Levi Ward." The Court was requested to pass upon the manner in which the personal property was to be distributed. It held that the word "heirs" was used in the sense of "children" and as a designation of persons, and directed a distribution of the property *per capita.* Later, the parties requested the Court to construe the same language with respect to the disposition of the real property, the opinion being reported in 12 N.C. 67. There the Court held the beneficiaries under the will took *per stirpes* and not *per capita.* When the second opinion was handed down, the personal property had been distributed *per capita,* whereupon another action was instituted by *Ward v. Stow, et als.,* 17 N.C. 509, to compel a redistribution of the personal property *per stirpes.* The Court held that the first opinion construing the will, to the effect that the beneficiaries thereunder took *per capita,* was correct and overruled *Stow v. Ward,* 12 N.C. 67.

In *Bryant, Admr., v. Scott,* 21 N.C. 155, the residue of the estate was "to be equally divided" among Edith Bryant, Margaret Parker, Julia Valentine, and the children of his daughter Temperance, and the children of a deceased son James. The Court held the division to be *per capita,* and said: "The intention that the grandchildren should take *per stirpes* is conjectured from the reasonableness of it, as applied to the state of most families. But when the gift is made under circumstances which exclude all reference to the statute of distribution, that conjecture must be given

up; and when to that is added a direction for an equal division among all the donees, no court could feel safe in making an unequal division."

In the instant case, the testator directs that the residue of his estate be divided among his "legal heirs . . . equally, share and share alike as provided by the laws of North Carolina."

We must determine whether the testator intended that upon ascertaining who his "legal heirs" are, as provided by the laws of North Carolina, such heirs should take *per capita*—that is, equally, share and share alike; or, whether he intended that his "legal heirs" should take the residue of his estate in the proportions provided by law in the same manner as they would take had he died intestate. In the latter case, his heirs would not "share and share alike," neither would they share "equally."

In construing a will, the entire instrument should be considered; clauses apparently repugnant should be reconciled and effect given where possible to every clause or phrase and to every word. "Every part of a will is to be considered in its construction, and no words ought to be rejected if any meaning can possibly be put upon them. Every string should give its sound," *Edens v. Williams,* 7 N.C. 27. *Williams v. Rand, supra; Lee v. Lee,* 216 N.C. 349, 4 S.E. 2d 880; *Bell v. Thurston,* 214 N.C. 231, 199 S.E. 93; *Roberts v. Saunders,* 192 N.C. 191, 134 S.E. 451. But, where provisions are inconsistent, it is a general rule in the interpretation of wills, to recognize the general prevailing purpose of the testator and to subordinate the inconsistent provisions found in it. *Snow v. Boylston,* 185 N.C. 321, 117 S.E. 14; *Tucker v. Moye,* 115 N.C. 71, 20 S.E. 186; *Macon v. Macon,* 75 N.C. 376; *King v. Lynch,* 74 N.C. 364; *Lassiter v. Wood,* 63 N.C. 360.

In 40 Cyc. 1464, the author says: "The word 'heirs' in a will, when applied to real estate, primarily means persons so related to one by blood that they would take the estate in case of intestacy; and when applied to personalty, primarily means next of kin or those persons who would take under the statute of distribution in case of intestacy, and this rule applies where the will directs realty to be sold and the proceeds paid to the heirs." *Everett v. Griffin,* 174 N.C. 106, 93 S.E. 474.

One of the leading cases on the question before us is *Freeman v. Knight,* 37 N.C. 72, where the Court was called upon to interpret an item in Josiah Freeman's will which read as follows: "It is also my will that Big Sam and Isaac should be sold and the proceeds equally divided between my legal heirs." *Gaston, J.,* in speaking for the Court said: "Where personal property is given *simpliciter* to 'heirs,' the statute of distributions is to be the guide, not only for ascertaining who succeeds and who are the 'heirs,' but how they succeed or in what proportions do they respectively take. But as donees claim, not under the statute, but under the will, if the will directs the manner and the proportions in which

they are to take, the directions of the will must be observed and guidance of the statute is to be followed no further than where the will refers to it—that is to say, for the ascertainment of the persons who answer the descriptions therein given. The division directed by the will must be obeyed." *Hill v. Spruill,* 39 N.C. 244.

In the cases of *Rogers v. Brickhouse,* 58 N.C. 301, and *Burgin v. Patton,* 58 N.C. 425, the Court did not adhere to the decision in *Freeman v. Knight, supra.* However, the next time the question was presented to the Court for consideration, in *Hackney v. Griffin,* 59 N.C. 381, *Chief Justice Pearson,* speaking for the Court, said: "It is settled that the effect of the word 'equal' is to require the distribution to be made *per capita; Freeman v. Knight,* 37 N.C. 72, and, as stated in that case, whatever might be the thought of this distinction, were the matter now a new one, to disregard them at this day would be *quieta movere.*" And again in *Tuttle v. Puitt,* 68 N.C. 543, the Court speaking through *Rodman, J.,* said: "It is too firmly settled by authority to admit of a question, that where a testator directs his property, whether real or personal, to be equally divided among his heirs, the division must be *per capita* and not *per stirpes.*" *Everett v. Griffin, supra; Wooten v. Outland,* 226 N.C. 245, 37 S.E. 2d 682.

The general rule in this jurisdiction is to the effect that where an equal division is directed among heirs, or a class of beneficiaries, even though such class of beneficiaries may be described as *heirs* of deceased persons, *heirs* or *children* of living persons, the beneficiaries take *per capita* and not *per stirpes. Stowe v. Ward, supra* (10 N.C. 604); *Byrant, Admr., v. Scott, supra; Freeman v. Knight, supra; Hill v. Spruill, supra; Hackney v. Griffin, supra; Tuttle v. Puitt, supra; Shull v. Johnson,* 55 N.C. 202; *Hastings v. Earp,* 62 N.C. 5; *Waller v. Forsythe,* 62 N.C. 353; *Britton v. Miller,* 63 N.C. 268; *Culp v. Lee,* 109 N.C. 675, 14 S.E. 74; *Leggett v. Simpson,* 176 N.C. 3, 96 S.E. 638; *Ex parte Brogden,* 180 N.C. 157, 104 S.E. 177; *Burton v. Cahill,* 192 N.C. 505, 135 S.E. 332; *Tillman v. O'Briant,* 220 N.C. 714, 18 S.E. 2d 131.

The rule, however, will not control if the testator indicates the beneficiaries are to take by families or by classes as representatives of the deceased ancestor. *Wooten v. Outland, supra,* and cited cases.

In a bequest, or devise, as well as under the statute of distributions, or the canons of descent, where the beneficiaries take as representatives of an ancestor, they take *per stirpes. In re Poindexter,* 221 N.C. 246, 20 S.E. 2d 49, 140 A.L.R. 1138. But, when they take directly under a bequest, or devise, as individuals and not in a representative capacity, and the testator provides that the division or distribution shall be in equal proportions, they take *per capita. Wooten v. Outland, supra.*

The language used by the testator in his will, when considered in the light of our decisions, leads us to the conclusion that he intended for the residue of his estate to be equally divided among his legal heirs, share and share alike, and that the reference to the laws of North Carolina was intended only for the purpose of ascertaining who are his "legal heirs."

This interpretation will give effect to every clause or phrase, and every word in the will. Or, to put it another way, every string will give its sound, *Edens v. Williams, supra,* and every note will be retained in the melody. To hold otherwise would require us to ignore the direction of the testator that the residue of his estate is to be divided among his "legal heirs, equally, share and share alike." The appellants are claiming under the will, and the division directed therein must be obeyed. *Freeman v. Knight, supra.*

The argument of the appellees to the effect that to allow an equal distribution *per capita* will result in an unfair and unnatural distribution as between the brothers of the testator and other legatees, will not be permitted to disturb the express provisions in the will which point to a *per capita* distribution. *Johnston v. Knight,* 117 N.C. 122, 23 S.E. 92; *Burton v. Cahill, supra.*

The judgment of the court below is

Reversed.

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

JOHNSON, J., dissenting: It may be conceded that where the words "equally" or "share and share alike" are used to indicate an equal division among a class, they ordinarily import a division *per capita*. *Hobbs v. Craige,* 23 N.C. 332; *Freeman v. Knight,* 37 N.C. 72; *Hill v. Spruill,* 39 N.C. 244; *Henderson v. Womack,* 41 N.C. 437; *Hackney v. Griffin,* 59 N.C. 381; *Tuttle v. Puitt,* 68 N.C. 543; *Culp v. Lee,* 109 N.C. 675, 14 S.E. 74; *Johnston v. Knight,* 117 N.C. 122, 23 S.E. 92; *Burton v. Cahill,* 192 N.C. 505, 135 S.E. 332. See also 57 Am. Jur., Wills, Sec. 1297; Annotations: 16 A.L.R. 15, p. 22; 78 A.L.R. 1385, p. 1389; and 126 A.L.R. 157, p. 161.

But as stated in 57 Am. Jur., Wills, Sec. 1297, "There is abundant authority, however, to the effect that such expressions do not necessarily require a *per capita* equality of division but apply just as readily and appropriately to a *per stirpes* equality. Thus, it has been held that the word 'equally' may be satisfied by an equality between a class and legatees named, and that the expression 'each to share and share alike' may be satisfied by a division between classes."

Especially is this so when the context imports a *per stirpes* division (57 Am. Jur., Wills, Sec. 1297; Annotations: 16 A.L.R. 15, p. 25; 78

A.L.R. 1385, p. 1390; and 126 A.L.R. 157, pp. 162 and 163), as where there is a reference in the will to the statutes of descent or distribution, such as a direction that the division shall be "as provided by the laws of the state," and such reference appears from the context to relate not solely to the persons who are to take, but also, or instead, to the proportions in which they are to take. "In such circumstances the distribution will be *per stirpes* rather than *per capita* where," as here, the succession is to heirs of different degrees of relationship to the decedent. 57 Am. Jur., Wills, Sec. 1299. See also Annotations 16 A.L.R. 15, p. 29; 126 A.L.R. 157, p. 165; 69 C.J. 287 *et seq.; Bivens v. Phifer,* 47 N.C. 436.

And should there be doubt as to whether the limitation "as provided by the laws of the state," or like expression, is referable to the mode of ascertaining who are to take, or to the proportions in which the beneficiaries are to take, then the following observation of the Iowa Court would seem to be in point: "Where the question is in the balances of doubt, the doubt is to be solved in favor of a taking *per stirpes* rather than *per capita*. One reason for this preference is that such taking is in accord with the laws of descent and in accord with the natural instinct of testators." *Claude v. Schutt,* 211 Iowa 117, 233 N.W. 41. See also 57 Am. Jur., Wills, Sec. 1292, p. 855.

In the instant case the disputed item of the will is as follows:

"The remainder of my estate is to be divided among my legal heirs, including said Myrtle Coppedge Bunn, equally, share and share alike as provided by laws of North Carolina, . . ."

The limitation "as provided by laws of North Carolina" is interpreted in the majority opinion as referring solely to the mode of ascertaining who are to take, *i.e.,* that this clause "was intended only for the purpose of ascertaining who are his 'legal heirs.' " However, it would seem that upon a contextual interpretation of the disputed item this qualifying clause may be construed with more force of logic as referring to the manner and proportions in which the testator's "heirs" are to take under the will. Here, it is observed that the first direction of the testator is that the remainder of his estate be divided among "my legal heirs." He does not say "heirs." He qualifies it by saying "legal heirs." This qualification made it perfectly clear who were to take under the will. The testator was a bachelor. His only heirs and next of kin were two living brothers and the children and grandchildren of a deceased brother and a deceased sister. Thus, the job of determining who were the testator's "heirs" was simple. He made it more so when he said "my legal heirs." No further instruction was necessary in order to fix with certainty who were to take. There was no need to add the further instruction "as provided by laws of North Carolina." And this he did not do. To give the will such an interpretation requires that the clause "as provided by

laws of North Carolina" be taken out of context and transposed to another part of the sentence.

On the other hand, when the limitation "as provided by laws of North Carolina" is left where the testator put it, at the end of the sentence, it clearly appears to have been intended as a guide for fixing and determining the manner and proportions in which his "legal heirs" shall take under the will. So that, when the testator directed that the residue of his estate (and practically all of his estate falls in the residue) "be divided among my legal heirs, including said Myrtle Coppedge Bunn, equally, share and share alike," he qualified it by saying "as provided by laws of North Carolina," and that would seem to mean equally, share and share alike within classes,—*per stirpes,* as is the law of North Carolina. Such construction is rendered all the more certain by the fact that no comma breaks the cadence of the expression "share and share alike as provided by laws of North Carolina."

The interpretation expressed in the majority opinion seems to take out of context and restrict and unduly minimize the force of this closing limitation of the testator, "as provided by laws of North Carolina." This limitation is salutary. It would seem to be controlling. It makes the case distinguishable from the rule explained and applied in the cases cited in the majority opinion. In 69 C.J. 287, it is stated:

"In ascertaining how the parties are to take, the intention of the testator, reached by an examination of the language used as applied to all the surrounding circumstances and conditions present in the testator's mind at the time the will was written, is the determining factor. As a general rule the devisees or legatees will, if possible, be construed to take *per capita* rather than *per stirpes,* unless the will shows a contrary intention on the part of the testator, as where the beneficiaries are to take substitutionally. The presumption of *per capita* distribution is not a strong one, however, and is easily overborne; it will yield to a very faint glimpse of a different intention. In case of doubt, the statutes of descent and distribution should be followed as nearly as possible."

There is compelling natural logic in the view that the testator intended to put the residue of his estate in the lap of the law for division under our statutes of descent and distribution when he directed that it "be divided among my legal heirs, including Myrtle Coppedge Bunn, equally, share and share alike as provided by laws of North Carolina." Under the language of this will, it is hardly conceivable that he intended an equal *per capita* division among his fifteen heirs of such varying degrees of kinship, thus placing his two surviving brothers in no stronger position than his two grand nephews.

My vote is to sustain the *per stirpes* ruling of the court below.

McKINLEY PRESLEY v. C. M. ALLEN & COMPANY, INC.

(Filed 26 September, 1951.)

1. **Municipal Corporations § 25b—**

In the absence of evidence to the contrary, it will be assumed that an excavation along a street for the purpose of placing underground telephone wires and cables was made with the sanction and permission of the municipal authorities. G.S. 160-222.

2. **Municipal Corporations § 14a: Highways § 4b—**

A contractor excavating a ditch along a city street with the sanction and permission of the governing board of the municipality is under the same legal duty to the traveling public as the municipality would owe if it were in direct charge of the work, which is the duty to exercise care commensurate with the surrounding dangers and circumstances to warn travelers of the existence of the excavation and otherwise to protect them against injury therefrom.

3. **Same—**

Where the physical facts are sufficient to give the traveling public notice of a work project along a street, the usual rule that a traveler may assume a street to be in safe condition has no application in the use of that part of the street left open to traffic.

4. **Same—**

Ordinarily, barriers or guard rails at an excavation along a street are for the purpose of warning the traveling public and it is not required that they be sufficient to repel vehicles that may deviate from the traveled portion of the street into the zone of danger, or even that they be erected in the daytime when the excavation is plainly visible.

5. **Same—**

Where plaintiff motorist's own testimony is to the effect that he had knowledge of an excavation along a municipal street and the conditions extant, he may not maintain that the contractor was negligent in failing to provide adequate signs and barricades warning of the danger, since he had knowledge thereof and no one needs notice of what he already knows.

6. **Negligence § 19c—**

Nonsuit is properly entered when plaintiff's own evidence makes out a clear case of contributory negligence, and thus proves himself out of court.

7. **Municipal Corporations § 14a: Highways § 4b—Evidence held to show contributory negligence as matter of law on part of motorist skidding into excavation.**

Plaintiff motorist's evidence was to the effect that as he approached the place where defendant was excavating along that side of the street to the motorist's left, of which condition he had knowledge, he turned to the left to clear a vehicle parked at an angle on the right side of the street, which vehicle obscured his view of traffic further along the street, that immediately upon clearing the parked vehicle he was blocked by another vehicle which was double parked so as to leave insufficient room for plain-

tiff to pass between its left side and the ditch, that plaintiff applied his brakes, and that his car skidded on the wet mud from the excavation and its left front wheel went into the ditch, resulting in injury to plaintiff. *Held:* Conceding the contractor to have been negligent in placing the loose dirt from the excavation toward the traveled portion of the street where it became wet and slick, plaintiff's own evidence disclosed contributory negligence barring his recovery as a matter of law.

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

APPEAL by plaintiff from *Rousseau, J.,* January Term, 1951, of HAYWOOD. Affirmed.

Civil action to recover damages for personal injuries alleged to have been sustained by plaintiff when the pick-up truck he was driving ran into a ditch dug by the defendant contractor in and along the paved portion of Main Street in the Town of Canton while laying underground cables and wires for the Southern Bell Telephone and Telegraph Company.

The usual issues of negligence and contributory negligence were raised by the pleadings.

At the close of all the evidence the defendant's motion for nonsuit was allowed. From judgment based on such ruling the plaintiff appealed, assigning errors.

R. E. Sentelle, W. R. Francis, and Geo. M. Pritchard for plaintiff, appellant.

Harkins, Van Winkle, Walton & Buck for defendant, appellee.

JOHNSON, J. The plaintiff offered evidence tending to show that on and prior to 14 July, 1948, the defendant contractor was and had been engaged in excavating a ditch for the purpose of laying underground cables for the telephone company along Main Street at and near the junction of Adams Street in the Town of Canton, where traffic was heavy. The excavation extended from near the intersection of Main and Adams Streets westerly inside and along the paved portion of Main Street down to a point in Water Street an over-all distance of "two or three hundred feet." The project had been under way about two weeks. "They would excavate a distance," put in a section of the conduit, . . . "and close that up and go to another section." While the work was in progress the north side of Main Street between the excavation and the curb was left open to vehicular traffic. The ditch was about two feet wide and from three to five feet deep. It ran parallel to and about four feet inside from the south curb. The width of Main Street there is from 40 to 50 feet. Hence, there was left open for traffic on the north side of the ditch some 30 to 35 feet of the street. At the time of the mishap a section of the ditch from

50 to 100 feet long was open on Main Street immediately west of the Adams Street intersection.

The dirt and clay from the ditch had been thrown out on both sides, mainly on the north or traveled side, forming on that side an embankment from 18 to 24 inches high next to the ditch.

The evidence was conflicting as to the number and location of warning signs and barriers along and near the excavation. According to plaintiff's evidence (which controls the appeal), there were no guard rails between the ditch and the traveled portion of the street. The plaintiff testified, however, that "there was a horse (a type of barrier) at the upper end, . . . (with) a sign hanging on it that said 'Men Working.' That was probably 100 feet up the street." He and his witnesses also said like "horses" were stationed at other places near and at each end of the ditch.

Clay was "scattered on the right (north) side of the street coming west." As one of plaintiff's witnesses put it, "It wasn't too deep over in the street, it just got knocked over there and there was enough to make the street disagreeable for traffic, . . . the clay was all wet and slippery that day. It had been raining all day" but had just slackened. There was evidence that the surface of the street sloped slightly toward the west and also in the direction of the ditch.

The plaintiff related the details of the occurrences in substance as follows: That on the afternoon in question, at about 3:30 o'clock, he drove his pick-up truck up to the intersection of Main and Adams Streets. A station wagon in front of him went on through, but he was caught by the traffic light turning red. Immediately in front of plaintiff and beyond the intersection, a long work bus was parked on his right at an angle. The rear of this bus projected back from the sidewalk so that when plaintiff stopped on the red light the bus was so parked that he "couldn't see around it." A policeman standing on the northeast corner of the intersection motioned plaintiff around the bus. When he got around the bus, he said "I could (then) see . . . (the) station wagon there. . . . It was double-parked, and there was not room to get between (it) and the ditch, . . . and I saw I was going to hit the station wagon, so I applied my brakes and skidded into the ditch and the last thing I remember my chest hit the steering wheel." The distance between the parked station wagon and the ditch was "probably 4 or 5 feet, . . . not room for me to go through." He said he "skidded a little forward and sidewise" into the ditch, "approximately 4 feet." Only the left front wheel went in the ditch. At that point his pick-up was about 10 feet behind the double parked station wagon. The distance traveled by the plaintiff from the intersection to where he came to rest in the ditch varied according to plaintiff's evidence from 10 to 20 feet, and he said he was

driving 7 or 8 miles an hour. He said the policeman "motioned me through pretty fast and I stepped on it and went on." There was no evidence tending to show signs of skid marks made by plaintiff's pick-up near where it went in the ditch.

The plaintiff insists that his evidence was sufficient to take the case to the jury. He places chief emphasis on the evidence which tends to support his allegations that the defendant was negligent in (1) failing to provide adequate signs, barriers, and guard rails for the protection of the traveling public; and (2) "throwing loose clay from the ditch onto the pavement, . . . and in permitting the wet clay to be scattered and strewn over the pavement where the public was traveling."

1. *The alleged failure to provide adequate signs, barriers, and guard rails.*—On this record it may be assumed that in placing the telephone wires and cables underground the defendant contractor was performing a lawful undertaking for the telephone company and that the ditch was being excavated along Main Street with the sanction and permission of the governing board of the Town. G.S. 160-222.

The question then arises as to what duty the defendant owed the public in respect to keeping safe the traveled portion of the street while the construction work was in progress.

It seems to be conceded, and rightly so, that the defendant, being in charge of the excavation project, was under substantially the same legal duty to the traveling public as would the Town if it had been in direct charge of making the excavation for some purpose of its own. *Kinsey v. Kinston,* 145 N.C. 106, 58 S.E. 912. See also McQuillin, Municipal Corporations, 3d Ed., Vol. 19, Sec. 54.42, pp. 148 to 150.

The defendant was not an insurer of the safety of travelers upon the street. *Watkins v. Raleigh,* 214 N.C. 644, 200 S.E. 424; *Houston v. Monroe,* 213 N.C. 788, 197 S.E. 571. And that is so notwithstanding the fact that in making the excavation inside of the traveled portion of the street the defendant may have created a dangerous condition therein. Assuming, as we may, that the excavation was made under permission duly granted by the municipality, the defendant contractor was under the duty to exercise ordinary care, *i.e.,* care commensurate with the surrounding dangers and circumstances, to warn travelers of the existence of the excavation, and otherwise to protect them against injury therefrom. *Evans v. Construction Co.,* 194 N.C. 31, 138 S.E. 411; *Ramsbottom v. Railroad,* 138 N.C. 38, 50 S.E. 448; 25 Am. Jur., Highways, Sec. 400, pp. 697 and 698. See also *Murray v. R. R.,* 218 N.C. 392, 11 S.E. 2d 326; Anno. 119 A.L.R. 841.

Also, where, as here, a work project or repair job is under way and a portion of the street is left open to traffic, the usual rule that a traveler may assume a public street to be in safe condition has no application.

Beaver v. China Grove, 222 N.C. 234, 22 S.E. 2d 434. The public is not invited to use the open portion as in all respects entirely safe, as under ordinary conditions. The invitation has its limitations and includes warnings of danger based on physical facts apparent to the traveler. *Phelan v. Granite Bituminous Paving Co.,* 227 Mo. 666, 127 S.W. 318; 25 Am. Jur., Highways, Sec. 400, p. 698. Therefore, a contractor lawfully in charge of an excavation project in a street, as in the instant case, fulfills his obligation to those who use the adjacent traveled portion of the street when in the exercise of ordinary care he takes reasonable precautions to notify the public that work of such character is in progress and to guard against injuries arising therefrom. *Phelan v. Granite Bituminous Paving Co., supra;* 25 Am. Jur., Highways, Sec. 400, p. 698.

Thus it would seem that ordinarily the law imposes no special requirement that barriers or guard rails of any particular kind be erected as the means of giving protection and warning against dangers incident to a temporary street excavation, on pain of liability for failure to do so. In the final analysis, the test of the sufficiency of the warning is not whether barriers or other physical devices are used, but is whether the means employed, whatever they may be, are reasonably sufficient to give warning of the danger. 25 Am. Jur., Highways, Sec. 413, p. 708. Ordinarily, it would seem to be sufficient if a plain warning of danger is given and the traveler has notice and knowledge of facts sufficient to enable him, in the exercise of ordinary care, to avert injury. 63 C.J.S., Municipal Corporations, Sec. 821, p. 158.

It follows, therefore, that when an excavation is plainly visible, the municipality (or responsible authority) is not bound to place a guard or signal there in the daytime. *Rock Island v. Gingles,* 217 Ill. 185, 75 N.E. 468; 63 C.J.S., Municipal Corporations, Sec. 821, p. 158. See also McQuillin, Municipal Corporations, 3d Ed., Vol. 19, Sec. 54.90, top p. 343.

Also, when a contractor who is charged with the duty of giving protective warning in respect to a street excavation, or temporary hazard of like kind, proceeds to erect barriers in the vicinity of the project, ordinarily it may be assumed that the purpose of the barriers is to warn travelers of the danger, and not to furnish protective shields for repelling the force of vehicles that may deviate from the traveled portion of the street into the zone of danger. It is not required that such barriers be proof against any substantial degree of force. It suffices if they are reasonably calculated to give warning to those who themselves are exercising ordinary care for their own safety. *Love v. Asheville,* 210 N.C. 476, 187 S.E. 562; *Haney v. Lincolnton,* 207 N.C. 282, 176 S.E. 573.

When we come to apply the foregoing rules of law to the plaintiff's evidence, it would seem that the testimony strongly negatives any impli-

cation of negligence on the part of the defendant in respect to failure to provide adequate warnings of danger for the traveling public.

In any event, it appears that the mishap occurred in broad daylight. The plaintiff had passed the place earlier that day. He had "seen men working there better than two weeks, off and on." He said, "I had passed that place sometimes once a day and sometimes twice a day." Thus the plaintiff had actual knowledge of the condition of the street and of the excavation project therein. "No one needs notice of what he already knows," and "knowledge of the danger is equivalent to prior notice." *Beaver v. China Grove, supra* (222 N.C. 234, p. 236). Accordingly, on this record there appears to be a complete lack of causal connection between the injuries complained of and any negligence of the defendant that may be predicated upon plaintiff's allegations that defendant was negligent in failing to provide adequate signs, barricades, and guard rails for the protection of the traveling public (*Beaver v. China Grove, supra*), and proximate cause is an essential element of actionable negligence. *Love v. Asheville, supra* (210 N.C. 477). See also *Wood v. Telephone Co.*, 228 N.C. 605, 46 S.E. 2d 717.

2. *The question of actionable negligence predicated upon permitting wet clay to be scattered over the traveled portion of the pavement.*—If we should concede, without deciding, that the plaintiff made out a *prima facie* case on this theory (*Grab v. Davis Const. Co.*, 233 Mo. App. 819, 109 S.W. 2d 882), nevertheless, it is manifest from the evidence adduced by the plaintiff that he failed to exercise due care for his own safety and that such failure to exercise care contributed to, and was a proximate cause of, his injuries. It is settled by many decisions of this Court that judgment of nonsuit may properly be entered when the plaintiff by his own evidence makes out a clear case of contributory negligence. He thus proves himself out of court. *Sawyer v. Southern Rwy. Co., et al., ante,* 164; *Watkins v. Raleigh, supra* (214 N.C. 644); *Houston v. Monroe, supra* (213 N.C. 788).

The plaintiff's evidence shows he knew the ditch was there and that the clay was piled alongside of it. He said, "I had seen men working there better than two weeks, off and on." And further that he "Had passed over the same place fifty times while they were digging that ditch. Every time I passed without any trouble." He said he knew the men were working there the day of the accident and "knew they were throwing dirt out of the ditch." He had driven past the place earlier that day. The evidence discloses that it had rained all day until just before the mishap. Thus if the clay was slick on the surface of the pavement, he knew, or in the exercise of due care should have known it. While he was caught by the red traffic light, just before crossing the intersection, the condition of the pavement was in full view, so that if, as testified by his

witness Josephson, "there was a film of dirt on the street all over the intersection, and . . . piled alongside of the ditch," the plaintiff was chargeable with notice of such condition. The evidence shows unmistakably he was thoroughly familiar with all the conditions of the street at the time.

It is also clear from the record that the traveled portion of the street, parallel to and on the north side of the ditch, was amply wide for him, in the exercise of due care, to have remained out of slipping distance of the ditch. As he proceeded westerly on Main Street, the traveled portion of Main Street north of the ditch was from 30 to 40 feet wide. True, he had to swing left around the rear of a parked bus on the right side of the street immediately beyond the intersection, but even so, this left plenty of room for him to have driven around the bus and averted the danger of skidding into the ditch.

The only reasonable inferences deducible from the evidence are that he either (1) neglected to maintain a proper lookout and failed to exercise proper control over his pick-up in swinging wide behind the parked work bus and within slipping distance of the ditch, when he had ample space to the right of the ditch to have remained out of danger; or (2) steered his pick-up into the wet mud and clay mound in close proximity to the ditch, in an effort to pass to the left of the parked station wagon ahead of him, and learned too late there was not room to pass in the four or five-foot space between the ditch and the station wagon. In either of these events, he is chargeable as a matter of law with negligence proximately causing or contributing to his injury. *Ovens v. Charlotte,* 159 N.C. 332, 74 S.E. 748; *Sawyer v. Railroad, supra,* and cases cited; *Alton v. English,* 69 Ill. App. 197; *Marshall v. Baton Rouge* (La. App.), 32 So. 2d 469. See also McQuillin, Municipal Corporations, 3d Ed., Vol. 19, Sec. 54.138, p. 504 *et seq.*

We conclude, therefore, that the motion to nonsuit was properly allowed.

Affirmed.

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

MAMIE C. CAMPBELL v. W. A. CAMPBELL; AND H. A. BOWEN, H. O. PEEL, AND D. C. PEEL, EXECUTORS OF THE ESTATE OF HENRY D. PEEL.

(Filed 26 September, 1951.)

1. Husband and Wife § 12d (4)—

A deed of separation between husband and wife is annulled, avoided and rescinded, at least as to the future, by the act of the spouses in subsequently resuming conjugal cohabitation, and is not revived by a later separation.

2. Contracts § 1—

A contract is an agreement, upon a sufficient consideration, to do or not to do a particular thing.

3. Husband and Wife § 5: Parent and Child § 5—

Since the father is under primary legal duty to support his minor child, the mother's promise to care for and maintain a child of the marriage is sufficient consideration to support the father's agreement upon their separation to pay the mother stipulated periodic sums for the care and maintenance of the child left in her custody, and his agreement is enforceable against him at the suit of the mother, and therefore her testimony that upon such separation he promised to make stipulated periodic payments to her for the support of the child is sufficient to overrule nonsuit in her action upon the agreement.

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

APPEAL by defendant, W. A. Campbell, from *Halstead, Special Judge,* and a jury, at April Term, 1951, of MARTIN.

Civil action by the mother upon an agreement by the father to make periodic payments to the mother for the support of a minor child left in the custody of the mother on the separation of the parents.

Since the plaintiff does not seek any independent relief against the Executors of Henry D. Peel, the term "defendant" will hereafter be used to designate the defendant, W. A. Campbell, alone.

The only testimony at the trial was that of the plaintiff. It disclosed the facts summarized in the numbered paragraphs set forth below.

1. The plaintiff, Mamie C. Campbell, and the defendant, W. A. Campbell, were married to each other in Wayne County, North Carolina, 20 May, 1933. They established their matrimonial domicile in Nash County, North Carolina, where their daughter, Wilma Jean Campbell, was born 28 May, 1936.

2. Subsequent to the daughter's birth, to wit, on 28 August, 1936, the plaintiff and the defendant separated. At that time they signed a separation agreement stipulating that they ceased conjugal cohabitation by mutual consent; that all rights of each party in the other's property were released; that the custody of Wilma Jean Campbell was given to the

plaintiff; and that the defendant was to pay the plaintiff "for her and the support of the said child the sum of $40.00 each and every month so long as this agreement is in effect." The separation agreement expressly stated that "the wife agrees that she will execute, acknowledge and deliver without cost to her at the request of the husband or his legal representatives all such deeds, releases, or other instruments as may be necessary to . . . make effectual the provisions . . . of this agreement."

3. Two months after the signing of the separation agreement, to wit, on 28 October, 1936, the plaintiff and the defendant became reconciled and resumed the marital relation, and from that time until 1 January, 1940, they "lived together as man and wife" in Nash County, North Carolina, enjoying the joint custody of their daughter.

4. On the date last mentioned, the defendant left the plaintiff and their daughter at the matrimonial domicile in Nash County, North Carolina, and became a nonresident of North Carolina. On 31 May, 1941, he obtained an absolute divorce from the plaintiff in the Superior Court of Richmond County, Georgia. Soon thereafter he located in Florence County, South Carolina, where he has since resided. Meanwhile, the plaintiff has actually maintained and supported the child, Wilma Jean Campbell, in her home in Nash County, North Carolina.

5. Subsequent to the final separation of the parties on 1 January, 1940, the defendant promised to pay the plaintiff "the sum of $40.00 a month for the support of his child," and he complied with such promise until June, 1945.

6. At the time last mentioned, the defendant undertook to sell land owned by him in Florence County, South Carolina, to a third person, and requested the plaintiff to sign a deed conveying such land to such person. The plaintiff refused this request, and the defendant thereupon substantially reduced the amount of his monthly payments to the plaintiff. She has never assented to such action on his part.

The plaintiff brought this action against the defendant to recover the difference between the sums actually paid to her by him subsequent to June, 1945, and the sums which he would have paid to her after that time if he had continued to make payments of $40.00 each month. The complaint invoked both the separation agreement of 28 August, 1936, and the subsequent promise mentioned in paragraph 5 of the statement of facts as a basis for the relief demanded. The defendant answered, alleging that the separation agreement "was abrogated and rendered void by the plaintiff and the defendant living together as man and wife for a period of three or four years afterwards." He denied the making of the subsequent promise, and asserted that he acted voluntarily in making payments to plaintiff for the support of his child subsequent to the final separation on 1 January, 1940.

The jury returned the following verdict:

What amount, if any, is the defendant, W. A. Campbell, indebted to the plaintiff for the support of his child, Wilma Jean Campbell? Answer: $1,651.00.

Judgment was entered in favor of the plaintiff and against the defendant in conformity with the verdict, and the defendant appealed, assigning error.

Cooley & May and Hugh G. Horton for plaintiff, appellee.

Peel & Peel for defendant, W. A. Campbell, appellant.

ERVIN, J. The assignments of error raise this single inquiry: Was the plaintiff's evidence sufficient to withstand the defendant's motion for a compulsory nonsuit and to support the verdict in her favor?

The defendant insists that this question should be answered in the negative. He advances these arguments to sustain his position: That the separation agreement of 28 August, 1936, embodies the only contract ever made between him and the plaintiff with respect to the support of his minor child; that in consequence the plaintiff's alleged cause of action is necessarily predicated upon the separation agreement; that the plaintiff's own testimony shows that she breached the separation agreement in June, 1945, by refusing to perform her covenant to execute "all such deeds . . . as may be necessary to . . . make effectual" the release of her rights in the defendant's property; and that this violation of the terms of the separation agreement by the plaintiff relieved the defendant from any further liability under his covenant to make periodic payments to plaintiff for the support of his minor child.

The defendant's position is a questionable one even if his assumptions that the plaintiff's claim is necessarily based on the separation agreement and that she has violated such agreement in the manner indicated be accepted as valid. This is true because it can be asserted with much persuasiveness that the plaintiff's covenant to execute such deeds as may be necessary to make effectual the release of her rights in the defendant's property and the defendant's covenant to make periodic payments to plaintiff for the support of his minor child are independent rather than interdependent, and that in consequence the breach by the plaintiff of her covenant to execute the deeds will not exonerate the defendant from the performance of his covenant to make the payments. *Fifth Avenue Bank of N. Y. v. Hammond Realty Co.*, 130 F. 2d 993; *Hughes v. Burke*, 167 Md. 472, 175 A. 335; *Moller v. Moller*, 121 N. J. Eq. 175, 188 A. 505.

We refrain, however, from expressing any opinion on this precise point, for the very simple reason that the second premise underlying the defend-

ant's position, *i.e.*, that the plaintiff's claim is based on the separation agreement of 28 August, 1936, is lacking in validity.

Manifestly the plaintiff's cause of action cannot be made to hinge on the separation agreement. That agreement has been without legal efficacy since 28 October, 1936, when the plaintiff and the defendant resumed their marital relation. This is so because a separation agreement is annulled, avoided, and rescinded, at least as to the future, by the act of the spouses in subsequently resuming conjugal cohabitation. *Reynolds v. Reynolds,* 210 N.C. 554, 187 S.E. 768; *S. v. Gossett,* 203 N.C. 641, 166 S.E. 754; *Moore v. Moore,* 185 N.C. 332, 117 S.E. 12; *Archbell v. Archbell,* 158 N.C. 409, 74 S.E. 327, Ann. Cas. 1913 D, 261; *Smith v. King,* 107 N.C. 273, 12 S.E. 57. The subsequent separation of the parties on 1 January, 1940, did not revive the separation agreement. 42 C.J.S., Husband and Wife, section 601. It is noted that our conclusion on this phase of the litigation conforms to the view expressed in the answer.

The defendant's first premise, *i.e.*, that the separation agreement of 28 August, 1936, contained the only contract ever made between him and the plaintiff with respect to the support of his minor child, is likewise without validity.

A contract is an agreement, upon a sufficient consideration, to do or not to do a particular thing. *Belk's Department Store v. Insurance Co.,* 208 N.C. 267, 180 S.E. 63. Inasmuch as the father is under a primary legal duty to support his minor child (*In re Tenhoopen,* 202 N.C. 223, 162 S.E. 619; *S. v. Jones,* 201 N.C. 424, 160 S.E. 468; *Wise v. Raynor,* 200 N.C. 567, 157 S.E. 853), the mother's promise to care for and maintain the child is sufficient consideration for the father's undertaking to compensate her for so doing. Hence, an agreement by the father to pay the mother, from whom he is separated, stipulated periodic sums for caring for and maintaining a minor child left in her custody is enforceable against the father at the suit of the mother. *Shaw v. Shaw,* 24 Del. Ch. 110, 9 A. 2d 258; *Maxwell v. Boyd,* 123 Mo. App. 334, 100 S.W. 540; *In re Sear's Estate,* 313 Pa. 415, 169 A. 776.

This being true, the testimony of plaintiff at the trial was ample to overcome the defendant's motion for a compulsory nonsuit and to sustain the verdict in plaintiff's favor. It was sufficient to establish the allegation of the complaint that after their final separation the plaintiff and the defendant made a new contract whereby the plaintiff agreed to care for and maintain their minor child and whereby the defendant undertook to pay her the sum of $40.00 monthly for so doing so long as the child remained with the plaintiff.

No error.

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

STATE v. LEWIS CLARK.

(Filed 26 September, 1951.)

1. Husband and Wife § 5—

A husband is under legal duty to furnish adequate support for his wife, which means support sufficient to meet the requirements of her personal maintenance in supplying food, clothing and housing suitable to their position in life and commensurate with the husband's ability, and medical assistance reasonably required for the preservation of health.

2. Same—

In order to support a conviction under G.S. 14-325 it is necessary for the State to show that the husband failed to supply adequate support for his wife and also that such failure was willful, *i.e.*, purposely omitted without just cause in violation of law, and the statute may not be extended to include cases not clearly within its terms.

3. Same—

Failure of the husband to give his wife the affectionate consideration he should manifest for her is not sufficient to constitute the offense defined by G.S. 14-325.

4. Same—

Evidence tending to show that defendant provided for the personal maintenance of his wife according to his condition in life while she was living with him, including medical and hospital expenses, but that he failed to give her as much spending money as she thought she should have had and failed to give her the affectionate consideration she deemed proper in the relationship, *is held* insufficient to warrant a conviction in a prosecution under G.S. 14-325.

5. Criminal Law § 52a (1)—

On motion to nonsuit, only the State's evidence will be considered, except such of the defendant's evidence as tends to explain or make clear that which has been offered by the State.

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

APPEAL by defendant from *Rudisill, J.*, May Term, 1951, of BUNCOMBE. Reversed.

The bill of indictment charged the defendant with willfully abandoning his wife without providing adequate support for her (G.S. 14-322); and in a second count with willfully neglecting to provide adequate support for his wife while living with her. G.S. 14-325.

The jury returned verdict of not guilty on the first count but "guilty of non-support of his wife while living with her."

From judgment on the verdict defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Love, and Robert B. Broughton, Member of Staff, for the State.
Don C. Young for defendant.

DEVIN, C. J. The defendant assigns error in the denial of his motion for judgment as of nonsuit on the second count.

The facts were these: The defendant and the State's witness were married 19 May, 1950, in South Carolina, and on their return to Asheville the fact of the marriage was not revealed and the wife continued to live with her mother. On 15 July they began living together in a five-room house on Middlemount Avenue, the home of defendant's mother in which defendant had one-third interest. The wife was then pregnant. The latter part of September the wife went to Marion where her father and other relatives lived, and where she did some work as a baby-sitter, returning, however, frequently on week ends to Asheville. She returned to defendant's home the last of November, and remained there until 1 January, 1951, when she left and went to live with her mother, then residing in Burnsville. She assigned as reason for leaving the defendant's home that his conduct to her was unkind and such as to cause her to leave. The defendant is employed by the Tidewater Supply Company and earns $40 a week, out of which he made payments on his automobile. The baby was born 6 March, 1951. The defendant paid the doctors and hospital bills and is paying $10 a week for the support of the child. After the separation defendant went to see his wife to induce her to return home with the baby, but she declined to do so. This was after the case was in court.

As to the charge of neglect to provide adequate support for her while living with her, the defendant's wife testified in part as follows: "After I went home with him he gave me food and he gave me some money to pay on some shoes for my birthday, some gowns and a baby blanket for Christmas. He gave me $3.00 to pay on my shoes. He gave me a little change, but nothing to spend the way I wanted to . . . any clothes or anything that I needed. I asked him for money for clothing, but he did not give it to me. He told me that he did not think that I needed it. I think that I did. After I was pregnant I asked him for money for dresses. He didn't give me any. While I was pregnant and living with my husband my mother gave me some maternity dresses and my aunt gave me some. No, I didn't ask my husband for other clothes, I just asked him for maternity clothes because I thought that I could do without the other things. Yes, I asked him for money to go see a doctor while I was pregnant. Sometime he would say he didn't have it, to get it from his mother, and if I had any he wouldn't give me any. I got the money from him a time or two, and his mother gave me some a time or two.

Yes, my mother gave me money to go see the doctor a few times when I didn't have any. Lewis gave me plenty of food while I was there. I had plenty of clothes, except maternity dresses. I had not put on maternity dresses when I left there on January first. I didn't see any sense in wearing them until I had to. While at the Clark home before I left there I wore my dungarees—that is a kind of slacks. I got maternity dresses before I left the Clark home. My mother and my aunt gave them to me. We went out together at night very seldom. He took me to picture shows a few times. . . . 'In Domestic Relations Court I testified that all Lewis failed to give me was some maternity dresses, and so far as other clothes were concerned I had plenty of clothes. Yes, I did have plenty.' . . . Mrs. Clark (his mother) was good to me."

The period of time during which the defendant's wife lived in the home with him was apparently a little more than 3 months, and the question raised by defendant's motion to nonsuit on the second count in the bill is whether accepting her testimony as true it affords substantial evidence of willful neglect on his part to provide adequate support for her during this period.

Adequate is defined as meaning sufficient to meet specific requirements. Webster; *Commonwealth v. Mathues,* 210 Pa. 372 (395). Support as the word is used in the statute means personal support, maintenance; the supplying of food, clothing and housing suitable to their condition in life and commensurate with the defendant's ability; together with medical assistance reasonably required for the preservation of health. "A husband is under the legal duty of supporting his wife by furnishing her with such necessaries as the law deems essential to her health and comfort, including suitable food, clothing, lodging and medical attendance." 2 Wharton Cr. Law, sec. 1852; *State v. Moran,* 99 Conn. 115, 36 A.L.R. 862. To constitute a criminal offense under the statute the neglect on the part of the husband to provide adequate support for his wife must have been willful. The support which the law deems adequate must have been purposely omitted without just cause or excuse in violation of law. The neglect must have been unjustifiable and wrongful. *S. v. Falkner,* 182 N.C. 793, 108 S.E. 756. This being a criminal statute, it may not be extended to include cases not clearly within its terms. *S. v. Falkner, supra.*

In the case at bar the suitability of the house the wife occupied is not questioned, and she testified she had plenty of food. She said she asked him for money for clothes and that he did not give it to her because he thought she did not need any, but later she testified, "I had plenty of clothes except maternity dresses," but added her mother and aunt had given her maternity dresses, and she did not put them on until after she had left defendant's home. Her principal complaint was the defendant's

failure to give her as much spending money as she thought she should have had. She also complained that when she asked him for money to see the doctor, he was not always responsive, but she said, "I went to see Dr. Clayton as frequently as I wanted to, or he told me to come." The evidence seems to show she received proper medical care, and that for this as well as for her hospital expenses the defendant paid.

According to the testimony of the State she did not receive the affectionate consideration a husband should manifest for his wife, but failure in this respect would not be sufficient to constitute the criminal offense defined by the statute.

There was evidence from the defendant which tended to throw a different light on the transactions and relations in the home while his wife was living there with him. But on motion to nonsuit we consider only the State's evidence except such of the defendant's evidence as tends to explain or make clear that which has been offered by the State.

A careful analysis of the State's evidence leads to the conclusion that it was insufficient to warrant conviction of the defendant on the second count in the bill, and that the motion for nonsuit should have been sustained. This disposition of the case renders it unnecessary to determine the question raised as to the sufficiency of the verdict to support the judgment. *S. v. Lassiter,* 208 N.C. 251, 179 S.E. 891.

Judgment reversed.

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

L. A. MUSE v. W. F. MORRISON, POWELL DEWEESE, AB ROBINSON, CARY SMATHERS, W. L. SNYDER AND LLOYD SELLERS.

(Filed 26 September, 1951.)

1. Conspiracy § 1—

An action for civil conspiracy lies when there is an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way, resulting in injury inflicted by one or more of the conspirators pursuant to the common scheme.

2. Conspiracy § 2—

Civil liability of conspirators is joint and several, and each conspirator is deemed a party to every act done by any of them in furtherance of the common design.

3. Pleadings § 15—

Upon demurrer the facts alleged in the complaint will be taken as true.

4. Conspiracy § 2: Pleadings § 19b—

A complaint alleging that defendants, the executive secretary of the State Board of Examiners of Plumbing and Heating Contractors, licensees of the Board, the town clerk and members of the board of aldermen, conspired together to drive plaintiff out of his work, trade and business, and alleging numerous wrongful acts maliciously and unlawfully done by certain of the alleged conspirators in furtherance of the common design, resulting in damage to plaintiff, *is held* not subject to demurrer for misjoinder of parties and causes.

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

APPEAL by plaintiff from *Rudisill, J.*, at March Civil Term, 1951, of BUNCOMBE.

Civil action (1) to recover of defendants actual and punitive damages as result of various tortious acts committed against plaintiff as parts of a conspiracy to drive plaintiff, a journeyman plumber, out of his work, trade and business; (2) to restrain defendants from signing, issuing, directing the use of, or in any other way or manner prosecuting or issuing warrants or other process under Article 2 of Chapter 87 of General Statutes—G.S. 87-16 to G.S. 87-27, against plaintiff, and (3) "that the defendant be required to issue to plaintiff the license required under Article 2 of Chapter 87 of General Statutes—G.S. 87-16 to G.S. 87-27, and permitting him to work as a journeyman plumber"; all as expressed in his prayer for relief, heard in trial court upon demurrer to complaint.

Plaintiff alleges in his complaint, briefly stated, substantially the following: 1. That at the time of the grievances of which complaint is made (a) he was a journeyman plumber in the town of Canton, North Carolina, and elsewhere, working for an hourly or daily wage, and has so worked continuously for 32 or 33 years, earning a living for himself and family; and (b) defendants, W. F. Morrison was executive secretary of the State Board of Examiners of Plumbing and Heating Contractors, and W. L. Snyder was Town Clerk of the Town of Canton, and Powell Deweese, Ab Robinson, Lloyd Sellers and Cary Smathers were members of the Board of Aldermen of the Town of Canton, N. C., or licensee members of the Board of Plumbers and Heating Contractors.

2. That in 1936 the defendant W. F. Morrison "in an unlawful agreement and consort with certain of the other defendants, licensees, members of the State Board of Examiners of Plumbing and Heating Contractors doing business in the town of Canton, N. C., unlawfully, wantonly, recklessly, maliciously and corruptly conspired, confederated and agreed with said licensee members and defendants named herein to drive the plaintiff out of his work, trade and business as a plumber and out of the town of Canton, N. C., and Haywood County"—and "to injure and destroy" him "in his trade and business."

3. That, as a part, and in furtherance of said scheme, defendant W. F. Morrison, unlawfully and corruptly, (a) refused to issue license to plaintiff under the grandfather clause contained in the Plumbing and Heating Act,—Chapter 52 of Public Laws 1931, now G.S. 87-16 to G.S. 87-27, and (b) failed to pass plaintiff on examination directly contrary to the agreement and understanding plaintiff had with the legally constituted State Board of Examiners of Plumbing and Heating Contractors.

4. That as a part, and in furtherance of said scheme W. F. Morrison, acting for himself and in behalf of the other defendants, in some instances, and the defendants in others, unlawfully, willfully and maliciously instituted and pursued various criminal prosecutions, between 1936 and 1948, upon warrants charging plaintiff with violations of the provisions of said Plumbing and Heating Act, all of which have terminated favorably to him.

5. That also as a part of said unlawful conspiracy for the purpose aforesaid, W. L. Snyder, as Town Clerk of Canton, unlawfully refused plaintiff a privilege license, and to have his plumbing work inspected, and has been active in the wrongful and unlawful "prosecution and persecution."

6. That because of the unlawful, malicious, willful and corrupt acts of defendants, plaintiff has been injured and damaged in his character, reputation, business, work, trade and standing, etc. And he prays judgment against defendants in specific substantial sums for actual and punitive damages.

The defendants, in apt time, filed a joint demurrer to the complaint, for that: (1) There is a defect of parties plaintiff and defendant; (2) several causes of action have been improperly joined; and (3) the complaint does not state facts sufficient to constitute a cause of action against defendants, etc.

The court, upon hearing the demurrer, being of opinion that the demurrer should be sustained for misjoinder both of parties and of causes of action, entered an order in accordance therewith, and dismissed the action.

Plaintiff appeals therefrom to Supreme Court and assigns error.

Cecil C. Jackson for plaintiff, appellant.

T. A. Clark, Jones & Ward, and Walter R. McGuire for defendants, appellees.

WINBORNE, J. Appellant challenges, and we hold properly so, the correctness of the decision of the court below as shown in the judgment from which this appeal is taken.

The declared purpose of this action is to recover damages for alleged injury to plaintiff allegedly caused by wrongful acts done by one or more of the defendants as a part of and in furtherance of an alleged conspiracy between defendants "to drive the plaintiff out of his work, trade and business as a plumber and out of the town of Canton, N. C., and Haywood County."

"A conspiracy is generally defined to be 'an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way.'" *S. v. Dalton,* 168 N.C. 204, 83 S.E. 693; *S. ex rel. Swann v. Martin,* 191 N.C. 404, 132 S.E. 16; *McNeill v. Hall,* 220 N.C. 73, 16 S.E. 2d 456; *Holt v. Holt,* 232 N.C. 497, 61 S.E. 2d 448.

In the *Holt case, supra,* in opinion by *Ervin, J.,* this Court held that "to create civil liability for conspiracy, a wrongful act resulting in injury to another must be done by one or more of the conspirators pursuant to the common scheme and in furtherance of the common object. The gravamen of the action is the resultant injury, and not the conspiracy itself."

The liability of the conspirators is joint and several. That "Every one who does enter into a common purpose or design is equally deemed in law a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others in furtherance of such common design," as quoted by *Smith, C. J.,* in *S. v. Jackson,* 82 N.C. 565. See also *S. v. Anderson,* 208 N.C. 771, 182 S.E. 643; *S. v. Smith,* 221 N.C. 400, 20 S.E. 2d 360; *Mfg. Co. v. Arnold,* 228 N.C. 375, 45 S.E. 2d 577.

In the light of these principles, and admitting the facts alleged in the complaint, which we must do in testing the sufficiency of a complaint challenged by demurrer, *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761; *Poole v. Bd. of Examiners,* 221 N.C. 199, 19 S.E. 2d 635, and numerous other cases, we are of opinion and hold that there is neither misjoinder of parties to the action nor misjoinder of causes of action alleged in the complaint. A conspiracy between defendants is alleged in the complaint. There are allegations that numerous wrongful acts were unlawfully, maliciously and corruptly done by certain of the alleged conspirators as a part of and in furtherance of the common object. (In this connection reference is made to the cases of *S. v. Ingle,* 214 N.C. 276, 199 S.E. 10, and *S. v. Mitchell,* 217 N.C. 244, 7 S.E. 2d 567, treating of the subject of journeyman plumber in relation to the provisions of G.S. 87-16 to G.S. 87-27). Moreover, it is alleged that plaintiff has been injured and is damaged as the result of the acts so done.

Whether plaintiff is able, in his proof, to make good the allegations of his complaint is of no concern now. But he is entitled to an opportunity to do so—a day in court.

The judgment below is
Reversed.

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

THOMAS W. PRIDGEN v. CHARLES R. TYSON AND WIFE, MRS. CHARLES R. TYSON, GEORGE TYSON (UNMARRIED), CLIFTON TYSON AND WIFE, AVA TYSON, OSCAR TYSON AND WIFE, NETTIE MAE TYSON, LEVY TYSON AND WIFE, BETTY TYSON, BEULAH TYSON JONES AND HUSBAND, GEORGE JONES, MABEL TYSON DAVENPORT AND HUSBAND, ERNEST DAVENPORT, JAKE TYSON AND WIFE, ELLEN TYSON, TOM TYSON AND WIFE, DAISY TYSON, JACK TYSON AND WIFE, MYRTIE TYSON, LEE TYSON AND WIFE, ELBER TYSON, EULA TYSON MASSENGILL AND HUSBAND, TOM MASSENGILL, AND PATSY TYSON WINBORNE AND HUSBAND, STEPHEN WINBORNE.

(Filed 26 September, 1951.)

1. Wills § 33c—

As a general rule remainders vest at the death of testator unless some later time for the vesting is clearly expressed in the will, or is necessarily implied therefrom, and adverbs of time and adverbial clauses designating time do not create a contingency but rather indicate a time when the enjoyment of the estate shall begin.

2. Same—

A devise to testator's grandson for life and after his death to testator's "male children or their bodily heirs," *is held* to create a life estate in the grandson with remainder vesting at the time of testator's death in testator's sons, and therefore a deed from all of testator's sons to the life tenant vests a good and indefeasible fee simple estate in him. Furthermore, the deeds of testator's sons and the heirs of a deceased son would estop them and all who may claim through or from them.

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

APPEAL by defendants from *Harris, J.,* February Term, 1951, of WILSON.

This is an action to remove a cloud upon the title to the tract of land which the plaintiff alleges he owns in fee simple, but in which the defendants, or some of them, claim an interest.

The rights of the parties depend upon the interpretation placed upon the provisions contained in Item 4 of the last will and testament of Thomas M. Tyson, dated 2 September, 1896, which reads as follows:

"Item Fourth I give and devise to my daughter. Patsey A. Pridgeon bodiley heirs one dollar each. I also lend her bodiley heirs one hundred

acres of real estate during theire lifetime after my earthly existance after their deceas my male children or their bodiley heirs shall inherit the same real estate laying in wilson county north carolina known as the Johnathan Parker tract his distributed shair of his farthers estate adjoining. John Hales and others. (sic)"

At the time of the death of the testator, Patsy A. Pridgen, his daughter, was living, as was also her son, Thomas W. Pridgen, the plaintiff in this action. The testator also left surviving him, another daughter, Rachel L. Abernathy, and four sons.

The plaintiff, Thomas W. Pridgen, is the only bodily heir, or child, of Patsy A. Pridgen, now deceased, and as such came into possession of the aforesaid 100 acres of land, and has remained in possession thereof until the present time.

On 17 September, 1917, Joshua L. Tyson and wife, Charles R. Tyson and wife, Lemuel C. Tyson and wife, they being three of the four male children of the late Thomas M. Tyson, executed and delivered to the plaintiff, Thomas W. Pridgen, their deed conveying to him all their right, title, and interest in and to the aforesaid lands in fee simple. And on 14 September, 1949, all the children of the late John T. Tyson, the fourth male child of the late Thomas M. Tyson, together with their respective spouses, conveyed to the plaintiff all their right, title, and interest, in fee simple, in and to said lands, it being a one-fourth undivided interest in the remainder.

The court below held that plaintiff is the owner in fee simple of the tract of land devised by the late Thomas M. Tyson, in Item 4 of his will, and entered judgment accordingly. Defendants appeal and assign error.

Lucas & Rand and Z. Hardy Rose for plaintiff, appellee.
O. B. Moss and Claude C. Abernathy for defendants, appellants.

DENNY, J. It is conceded that the plaintiff, Thomas W. Pridgen, took only a life estate in the devised premises, under the will of Thomas M. Tyson, and that all persons claiming any interest in the estate are parties to the action. The defendants contend, however, that the male children of the testator took only a contingent interest conditioned upon their surviving Thomas W. Pridgen, the plaintiff, and that in order to ascertain the ultimate takers under the will, the roll must be called at the death of Thomas W. Pridgen, citing *Trust Co. v. Waddell,* 234 N.C. 34, 65 S.E. 2d 317; *Carter v. Kempton,* 233 N.C. 1, 62 S.E. 2d 713; *House v. House,* 231 N.C. 218, 56 S.E. 2d 695; *Mercer v. Downs,* 191 N.C. 203, 131 S.E. 575, and similar cases.

We do not so construe the devise to the male children of the testator and their bodily heirs. The remainder to them was not made contingent

upon their surviving the life tenant as was the case in *Trust Co. v. Waddell, supra,* and *Mercer v. Downs, supra.* Nor was it made contingent upon survival at the termination of a fixed period of time as in the case of *Carter v. Kempton, supra,* or upon the life tenant dying without issue as was the case in *House v. House, supra.*

On the contrary, the male children of Thomas M. Tyson, or their bodily heirs, prior to the execution of their respective deeds to plaintiff, were entitled to the immediate possession of the devised premises subject only to the termination of the preceding life estate. Therefore, we hold that upon the death of Thomas M. Tyson, his male children took vested remainders in the devised premises.

In the case of *Priddy & Co. v. Sanderford,* 221 N.C. 422, 20 S.E. 2d 341, *Barnhill, J.,* in speaking for the Court said: "The remainder is vested, when throughout its continuance, the remainderman and his heirs have the right to the immediate possession whenever and however the preceding estate is determined; or, in other words, a remainder is vested if, so long as it lasts, the only obstacle to the right of immediate possession by the remainderman is the existence of the preceding estate; or, again, a remainder is vested if it is subject to no condition precedent save the determination of the preceding estate."

It is the general rule that remainders vest at the death of the testator, unless some later time for the vesting is clearly expressed in the will, or is necessarily implied therefrom, *Priddy & Co. v. Sanderford, supra. Weill v. Weill,* 212 N.C. 764, 194 S.E. 462; *Witty v. Witty,* 184 N.C. 375, 114 S.E. 482; *Baugham v. Trust Co.,* 181 N.C. 406, 107 S.E. 431. And it is a prevailing rule of construction with us that adverbs of time, and adverbial clauses designating time, do not create a contingency but merely indicate the time when enjoyment of the estate shall begin. *Priddy & Co. v. Sanderford, supra; Carolina Power Co. v. Haywood,* 186 N.C. 313, 119 S.E. 500.

Since, in our opinion, the male children of the testator took vested remainders in the devised premises upon the death of the testator, it follows that the deed executed and delivered to plaintiff by three of the male children of the testator, and the deed executed to plaintiff by all the children of the other male child of the testator, as set out herein, are sufficient to give the plaintiff, Thomas W. Pridgen, the owner and holder of the life estate, a good, indefeasible, fee simple estate in the devised premises. Moreover, the defendants who conveyed all their right, title, and interest in and to the devised premises, to the plaintiff, and all who may claim through or from them, are bound by these conveyances. *Buffaloe v. Blalock,* 232 N.C. 105, 59 S.E. 2d 625, and cited cases.

The judgment of the court below is

Affirmed.

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

IN THE MATTER OF THE ESTATE OF DOUGLAS C. EDWARDS.

(Filed 26 September, 1951.)

1. **Executors and Administrators § 2b—**

The right to appointment as administrator of an estate is entirely statutory, and the only child of a decedent who leaves no widow is entitled to the entire surplus of descendant's personal estate, G.S. 28-149 (4), and therefore is the sole "next of kin" of decedent within the meaning of G.S. 28-6, and upon his timely application to the proper clerk has an absolute right to receive letters of administration unless he is disqualified. G.S. 28-8.

2. **Same—**

A finding by the clerk that the next of kin entitled to appointment as administrator is disqualified because of want of understanding, G.S. 28-8 (4), must be based upon evidence received by the clerk in open court, and where the record shows that the conclusion of the clerk was based upon undisclosed and unrecorded information obtained by him from third persons outside of court and in the absence of petitioner and his counsel without opportunity for cross-examination, the proceedings will be remanded so that the matter may be determined in accordance with due process of law.

3. **Constitutional Law § 20a—**

Art. I, sec. 17, of the Constitution of N. C., guarantees a litigant in every kind of judicial proceeding the right to an adequate and fair hearing before an impartial tribunal where he may contest the claim set up against him and be allowed to meet it on the law and on the facts, and show if he can that it is unfounded.

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

APPEAL by petitioner, Fred Edwards, from *Bone, J.*, in Chambers at Nashville, North Carolina, 31 March, 1951, in a proceeding in the Superior Court of Edgecombe County for the appointment of an administrator.

Properly interpreted, the record reveals these things:

1. On 13 March, 1951, Douglas C. Edwards, whose wife had predeceased him, died intestate at his domicile in Edgecombe County, North Carolina, leaving a substantial personal estate. He was survived by an only child, namely, the petitioner, Fred Edwards, an adult resident of North Carolina, who has never been convicted of a felony or renounced his right to qualify as administrator of his deceased father.

2. On 22 March, 1951, the petitioner applied to the Clerk of the Superior Court of Edgecombe County by verified petition for letters of administration on the estate of the decedent.

3. On 29 March, 1951, the Clerk denied the petition in an order containing this finding and adjudication: "It is by the court . . . found as a fact that the said Fred Edwards is an incompetent person and lacking in understanding and is incompetent within the meaning of the statute to settle the estate in question, and the court in its discretion refuses to appoint the said Fred Edwards as administrator of the estate of Douglas C. Edwards."

4. The order specifies, in substance, that the finding as to the incompetency of petitioner is based upon undisclosed and unrecorded information obtained by the Clerk from third persons outside of court in the absence of petitioner and his counsel, who were not apprised of the identity of such third persons or given any opportunity to cross-examine or confute them.

5. The petitioner appealed from the order of the Clerk to the resident judge of the judicial district embracing Edgecombe County, who entered judgment affirming the order. The petitioner thereupon appealed from such judgment to the Supreme Court, making assignments of error sufficient to raise the legal questions hereinafter considered.

P. H. Bell for petitioner, appellant.
No counsel contra.

ERVIN, J. The appeal presents this solitary question: Did the judge err in affirming the order of the clerk refusing to grant administration to the petitioner?

The right to administer on the estate of an intestate is entirely statutory. Generally speaking, the right is given to the surviving spouse, the next of kin, the creditors, and other persons legally competent, in the order named. G.S. 28-6. As here used, the term "next of kin" means those persons who take the surplus of the personal estate of an intestate under the statute of distribution. *Henry v. Henry,* 31 N.C. 278; *Weaver v. Lamb,* 140 Iowa 615, 119 N.W. 69, 22 L.R.A. (N.S.) 1161, 17 Ann. Cas. 947.

Since the decedent left no widow, the petitioner, as his only child, takes the entire surplus of his personal estate under subdivision four of the statute of distribution, G.S. 28-149. In consequence, the petitioner is the sole next of kin, and as such is the party primarily entitled to administration. Moreover, he has made timely application to the proper Clerk, *i.e.,* the Clerk of the Superior Court of Edgecombe County, for appointment as administrator. G.S. 28-15. These things being true, the peti-

tioner has an absolute legal right to receive letters of administration, unless he is disqualified. *Williams v. Neville,* 108 N.C. 559, 13 S.E. 240; *In re Bailey Will,* 141 N.C. 193, 53 S.E. 844.

The order of the clerk holds that the petitioner is not entitled to administration on the estate of his deceased father, and assigns as the reason for such holding that the petitioner is under the disqualification defined by this statutory provision: "The clerk shall not issue letters of administration . . . to any person who, at the time of appearing to qualify . . . (4) is adjudged by the clerk incompetent to discharge the duties of such trust by reason of . . . want of understanding." G.S. 28-8.

The record on this appeal discloses that the supposed factual foundation underlying the order, *i.e.,* that the petitioner is incompetent to discharge the duties of an administrator by reason of want of understanding, is not supported by evidence received by the clerk in open court. Indeed, the record shows that the conclusion of the clerk as to the alleged incompetency of the petitioner rests upon undisclosed and unrecorded information obtained by the clerk from third persons outside of court in the absence of the petitioner and his counsel, who were not apprised of the identity of such third persons or accorded any opportunity to cross-examine or confute them.

The conduct of the proceeding by the clerk contravenes the law of the land clause embodied in Article I, Section 17, of the North Carolina Constitution, which guarantees to the litigant in every kind of judicial proceeding the right to an adequate and fair hearing before an impartial tribunal, where he may contest the claim set up against him, and be allowed to meet it on the law and the facts and show if he can that it is unfounded. *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 608; *Surety Corp. v. Sharpe,* 232 N.C. 98, 59 S.E. 2d 593.

The order of the clerk nullifies the petitioner's constitutional right to an adequate and fair hearing, for manifestly there is no hearing in any real sense when the litigant does not know what evidence is received and considered by the court, and is not accorded any opportunity to cross-examine the witnesses against him or to offer testimony in explanation or rebuttal of that given by them. *Interstate Commerce Commission v. Louisville & N. R. Co.,* 227 U.S. 88, 57 L. Ed. 431, 33 S. Ct. 185.

For the reasons given, the order and judgment are vacated and the proceeding is remanded to the Superior Court of Edgecombe County with directions that the clerk proceed to determine the question of fact involved in the cause in a manner consistent with the petitioner's constitutional right to an adequate and fair hearing.

Error and remanded.

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

L. A. MUSE, GUS MUSE, DAVE MUSE, MAMIE MUSE YOUNG, JESS MUSE, CECIL MUSE, RUSS MUSE, SHIRLEY MUSE BRYSON, RAY ROBINSON, BERTHA ROBINSON SMATHERS AND RHETTA ROBINSON RHYMER, v. ELVA MUSE, GLADYS MUSE HALL, AND JOHN MUSE.

(Filed 26 September, 1951.)

1. Trial § 49—

The setting aside of the verdict on one issue because contrary to the weight of the evidence, and the granting of a new trial limited to that issue in instances in which the issues may be separated, is within the sound discretion of the trial judge, G.S. 1-207, no matter of law or legal inference being involved.

2. Appeal and Error § 2—

Where the trial court grants a new trial limited to a single issue upon which he set the verdict aside as being contrary to the weight of the evidence, and orders that final judgment should await the result of the partial new trial, appeal from this order is premature and will be dismissed.

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

APPEAL by plaintiffs from *Rudisill, J.*, at June Term, 1951, of BUNCOMBE.

Civil action by heirs of grantors to cancel deeds to realty on ground of mental incapacity, fraud and undue influence.

The jury returned the following verdict upon the issues joined on the pleadings:

1. Did the grantor, K. M. Muse, have the mental capacity to execute the three deeds in controversy on 22 April, 1940? Answer: "Yes."

2. Did the grantor, Mrs. M. A. Muse, have the mental capacity to execute the three deeds in controversy on 22 April, 1940? Answer: "Yes."

3. Were the three paper writings in controversy procured by fraud and undue influence of the defendants, or either of them? Answer: "Yes."

The defendants moved "the court to set aside the verdict of the jury on the third issue, and to affirm the verdict of the jury on the first and second issues." The trial judge sustained the motion in the exercise of his discretion because he deemed the answer of the jury to the third issue contrary to the weight of the evidence. After finding "as a fact that the matters and things involved in issues one and two and the matters and things involved in the third issue can be separated without any injury to the parties," he entered an order allowing the verdict to stand as to the first and second issues, setting aside the verdict as to the third issue, and granting a partial new trial limited to the third issue. The order

provided that the entry of a final judgment should await the result of the partial new trial. The plaintiffs appealed, assigning the rendition of the order as error.

Cecil C. Jackson for plaintiffs, appellants.
Don C. Young for defendants, appellees.

ERVIN, J. When no matter of law or legal inference is involved, the granting or refusing a new trial upon all or any one of the issues rests in the sound discretion of the trial judge. G.S. 1-207; *Hawley v. Powell,* 222 N.C. 713, 24 S.E. 2d 523; *Campbell v. Laundry,* 190 N.C. 649, 130 S.E. 638; *Billings v. Observer,* 150 N.C. 540, 64 S.E. 435; *Jarrett v. Trunk Co.,* 144 N.C. 299, 56 S.E. 937; *Benton v. Collins,* 125 N.C. 83, 34 S.E. 242, 47 L.R.A. 33; McIntosh on North Carolina Practice and Procedure in Civil Cases, section 611. The record does not indicate that the judge abused his discretion in setting aside the verdict on the third issue and in awarding a partial new trial limited to that issue. Indeed, it supports the contrary conclusion. Inasmuch as no judgment has been entered in the cause, the present appeal is premature, and must be dismissed. *Hawley v. Powell, supra.*

Appeal dismissed.

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

JACK HALL v. COBLE DAIRIES, INC., AND JAMES LESTER DOCKERY.

(Filed 10 October, 1951.)

1. Pleadings § 19c—

A demurrer admits the truth of every material fact properly alleged.

2. Negligence § 9—

Ordinarily, foreseeability is an essential element of proximate cause, but this does not require that the tort-feasor be able to anticipate the particular consequences ultimately resulting from his negligence, but only that by the exercise of reasonable care he might have foreseen consequences of a generally injurious nature, and that the injuries actually sustained be such as in ordinary circumstances were likely to have ensued.

3. Automobiles §§ 8d, 18a, 18b—Complaint held not demurrable on ground that injuries sustained could not have been reasonably foreseen.

Allegations to the effect that defendants left their tractor-trailer standing on the highway at nighttime without lights, flares or signals as required by statute, that plaintiff, driving his automobile in a careful and

prudent manner, collided with the rear thereof, that in the collision plaintiff was severely shocked and, while in a dazed and addled condition, walked out on the highway and was hit by a car traveling in the opposite direction, causing the injuries sued on, *is held* not demurrable on the ground that upon the facts alleged defendants could not have foreseen that plaintiff would be injured by being struck by the car, since defendants could have foreseen generally injurious consequences from the negligence alleged, and the injuries complained of were not beyond the pale of natural consequences of such negligence.

4. **Negligence § 7—**

An independent intervening cause is one which could not have been reasonably anticipated and which breaks the causal connection between the primary negligence and the injury, but if the intervening act might have been anticipated in the natural and ordinary course of things, including those acts which constitute a normal response to the stimulus of the situation created by the primary negligence, such intervening act does not insulate the primary negligence, even though it be a contributing cause of the injury.

5. **Automobiles §§ 18a, 18d—Complaint held not demurrable on ground that upon facts alleged injury was due to independent act of third party.**

Allegations to the effect that, as a result of defendants' negligence, plaintiff collided with the rear of defendants' truck, and that while in a dazed condition from the impact, plaintiff walked out into the highway and was struck by an automobile traveling in the opposite direction, *is held* not demurrable on the ground that upon the facts alleged defendants' negligence was insulated by the independent intervening acts of the driver of the car, since upon the facts defendants' primary negligence, acting through the normal response to the stimulus set in motion by it, continued in active operation up to the time plaintiff was struck by the car.

6. **Pleadings § 19c—**

Upon demurrer the complaint will be liberally construed in favor of the pleader.

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

APPEAL by plaintiff from *Rudisill, J.*, at Regular May Term, 1951, of BUNCOMBE. Reversed.

Civil action to recover damages for personal injuries alleged to have resulted from negligence of the defendants, heard upon demurrer to the complaint for alleged failure to state facts sufficient to constitute a cause of action.

At the hearing the trial judge sustained the demurrer and the plaintiff appealed, assigning error.

Butler & Mitchell, Sale, Pennell & Pennell, and Joe K. Byrd for plaintiff, appellant.

Pierce & Blakeney and Richard E. Wardlow for defendants, appellees.

JOHNSON, J. The plaintiff alleges in pertinent part that on the night of 27 September, 1947, at about 7:30 o'clock, a large tractor-trailer of the corporate defendant, in charge of the individual defendant, was parked on the paved portion of U. S. Highway No. 70 within the corporate limits of the Town of Glen Alpine, North Carolina, with the truck and trailer entirely blocking the right side of the highway, "without displaying lights, flares or lanterns 200 feet in the front and rear of said truck and trailer," in violation of "the laws of the State of North Carolina governing the operation of motor vehicles"; that the plaintiff came along in his 1941 Chevrolet automobile, driving eastwardly, "in a careful and prudent manner, on his right hand side of said highway," and at about 30 miles per hour; "that it was dusk dark and visibility was poor; that a short distance from the scene of the accident . . . there is a dip in the highway, and as plaintiff reached the crest of the hill, suddenly and without warning he saw in front of him, parked on the highway, the truck and trailer belonging to defendant Coble Dairies, Inc.; . . . that said truck and trailer had been parked there for some time . . .; that just behind said trailer, and standing on the highway, were three men, one of whom was the defendant, James Lester Dockery, and one of whom was another employee of Coble Dairies, Inc., . . .; that motor vehicles were traveling on the highway in westward direction, and plaintiff, in an effort to avoid hitting the men standing back of the truck and trailer . . ., and to avoid driving into the oncoming traffic, applied his brakes and swerved sharply to the right and onto the shoulder of said highway, causing the automobile to skid into the right rear side of said trailer, which caused his wife's head to be thrown against the windshield of said car, breaking her nose and inflicting serious and painful cuts and bruises on her face and body;"

"That the plaintiff was severely shocked and shaken up by the suddenness of the impact, as aforesaid."

"That immediately after the collision . . ., this plaintiff got out of his automobile and went around to its right side in order to assist his wife, who was bleeding profusely; that when he had attended to his wife and had returned to the left side of his car, still in a dazed and addled condition from shock caused by the collision, aforesaid, just as he was attempting to enter the automobile he was suddenly stricken by an automobile traveling west over said highway, causing the injuries hereinafter set forth."

"That the reckless, wanton, and unlawful acts of the defendant Coble Dairies, Inc., by and through its agents, servants and employees, as above set forth, was the proximate cause of the permanent injury to the person of this plaintiff hereinafter described, in that the defendant Coble

Dairies, Inc., through its agents, servants, and employees, failed and neglected:

"(a) to display the rear lights prescribed by Chapter 20, Section 129, Subsection (d), and Section 134 of the General Statutes of North Carolina, and in that the defendant, Coble Dairies, Inc., its agents, servants and employees permitted the said motor vehicle to stand on the highway without displaying thereon a lamp projecting a red light visible under normal atmospheric conditions from a distance of 500 feet to its rear;

"(b) to remove said motor vehicle from the travelled portion of said highway, so as to leave a clear and unobstructed width of not less than 15 feet upon the main travelled portion of said highway opposite said motor vehicle, in violation of Chapter 20, Section 161 of the General Statutes of North Carolina.

"(c) to display, not less than 200 feet in front and rear of such vehicle a red flag, red flares, or lanterns;

"(d) to use due care, caution and circumspection for the rights of others using said highway;

"All of which acts of omission and commission were the direct and proximate cause of the injuries and damages hereinafter set forth."

"That by reason of the negligence, recklessness and wanton and willful disregard for others on the part of the defendants, which was the sole and proximate cause of the plaintiff's being stricken by the aforesaid automobile, this plaintiff was knocked to the pavement and dragged 93 feet along said highway, inflicting" . . . injuries as described, and entitling plaintiff to damages in a substantial sum.

By demurring to the sufficiency of the complaint to state a cause of action, the defendants admit as true every material fact properly alleged. *S. v. Trust Co.,* 192 N.C. 246, 134 S.E. 656; *Trust Co. v. Wilson,* 182 N.C. 166, 108 S.E. 500.

The chief contention urged by the defendants is that the facts alleged by the plaintiff, when taken as true, fail to establish the required causal connection between the plaintiff's injuries and the alleged negligence of the defendants. It is urged that the essential elements of proximate cause are lacking. The plaintiff's allegations as to this are in substance as follows:

(1) That the defendants' tractor-trailer unit had been unlawfully left standing (as disabled) on the paved portion of the highway, near the crest of a hill, without displaying lights, flares, and signals, as required by statute.

(2) That the plaintiff, driving his automobile in "a careful and prudent manner," came over the crest of the hill and collided with the rear of the tractor-trailer.

(3) That in the collision the plaintiff was "severely shocked and shaken up by the . . . impact."

(4) That he got out of his automobile and went around to its right side in order to assist his wife who was bleeding profusely from injuries sustained in the collision.

(5) That after rendering his wife assistance, he returned to the left side of his car "still in a dazed and addled condition from shock caused by the collision," and just as he was attempting to enter the automobile he was suddenly hit by an automobile traveling in the opposite direction over the highway, causing the injuries for which recovery is sought.

It is the contention of the defendants: (1) that the defendants were not chargeable with the "duty to foresee that the plaintiff . . . (after the collision) would eventually walk out upon the highway and that a third person would operate an automobile in such manner as to strike and injure the plaintiff, as he alleges," and that therefore the plaintiff has alleged himself beyond the bounds of the rule of foreseeability, as an essential test of actionable negligence; and (2) that there is a lack of causal connection between the defendants' alleged negligence and the plaintiff's injuries, for "that the intervening independent action of the motorist operating the westwardly-traveling automobile, that came along later and struck the plaintiff, was the actual, real, and proximate cause of the plaintiff's injuries." These contentions of the defendants will be treated *seriatim:*

1. *The question of foreseen or foreseeable consequences.*—It may be conceded that in this jurisdiction in order to warrant a finding that negligence, not amounting to a willful or wanton wrong, was the proximate cause of an injury, ordinarily it must appear that injurious consequences were foreseen, or reasonably should have been foreseen, by the wrongdoer at the instant of the negligent act. *Drum v. Miller,* 135 N.C. 204, 47 S.E. 421; *Dunn v. Bomberger,* 213 N.C. 172, 195 S.E. 364. See also 38 Am. Jur., Negligence, Sec. 58, pp. 708, 709.

However, it is established by authoritative decisions of this Court that when the test of foreseen or foreseeable consequences is applied in determining proximate cause or actionable negligence, it is not necessary that the tort-feasor should have been able to foresee the injury in the precise form in which it occurred, nor to have been able to anticipate the particular consequences ultimately resulting from the negligent act or omission. *Drum v. Miller, supra* (135 N.C. 204). See also 38 Am Jur., Negligence, Sec. 62, p. 713. Ordinarily, under our decisions it suffices to show (1) that "by the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected." (*Drum v. Miller, supra* (135 N.C. 204, top p. 215)); *McIntyre*

v. Elevator Co., 230 N.C. 539, 54 S.E. 2d 45; *Rattley v. Powell,* 223 N.C. 134, 25 S.E. 2d 448; *Evans v. Rockingham Homes, Inc.,* 220 N.C. 253, 17 S.E. 2d 125; *Lancaster v. Greyhound Corp.,* 219 N.C. 679, p. 688, 14 S.E. 2d 820; *Ellis v. Sinclair Refining Co.,* 214 N.C. 388, 199 S.E. 403; *Dunn v. Bomberger, supra* (213 N.C. 172, p. 177). See also 38 Am. Jur., Negligence, Sec. 62, pp. 713, 714, and (2) that the injuries sustained were the natural and probable, although not the necessary and inevitable, result of the negligent fault of the defendants, *i.e.,* such injuries as were likely, in ordinary circumstances, to have ensued from the act or omission in question. *McIntyre v. Elevator Co., supra* (230 N.C. 539); *Bowers v. Railroad Co.,* 144 N.C. 684, 57 S.E. 453; *Drum v. Miller, supra* (135 N.C. 204). See also: *Brady v. Railroad Co.,* 222 N.C. 367, p. 373, 23 S.E. 2d 334; 38 Am. Jur., Negligence, Sections 57 and 62; Anno: 155 A.L.R. 157.

Tested by the foregoing rules, it is manifest that the defendants are chargeable with having foreseen that consequences of a generally injurious nature would likely result from their conduct in leaving the tractor-trailer on the paved portion of the highway, without lights, flares, and signals as alleged. Upon this record, we cannot say it was beyond the pale of natural consequences that the plaintiff in the ensuing collision was severely shocked, to the extent that he was "dazed and addled" and in that condition walked out on the highway and was hit by a passing motorist. Therefore it would seem that the complaint meets the required tests as to foreseen or foreseeable consequences.

2. *The question of an independent intervening cause.*—It is settled law that an independent intervening cause which breaks the chain of causation from the original negligent act or omission may relieve the original wrongdoer of liability, on the theory of insulating the original negligence. *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808; *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88; *Beach v. Patton,* 208 N.C. 134, 179 S.E. 446; *Hinnant v. R. R.,* 202 N.C. 489, 163 S.E. 555; *Balcum v. Johnson,* 177 N.C. 213, 98 S.E. 532. See also 65 C.J.S., Negligence, Sec. 111, pp. 687, 688.

However, the intervening cause which will relieve of liability for injury must be a new, independent and efficient cause, intervening between the original negligent act or omission and the injury ultimately suffered, which turns aside the natural sequence of events and produces a result which would not otherwise have followed, and which could not have been reasonably anticipated. An efficient, intervening cause is a new proximate cause, which breaks the connection of the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action, and rendering its effect in the chain of causation remote. It is immaterial

how many new events or forces have been introduced, if the original cause remains active, the liability for this result is not shifted. The causal connection must be actually broken and the sequence interrupted in order to relieve the defendant from responsibility. The mere fact that another person or agency concurs or co-operates in producing the injury or contributes thereto in some degree, whether large or small, is not of controlling importance. Ordinarily, it is immaterial how many others may have been at fault if the defendant's original negligence was the efficient cause of the injury. *Balcum v. Johnson, supra* (177 N.C. 213); *Harton v. Telephone Co.,* 141 N.C. 455, 54 S.E. 299. See also: *Ins. Co. v. Stadiem,* 223 N.C. 49, 25 S.E. 2d 202; 38 Am. Jur., Negligence, Sec. 67, pp. 722, 723.

And ordinarily "the connection is not actually broken if the intervening event is one which might in the natural and ordinary course of things, be anticipated as not entirely improbable, and the defendant's negligence is an essential link in the chain of causation." Shearman and Redfield on Negligence, Revised Ed., Vol. 1, Sec. 38, p. 101.

In *Insurance Co. v. Stadiem, supra* (223 N.C. 49), the rule is stated this way by *Chief Justice Stacy:*

". . . if the original act be wrongful, and would naturally prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not in themselves wrongful, the injury is to be referred to the wrongful cause, passing by those which are innocent. *Scott v. Shepherd,* 2 Bl., 892 (*Squib Case*). But if the chain of causation be broken by the intervention of some efficient, independent cause, such intervening cause is to be regarded as the proximate cause of the injury, and in an action against the original wrongdoer the law will not undertake further to pursue the question or resulting damage. . . . To avail the original wrongdoer as a defense, however, the intervening cause must be both independent and responsible of itself. . . .

"In searching for the proximate cause of an event, the question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Do the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?" (223 N.C. p. 53.)

In 65 C.J.S., Negligence, Sec. 111, p. 695, it is stated: "An intervening act does not become a superseding cause if it is a normal response to the stimulus of a situation created by the negligence of another."

Also, on the topic of acts done during delirium caused by negligent conduct, as affecting causal relation, this pertinent statement is found

in the American Law Institute's Restatement of the Law of Torts, Vol. II, Sec. 465, p. 1211:

"If the actor's negligent conduct so brings about the delirium . . . of another as to make the actor liable for it, the actor is also liable for harm done by the other to himself while delirious . . ., if his delirium . . . prevents him from realizing the nature of his act and the certainty or risk of harm involved therein, . . ."

See also: Carpenter, Proximate Cause, 14 So. Cal. L. Rev., 115, pp. 117, 152; and 14 So. Cal. L. Rev., 416, p. 448; Beale, Proximate Consequences of an Act, 33 Harv. L. Rev., p. 633, pp. 643 to 658.

Here, taking the allegations of the complaint as true, it appears that the alleged negligence of the defendants caused the initial collision; that in the collision the plaintiff was "dazed and addled," and in that condition walked out on the highway and was hit by the passing motorist and thereby suffered the injuries sued on. The force set in motion by the defendants appears to have continued in active operation through the force it stimulated into activity down to the final injury. Thus, it would seem the plaintiff has alleged a continuous succession of events, so linked together as to make a natural whole.

It is urged by the defendants that the complaint shows upon its face that the plaintiff was negligent in walking out on the highway in front of the passing automobile and that the passing motorist was negligent in hitting the plaintiff, and further that the negligence of the passing motorist was "a new, independent, efficient, intervening and outside factor," which concurring with the negligence of the plaintiff proximately caused his injuries. We are unable, however, so to interpret the allegations of the complaint. A perusal of the complaint, with this intimation in mind, rather tends to confirm the impression that these elements of negligence were adroitly avoided by counsel in drafting the pleading. Both of these factors of possible negligence (contributory negligence of the plaintiff and intervening negligence of the passing motorist) may be made available to the defendants as defenses. However, where, as here, these factors of possible negligence do not affirmatively appear on the face of the complaint, they may not be brought in by demurrer. *Smith v. Railroad,* 129 N.C. 374, 40 S.E. 86. The sole function of a demurrer is to test the legal sufficiency of the challenged pleading. A demurrer may not call to its aid facts not appearing on the face of the alleged defective pleading. *Trust Co. v. Wilson, supra* (182 N.C. 166); *Wood v. Kincaid,* 144 N.C. 393, 57 S.E. 4; *Davison v. Gregory,* 132 N.C. 389, 43 S.E. 916.

The decision in *Hinnant v. Railroad Co., supra* (202 N.C. 489), cited and relied on by the defendants, is distinguishable. There, the plaintiff, a guest passenger in an automobile, was injured in a grade-crossing collision. He joined as defendants both the driver of the automobile and the

railroad company, alleging negligence against both. There, it appeared upon the face of the complaint, and as the only reasonable inference deducible therefrom, that the negligence of the defendant driver of the automobile intervened as an independent factor, breaking the sequence of events between the plaintiff and the negligence of the railroad company, and completely insulating the original or primary negligence of the railroad company. In the instant case, the passing motorist is not joined as a defendant and the complaint alleges against him no act or omission of negligence.

The rest of the decisions cited and relied upon by the defendants likewise are distinguishable. (*Beach v. Patton, supra* (208 N.C. 134); *Powers v. Sternberg, supra* (213 N.C. 41); *Peoples v. Fulk,* 220 N.C. 635, 18 S.E. 2d 147). In each of these cases issues were joined upon the pleadings and the evidence had been adduced below. In each instance this Court held, as a matter of law upon the evidence adduced, that the primary negligence, if any, of the party charged was insulated by the intervening negligence of a codefendant or third party. Here, however, issues have not been joined. We are still out on the fringes of the controversy, merely testing by demurrer the legal sufficiency of the allegations of the complaint.

And, upon a liberal construction of the complaint in favor of the pleader, as is the rule upon demurrer (*S. v. Trust Co., supra; Bryant v. Ice Co.,* 233 N.C. 266, 63 S.E. 2d 547), it sufficiently appears that the negligence of the defendants was the proximate cause of the plaintiff's injuries, *i.e.,* the cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed. *Ellis v. Refining Co., supra* (214 N.C. 388); *Harton v. Telephone Co., supra* (141 N.C. 462; *McIntyre v. Elevator Co., supra* (230 N.C. 539); and *Ramsbottom v. Railroad Co.,* 138 N.C. 38, 50 S.E. 448.

It follows, therefore, that the complaint states facts sufficient to constitute a cause of action against the defendants, and that the demurrer should have been overruled. The judgment below is

Reversed.

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

ROMAINE CLARK WOODARD AND DAVID WOODARD v. WILLIAM THOMAS CLARK, JR., NANNIE SUE CLARK, GEORGE THOMAS DAVIS, MARY ELIZABETH CLARK DAVIS, GEORGE THOMAS DAVIS, JR., WILLIAM BLOUNT FLOWERS, NANNIE SUE CLARK FLOWERS, SUZANNE FLOWERS, WILLIAM THOMAS CLARK III, HENRY GROVES CONNOR, ALICE WHITEHEAD CONNOR, CHARLES E. HUSSEY, MARY CLARK HUSSEY, GEORGE HACKNEY III, BESSIE HANCOCK HACKNEY, AND THE UNBORN ISSUE OF WILLIAM THOMAS CLARK, JR., HENRY GROVES CONNOR AND MARY CLARK HUSSEY.

(Filed 10 October, 1951.)

1. Wills § 31—

The objective of construction is to effectuate the intent of the testator as expressed in his will, for his intent as so expressed is his will.

2. Wills § 33a—

While a devise is to be construed to be in fee simple unless a contrary intent plainly appear from the instrument, G.S. 31-38, and a devise generally and indefinitely, standing alone, constitutes a devise in fee simple, where the clause devising property generally to a beneficiary expressly states that it should be "subject to the other provisions of my will, both hereinbefore and hereinafter contained," another item which clearly expresses testator's intention to transfer an estate of less dignity than a fee simple becomes incorporated therein and is controlling.

3. Same—

Where, after a general devise, a later item stipulates that in the event the beneficiary should die without issue her surviving, the property given to her should pass to such of her kindred as are of testator's blood, and that the property should "be divided" and certain of testator's kindred as ascertained in the manner set forth in the will "shall have such part" as should be ascertained under the provisions of the instrument, the later item makes a positive disposition of the property in the event the first beneficiary should die without issue, and, with other portions of the will in this case, clearly expresses testator's intent that the first beneficiary should take less than a fee absolute.

4. Wills § 33f—

Where a beneficiary is granted power to sell and convey any part of the property devised to her, but such power is connected with discretionary authority to exchange, convert, invest and reinvest any part of the property as changing conditions might require, and there is a positive disposition of the property to others in the event the first beneficiary should die without issue her surviving, and not a mere disposition of what might be left, the first beneficiary is not given an unrestricted power of disposition, but only the power to sell or exchange for reinvestment, and she does not take the fee absolute.

5. Wills § 39—

Where, in an action to construe a will, the parties request the court to define the exact measure of plaintiff's title and fix and declare the force

and effect of conditions and qualifications annexed thereto, plaintiff is entitled to such adjudication, and where the trial court fails to so adjudicate the cause will be remanded.

6. Same: Appeal and Error § 1—

The Supreme Court has no original jurisdiction to declare and define an estate conveyed by will, but is limited to a review of the decisions of the Superior Courts of the State.

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

APPEAL by plaintiff from *Harris, J.,* May Term, 1951, WILSON. Error and remanded.

Action under the Declaratory Judgment Statute in which plaintiff prays the court to construe the will of William T. Clark with special reference to the property devised to her and declare and fix the exact quality of her estate therein and her rights, privileges, and responsibilities in respect thereto.

On 9 March 1939, William T. Clark, a resident of Wilson County, died testate, possessed of a large and valuable estate consisting of both real and personal property. In his will, after making certain specific gifts and devises, he devised all the rest and residue of his estate to his wife and daughter, plaintiff herein, in the following language:

"ITEM 15: Subject to the other provisions of my Will, both hereinbefore and hereinafter contained, all the rest and residue of my estate of every kind and character, real, mixed, or personal, wheresoever the same may be situate, after the payment of the above enumerated legacies, and the payment of my debts, charges and costs of administration, taxes of all kinds, I give, devise and bequeath unto my wife, Mary H. Clark and unto our daughter, Romaine Clark Woodard, share and share alike."

Item 16 of the will contains certain provisions regarding the estate devised to plaintiff. The testator, by codicil, revoked this item in his will and substituted in lieu thereof Item 5 of his codicil which is as follows:

"I hereby revoke Item 16 in my Last Will and Testament and do ordain, declare and publish the following in lieu thereof: My daughter, Romaine Clark Woodard has no children at the time of the writing of this Will. I have no desire to hamper or restrict her in the ownership of the property which I am giving her in this my Last Will and Testament, but I do desire in the event she dies without issue surviving, that the property which I have given to her in this my Last Will and Testament shall pass to such of her kindred as are of my blood, as hereinafter named, to-wit:

"If at the death of my daughter, without leaving issue surviving, my nephews, William T. Clark, Jr., and Henry Groves Connor, III, and my

niece Mary Clark Hussey are each and all living, then the number of children which all have, shall be determined and the property passing under this provision shall be divided into as many parts as there are children of my said nephews and niece, and each of my nephews and niece shall take as many parts as he or she has children.

"In the event of the death of my daughter without issue surviving, either of my nephews or my niece shall have no children—(my grandnephews or grandnieces), then the property is to be divided into as many parts as there are children—(my grandnephews and grandnieces), the one or ones having no children being counted as one of my grandnieces or grandnephews, and the nephew or niece which has no children shall each take one part and those having children shall take as many parts as they have children.

"If, upon the happening of such event, either one of my nephews or my niece shall be dead, leaving issue surviving, such issue shall take such part as his, her or their parents would have taken. If, upon the happening of such event, either one of my nephews or my niece shall be dead, without leaving issue, the property is to be divided among the survivor or survivors of their issue, in accordance with the rules herein laid down.

"I realize that it will be very difficult to ascertain at the death of my daughter without issue, what her part of her then estate will be derived from this my Last Will and Testament, as the investments which she will take from me will doubtless be changed from time to time and the identity be lost and converted into other investments. This can only be done upon the basis of ascertaining what proportion of her estate at her death, which she takes under this my Last Will and Testament, will bear to the total of her estate or some such method of calculation as that. My daughter, so long as she lives, is to have full power of disposition, whether the property be real or personal; she may sell the same, conveying an absolute fee simple title thereto; she may convert the same from one species of property to another species of property; she may change the investments. Any conveyance or disposition made by her shall put in the purchaser or vendee an absolute fee simple title. I have heretofore given my daughter large sums of money. This Will is in no wise to affect her disposition of that or of any sum which she derived from any other source, it being my purpose and intent that this provision in my Last Will and Testament shall only apply to the property which she takes hereunder.

"If my daughter, Romaine Clark Woodard shall leave issue surviving, then the provisions which I have herein made in the event of her death without issue, of course shall not apply."

Item 16 of the will and Item 5 of the codicil are in substantially the same language except that in the will the gift over is to his sister, his

nephew, and his niece, whereas in the codicil it is to his two nephews and his niece, and the basis of division is not identical.

The plaintiff alleges and contends that she was devised an absolute, unqualified estate in and to one-half of the residuum and that the provisions of Item 5 of the codicil are void and without effect and for that reason in no wise limit the absolute title devised to her. The defendants, on the other hand, allege and contend that said provisions are valid and vest title to said property in them, effective at the death of plaintiff, provided she dies without issue.

No child has yet been born to plaintiff, but she has adopted two children for life. She is anxious to know the exact quality of the estate devised to her and her rights in respect thereto. She prays that the court adjudge that she is the absolute owner of the property, unaffected by any provision of Item 5 of the codicil, and that, in the event the court shall not so hold, then that it adjudicate, fix, and declare the exact title and interest in the same and the nature and extent of the limitations, qualifications, and restrictions imposed on her title by the provisions of the codicil. The defendants, asserting a defeasible title in remainder, join in plaintiff's latter prayer.

The court below entered judgment, the material parts of which are as follows:

"2. That the devise and bequest to Romaine Clark Woodard as set forth in Item Fifteen (15) of the Will and Item Five (5) of the Codicil are subject to all of the limitations, restrictions, qualifications and conditions therein contained.

"3. That Romaine Clark Woodard holds a defeasible fee, only, in and to the realty and personalty devised and bequeathed to her under said Item Fifteen (15) of the Will and Item Five (5) of the Codicil."

It did not, however, undertake to answer and comply with the second prayer of plaintiff by spelling out the exact nature and extent of the limitations imposed on plaintiff's title by the provisions of the codicil. Plaintiff excepted and appealed.

Brooks, McLendon, Brim & Holderness for plaintiff appellants.

Lucas & Rand, Wade A. Gardner, Carr & Gibbons, and Wiley L. Lane for defendant appellees.

BARNHILL, J. The rules controlling the construction of a will are variously stated in numerous decisions of this Court. They all come to this: The objective of construction is to effectuate the intent of the testator as expressed in his will, for his intent as so expressed is his will. *Seawell v. Seawell,* 233 N.C. 735, and cases cited.

A consideration of the language contained in the Clark will in the light of this rule leads us to the conclusion that the devise to the plaintiff does not vest her with an absolute, unrestricted title to the property she received under the will.

It is true that a devise of real property shall be construed to be a devise in fee simple "unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity," G.S. 31-38, and a devise generally or indefinitely, standing alone, constitutes a devise in fee simple. *Buckner v. Hawkins,* 230 N.C. 99, 52 S.E. 2d 16, and cases cited. But here the devise was made "subject to the other provisions of my Will, both hereinbefore and hereinafter contained." Thus the testator, by reference incorporated all the provisions of Item 5 of the codicil in, and made them a part of, Item 15 and subjected the devise to the limitations thereby imposed.

These provisions of the will clearly express the intention of the testator that plaintiff should take an estate in the residuary devise of less dignity than a fee simple.

The language in the codicil, "I have no desire to hamper or restrict her in the ownership of the property . . . but I do desire in the event she dies without issue surviving, that the property which I have given to her . . . shall pass to such of her kindred as are of my blood, as hereinafter named," is inseparably tied in with the succeeding positive disposition of the property in the event plaintiff shall die without issue surviving. "The property passing under this provision shall be divided"; "shall each take one part"; "the property is to be divided"; "shall have such part" are not words of recommendation, wish or desire. They are imperative and dispositive in nature, effectively devising the property to others in the event plaintiff should die without issue surviving. *Brinn v. Brinn,* 213 N.C. 282, 195 S.E. 793; *Elmore v. Austin,* 232 N.C. 13, 59 S.E. 2d 205.

This conclusion is supported by at least two other provisions in the codicil which clearly indicate the testator intended that plaintiff should take less than a fee absolute. He provides a method of ascertaining, at the death of plaintiff, that portion of her then estate which represents the devise to her. He then, later, says: "I have heretofore given my daughter large sums of money. This Will is in no wise to affect her disposition of that or of any sum which she derived from any other source, it being my purpose and intent that this provision in my Last Will and Testament (Item 5 of the codicil) shall only apply to the property which she takes hereunder." Why provide for the separation of her estate at the time of her death, or stipulate that the conditions contained in the will shall not apply to property he had given her during

his lifetime, save to make clear his intent that the conditions shall, as he unequivocally states, limit the estate devised?

The power of disposition vested in plaintiff is not sufficient to bring this devise within the line of cases relied on by plaintiff. The testator does not confine the limitation over to property "not used by her" or property she does not consume as in *Barco v. Owens,* 212 N.C. 30, 192 S.E. 862; or to property which the plaintiff "dies possessed of," as in *Carroll v. Herring,* 180 N.C. 369, 104 S.E. 892; or "what is left" after a power to "use and spend as he chooses, without any restriction," as in *Roane v. Robinson,* 189 N.C. 628, 127 S.E. 626; or what shall "remain unconsumed and undisposed of" pursuant to a power "to use, consume and dispose of the same absolutely as she shall see fit" as in *Heefner v. Thornton,* 216 N.C. 702, 6 S.E. 2d 506; or "whatever property there is left" pursuant to power "to do as they like with this property" as in *Taylor v. Taylor,* 228 N.C. 275, 45 S.E. 2d 368.

An unrestricted power of disposition in the first taker is implicit in the expressions "what remains," "such portion as may remain undisposed of" and the like.

Here the limitation over is of the *corpus* of the estate devised to plaintiff. Nowhere in the will is she, either expressly or impliedly, vested with authority to consume, give away, or dispose of any part of the principal for her own use or benefit.

Unquestionably she is granted the power to sell and convey any part of the property. However, this power must be construed in the light of the other provisions of the will, particularly of Item 5 of the codicil. It is inseparably connected with and attached to the discretionary authority to exchange, convert, invest, and reinvest any part of the property as changing conditions may require. As said in *Chewning v. Mason,* 158 N.C. 578, 74 S.E. 357: "There is a marked distinction between property and power." When she disposes of any part of the *corpus,* she is to receive a *quid pro quo*—its equivalent in cash or securities—and the property received in exchange becomes a part of the devised estate in lieu of that which is conveyed.

The court below entered judgment that plaintiff is seized of a defeasible fee only. But the term "defeasible fee" denotes a base or qualified fee in realty. It is peculiar to the law of real property, and is not ordinarily used to denote an estate in personalty.

The owner of a base or qualified fee has the right to the present possession, use, and control of the property. *Pendleton v. Williams,* 175 N.C. 248, 95 S.E. 500; *Bunting v. Cobb, ante,* p. 132. He does not, however, have the power to sell and convey any part of the property and vest the purchaser with absolute title. This authority is vested in plaintiff. It

would seem, therefore, that the adjudication does not adequately define the nature and quality of plaintiff's title.

It is true the court further adjudged that plaintiff holds title to the property "subject to all the limitations, restrictions, qualifications and conditions" contained in the will. The plaintiff, however, prays the court to fix and declare the force and effect of these conditions and qualifications and define the exact nature of her title and her rights in and to both the personal property and the real estate bequeathed and devised to her. She is entitled to a specific answer to her prayer. This the court failed to give.

Is the language of the codicil sufficient to create a trust? If not, just what are the limitations upon plaintiff's title? At common law there could be no limitation over of an estate in personal property without the intervention of a trustee. *Brown v. Pratt,* 56 N.C. 202; *Speight v. Speight,* 208 N.C. 132, 179 S.E. 461. Does that rule still prevail in this State? *Ernul v. Ernul,* 191 N.C. 347, 132 S.E. 2; *Baker v. R. R.,* 173 N.C. 365, 92 S.E. 170. If so, is it controlling here? These and perhaps other questions lie at the root of the problem plaintiff's petition presents to the court. As yet they have not been adequately answered. For that reason the cause must be remanded to the end the court may spell out plaintiff's rights and define the limitations attached to her title to the property involved.

Why doesn't this Court perform this judicial function and be done with it? Simply because this Court possesses no original jurisdiction in such matters. Its duty is to review the decisions of the Superior Courts of the State. The court below must exercise its original jurisdiction. If the parties are not then satisfied with the judgment entered they may bring the cause back for review.

Counsel have filed comprehensive briefs. While we have not deemed it necessary at this time to cite all the cases to which our attention has been directed, they have, none the less, been of material assistance to the Court. However, counsel do not undertake to draw any distinction between the real and the personal property. Perhaps there is none. In any event, it is "a hole worth looking into."

Error and remanded.

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

JAMES H. JACKSON, ADMINISTRATOR OF THE ESTATE OF JUDITH LANE JACKSON, DECEASED, v. MOUNTAIN SANITARIUM AND ASHEVILLE AGRICULTURE SCHOOL, A CORPORATION; DR. T. H. JOYNER, AND EDGAR A. HANSON.

(Filed 10 October, 1951.)

1. Hospitals § 8—

In this action for malpractice, nonsuit as to defendant hospital is affirmed on authority of *Wilson v. Hospital*, 232 N.C. 362.

2. Hospitals § 10—

In this action for malpractice, nonsuit as to the anesthetist affirmed on authority of *Byrd v. Hospital*, 202 N.C. 337.

3. Trial § 17—

Error in the exclusion of evidence competent for a restricted purpose is not cured because the evidence was offered generally, it being the duty of the opposing party to request that its admission be restricted if he so desires.

4. Physicians and Surgeons § 14—

A physician or surgeon must (1) possess the degree of learning, skill, and ability which others similarly situated possess; (2) must exert his best judgment in the treatment and care of his patient; (3) and must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case.

5. Physicians and Surgeons § 16—

Where plaintiff, in an action for wrongful death resulting from alleged malpractice, relies upon the failure of defendant surgeon to exercise reasonable care and diligence in the application of his knowledge and skill, plaintiff must not only show that defendant was negligent in this respect but also that such negligence was the proximate cause, or one of the proximate causes, of the death of his intestate.

6. Same—

Ordinarily the standard of care required of a physician or surgeon can be established only by expert testimony, but when such standard is established by expert testimony, nonexpert witnesses may testify in most cases as to a departure therefrom.

7. Same—

Where the evidence is to the effect that a person allergic to ether dies from its use almost immediately, and that in the instant case plaintiff's intestate lived approximately twenty hours after ether was administered, the question of whether intestate died as the result of an abnormal reaction to the ether is eliminated.

8. Same—In proper instances the jury may determine question of proximate cause from facts and circumstances without aid of expert testimony.

Plaintiff introduced medical expert testimony to the effect that it is not good medical practice to administer ether or operate while the patient has

a cold, together with medical expert testimony that it is not good medical practice to leave a patient unseen for five or six hours after an operation, with lay testimony to the effect that defendant-surgeon was advised that his patient, plaintiff's intestate, had a cold but that defendant nevertheless operated, and that he did not visit intestate for some five or six hours after the operation, with further expert testimony that death resulted from cerebral edema due to anoxia. *Held:* The evidence is sufficient for the jury to determine the question of proximate cause as an inference from the facts and circumstances shown in evidence, and therefore an instruction to the effect that if it did not appear from the evidence that intestate would not have died if defendant or some competent physician or a nurse had been with her after the operation, there would be no evidence of proximate cause, is error as requiring medical expert testimony as the sole method of establishing this essential element.

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

APPEAL by plaintiff from *Patton, Special J.,* February Term, 1951, BUNCOMBE.

Civil action to recover damages for the alleged wrongful death of plaintiff's intestate.

Pursuant to arrangements made the preceding day, defendant Joyner performed a tonsillectomy on plaintiff's intestate on the morning of 20 December 1948. She was carried to the operating room about 9:30 a.m. Although the operation was completed about 10:30, she was not taken to her room until about 11:30. At that time she was in a comatose state. She continued in that state until about 5:45 a.m., 21 December, when she died. After reaching her room, she did not move until spasms set in later. She was hot and feverish, her temperature going up to 107. Although the child's mother made repeated efforts through the nurses to get in touch with Dr. Joyner, he did not visit the patient until about 5:15 p.m. He then did nothing for her—just stood and looked at her about five minutes. Glucose was administered about 5:30 under Dr. Joyner's orders. He returned about 7:00 p.m. The patient was then having spasms. He did nothing then, but returned about 9:00 or 9:30. The nurses began to give oxygen about 7:40. Dr. Joyner returned about 12:00 midnight. He left the hospital for home to get some rest about 2:30 a.m. The mother asked him why he did not come and attend to Judith. He said he was so busy he just did not have the time to attend to her.

On 19 December the mother told the doctor Judith had a cold and her nose was running. He said he would have to operate the next day because he was leaving town, and it did not matter that she had a cold. She told him she wanted her doctor to administer the anesthetic. He said no: they had a man—Edgar Hanson—to do the work and he would use him.

Hanson administered the anesthetic and later went to the patient's room about 3:00 p.m. He took Judith and "pitched her up."

It is not good medical practice to leave a patient unseen for a period of five or six hours after an operation. The doctor should see that the patient is in good condition. It is bad medical practice to administer ether and operate while the patient has a cold. He is apt to die a typical anesthesia death. It is very hazardous because it is very likely to cause the infection to spread into the lungs, causing either pneumonia or a collapse of the lungs.

After death the lungs of plaintiff's intestate revealed rather numerous areas where the air sacs were filled with pus cells. Pus also appeared in the bronchial tubes. There was evidence of limited pneumonia and also edema.

A person who is allergic to ether dies from its use almost immediately—sometimes even before an incision can be made.

Post-operative hyperthermia follows convulsions due mostly to ether. When a patient remains in a comatose state for more than one and one-half or two hours after ether is administered, there is cause for alarm. The physician should immediately begin the use of oxygen, examine the patient for shock, and take other precautions, keeping in constant touch with the patient.

Plaintiff's intestate died from cerebral edema due to anoxia, that is, lack of oxygen. This was in all probability due to anesthesia.

These facts in substance constitute outstanding features of the evidence offered by the plaintiff. The evidence offered by defendant was in many respects in sharp conflict. However, the questions raised on this appeal require a consideration of the evidence in the light most favorable to plaintiff.

The court entered judgment as in case of nonsuit as to all the defendants except Dr. Joyner. As to him, appropriate issues were submitted to the jury. They, for their verdict, found that the death of plaintiff's intestate was not caused by the negligence of said defendant. From judgment on the verdict plaintiff appealed.

W. W. Candler, Don C. Young, and Cecil C. Jackson for plaintiff appellant.

Smathers & Meekins for defendants Mountain Sanitarium and Asheville Agriculture School and Edgar A. Hanson.

Harkins, Van Winkle, Walton & Buck for defendant Dr. T. H. Joyner.

BARNHILL, J. The record fails to disclose any evidence of sufficient probative force to require the submission of issues as against the corporate defendant. Hence the judgment of nonsuit as to it must be

affirmed. *Wilson v. Hospital,* 232 N.C. 362, 61 S.E. 2d 102, and cases cited. See Anno. 60 A.L.R. 147.

The judgment of nonsuit as to the defendant Hanson is sustained on authority of *Byrd v. Hospital,* 202 N.C. 337, 162 S.E. 738. What is there said is controlling here.

However, different questions are presented on plaintiff's appeal from the judgment on the verdict as to the defendant Joyner.

Dr. Peasley performed an autopsy on the body of plaintiff's intestate. He made a detailed written report of his findings. He identified this report. Thereafter, plaintiff offered it in evidence. Objection thereto was sustained. In this there was error. This error is not cured, as contended by the defendant, by the fact the plaintiff offered the report generally and not specifically for the purpose of corroboration. If the defendants desired the evidence to be so restricted, it was their duty to request the court to so instruct the jury.

In the course of its charge, the court below instructed the jury as follows:

"The Court instructs you, gentlemen of the jury, that if it does not appear that if the defendant or another physician or a competent nurse had been with the deceased, she would not have died or that her death was the result of her condition prior to the operation which could have been discovered by the defendant by any examination which it was his duty to make, then there would be lack of proximate cause."

This must be held for error.

In former decisions of this Court, we have fully discussed the requisite standard of learning and skill and the duty of a physician or surgeon who undertakes to render professional services to a patient. *Nash v. Royster,* 189 N.C. 408, 127 S.E. 356; *Groce v. Myers,* 224 N.C. 165, 29 S.E. 2d 553; *Wilson v. Hospital, supra.* Briefly stated, it comes to this: (1) He must possess the degree of professional learning, skill, and ability which others similarly situated ordinarily possess; (2) he must exert his best judgment in the treatment and care of his patient; and (3) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case.

There is no evidence in the record tending to show that Dr. Joyner did not possess the requisite knowledge and skill. Plaintiff does not seriously contend to the contrary. His case is made to rest upon the allegation that said defendant, in treating plaintiff's intestate, failed to exercise reasonable care and diligence in the application of such knowledge and skill, and the evidence in support thereof. To make out his case he must not only prove that the defendant was negligent in this respect, but also that such negligence was the proximate cause, or one of the proximate causes, of the death of his intestate.

The court below, in the quoted excerpt from the charge, instructed the jury that there is a failure of proof of proximate cause unless it is made to appear (1) that if the defendant or another physician or a competent nurse had been with the deceased she would not have died, or (2) that her death was the result of her condition prior to the operation which could have been discovered by the defendant by an examination which it was his duty to make. Thus the court laid down the rule that in cases of this kind proximate cause can be established only through the medium of expert testimony and, in effect, eliminated "the greater weight of the evidence" rule as to the burden of proof which applies in civil cases. It must be made to appear by expert testimony that the defendant or another physician or a competent nurse, if present, would have saved the life of this child, or else there was no actionable negligence. There could be no commerce between the facts in evidence and the rationalization of the jury unless such facts were established by expert testimony. The jury must have so understood.

The courts generally recognize that the science of medicine is an experimental science and they have been extremely careful to protect physicians and surgeons against verdicts resting on non-expert testimony in those cases where non-expert testimony could constitute nothing more than mere conjecture or surmise and in which only an expert could give a competent opinion or draw a reliable inference. Yet this Court has not and could not go so far as to say that in no event may a physician or surgeon be held liable for the results of his negligence unless the causal connection between the negligence and the injury or death be established by the testimony of a brother member of defendant's profession. Indeed, we doubt that a physician or surgeon could be found who would be willing to testify unequivocally, in any case, that if he had been present he could have prevented the injury or death. In any event, such a rule would erect around the medical profession a protective wall which would set it apart, freed of the legal risks and responsibilities imposed on all others.

It is true it has been said that no verdict affirming malpractice can be rendered in any case without the support of medical opinion. If this doctrine is to be interpreted to mean that in no case can the failure of a physician or surgeon to exercise ordinary care in the treatment of his patient, or proximate cause, be established except by the testimony of expert witnesses, then it has been expressly rejected in this jurisdiction. *Groce v. Myers, supra; Wilson v. Hospital, supra; Covington v. James,* 214 N.C. 71, 197 S.E. 701; *Gray v. Weinstein,* 227 N.C. 463, 42 S.E. 2d 616.

Rightly interpreted and applied, the doctrine is sound. Opinion evidence must be founded on expert knowledge. Usually, what is the

standard of care required of a physician or surgeon is one concerning highly specialized knowledge with respect to which a layman can have no reliable information. As to this, both the court and jury must be dependent on expert testimony. Ordinarily there can be no other guide. For that reason, in many instances proximate cause can be established only through the medium of expert testimony. There are others, however, where non-expert jurors of ordinary intelligence may draw their own inferences from the facts and circumstances shown in evidence. *Groce v. Myers, supra; Buckner v. Wheeldon,* 225 N.C. 62, 33 S.E. 2d 480; *Mitchell v. Saunders,* 219 N.C. 178, 13 S.E. 2d 242; *Olinger v. Camp,* 215 N.C. 340, 1 S.E. 2d 870; *Pendergraft v. Royster,* 203 N.C. 384, 166 S.E. 285, 41 A.J. 243; Anno. 69 A.L.R. 1154; 129 A.L.R. 116.

When the standard of care, that is, what is in accord with proper medical practice, is once established, departure therefrom may, in most cases, be shown by non-expert witnesses.

Here the plaintiff, in the type of evidence offered, has met the test. What the approved practice and the approved treatment are under the circumstances disclosed by plaintiff's evidence, as well as the probable cause of death, have been established, at least *prima facie,* by expert testimony. Failure of the physician to follow the approved practice and administer the approved treatment with ordinary care and diligence is made to appear by lay testimony.

Plaintiff's expert testimony tends to show that it is bad practice to administer ether to a person who is suffering from a common cold. The intestate's mother informed the surgeon that the child then had a cold. It was not essential that plaintiff prove that the defendant failed to make an examination to discover what he already knew.

Due to allergy and the varying conditions of the human system, the reaction of a particular person to a specific drug is not always predictable. *Lippard v. Johnson,* 215 N.C. 384, 1 S.E. 2d 889. Ether, when administered in a careful manner and in acceptable dosage, may cause the death of the patient. In such cases, however, the patient will die almost instantly. Plaintiff's intestate lived approximately twenty hours. Thus, death from abnormal reaction in the nature of an allergy is eliminated.

It follows that plaintiff's evidence, standing alone, is fully sufficient to support the inference of actionable negligence. The weight and credibility of the defendant's evidence are jury questions. Whether it is sufficient to rebut the evidence offered by plaintiff is for the jury to decide. Hence, what inferences and deductions should be drawn from the testimony, when considered as a whole, was for the jury to decide, under proper instructions from the court.

The defendants on their appeal here cite and rely on *Smith v. Wharton,* 199 N.C. 246, 154 S.E. 12, and it is apparent the court below, in giving the quoted instruction, relied on what was there said. However, that decision does not warrant the interpretation accorded it by the defendants. It is true that *Connor, J.*, speaking for the Court in that case, said: "It does not appear that if defendant, another physician or a competent nurse had been with her, she would not have died, nor does it appear that her death was the result of her condition prior to the operation which could have been discovered by any examination which it was the duty of the defendant to make." But that is not laid down as an exclusive method of proof. Indeed, the opinion specifically states that the question whether plaintiff must resort to expert testimony to establish want of due care was not presented or decided. In so doing, the court used this language:

"We do not decide the question discussed in the briefs filed in this Court, as to whether in the absence of testimony of expert witnesses tending to show that defendant, a physician and surgeon, failed to exercise the care ordinarily required of men of his profession, with respect to patients under circumstances similar to those in the instant case, plaintiff was not entitled to recover in this action, for that there was no evidence from which the jury could find that he was negligent . . . We do not deem it wise to discuss or to decide the question until it shall be necessary for us to do so."

As to the corporate defendant and defendant Hanson: Affirmed.

As to defendant Joyner: New trial.

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

IN THE MATTER OF THE WILL OF HANNAH WILLIAMS, SR.

(Filed 10 October, 1951.)

Wills § 6—Signature of testator may appear in any part of the instrument.

A will may be signed by testator, or by another person in his presence and by his direction, at any place in the instrument, since the statute does not require that the signature be "subscribed," G.S. 31-3, and therefore testimony to the effect that the instrument was written at the direction of testatrix and in her presence and in accordance with her wishes, and that her name appeared thereon in the beginning in the words "will of Hannah Williams, Sr., and that after it was written it was read to her and she stated that it was correct, *is held* sufficient to support a finding by the jury that the paper writing was signed in the name of testatrix by the draftsman in her presence and at her request.

APPEAL by caveators Essie Allen Robinson and Junius L. Williams, from *Burney, J.*, at April Term, 1951, of NORTHAMPTON.

Proceeding to probate in solemn form will of Hannah Williams, Sr., on issues raised by caveat filed by caveators above named.

The propounders, in their petition to the court, allege, among other things, substantially the following:

1. That Hannah Williams, Sr., late of Northampton County, North Carolina, died testate 2 March, 1922,—being at the time the owner of the real estate hereinafter mentioned.

2. That the petitioners propound for probate in solemn form a paper writing, bearing date 17 May, 1920, purporting to be the last will and testament of Hannah Williams, Sr., the original of which is on file in office of Clerk of Superior Court of Northampton County, North Carolina, and a copy of which, marked Exhibit A, is as follows:

EXHIBIT "A"—HANNAH WILLIAMS' WILL.

"Garysburg, N. C.
May 17th, 1920

"Will of Hannah Williams, Sr.
Garysburg, North Carolina
Northampton County

"I give the following property to the parties, or persons named below.

"To A. W. Williams, I give (2) two acres situated on the North side joining Mr. G. E. Ransom.

"To W. M. Williams, I give (2) two acres situated on the North side joining G. E. Ransom, and the (2) acres given A. W. Williams.

"To Essie Allen, I give (1) acre, situated on the North side joining G. E. Ransom, and W. M. Williams.

"To Junius L. Williams, I give (1) one acre situated on the North joining G. E. Ransom, and Essie Allen.

"To W. W. Williams, I give the house and all of the other land.

"To Mary Mason, I give ($5.00) Five Dollars in money.

"To Esta Williams, I give ($5.00) Five Dollars in money.

"To Earnest Williams, I give ($5.00) Five Dollars in money.

"I also appoint or designate W. W. Williams as Administrator of my estate without bond.

"We certify that Hannah Williams, Sr., was in her sound mind.

"Witness this May 17th, 1920.

(s) L. N. NEAL (SEALED)
(s) M. P. SWEATT (SEALED)
(s) PETER SWEATT (SEALED)."

3. That theretofore said paper writing has been duly offered for and admitted to probate in common form in Superior Court of Northampton County, North Carolina, as the last will and testament of Hannah Williams, Sr., and W. W. Williams then qualified as executor thereof; and now petitioners desire and move that the probate thereof be in solemn form to the end that there may be no future controversy.

4. That petitioners are now the owners in fee simple and equitably entitled to 30/32 undivided interest in and to all the real estate devised in said paper writing, having acquired title thereto in following manner:

(a) On 21 January, 1929, Walter W. Williams, the sole residuary devisee in said paper writing, and his wife, executed a deed of trust, duly registered, to John A. Suiter, Trustee, in which they conveyed, with general warranty, all the real estate devised in said paper writing, to secure the payment of a certain indebtedness to William M. Person, with power of foreclosure in the event of default in payment thereof at maturity.

(b) Default occurred in the payment of the indebtedness, and John A. Suiter, Trustee, having been duly requested to do so, and in the exercise of the power of foreclosure, sold all the land conveyed by said deed of trust, and pursuant thereto on 8 March, 1932, executed a deed, which is duly registered, to William M. Person, as the last and highest bidder.

(c) On 6 April, 1949, William M. Person died intestate, being at the time the owner in fee and equitably entitled to and in possession of all the real estate so conveyed to him by John A. Suiter, Trustee. And petitioners, and two others named, are all the heirs at law of William M. Person, deceased, who, prior to filing the petition for probate of said paper writing in solemn form, duly requested W. W. Williams, as executor, to make application, within ten days after date of service thereof, to Superior Court of Northampton County for the probate in solemn form of said paper writing as the last will and testament of Hannah Williams, Sr., and duly notified him that upon his failure so to do, they, as persons interested in the estate in the manner as above set forth, would apply therefor to the Superior Court.

The caveators, in their caveat, set forth, among other things:

That the paper writing, Exhibit A, propounded for probate in solemn form is not the last will and testament of Hannah Williams, Sr., for that: "(a) As these caveators are informed and believe, and upon such information and belief aver, that the paper writing as aforesaid was not signed by the said Hannah Williams, Sr., nor was it signed by anyone for her or at her direction.

"(b) At the time of the alleged writing of said paper, purporting to be her last will and testament, the said Hannah Williams, Sr., was not competent to make a last will and testament.

"(c) That such paper writing purporting to be a will was obtained by undue influence and fraud."

The cause was duly transferred to Superior Court of Northampton County for trial, and was tried at April Term, 1951.

Upon the trial: Rev. L. N. Neal, "one of the witnesses to the will," being duly sworn, testified: "I am 84 years old . . . I knew Hannah Williams, Sr. . . . Hannah Williams, Sr. could not read or write." "Q. I hand you a paper writing bearing date of May 17, 1920, which purports to be the will of Hannah Williams, Sr., which has been identified by the Court Reporter as 'A.' Please examine this paper writing and state in whose handwriting it is written." Caveators object—overruled—exception. "A. I wrote this will. Mrs. Williams sent for me and Rev. Sweatt to come down to her place. She requested me to write this paper writing for her. Hannah Williams told me the purpose for which she wanted this paper writing written." Caveators object—overruled—exception. "Hannah Williams told me that she wanted me to write her will. She told me she owned the homeplace upon which she lived. She told me what she wanted to do with her property at the time I wrote this paper writing. I wrote this paper in accordance with what Hannah Williams, Sr., told me as to the disposition she desired to make of her property after her death. I wrote this paper writing by her authority and direction and in her presence . . . in her room in the house where she lived which was on her homeplace. Rev. M. P. Sweatt and another young man by the name of Sweatt were present when the paper writing was written and signed. I was present, Hannah Williams, Sr. was present and they were all present. After the paper was written, I read it over to her and asked her if it was correct. She answered, 'Yes.' She acknowledged it in the presence of me and the other witnesses. I signed the name of Hannah Williams, Sr. at the head of this paper writing in her presence and at her request. I did so in the presence of the other witnesses. M. P. Sweatt, Peter Sweatt and myself signed and subscribed the paper writing as witnesses in Hannah Williams' presence, at her request and in the presence of each other. Hannah Williams, Sr. was well and hearty, up and about, walking all over the house . . . In my opinion Hannah Williams Sr. had mind enough at the time this paper was executed to know the property she owned, who her kin people were and the claims which they made upon her and the effect of making a will. I did not see or overhear anyone coerce or compel Hannah Williams, Sr. to make this will, and she acted freely and voluntarily."

Then on cross-examination, the witness was asked these questions, to which he answered as shown:

"Q. Did you see in this paper writing where this woman signed it or not?

"A. No, I signed it for her at her request.

"Q. Is there anywhere on this paper where you signed at her request?

"A. I don't know. I think so."

And continuing in part, "At the top of the paper shows what she asked me to do." "Q. You have in this paper 'Will of Hannah Williams, Garysburg, N. C.' That is the only place you have it in the will?" "A. That is right. I put it in there to identify who she was and where she lived. That is why I put it there. I don't remember exactly the words she said to me on this occasion . . ."

Peter Sweatt, "one of the witnesses to the will," testified in pertinent part: "I knew Hannah Williams and she lived about three-quarters of a mile from me and I would see her and talk to her practically every week . . . I know W. W. Williams. He is son of Hannah Williams. He stayed with and took care of his mother as long as she lived. My name appears as a subscribing witness to the paper writing dated May 17, 1920, which purports to be the will of Hannah Williams, Sr., and is identified as 'A.' I saw it written by L. N. Neal. L. N. Neal wrote the paper at the request of Hannah Williams, Sr."

"Q. Did you hear Hannah Williams, Sr. say the purpose for which she wanted this paper writing?" Caveators object—overruled—exception.

"A. I do not remember for what purpose she said she wanted it written. Hannah Williams, Sr. told me at the time . . . that she owned the homeplace upon which she lived."

"Q. Was this paper writing written in accordance with what Hannah Williams, Sr. said she wanted to do with her property after she died?" Caveators object—overruled—exception.

"A. Yes. This paper was written by her authority and at her direction, in her room in her house. M. P. Sweatt, Rev. Neal, myself and Hannah Williams, Sr. were present when this paper was written. This paper was read to Hannah Williams, Sr. She said that was what she wanted to do with her property.

"L. N. Neal signed the name of Hannah Williams, Sr. at the top of this will in her presence, at her request and by her direction. L. N. Neal, M. P. Sweatt and I signed and subscribed this paper writing as witnesses in her presence and at her request and in the presence of each other. M. P. Sweatt was my father. He is now dead. I know his signature and that is his genuine signature to the paper writing as one of the subscribing witnesses.

"Hannah Williams was getting along and around all right and I think she was normal. In my opinion she had mind enough at the time this paper was written to know who her kin people were and their claims upon her and what property she owned and the effect of making a will. I never saw her when she did not have such mental capacity. I never

saw anyone do or say anything to coerce or compel Hannah Williams, Sr., to make this will."

The propounders offered testimony of other witnesses tending to show that, at all times prior to her death, Hannah Williams, Sr., had mental capacity to know what property she had, who her kinspeople were, their claims upon her, and the effect of making a will.

Propounders then offered in evidence the paper writing bearing date 17 May, 1920, which purports to be the will of Hannah Williams, Sr., and identified as "A," hereinabove copied.

Caveators object—overruled—exception.

Propounders further offered evidence tending to show the following:

I. That Hannah Williams, Sr., had four children—

(1) A. W. Williams, who predeceased her, leaving no children.

(2) W. M. Williams, who predeceased her, leaving no children.

(3) Elizabeth Williams Allen who predeceased her, leaving a daughter, Essie Allen Robinson; and

(4) W. W. Williams, who is living, and then in the courthouse.

II. That (1) Junius L. Williams is son of Junius L. Williams, Sr., a brother of Hannah Williams, Sr.

(2) Esther Williams, sister of Junius L. Williams, and niece of Hannah Williams, Sr., is dead.

(3) Mary Mason, sister of Esther Williams and Junius L. Williams, and niece of Hannah Williams, Sr., is dead.

(4) Ernest Williams, brother of Esther Williams, Mary Mason and Junius L. Williams, is nephew of Hannah Williams, Sr.

III. That Hannah Williams, Sr., owned her homeplace at time of her death.

And propounders also offered in evidence record of deed of trust from Walter W. Williams and wife to John A. Suiter, Trustee, and of deed from John A. Suiter, Trustee, to William M. Person, and testimony tending to show the facts pertaining to their interest in the estate as set forth in their petition as hereinabove stated, and to their request that W. W. Williams, as executor, apply to the court for probate of said paper writing in solemn form. Caveators object—overruled—exception.

Caveators offered no evidence.

At the close of evidence propounders tendered these issues, which were submitted to and answered by the jury as shown:

"1. Are the propounders persons interested in the estate of Hannah Williams, Sr.?

"Answer: Yes.

"2. If so, did the propounders notify and request W. M. Williams, Executor, to offer said paper writing for probate in solemn form as the

last will and testament of Hannah Williams, Sr. as alleged in the petition?

"Answer: Yes.

"3. If so, did W. W. Williams, Executor, fail to offer said paper writing for probate in solemn form as the last will and testament of Hannah Williams, Sr.?

"Answer: Yes.

"4. If so, was the paper writing dated May 17, 1920 and offered for probate as the last will and testament of Hannah Williams, Sr., deceased, signed and executed according to law?

"Answer: Yes.

"5. If so, did the said Hannah Williams, Sr. have mental capacity to make a will on the 17th day of May 1920?

"Answer: Yes.

"6. If so, was the execution of said paper writing procured by undue influence or fraud?

"Answer: No.

"7. Is the paper writing dated May 17, 1920 offered for probate by Elizabeth Lane and others, and every part thereof, the last will and testament of Hannah Williams, Sr.?

"Answer: Yes."

Caveators objected to submission of the first, second and third issues. Objection overruled—exception. They thereupon "requested the court to answer the fourth issue No, which the court refused to do and to which the caveators excepted."

Judgment was signed by the court in accordance with the verdict, to which caveators excepted, and appealed to Supreme Court and assign error.

E. R. Tyler and Gay & Midyette for propounders, appellees.

Charles W. Williamson, Floyd T. Hall, and P. H. Bell for caveators, appellants.

WINBORNE, J. The pivotal question here presented is this: In the light of the testimony of the two subscribing witnesses, who testified in the trial below, is the paper writing propounded for probate "signed" by Hannah Williams, Sr., within the purview of G.S. 31-3 which prescribes the requirements for formal execution of a written will with witnesses? The answer is "Yes."

In this State it is provided by statute G.S. 31-3 that "no last will or testament shall be good or sufficient, in law, to convey or give any estate, real or personal, unless such last will shall have been written in the testator's lifetime, and signed by him, or by some other person in his presence

and by his direction, and subscribed in his presence by two witnesses at least, no one of whom shall be interested in the devise or bequest of the estate . . ."

This statute is similar in purport to the statute G.S. 22-2 pertaining to contracts requiring writing, generally known as the statute of frauds, which declares that "all contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."

That the name of the testator may be signed to the paper writing by some other person in his presence and by his direction is expressly authorized by the statute G.S. 31-3. Such is the case also in instances to which the provisions of G.S. 22-2 apply. The principle is recognized in *Devereux v. McMahon,* 108 N.C. 134, 12 S.E. 902; *In re Johnson,* 182 N.C. 522, 109 S.E. 373; *S. v. Abernethy,* 190 N.C. 768, 130 S.E. 619.

And with respect to the signing by the testator, or by "the party to be charged," as the case may be, this Court in interpreting the statutes, has held that when a signature is essential to the validity of the instrument, it is not necessary that the signature appear at the end unless the statute uses the word "subscribe." *Devereux v. McMahon, supra; Hall v. Misenheimer,* 137 N.C. 183, 49 S.E. 104; *Richards v. Lumber Co.,* 158 N.C. 54, 73 S.E. 485; *Boger v. Lumber Co.,* 165 N.C. 557, 81 S.E. 784; *Burriss v. Starr,* 165 N.C. 657, 81 S.E. 929; *Peace v. Edwards,* 170 N.C. 64, 86 S.E. 807; *Alexander v. Johnston,* 171 N.C. 468, 88 S.E. 785; *S. v. Abernethy, supra; Corp. Comm. v. Wilkinson,* 201 N.C. 344, 160 S.E. 292; *Paul v. Davenport,* 217 N.C. 154, 7 S.E. 2d 352; *In re Will of Goodman,* 229 N.C. 444, 50 S.E. 2d 34.

In the *Richards case, supra, Clark, C. J.,* writing for the Court, declared that "this has always been ruled in this State in regard to wills, as to which the signature may appear anywhere." This declaration is recognized in *Boger v. Lumber Co., supra; Burriss v. Starr, supra; Peace v. Edwards, supra; Alexander v. Johnston, supra.*

And in *Boger v. Lumber Co., supra,* it is said that "the authorities make a distinction between statutes requiring instruments to be signed and those requiring them to be subscribed, holding with practical unanimity, in reference to the first class, that it is not necessary for the name to appear at any particular part of the instrument, if written with the intent to become bound; and as to the second class, that the name must be at the end of the instrument."

In the light of these principles, the testimony of the subscribing witnesses, in the present case, is sufficient to support a finding by the jury that the paper writing in question was signed in the name of Hannah Williams, Sr., by Rev. L. N. Neal in her presence and at her request,

within the meaning of the statute G.S. 31-3. The words "will of" preceding the name of Hannah Williams, Sr., given their ordinary meaning, tend to identify the paper writing as her will, and to indicate that she knew it to be her will.

All other questions stated in the brief of appellants have been given due consideration, and each is found to be without merit.

Hence in the judgment below we find

No error.

STATE v. L. C. PARKER.

(Filed 10 October, 1951.)

1. Criminal Law § 44—

A motion for continuance is addressed to the sound discretion of the trial court and its ruling thereon is not reviewable when no abuse of discretion appears upon the face of the record.

2. Criminal Law § 12f—

In those instances in which the Recorder's Court and the Superior Court are given concurrent jurisdiction, that court which first takes cognizance of the offense acquires the case, and when defendant enters a plea in abatement in that court which later issues process for the same offense, such plea should be sustained. G.S. 7-64; Chap. 269, sec. 6, Public-Local Laws 1911.

3. Conspiracy § 3—

A criminal conspiracy is an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful manner, the crime being the illegal agreement and not its execution.

4. Criminal Law § 52a (3)—

When the State relies upon circumstantial evidence, the circumstances must be such as to produce in the minds of the jurors a moral certainty of defendant's guilt, and exclude any other reasonable hypothesis.

5. Conspiracy § 6—

While a criminal conspiracy may be shown by circumstantial evidence, evidence tending to show merely that defendant was guilty of a criminal offense, but leaves in the realm of conjecture the question of his unlawful agreement with others to commit the offense, nonsuit on the charge of conspiracy should be granted.

6. Intoxicating Liquor § 4a—

Possession of any quantity of nontax-paid liquor is unlawful anywhere in this State without exception. G.S. 18-48.

7. Intoxicating Liquor § 9b—

Illegal possession of intoxicating liquor is *prima facie* evidence that its possession is for the purpose of sale. G.S. 18-11.

8. Intoxicating Liquor § 4b—

Possession of intoxicating liquor in violation of statute may be either actual or constructive.

9. Intoxicating Liquor § 9d—

Evidence tending to show that defendant had ninety-six gallons of intoxicating liquor in the basement of the tenant house on defendant's farm, and that defendant alone had the key to the door to the basement, is sufficient to support constructive possession.

10. Criminal Law § 83—

Where separate judgment is entered on conviction of each count in the bill of indictment, and conviction on one or more of the counts cannot be sustained, the cause will be remanded to the trial court for proper judgment on the remaining counts.

APPEAL by defendant from *Hatch, Special Judge,* at Regular February Term, 1951, of JOHNSTON.

Criminal prosecutions upon two bills of indictment, each containing two counts, returned by grand jury at February Term, 1951, of Superior Court of Johnston County, charging that on 20 January, 1951, defendant unlawfully and willfully (1) did combine, conspire and confederate with one Elmo Allen to unlawfully possess intoxicating liquor upon which taxes due the United States Government and the State of North Carolina had not been paid; (2) have and possess ninety-six gallons of intoxicating liquor upon which taxes due the State of North Carolina and United States Government had not been paid; (3) did have and possess alcoholic liquors upon which taxes due the United States Government and the State of North Carolina had not been paid, for the purpose of sale; and (4) at divers other times prior thereto, transport upon a motor vehicle intoxicating liquors upon which taxes due the State of North Carolina and United States Government had not been paid, to all of which defendant pleaded not guilty.

However, upon the call of the case in Superior Court on Friday, 16 February, 1951, and before pleading, defendant moved for continuance for the term upon two grounds: (1) The bill of indictment having been returned on Wednesday, 14 February, 1951, and defendant having been arrested around 3 p.m., same day, and kept in custody until court adjourned, he had not had sufficient time to prepare his defense; and there were two material witnesses, naming them, who were absent, and for whom subpoena had been issued and returned by the officer showing that they were "not to be found in Johnston County"; and (2) the solicitor, in opposing defendant's motion for continuance, had made prejudicial statement in the presence of prospective jurors. The motions were denied—and defendant excepted.

Defendant then moved to quash the bill of indictment, in so far as the charge preferred against him in Recorder's Court of Johnston County on 20 January, 1951, as shown by warrant then issued out of said court, covers the charges in Superior Court. In support thereof defendant offered as evidence the two bills of indictments on which the prosecution rests, as hereinabove described, and the warrants so issued by the Recorder's Court. The charge in the warrant is possession on 20 January, 1951, of "A complete distillery for the manufacture of whiskey," and of "96 gallons of whiskey on which the tax imposed by the State of North Carolina and the tax imposed by the United States had not been paid." In addition thereto, defendant proposed to show by the sheriff the identity of the charge in the warrant and of like charge in the bills of indictment. Objection by the State was sustained.

In this connection the record shows that warrant for defendant was issued out of Recorder's Court on 20 January, 1951, upon affidavit of one of the officers taking part in the seizure of the intoxicating liquor here involved, and on 21 January, 1951, defendant was arrested by same officer under the warrant and placed in jail and kept there until he gave bond. Later he moved in the Recorder's Court for a jury trial. And it is admitted that, therefore, the charges contained in the warrant have not been tried or disposed of.

Motion to quash was denied and defendant excepted.

Upon the trial in Superior Court the State offered evidence tending to show substantially this narrative: Defendant, L. C. Parker, lives in Raleigh, but has a farm about 20 miles away in Cleveland Township, Johnston County, on which he has a tenant house in which Elmo Allen lives. The basement to this house is of cement blocks.

On 20 January last, about 10:30 o'clock a.m., officers of Johnston County, and a patrolman, went to said place of defendant. Elmo Allen and his wife were there but defendant was not. The officers walked around the house with Elmo Allen, and seeing black builder's paper over the basement windows, one of the officers asked what was in the basement, and "he said he didn't know, that he was not permitted in that part of the building and didn't have a key." As a result of the conversation, a search warrant was obtained. Allen still contended that he did not have a key.

In the basement the officers found sixteen cases of liquor—whiskey, in half-gallon jars—twelve jars to the case, making a total of 96 gallons. The cases were stacked against the windows,—four cases high. There was nothing on the jars to indicate that the tax had been paid. In the basement there was "some hog-feed" and "cement."

Elmo Allen talked with the officers,—and was arrested and taken to jail.

Defendant was arrested that night in Smithfield when he came down with a bondsman for Elmo Allen. He was put in jail also. He told the sheriff that one of the keys he had fitted the lock on the basement. The sheriff went that night to the home of Elmo Allen to see if the key fitted. He saw about 75 to 100 bags of cement in the basement. The next day defendant told the sheriff that "he was the only one who had a key to the basement." He made no statement to the officers about the whiskey.

Also upon the trial Elmo Allen, as witness for the State, testified in pertinent part: "I was at home the night . . . the whiskey was found in the basement of the house I lived in. The whiskey was Mr. Leon's . . . Hoover and Earl Parker made the whiskey out of sugar. They brought it there on Friday night on a pick-up truck at about midnight. Leon Parker was there . . . There is no door leading from upstairs to the basement,—the door being on the ground level, and I am not allowed in there unless he is there to open it. Mr. Leon had the key to the basement. I never had a key and had no right to go in . . . For the last two years whiskey belonging to L. C. Parker has been placed in the basement. I have helped put whiskey in that basement on several occasions . . . I would say 10 or 12 times—that whiskey belonged to L. C. Parker."

Defendant, on the other hand, testifying as a witness for himself, denied in all material aspects the testimony offered by the State, particularly that of the witness Elmo Allen, and denied that he owned, or had knowledge of the ninety-six gallons of intoxicating liquor found by the officers in the basement of his tenant's house. He testified that Elmo Allen used the basement for various purposes, in the operation of the farm, and had a key to the door through which the basement was entered; that he, the defendant, stored cement in the basement,—cement he used in his construction work; and that he used the key he had, in going in and out of the basement to put cement in, and to take it out.

Defendant also offered testimony of several witnesses tending to support his testimony.

The case was submitted to the jury.

Verdict: Guilty on all but one count. Not guilty as to transporting.

Judgment: That defendant be confined in the common jail of Johnston County to be assigned to work the roads under the supervision of the State Highway and Public Works Commission as follows: First Count: For a period of twelve months; Second Count: For a period of twelve months, to begin at the expiration of sentence in the first count, suspended for a period of five years, and defendant placed on probation five years upon condition that he pay a fine of $2,500.00 and costs; and Third Count: For a period of twelve months, to run concurrently with the first count.

Defendant appeals therefrom to Supreme Court and assigns error.

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

E. R. Temple and J. R. Barefoot for defendant, appellant.

WINBORNE, J. Decision on the assignments of error brought forward in the brief of appellant requires express consideration of these questions:

1. Defendant's challenge to the ruling of the trial judge in denying his motion for a continuance at the February Term, 1951, on the grounds stated, is not well taken.

Our decisions are to the effect that this is a matter addressed to the discretion of the trial judge, and, in the absence of manifest abuse, his ruling thereon is not reviewable. And on the facts presented on this record, we are of opinion that no such abuse has been made to appear. See, among many others, these cases: *S. v. Riley,* 188 N.C. 72, 123 S.E. 303; *S. v. Lea,* 203 N.C. 13, 164 S.E. 737; *S. v. Banks,* 204 N.C. 233, 167 S.E. 851; *S. v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520.

2. The ruling of the court, on defendant's plea in abatement, erroneously designated "Motion to quash the bill of indictment" (*S. v. Shemwell,* 180 N.C. 718, 104 S.E. 885), as to the count (the second) charging unlawful possession of ninety-six gallons of intoxicating liquor on which taxes had not been paid, is questioned, and properly so, we hold.

The ground on which the plea is based is that the offense charged in this count is one over which the Recorder's Court of Johnston County had concurrent jurisdiction, and over which it had exercised jurisdiction prior to the finding of the bill of indictment in Superior Court.

In this connection, attention is directed to the Act of General Assembly of North Carolina, Public-Local Laws 1911, Chapter 269, by which the Recorder's Court of Johnston County was created. Section 6 of this act, in pertinent part, reads as follows: "Said court shall have all jurisdiction and power in all criminal cases arising in said county which are now or may hereafter be given to justices of the peace, and in addition to the jurisdiction conferred by this section, shall have concurrent original jurisdiction of all other criminal offenses committed in said county below the grade of felony, as now defined by law, and the same are hereby declared to be petty misdemeanors . . ."

Such being the case, the provisions of G.S. 7-64 are inapplicable in that this section of the General Statutes divests inferior courts of exclusive jurisdiction of certain criminal actions and declares that their jurisdiction of such actions shall be concurrent with Superior Court, and exercised by the court first taking cognizance thereof. *S. v. Reavis,* 228 N.C. 18, 44 S.E. 2d 354.

However, decisions of this Court are uniform in holding that where two courts have concurrent jurisdiction of a case, the court which first

acquires jurisdiction over the case retains it to the exclusion of the other court. *Childs v. Martin,* 69 N.C. 126; *In re Schenck,* 74 N.C. 607; *Haywood v. Haywood,* 79 N.C. 42; *Young v. Rollins,* 85 N.C. 485; *S. v. Williford,* 91 N.C. 529; *Worth v. Bank,* 121 N.C. 343, 28 S.E. 488; *Hambley v. White,* 192 N.C. 31, 135 S.E. 626; *Allen v. Ins. Co.,* 213 N.C. 586, 197 S.E. 200; see also McIntosh, N.C.P.&P., p. 62.

In *Childs v. Martin, supra,* and in others of the cases cited, the principle is expressed in this quotation: "The rule is where there are courts of equal and concurrent jurisdiction the court possesses the case in which jurisdiction first attaches." *Merrill v. Lake,* 16 Ohio 673.

And in *S. v. Williford, supra,* this Court in opinion by *Ashe, J.,* said: "Where the jurisdiction is concurrent, it would seem that either court may take jurisdiction, and when no objection by plea in abatement is made to the jurisdiction, it may proceed to judgment; and such judgment may be pleaded in bar of the prosecution in the other court."

But in the instant case plea in abatement is made in Superior Court to the count in question. Hence it is without jurisdiction to proceed to judgment thereon, and its judgment would not be a bar to further prosecution in the Recorder's Court for same offense. See *S. v. Tisdale,* 19 N.C. 159; *S. v. Casey,* 44 N.C. 209; *S. v. Williford, supra; S. v. Roberts,* 98 N.C. 756, 3 S.E. 682; compare *S. v. Bowers,* 94 N.C. 910.

In the case *S. v. Roberts, supra,* the Court said: "It is settled that although a party may be indicted for a criminal offense in a court having jurisdiction of it, yet if pending that indictment, and before being held to answer thereto, he shall be indicted and convicted of the same offense in another court having concurrent jurisdiction thereof, he may plead as a defense to the first indictment such former conviction and have his plea sustained."

But in the present case the Recorder's Court had issued warrant for defendant, and he had been held to answer the charge in that court, before the bill of indictment was obtained in Superior Court. Therefore, defendant's plea in abatement as to the second count in the bill of indictment on which he was indicted in Superior Court should have been sustained.

3. Appellant assigns as error the ruling of the court in denying his motion for judgment as of nonsuit on all counts, and particularly as to the count charging conspiracy. Taking the evidence in the light most favorable to the State, we are of opinion and hold that the evidence is insufficient to take the case to the jury on the conspiracy charge.

"A conspiracy is generally defined to be 'an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way.'" *S. v. Dalton,* 168 N.C. 204, 83 S.E. 693. *S. v. Ritter,* 197 N.C. 113, 147 S.E. 733; *S. v. Lea, supra; S. v. Whiteside,* 204 N.C.

710; 169 S.E. 711; *S. v. Summerlin,* 232 N.C. 333, 60 S.E. 2d 322; *Muse v. Morrison, ante,* 195.

The crime of conspiracy consists of the conspiracy, and not its execution. *S. v. Younger,* 12 N.C. 357; *S. v. Ritter, supra; S. v. Wrenn,* 198 N.C. 260, 151 S.E. 261.

And the offense of unlawful conspiracy may be shown by circumstantial evidence. *S. v. Lea, supra; S. v. Whiteside, supra; S. v. Summerlin, supra.* But "when the State relies upon circumstantial evidence for a conviction, the circumstances and evidence must be such as to produce in the minds of the jurors a moral certainty of defendant's guilt, and exclude any other reasonable hypothesis." *S. v. Stiwinter,* 211 N.C. 278, 189 S.E. 868, and cases cited. See also *S. v. Madden,* 212 N.C. 56, 192 S.E. 859; *S. v. Miller,* 220 N.C. 660, 18 S.E. 2d 143; *S. v. Graham,* 224 N.C. 347, 30 S.E. 2d 151; *S. v. Webb,* 233 N.C. 382, 64 S.E. 2d 268, and cases cited.

4. But as to the third count, charging defendant with the unlawful possession of alcoholic liquors on which taxes had not been paid, for the purpose of sale, the evidence is sufficient to support a verdict of guilty.

The possession of nontax-paid liquor in any quantity anywhere in the State is, without exception, unlawful. G.S. 18-48; *S. v. McNeill,* 225 N.C. 560, 35 S.E. 2d 629; *S. v. Barnhardt,* 230 N.C. 223, 52 S.E. 2d 904.

Possession of liquor by any person not legally permitted to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of sale. G.S. 18-11, formerly C.S. 3411 (j); *S. v. Graham,* 224 N.C. 347, 30 S.E. 2d 151.

Moreover, 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,* 190 N.C. 239, 129 S.E. 600; *S. v. Penry,* 220 N.C. 248, 17 S.E. 2d 4; *S. v. Webb, supra.*

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."

Thus, the evidence tending to show that ninety-six gallons of intoxicating liquor were found in the basement of the tenant house on defendant's farm, and tending to show that he alone had key to the door to the basement, is sufficient to support constructive possession.

Other exceptions directed against the charge, given by the court to the jury, and to failure of the court to charge in accordance with provisions of G.S. 1-180 have been given due consideration and fail to show error for which a new trial should be granted.

But the judgment will be set aside and the case will be remanded to the trial court to the end that proper judgment may be entered in accordance

with this opinion. *S. v. Lewis,* 226 N.C. 249, 37 S.E. 2d 691; *S. v. Malpass,* 226 N.C. 403, 38 S.E. 2d 156; *S. v. Braxton,* 230 N.C. 312, 52 S.E. 2d 895; *S. v. Camel,* 230 N.C. 426, 53 S.E. 2d 313.

Error and remanded.

MARY ETHEL JACKSON, LEA JACKSON ROBERTS, YATES C. JACKSON, HATTIE J. KELLY, MARY JACKSON STOVALL, EMILY JACKSON HAWKINS AND JOHNNIE M. CARSON v. CLEO BRYANT LANGLEY AND JOHN BRYANT LANGLEY, A MINOR, BY HIS DULY APPOINTED GUARDIAN AD LITEM, R. E. BRANTLEY.

(Filed 10 October, 1951.)

1. Wills § 33c—

The law favors the early vesting of estates, and when a devise contains no limitation over in the event of the death of the devisee or legatee the estate will vest at the time of the death of testator in the absence of an express intention to the contrary.

2. Same—Where property is devised in trust for named beneficiary, he takes equitable title vesting at time of testator's death.

The fact that property is devised to a trustee for the benefit of the devisee, with provision that when the devisee attains the age of twenty-five years all the property of the estate or the remainder thereof or any substitution taken therefor in the course of the administration, should vest in him and be turned over to him, his heirs and assigns absolutely, *held* not to prevent the vesting of the estate in the beneficiary at the time of the death of testator, since the equitable estate vests as of that time and the provision for the vesting of the estate at the expiration of the trust being merely the ascertainment of the time the legal title should also vest in the beneficiary discharged of the trust.

3. Same: Wills § 33d—

The fact that the trustee is given the right to use the income or the *corpus* of the trust for his own benefit in the event of certain enumerated emergencies does not prevent the vesting of the equitable title in the beneficiary as of the time of testator's death, but merely makes it subject to be divested of such portion thereof as may be required to meet the authorized needs of the trustee, the trustee being in the same position as a life tenant with power to use the *corpus* or any part thereof for his own use.

4. Same: Descent and Distribution § 9a—Upon death of owner of vested equitable title, the property descends to his heirs under the canons of descent.

Testatrix left property in trust to her husband for the use of her son, with further provision that the son should take the property free from the trust upon attaining the age of twenty-five years. The son died before his twenty-fifth year and the father died thereafter leaving a child by a subsequent marriage. *Held:* The property vested in testatrix' son as of the date of her death, and upon the death of the son without issue, the

father took the property under the canons of descent, G.S. 29-1 (6), and upon the father's death intestate the property passed to his child by the second marriage under G.S. 29-1 (1) subject to the dower rights of his surviving widow.

DEFENDANTS' appeal from *Crisp, Special Judge,* January-February Term, 1951, of POLK.

This is an action instituted for the purpose of obtaining a declaratory judgment to determine the rights of the respective parties in and to an undivided interest in certain real property devised in the last will and testament of Bessie J. Langley, which will has been duly probated.

The facts are not in dispute, and may be summarily stated as follows:

1. John L. Jackson devised to his daughter, Bessie J. Langley, an undivided two-fifths interest in certain improved real estate in the Town of Tryon, North Carolina, which interest she owned in fee simple at the time of her death.

2. Bessie J. Langley left no issue surviving her except her son, John Alfred Langley, Jr., but was survived by several brothers and sisters.

3. On 3 June, 1938, she executed a will disposing of her estate in the following manner:

"ITEM III. I hereby devise and bequeath all of my property, real and personal, wheresoever situate, to my said Executor above named, to wit: my husband, his heirs and assigns, in trust, however, to hold, manage and conserve the same so as to produce an income and to apply the net income, after paying taxes and other necessary and proper expenses, to the support, maintenance and education of my son, John Alfred Langley, Jr., during his minority and until he reaches the age of 25 years, giving my said Trustee the authority, if it is necessary in providing for the education of our said son, to use the *corpus* or any part of my said estate, with the further right in my said trustee, in case he should need the income for himself for his own support, if on account of illness or disability he cannot support himself, to appropriate to his own use the income during the period of such disability and if necessary for this purpose to invade and use the *corpus* or any part thereof.

"When my said son reaches the age of 25 years all of said property or the remainder thereof, or any substitutes taken therefor in the course of the administration, as hereinafter provided, shall vest in and be turned over to my said son, John Alfred Langley, Jr., his heirs and assigns absolutely.

"My said trustee shall have the right whenever in his opinion it is advisable to sell the property and change the form of the investment to do so, and may convey the property by good title to the purchaser free of limitations hereinabove set out, but he shall reinvest the proceeds in

other realty or in Governmental or Municipal bonds and shall hold such proceeds under the same trust, with the same right of changing the form of the investment as from time to time may be necessary."

4. After the death of Bessie J. Langley, John Alfred Langley, Jr., died intestate on 23 March, 1943, before he reached his 21st birthday, and his father, John Alfred Langley, Sr., died 2 April, 1949, intestate, and left surviving him his widow, Cleo Bryant Langley, and his minor son, John Bryant Langley, who is now about four years of age.

The court below held that under the provisions of the above will, the title to the two-fifths undivided interest of the testatrix in the property in question, did not vest in John Alfred Langley, Jr., upon the death of the testatrix, and never vested in him since he died before attaining the age of 25. Therefore, the court held that the undivided interest of Bessie J. Langley, in and to the store building in the Town of Tryon, is now owned by the brothers and sisters of the testatrix, and entered judgment accordingly.

Defendants appeal, assigning error.

J. T. Arledge and James B. Dixon for defendants, appellants.

M. R. McCown and J. Lee Lavender for plaintiffs, appellees.

DENNY, J. The sole question involved in this appeal is whether John Alfred Langley, Jr., took a vested or contingent remainder in his mother's estate under the terms of her will. The court below held, in effect, that his interest in the estate was contingent upon his attaining the age of 25 years, and having died before attaining that age, the estate never vested in him. We do not concur in this construction or interpretation of the will.

The law favors the early vesting of estates and when a will, like the one under consideration, contains no limitation over in the event of the death of the devisee or legatee, in the absence of an express intention to the contrary, the estate will vest at the time of the death of the testator. *Robinson v. Robinson,* 227 N.C. 155, 41 S.E. 2d 282; *Priddy & Co. v. Sanderford,* 221 N.C. 422, 20 S.E. 2d 341; *Coddington v. Stone,* 217 N.C. 714, 9 S.E. 2d 420; *Weill v. Weill,* 212 N.C. 764, 194 S.E. 462; *Satterfield v. Stewart,* 212 N.C. 743, 194 S.E. 459; *Mountain Park Institute v. Lovill,* 198 N.C. 642, 153 S.E. 114; *Taylor v. Taylor,* 174 N.C. 537, 94 S.E. 7; *Dunn v. Hines,* 164 N.C. 113, 80 S.E. 410.

Moreover, the devise of property to a trustee for a designated period, to manage and control the property as to both *corpus* and income, does not prevent it from vesting in the beneficiary. Page on Wills, 3rd Ed., Vol. 3, Section 1261, at page 701; *Plitt v. Peppler,* 167 Md. 252, 173

At. 35; *Hooker v. Bryan,* 140 N.C. 402, 53 S.E. 130; *Coddington v. Stone, supra.*

It is likewise said in 69 C.J., Wills, Section 1674 (6), page 595: "The fact that the legal title and control of the property are given to another in trust does not prevent the beneficiary from having a vested interest, as there may be vested equitable, as well as vested legal, interests. In other words, in so far as concerns the question of whether an interest is vested or contingent, a gift to trustees for the benefit of another is the same as it would be if it had been made, without the intervention of trustees, directly to the ultimate beneficiary." Also in 57 Am. Jur., Wills, Section 1226, page 809, in discussing this question, it is said: "The circumstance that a testamentary benefaction is given through the intervention of a trustee will, of course, preclude the immediate vesting in the beneficiary of the legal title to the subject matter of the gift, although such beneficiary may become vested with an equitable interest in fee upon the death of the testator."

Furthermore, the mere fact that John Alfred Langley, Sr., the trustee, was given the right to use the income from or *corpus* of the trust estate for his own benefit in the event certain enumerated emergencies arose, did not in any way affect or delay the vesting of the estate in John Alfred Langley, Jr., to any greater extent than if the trustee had been given a life estate with the power to use the *corpus,* or any part thereof, for his own use.

The overwhelming weight of authority, including our own decisions, supports the view that in such cases the estate vests in the ultimate beneficiary upon the death of the testator, subject to be divested of such portion thereof as may be required to meet the authorized needs of the life tenant or other designated person. Page on Wills, 3rd Ed., Section 1264, page 705; *Perry v. Rhodes,* 6 N.C. 140; *Brinson v. Wharton,* 43 N.C. 80; *Williams v. Smith,* 57 N.C. 254; *Myers v. Williams,* 58 N.C. 362; *Lehnard v. Specht,* 180 Ill. 208, 54 N.E. 315; *Braley v. Spragins,* 221 Ala. 150, 128 So. 149; *Woodman v. Woodman,* 89 Me. 128, 35 A. 1037; *Barker v. Ashley,* 58 R.I. 243, 192 A. 304; *Buxton v. Noble,* 146 Kan. 671, 73 Pac. 2d 43; *Downs v. Downs,* 243 Wisc. 303, 9 N.W. 2d 822.

In the case of *Myers v. Williams, supra,* certain slaves were bequeathed to the father, as trustee, for the benefit of his children, but with the further provision that the father was not to be accountable to his children for the proceeds from the labor of the slaves until the children became 21 years of age. The Court said: "The terms of the bequest to the children . . . import a present gift, although the slaves are not to be allotted to them and put into their possession until they respectively come of age. In the meantime, the profits were to be applied toward their education, and the provision in favor of the father, that he was not to be accountable

to his children during their minority, cannot have the effect contended for by counsel for the plaintiffs of preventing the legacy from being vested."

In *Fuller v. Fuller,* 58 N.C. 223, the Court quoted with approval from page 157 of Smith's "Original View of Executory Interests," as follows: "When the testator gives the whole of the intermediate income of real estate, or of personal estate, to the person to whom he devises or bequeaths such estate on the attainment of a certain age, but the attainment of that age does not form a part of the original description of the devisee or legatee, the interest is vested in right before that age, even though there is no prior distinct gift—no express gift, except at that age—it being considered that the testator merely intended to keep the devisee or legatee out of the possession or enjoyment until he should have become better qualified to manage, or more likely, to take due care of the property."

The instant case in every essential part is on "all fours" with *Coddington v. Stone, supra,* except for the provision giving John Alfred Langley, Sr., the trustee, a right to use the income or the *corpus* of the estate, or any part thereof, for himself in the event of certain emergencies. And this provision, as we have heretofore pointed out, did not postpone the time of the vesting.

In the case of *Coddington v. Stone, supra, Seawell, J.,* in an able and exhaustive opinion, discussed and considered the question now before us. C. C. Coddington, Sr., devised a very large estate to a trustee for the benefit of his three sons. The trustee was empowered to handle the estate until the testator's youngest son should reach the age of 21 years, at which time the trustee was directed to divide the trust estate into three equal parts and turn over one of such parts to each son, and the testator's will provided that upon turning over the property, "each of my sons shall thereupon become the absolute owner thereof," discharged of the trust. One of the Coddington children died before attaining the age of 21 years, and the Court held the estate vested at the death of the testator, in the three children, and that the deceased child having been vested with a beneficial interest in one-third of the estate, such interest, upon his own death, passed to his surviving brothers under the laws of descent and distribution. *Hooker v. Bryan, supra; Myers v. Williams, supra; Brinson v. Wharton, supra; Perry v. Rhodes, supra; Cropley v. Cooper,* 86 U.S. 167, 22 L. Ed. 109; *Plitt v. Peppler, supra; In re Estate of Aye,* 155 Kan. 272, 124 Pac. 2d 482.

The appellees contend, however, that the provision in the will of the testatrix, to the effect that when her son reached the age of 25 years, all of the property of the estate, or the remainder thereof, or any substitution taken therefor in the course of the administration, should vest in him and be turned over to him and his heirs and assigns absolutely, shows

clearly that the testatrix did not intend for the estate to vest until he attained the age of 25 years. We do not so hold, but construe this provision only as fixing the time when the legal and equitable title should vest in her son, discharged of the trust. *Coddington v. Stone, supra.*

Under the construction contended for by the appellees, if John Alfred Langley, Jr., had died just prior to attaining the age of 25 years and had, in the meantime married and left a wife and child, or children, his wife and child, or children, would take nothing, but the collateral heirs of the testatrix would be entitled to the estate. Such could not, in our opinion, have been the intention of the testatrix. *Cropley v. Cooper, supra; Coddington v. Stone, supra.*

Applying the law as laid down in the decisions and authorities cited herein, we hold that upon the death of John Alfred Langley, Jr., the two-fifths undivided interest in the real property in question, passed to John Alfred Langley, Sr., his father, under our canons of descent, G.S. 29-1, Rule 6. It follows, therefore, that upon the death of John Alfred Langley, Sr., intestate, the property passed to his son, John Bryant Langley under the canons of descent, G.S. 29-1, Rule 1, subject to the dower rights of Cleo Bryant Langley, the widow of John Alfred Langley, Sr.

The judgment of the court below is

Reversed.

WILLIAM J. McGURK v. L. B. MOORE AND WIFE, LENA C. MOORE.

(Filed 10 October, 1951.)

1. Lis Pendens § 1—

A notice of *lis pendens* can be filed against real property only in an action affecting its title. G.S. 1-116.

2. Lis Pendens § 6—

A motion to cancel as unauthorized a notice of *lis pendens* admits as true the factual averments of the complaint but not its legal conclusions.

3. Partnership § 4—

When one partner wrongfully takes partnership funds and uses them to buy or improve property, his co-partners may compel him to account to the partnership for the funds and enforce the resulting claim as an equitable lien on the property, or may charge the property with a constructive trust in favor of the partnership to the extent of the partnership funds used in its purchase or improvement. G.S. 59-51.

4. Partnership § 1a—

Where an agreement is in writing, whether the parties thereto are partners depends upon its legal effect under the provisions of the uniform partnership act.

5. **Same—**

An agreement under which one party makes loans and advances of money to the other for use in a business conducted by such other, with provision of equal division of the profits between the parties, with further provision that the first party might withdraw all advances upon notice for the purpose of liquidation and that after payment of such advances and the payment of all expenses, the net profits remaining should be equally divided, *is held* not to create a partnership, since the indispensable requisite of co-ownership is lacking, G.S. 59-36 (1), G.S. 59-37, and the relationship of the parties is simply that of creditor and debtor.

6. **Trusts § 5b—**

Where the relationship between the parties is that of debtor and creditor and not that of partners, the creditor is not entitled to a declaration of a constructive trust in realty paid for or improved with money borrowed for the debtor's business.

7. **Lis Pendens § 1—**

Where the relationship of the parties is that of debtor and creditor and not that of partners, the creditor is not entitled to a declaration of a constructive trust in property purchased in part or improved by the debtor with the money borrowed for use in the debtor's business, and therefore the creditor's action for the recovery of the funds does not affect title to the land and *lis pendens* cannot properly be filed against the realty.

8. **Lis Pendens § 6: Husband and Wife § 15a—**

Since each tenant by entirety is deemed seized of the whole estate, either of them alone may move to cancel an unauthorized notice of *lis pendens* against property.

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

APPEAL by plaintiff from *Rudisill, J.,* at June Term, 1951, of BUNCOMBE.

Motion by the *feme* defendant, Lena C. Moore, to cancel notice of *lis pendens* on ground that complaint fails to state a cause of action affecting the title to the real property covered by the notice.

When the complaint is stripped of legal conclusions, it avers the things stated in the seven numbered paragraphs set out below.

1. On 16 March, 1945, Eugene M. Murphy sold and conveyed certain land in Buncombe County, North Carolina, to the male defendant, L. B. Moore, and his wife, the *feme* defendant, Lena C. Moore, as tenants by the entirety. As part of the transaction, the defendants executed a deed of trust on the same land to Sam M. Cathey, Trustee, to secure the payment of the purchase price of the land to their grantor in monthly installments.

2. From 29 January, 1947, until 1 May, 1947, the male defendant, L. B. Moore, was engaged in selling automobiles in Buncombe County, North Carolina, under the assumed name of Capitol Motors. The plain-

tiff, William J. McGurk, advanced the following sums to the male defendant for use in such business during this period: $2,000.00 on 29 January, 1947, and $2,500.00 on 1 May, 1947.

3. At the time of the advancement of the last named sum, to wit, on 1 May, 1947, the male defendant, "L. B. Moore, trading and doing business under the firm name of Capitol Motors, party of the first part," and the plaintiff, "William J. McGurk, . . . party of the second part," entered into a written contract, whose preamble recites these things: "That L. B. Moore is engaged in the . . . sale . . . of automobiles" in Buncombe County, North Carolina; that "William J. McGurk has . . . advanced and loaned to the said L. B. Moore the sum of $4,500.00"; and that "William J. McGurk may from time to time in the future make other advances and loans to the said L. B. Moore . . ., all of which are made for the purpose of operating and maintaining said business."

4. The body of the contract defines the obligations and rights of the parties as follows: "The said L. B. Moore shall devote his entire time to the operation and management of said business . . .; that the said L. B. Moore shall purchase and resell at a profit all merchandise acquired by said company; that all expenses . . . in the operation of said business shall be borne out of the profits realized from the sale of said automobiles, and after all such expenses shall have been paid the net profits remaining shall be divided equally between the said L. B. Moore and William J. McGurk, to share and share alike. The profits aforesaid may be divided at any time but as frequently as is possible. For the services of the said L. B. Moore as aforesaid no salary or compensation shall be paid other than the sharing in the net profits as herein stated. . . . William J. McGurk may withdraw any and all advances made, or which may hereafter be made by him after having given thirty days written notice to the said L. B. Moore for the purpose of liquidating said business and closing out the records thereof. And after the payment of all said advances to the said William J. McGurk, and the payment of all expenses up to and including the closing out of said business, the net profits remaining shall be divided equally as aforesaid between the parties to this agreement."

5. On 24 September, 1947, the plaintiff advanced the further sum of $1,500.00 to the male defendant under the written contract of 1 May, 1947.

6. From 1 May, 1947, until 8 May, 1951, when this action was commenced, the male defendant had exclusive management of the business of selling automobiles under the assumed name of Capitol Motors. During this period, the male defendant collected substantial profits from the business.

7. The male defendant has refused to account to the plaintiff for the latter's share of the profits. Moreover, the male defendant has mis-

appropriated such profits and virtually all of the capital assets of the business, and has used the same to defray "his personal family living expenses," to make improvements on the land held by the defendants as tenants by the entirety, and to discharge the monthly installments maturing on the purchase price of such land. The remaining assets of the Capitol Motors are insufficient to satisfy the sums due plaintiff for advancements and profits, and the male defendant "is insolvent other than his interest in the . . . realty held by the entireties" with the *feme* defendant.

The complaint concludes as matters of law that the written contract of 1 May, 1947, made the plaintiff and the male defendant partners in the business known as the Capitol Motors, and that the advancements made by the plaintiff to the male defendant constituted contributions by plaintiff to the capital of the Capitol Motors. It prays that a receiver be appointed to take charge of the remaining assets of the Capitol Motors; that an accounting be had to determine the total amount of the capital assets and profits of the Capitol Motors misappropriated by the male defendant, and the amount of such assets and profits "invested in the real estate held by the defendants" as tenants by the entirety; and that "the court declare a . . . trust in favor of the partnership in the . . . realty in an amount equal to the partnership funds that the court shall find have been converted by the defendant, L. B. Moore, and invested in said realty."

At the time of the commencement of the action, to wit, on 8 May, 1951, the plaintiff filed notice of *lis pendens* against the land held by the defendants as tenants by the entirety with the Clerk of the Superior Court of Buncombe County, and thereafter, to wit, at the June Term, 1951, of the Superior Court of Buncombe County, the *feme* defendant moved before the presiding judge after notice to plaintiff for cancellation of the notice of *lis pendens* on the ground that the complaint fails to state a cause of action affecting the title to such land. The judge entered an order sustaining the motion, and the plaintiff appealed, assigning such ruling as error. Summons had not been served on the male defendant at the time of the entry of the order.

Sanford W. Brown and William V. Burrow for plaintiff, appellant.
No counsel contra.

Ervin, J. Under the statute, a notice of *lis pendens* can be filed against real property only in an action affecting its title. G.S. 1-116. The appeal, therefore, presents this primary question: Does the complaint state a cause of action affecting the title to the land held by the defendants as tenants by the entirety?

In passing on this inquiry, we accept as true the factual averments of the complaint. We are not bound, however, by the legal conclusions of the pleader.

When one partner wrongfully takes partnership funds and uses them to buy or improve property, his co-partners may obtain redress in one of these alternative ways:

1. They may compel him to account to the partnership for the funds, and enforce the resulting claim as an equitable lien on the property. *Hanna v. McLaughlin,* 158 Ind. 292, 63 N.E. 475; *Holmes v. Gilman,* 138 N.Y. 369, 34 N.E. 205, 34 Am. S. R. 463, 20 L.R.A. 566, 30 Abb. N. Cas. 213; *Brown v. Orr,* 110 Va. 1, 65 S.E. 499, 135 Am. S. R. 912.

2. They may charge the property with a constructive trust in favor of the partnership to the extent of the partnership funds used in its purchase or improvement. G.S. 59-51; The American Law Institute: Restatement of the Law of Restitution, section 202. See, also, in this connection: *Crone v. Crone,* 180 Ill. 599, 54 N.E. 605, and 68 C.J.S., Partnership, section 88.

The plaintiff invokes these principles in the case at bar. He concludes as a matter of law that the contract of 1 May, 1947, creates a partnership between him and the male defendant in the business designated as Capitol Motors. Starting with this legal conclusion as a premise, he advances these interdependent arguments to sustain the notice of *lis pendens:* That the male defendant wrongfully took funds of the partnership existing between him and the plaintiff under the firm name of Capitol Motors, and used them to improve the land and to pay off installments of its purchase price; that by reason thereof the plaintiff is entitled to a decree under the principles invoked by him charging the land with a constructive trust in favor of the partnership to the extent of the funds of the partnership thus misappropriated and used by the male defendant; and that in consequence the action affects the title to the land.

The plaintiff's position is valid if, and only if, his premise is sound. The contract of 1 May, 1947, is in writing, and the question of whether or not the plaintiff and the male defendant are partners in the business known as Capitol Motors depends upon the legal effect of the written contract under the provisions of the Uniform Partnership Act, which was adopted in North Carolina in 1941.

The Uniform Partnership Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." G.S. 59-36 (1). When the written agreement is tested by this definition, it is manifest that there is no partnership between the plaintiff and the male defendant in the business designated as Capitol Motors, for the very simple reason that the indispensable requisite of co-ownership of the business is lacking. *City of Wheeling v. Chester,* 134 F. 2d 759; *Spier*

v. Lang, 4 Cal. 2d 711, 53 P. 2d 138; *Cook v. Lanten,* 335 Ill. App. 92, 80 N.E. 2d 280; *Smith v. Maine,* 260 N.Y.S. 409, 145 Misc. 1; *Provident Trust Co. of Philadelphia v. Rankin,* 333 Pa. 412, 5 A. 2d 214. Under the contract, the male defendant is the sole owner and operator of Capitol Motors. The plaintiff merely made repayable "advances and loans" of money to defendant for use in the business. *Bankers Mortgage Co. v. Commissioner of Internal Revenue,* 142 F. 2d 130; *B. J. Carney & Co. v. Murphy,* 68 Idaho 376, 195 P. 2d 339. Indeed, all of the indicia of a partnership are wanting in the contract except that of sharing profits. It is plain, however, that the plaintiff is entitled to receive a share of the profits simply as compensation or interest for the use of his money by the male defendant. *In re Mission Farms Dairy,* 56 F. 2d 346; *Black v. Brandage,* 125 Cal. App. 641, 13 P. 2d 999. Consequently, the stipulation as to the sharing of profits falls within the following provision of the Uniform Partnership Act: "In determining whether a partnership exists, these rules shall apply: . . . (4) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment: . . . (d) As interest on a loan, though the amount of the payment vary with the profits of the business. . . ." G.S. 59-37.

When all is said, the relation between the plaintiff and the male defendant under the contract is simply that of creditor and debtor. For this reason, the plaintiff is not entitled to charge the land held by the defendants as tenants by the entirety with a constructive trust, and this action does not affect the title to such land.

This brings us to this secondary and final question: May an unauthorized notice of *lis pendens* against land held by a husband and wife as tenants by the entirety be canceled on motion of the wife alone?

A motion for the cancellation of an unauthorized notice of *lis pendens* must be made by some person aggrieved by the continuance of the notice on the records. *Painter v. Gunderson,* 123 Minn. 342, 143 N.W. 911. Manifestly the owner of the property involved is such a person. *Faber v. Hanbury,* 144 N.Y.S. 381, 159 App. Div. 59. Inasmuch as each tenant by the entirety is deemed seized of the whole estate (*Winchester-Simmons Co. v. Cutler,* 199 N.C. 709, 155 S.E. 611), either of them may move to cancel an unauthorized notice of *lis pendens* against the property held by the entirety. This conclusion finds substantial support in a well reasoned decision of the Appellate Court of Indiana, holding that one tenant by the entirety may apply for the judicial protection of his rights in the property. *Humberd v. Collings,* 20 Ind. App. 93, 50 N.E. 314.

The order canceling the notice of *lis pendens* is

Affirmed.

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

W. C. BULLOCK, ADMINISTRATOR OF THE ESTATE OF PINK BULLOCK (WILLIE P. BULLOCK), DECEASED, v. EXPRESSMEN'S MUTUAL LIFE INSURANCE COMPANY, RUDOLPH PINK BULLOCK, A MINOR, TALMADGE L. NARRON, GUARDIAN AD LITEM FOR RUDOLPH PINK BULLOCK, MINOR, AND MAYDIE TAYLOR BULLOCK.

(Filed 10 October, 1951.)

1. **Insurance § 36b (4)—**

When the wife feloniously kills her husband she is not entitled to receive the proceeds of an insurance policy on his life, even though she be named beneficiary therein. G.S. 28-10, G.S. 30-4, G.S. 52-19.

2. **Insurance § 36b (1)—**

The person entitled to the proceeds of a life insurance policy must be determined in accordance with the contract between the insurer and the insured, and the courts have no power to write into the contract any provision that is not there in fact or by implication of law in order to effectuate a presumed intent of insured.

3. **Convicts and Prisoners § 1—**

A person sentenced to imprisonment for a term of years retains his property rights unless otherwise provided by statute, the doctrine of *civiliter mortuus* not being recognized in this State.

4. **Insurance § 36b (1)—**

The policy in suit provided that the proceeds should be paid to insured's wife if living or to the insured's foster son if insured's wife predeceased insured. The insured was feloniously slain by his wife, and she was sentenced to imprisonment for manslaughter. *Held:* The foster son is not entitled to the proceeds of the policy even though insured's wife forfeited her right thereto, since under the terms of the policy his interest was contingent upon the wife predeceasing insured, and the proceeds should be paid to insured's administrator for payment of his debts and distribution of the surplus to his next of kin.

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

APPEAL by plaintiff from *Harris, J.*, June Term, 1951, of WILSON.

This was a suit on a policy of insurance on the life of Willie P. Bullock. The defendant Insurance Company paid into court the amount due on the policy, leaving to be determined which of two rival claimants, the administrator of the insured or a contingent beneficiary, Rudolph Pink Bullock, was entitled to the fund.

The policy of insurance issued by defendant Insurance Company on the life of Willie P. Bullock named the beneficiary therein as "Maydie Taylor Bullock, wife of the insured, if living, or if not living to Rudolph Pink Bullock, son of the insured." It was admitted that Willie P. Bullock died intestate 2 October, 1950, as result of bullet wound inflicted by his wife, Maydie Taylor, and that she was convicted of manslaughter therefor and sentenced to State's Prison for a term of five to ten years. This sentence she is now serving. Rudolph Pink Bullock, referred to in the policy as the son of the insured, is not a natural or adopted son nor related by blood to the insured or his wife, but had been cared for by them since childhood.

Maydie Taylor Bullock, made a party and served with process, did not answer.

Upon the facts admitted in the pleadings the court adjudged that Rudolph Pink Bullock was entitled to the proceeds of the policy. Plaintiff administrator of the insured excepted and appealed.

Thomas J. Moore, A. C. Owens, and L. H. Gibbons for plaintiff, appellant.

Talmadge L. Narron for defendant, appellee.

DEVIN, C. J. The policy of insurance out of which this controversy arose was taken out by the insured primarily for the benefit of his wife with provision to the effect that if she did not survive him a foster son should become the beneficiary. It was clearly expressed in the policy that upon the death of the insured the insurance money should be paid to his wife, Maydie Taylor Bullock, if living, or if not living to Rudolph Pink Bullock. Maydie Taylor Bullock did not predecease her husband, and is still living, but the law will not permit her to derive benefit from the death of the insured since admittedly it was caused by her felonious act. *Garner v. Phillips,* 229 N.C. 160, 47 S.E. 2d 845; *Parker v. Potter,* 200 N.C. 348, 157 S.E. 68; *Bryant v. Bryant,* 193 N.C. 372, 137 S.E. 188; *Anderson v. Insurance Co.,* 152 N.C. 1, 67 S.E. 53; *New York Mut. Life Ins. Co. v. Armstrong,* 117 U.S. 591; Vance on Insurance, sec. 156; 29 A.J. 979; Restatement, Restitution, sec. 189; 1 Appleman Insurance Law 456. The North Carolina statutes also declare that in such case she loses every right she would otherwise have been entitled to in the personal estate of her husband. G.S. 28-10; G.S. 30-4; G.S. 52-19. She can neither collect the insurance money nor assign her right to anyone else. *Equitable Life Assur. Soc. v. Weightman,* 61 Okla. 106; *Schmidt v. Northern L. Asso.,* 112 Iowa 41; *Johnston v. Metropolitan L. Ins. Co.,* 100 S.E. 865. So speaks the voice of authority.

The question then arises, who is entitled to the insurance money? The question thus presented is not without difficulty. Upon the facts here admitted we find no direct decision by this Court, and decisions from other jurisdictions are not definite or authoritative.

In *Parker v. Potter,* 200 N.C. 348, 157 S.E. 68, it appeared that J. A. Groves had obtained from the Woodmen of the World a policy of insurance on his life payable to his wife or in the event of her prior death, "if there be no surviving wife or children," to his next living relation. Subsequently J. A. Groves killed his wife and then committed suicide. This Court held in an opinion by *Justice Adams* that the interest of the wife was contingent upon her surviving her husband, and her death occurring before his, terminated her contingent interest, and the right to the insurance money passed to the next living relation of the insured. In the case at bar it would seem from the language of the policy that the interest of Rudolph Pink Bullock would accrue only in the event Maydie be not living at the time of the death of the insured.

In *Anderson v. Parker,* 152 N.C. 1, 67 S.E. 53, where the insured was killed by the beneficiary who then committed suicide, it was held the administrator of the insured was entitled to the insurance money.

Garner v. Phillips, 229 N.C. 160, 47 S.E. 2d 845, involved the devolution of real property where a son and only heir murdered his father and mother. It was held the son took only the naked legal title for the benefit of those next entitled.

In *Bryant v. Bryant,* 193 N.C. 372, 137 S.E. 188, the same result was reached where husband and wife having an estate by the entireties the wife was murdered by the husband.

The appellee calls our attention to the case of *Beck v. West Coast Life Ins. Co.,* 228 P. 2d 832, which was recently decided by the District Court of Appeals, First District of California. As there was apparently no effort to have the decision in this case reviewed by the Supreme Court of California, it will be presumed the law of that state on the facts disclosed is correctly stated. The policy of insurance in that case was on the life of Lila Loly Downey, and named as beneficiary the husband of the insured, David Albert Downey, "if living, otherwise to Jettie Knoll-Friend." The husband murdered his wife and was sentenced to imprisonment in the State Prison for life. In California, Penal Code section 2601 provides that "A person sentenced to imprisonment in the State Prison for life is thereafter deemed civilly dead." It was held that civil death denominated by the statute had the same legal effect as physical death, and that Jettie Knoll was entitled to the fund.

Appellee also cites the case of *Metropolitan Life Ins. Co. v. McDavid,* 39 F. Supp. 228. This was decided by the District Court for the Eastern District of Michigan in 1941. The husband, an employee, was insured

in a group policy issued to General Motors Corporation and contained provision that if no beneficiary was designated, the benefit should be paid to wife if living; if not living, to children; if none survive, to mother. There were other policies of insurance not here pertinent. The wife shot and killed her husband, was convicted of manslaughter and sentenced to five years in prison. There were no children. The Court held the wife was not entitled to any part of the proceeds of the policy, and that the rights of the parties should be determined exactly as they would have been if the wife had died prior to the death of her husband, and that the mother was entitled to the proceeds of the policy referred to.

In *Equitable Life Assur. Soc. v. Weightman,* 61 Okl. 106, the policy was to husband and wife payable to either on death of the other. The wife murdered her husband and was convicted and sentenced to imprisonment for life. It was held the administrator of the husband was entitled to the fund. The same result was reached in *Sharpless v. Grand Lodge,* 135 Minn. 35. See also *Box v. Lanier,* 112 Tenn. 393; *Greer v. Franklin Life Ins. Co.* (Texas), 221 S.W. 2d 857; *Schmidt v. Northern Life Asso.,* 112 Iowa 41; *Johnston v. Life Ins. Co.* (W. Va.), 100 S.E. 865; 1 Appleman Insurance Law, 455, and cases cited. However, in *Blanks v. Jiggetts,* 192 Va. 337, 64 S.E. 2d 809, it was held that a son who had murdered his father was entitled to inherit real property of his deceased mother, though the son's interest therein was accelerated by the death of his father. See also *Oleff v. Hodapp,* 129 Ohio St. 432, where it was held the murder of an associate in a joint and survivorship account did not divest the murderer of his property rights thereto in the absence of a controlling statute.

A general statement of the law on this subject will be found in the volume of Restatement of the Law entitled Restitution, section 189, as follows: "If the beneficiary of a life insurance policy murders the insured, he is not entitled to receive and to keep the proceeds of the policy. In such a case ordinarily the executor or administrator of the insured is entitled to receive the proceeds of the policy from the insurer and to apply them in the same way in which they would have been applicable if the beneficiary had predeceased the insured or was otherwise incapable of taking or disqualified from taking the proceeds. Ordinarily the proceeds would be applicable to the payment of the debts of the insured, and after payment of his debts would be payable to his residuary legatee, if any, and if none, to his next of kin." Provision for alternative beneficiaries in case the original designation fails, which occurs frequently in group insurance and insurance certificates issued by fraternal and mutual benefit societies, is generally followed, as in the *McDavid case, supra.*

While in the case at bar it may be presumed in the light of subsequent happenings the insured would have wished his foster son to have the insurance money, the Court, in determining as a question of law the party entitled, must give effect to the terms of the policy which constituted the contract between the insurer and the insured. The Court is without authority to change the terms of a contract the parties have entered into. This rule was succinctly stated in *Indemnity Co. v. Hood,* 226 N.C. 706 (710), 40 S.E. 2d 198, as follows: "It (the Court) has no power to write into the contract any provision that is not there in fact or by implication of law." By the terms of the policy the insurance here is made payable to Maydie Taylor Bullock, if living, or if not living to Rudolph Pink Bullock. As beneficiaries the wife and foster son are not on an equal footing. Rudolph's interest is made contingent upon the death of the wife before that of the insured. She, however, is still living. The law of North Carolina does not regard imprisonment in State Prison for a term of years as equivalent to legal death. The doctrine of *civiliter mortuus* is not recognized. *Schmidt v. Northern Life Asso.,* 112 Iowa 41. No corruption of blood, or forfeiture of estate results from conviction of crime. Unless otherwise provided by law one duly committed to prison on conviction of a criminal offense retains his property rights and his identity.

In *Parker v. Potter,* 200 N.C. 348, 157 S.E. 68, *Justice Adams,* delivering the opinion of the Court, quoted with approval from 2 Couch, Cyc. Ins. Law, sec. 306, as follows: "The status of a beneficiary designated as such in an insurance policy depends entirely upon the terms of the contract of insurance, construed in accordance with the rules of interpretation and construction applicable to such contracts, he being chargeable with notice of the contents of the same."

We think the language of the policy must control. Rudolph Pink Bullock's interest in the policy of insurance on the life of Willie P. Bullock was made by its terms contingent upon the death of Maydie Taylor Bullock during the lifetime of the insured. That event did not happen, and the net proceeds of the insurance should thereupon be paid to the administrator of the estate of Willie P. Bullock, who took out the policy and paid the premiums thereon, that it may be used to pay his debts and for distribution to his next of kin.

There was error in the judgment below, and the cause is remanded for judgment in accordance with this opinion.

Error and remanded.

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

STATE v. BILL GIBBS.

(Filed 10 October, 1951.)

1. Public Lands § 1—

The word "reservation" as descriptive of land has the definite and specific meaning of public land reserved for some special use, such as parks, forests, Indian lands, etc.

2. Hunting and Fishing § 1—

An indictment charging that defendant entered and hunted upon property leased by a gun club without written permission from the owner or lessee in violation of Chap. 539, Public-Local Laws 1933, does not charge the offense defined by the statute, since the statute refers to hunting and fishing on "reservations" without written permission from the owner, and the indictment is properly quashed upon motion.

3. Indictment and Warrant § 9—

An indictment for a statutory offense must contain averments of all essential elements of the crime created by the statute, and merely charging a breach of the statute in general terms and referring to it in the indictment is not sufficient.

4. Same—

The statutory directive that an indictment shall not be quashed for informality or refinement does not dispense with the requirement that each essential element of the offense must be charged. G.S. 15-153.

5. Indictment and Warrant § 17—

A bill of particulars is for the purpose of providing information not required to be set out in the indictment, and can never supply matter required to be charged as an essential ingredient of the offense. G.S. 15-143.

APPEAL by State of North Carolina from *Bobbitt, J.*, at Regular August Term, 1951, of YANCEY. Affirmed.

Criminal accusation under bill of indictment in the Superior Court of Yancey County charging that the defendant ". . . did enter upon and hunt and trespass on the property leased by Yancey Rod and Gun Club without written permission from the owner or Lessee, in violation of Public-Local Laws, 1933, Chapter 539."

Chapter 539 of the Public-Local Laws of 1933 is entitled "An act to protect hunting and fishing, and timber reservations in Yancey County," and provides:

"Section 1. That it shall be unlawful for any person to enter upon any hunting and fishing or timber reservations in Yancey County, without a written permission from the owner, and any person violating the provisions of this act shall be guilty of a misdemeanor and shall be fined

not less than twenty-five dollars, nor more than one hundred dollars, or imprisoned in the discretion of the court."

Upon the call of the case and before plea, the defendant moved the court to quash the bill of indictment for that it does not allege facts sufficient to constitute a violation of Chapter 539, Public-Local Laws of 1933, and for that the act is unconstitutional.

The court was of the opinion that the bill of indictment does not allege facts sufficient to constitute a criminal offense under Chapter 539 of the Public-Local Laws of 1933, and for that reason, and on that ground alone, allowed the defendant's motion to quash the bill, and judgment was entered accordingly, from which the State appealed.

Attorney-General McMullan, Assistant Attorney-General Moody, and Charles G. Powell, Jr., Member of Staff, for the State, appellant.

W. E. Anglin and Garrett D. Bailey for defendant, appellee.

JOHNSON, J. The purpose of Chapter 539 of Public-Local Laws of 1933, as shown by its title, is to protect hunting and fishing and timber reservations in Yancey County, and the Act provides: "that it shall be unlawful for any person to enter upon any hunting and fishing or timber reservation in Yancey County, without a written permission from the owner . . ."

The properties protected by the Act are "reservations." The word reservation as applied to a description of land has a definite, specific meaning. It is defined in *Webster* as "a tract of public land reserved for some special use, as for schools, for forests, for the use of the Indians, etc." According to Black's Law Dictionary, 2d Ed., p. 1026, "In public land laws of the United States, a reservation is a tract of land, more or less considerable in extent, which is by public authority withdrawn from sale or settlement, and appropriated to specific public uses; such as parks, military posts, Indian lands, etc."

The essential elements of the crime created by the Public-Local Act under which the bill of indictment was drawn are (1) entry (2) upon a hunting and fishing or timber reservation in Yancey County (3) without a written permission from the owner.

The bill of indictment does not charge that the defendant entered upon any hunting and fishing or timber reservation. This omission renders the bill fatally defective. *S. v. Miller,* 231 N.C. 419, 57 S.E. 2d 392; *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166; *S. v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149; *S. v. Ballangee,* 191 N.C. 700, 132 S.E. 795.

Decision here would seem to be controlled by the rule stated in *S. v. Morgan, supra* (226 N.C. 414, p. 415): "It is a universal rule that no indictment, whether at common law or under a statute, can be good if it

does not accurately and clearly allege all the constituent elements of the offense charged."

Also in point is the following observation of *Adams, J.*, in *S. v. Ballangee, supra* (191 N.C. 700, pp. 701 and 702): "The breach of a statutory offense must be so laid in the indictment as to bring the case within the description given in the statute and inform the accused of the elements of the offense. . . . Merely charging in general terms a breach of the statute and referring to it in the indictment is not sufficient."

"The bill need not be in the exact language of the statute, but it must contain averments of all the essential elements of the crime created by the act." *S. v. Miller, supra* (231 N.C. 419, p. 420).

In *S. v. Jackson, supra* (218 N.C. 373), *Justice Barnhill* succinctly states the formula this way: "An indictment for an offense created by statute must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself; and in order that it shall so appear, the bill must either charge the offense in the language of the act, or specifically set forth the facts constituting the same. . . . 'Where the words of a statute are descriptive of the offense, an indictment should follow the language and expressly charge the described offense on the defendant so as to bring it within all the material words of the statute. Nothing can be taken by intendment. . . .' "

In the light of the foregoing authorities, it is manifest that the court below properly quashed the bill of indictment. The decisions cited by the State seem to be distinguishable.

We have not overlooked G.S. 15-153, which provides that an indictment shall not be quashed by reason of a mere "informality or refinement." This statute, however, does not dispense with the requirement that the essential elements of an offense must be charged, and many decisions of this Court have so held. See *S. v. Tarlton,* 208 N.C. 734, 182 S.E. 481, and cases cited; *S. v. Cole,* 202 N.C. 592, 163 S.E. 594, and cases cited and analyzed.

Nor have we overlooked G.S. 15-143, which provides that a bill of particulars may be ordered in the discretion of the court. The function of a bill of particulars under the statute is to provide "further information not required to be set out" in the bill of indictment, but never to supply matter required to be charged as an essential ingredient of the offense. *S. v. Cole, supra; S. v. Wilson,* 218 N.C. 769, 12 S.E. 2d 654.

For the reasons given, the judgment below is

Affirmed.

STATE v. H. G. BRIDGEMAN.

(Filed 10 October, 1951.)

APPEAL by State of North Carolina from *Bobbitt, J.*, at Regular August Term, 1951, of YANCEY. Affirmed.

Criminal accusation under bill of indictment in the Superior Court of Yancey County charging that the defendant ". . . did enter upon and hunt and trespass on the property leased by Yancey Rod and Gun Club without written permission from the owner or Lessee, in violation of Public-Local Laws, 1933, Chapter 539."

Chapter 539 of the Public-Local Laws of 1933 is entitled "An act to protect hunting and fishing, and timber reservations in Yancey County," and provides:

"Section 1. That it shall be unlawful for any person to enter upon any hunting and fishing or timber reservations in Yancey County, without a written permission from the owner, and any person violating the provisions of this act shall be guilty of a misdemeanor and shall be fined not less than twenty-five dollars, nor more than one hundred dollars, or imprisoned in the discretion of the court."

Upon the call of the case and before plea, the defendant moved the court to quash the bill of indictment for that it does not allege facts sufficient to constitute a violation of Chapter 539, Public-Local Laws of 1933, and for that the Act is unconstitutional.

The court was of the opinion that the bill of indictment does not allege facts sufficient to constitute a criminal offense under Chapter 539 of the Public-Local Laws of 1933, and for that reason, and on that ground alone, allowed the defendant's motion to quash the bill, and judgment was entered accordingly, from which the State appealed.

Attorney-General McMullan, Assistant Attorney-General Moody, and Charles G. Powell, Jr., Member of Staff, for the State, appellant.

W. E. Anglin and Garrett D. Bailey for defendant, appellee.

JOHNSON, J. The judgment quashing the bill of indictment will be upheld on authority of what is said in the companion case of *S. v. Gibbs, ante,* 259. The bills of indictment in the two cases are identical, except as to the named defendants.

Affirmed.

STATE v. W. M. (BILL) BENSON.

(Filed 10 October, 1951.)

1. Criminal Law § 52a (7)—

A general motion to nonsuit in a prosecution upon an indictment containing several counts does not present the question of the sufficiency of the evidence as to one particular count.

2. Criminal Law § 35—

Testimony of a declaration by a person to the effect that he was an employee of the defendant and that defendant had whiskey in his possession, is incompetent as hearsay.

3. Conspiracy § 5—

While the acts and declarations of one conspirator in furtherance of the unlawful agreement is competent against the coconspirator, the existence of the conspiracy and defendant's participation therein at that time must be established by evidence *aliunde*, and in the absence of such evidence such declarations are incompetent as hearsay.

4. Conspiracy § 6: Intoxicating Liquor § 9d—

Evidence to the effect that nontax-paid whiskey was found in the room in defendant's store in which defendant's employee slept, and that the employee sold some liquor to an officer, *is held* insufficient to show a conspiracy between defendant and his employee to violate the prohibition law.

5. Criminal Law § 83—

While error relating to one count alone will not vitiate conviction on other counts upon which the trial was free from error, where, under the charge, prejudicial error is made to relate to all of the counts, a new trial will be awarded.

APPEAL by defendant from *Burgwyn, Special Judge,* March Term, 1951, JOHNSTON. New trial.

Criminal prosecution under a bill of indictment in which it is charged that defendant did unlawfully (1) enter into a conspiracy with one Sam Boykin to violate the prohibition law, (2) have and keep in his possession a quantity of liquor on which the federal and state taxes had not been paid, and (3) keep in his possession for the purpose of sale one-half gallon of intoxicating liquor.

The testimony considered in the light most favorable to the State tends to show that defendant operates a store in Johnston County and employs one Sam Boykin who sleeps in a room in the building. On 7 August 1950, officers went to the store with a search warrant and searched the premises. Boykin and Benson were there. The officers first spoke to Boykin, and Benson, who was on the other side of the store, "stooped down and started for the front door," but he was stopped and told to wait

until the search was completed. The officers searched behind the counter in the room where Boykin slept. They found two bottles of whisky on the floor against the wall and two or three jars with the odor of whisky in a compartment hole in the floor and one bottle behind some groceries with about one inch of whisky in it. It was "bootleg" liquor. The State also offered evidence of statements made by Boykin in the absence of Benson sometime prior to the search.

There was a general verdict of guilty. The court pronounced judgment on each count but suspended the sentences imposed on the second and third counts on the conditions set forth in the judgment. Defendant excepted and appealed.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Charles G. Powell, Jr., Member of Staff, for the State.

M. Butler Prescott for defendant appellant.

BARNHILL, J. The defendant entered a general demurrer to the evidence and moved to dismiss the cause as in case of nonsuit. His exception to the ruling of the court thereon does not present for decision the question whether there was any sufficient evidence to support the count charging a conspiracy to violate the prohibition law. If defendant desired to challenge the sufficiency of the evidence to establish a conspiracy, he should have directed his motion to that particular count.

The State offered evidence of declarations made to an officer by Boykin sometime prior to the search to the effect that he was working for Benson; that he did not have any whisky then but his boss had gone after some and would be back soon. At a later time, on the day before the search, Boykin told the officer he had no bonded whisky. His boss was on a drunk. He had some fairly good white whisky. He sold the officer one-half gallon of white whisky and some Seven-Up.

This evidence was nothing more than hearsay and was incompetent. Objection thereto should have been sustained.

The existence of a conspiracy may not be established by the *ex parte* declaration of an alleged conspirator made in the absence of his alleged coconspirator. Only evidence of the acts committed and declarations made by one of the coconspirators after the conspiracy is formed is competent against all, and then only when the declarations are made or the acts are committed in furtherance of the conspiracy. *S. v. Wells,* 219 N.C. 354, 13 S.E. 2d 613; *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *S. v. Dale,* 218 N.C. 625, 12 S.E. 2d 556; *S. v. Herndon,* 211 N.C. 123, 189 S.E. 173.

To render such statements competent, there must be evidence *aliunde* of the existence of the conspiracy at the time and the participation

therein of the party against whom the evidence is offered. *S. v. Blanton,* 227 N.C. 517, 42 S.E. 2d 663.

There is no evidence *aliunde* tending to show the existence of a conspiracy between Boykin and the defendant at the time these declarations were made. The evidence as to the search, the finding of liquor in the room in which Boykin slept, and the presence of defendant at his store at the time, is not sufficient to establish a conspiracy between Boykin and Benson to violate the prohibition law. It is well to note here that if any liquor was found in the main part of the store or elsewhere than in the room where Boykin slept, that fact is not made clear on this record.

Ordinarily when the error committed is directed to one count only, and, as to the other counts, the trial was free from error, the verdict on the counts concerning which there was no error will be sustained. But such is not the case here.

In its charge the court instructed the jury that if it found the existence of a conspiracy and further found that Boykin had in his possession liquor upon which federal and state taxes had not been paid, and that he had it for the purpose of sale, it should return a verdict of guilty against Benson on the second and third counts. Of necessity this instruction, on this record, was prejudicial to the defendant.

For the reasons stated there must be a

New trial.

STATE v. W. U. STALLINGS.

(Filed 10 October, 1951.)

1. Criminal Law § 62f—

The trial court has the discretionary power to suspend judgments for a reasonable length of time conditioned upon defendant's obedience to the law.

2. Same—

Prior to the effective date of Chap. 1038, Session Laws of 1951, a defendant's sole remedy to test the validity of an order of the Recorder's Court executing a suspended sentence was by *certiorari* or *recordari* challenging the order upon the ground that there was no sufficient evidence to support the finding of condition broken or the ground that the conditions were unreasonable or unenforceable or for an unreasonable length of time.

3. Same—

Review of an order executing a suspended sentence upon a writ of *recordari* from the Superior Court to the Recorder's Court is limited to the facts as they appear of record and the Superior Court may not hear evidence and determine the matter *de novo.*

4. Same—

Where the sole fact of record forming a basis of the recorder's order executing a suspended judgment is a statement by the defendant to an officer that the officer would not have to worry about catching him as he had already been arrested, the record evidence is insufficient to support a finding that defendant had violated the conditions of the suspended sentence that he remain law abiding for the period of suspension, and the affirmance of the recorder's order is reversed.

APPEAL by defendant from *Hatch, Special Judge,* February Term, 1951, of JOHNSTON. Reversed.

The defendant was found guilty in the Recorder's Court of Johnston County on charge of possession of intoxicating liquor for the purpose of sale in July, 1949, and the following sentence imposed: "four months jail to be worked on road, suspended on payment of $50 fine and court costs. Defendant not to violate prohibition laws for two years." Defendant did not appeal. The fine and costs have been paid. This case was numbered 10,158.

On 31 December, 1950, officers went to defendant's premises and read a search warrant, which, however, does not appear to have been issued in accordance with the statute, G.S. 15-27. The defendant was present and had a pint of nontax-paid whisky in his hand. On the trial in Recorder's Court 10 January, 1951, on charge of unlawful possession of intoxicating liquor, defendant was found guilty and sentence imposed. From this judgment defendant appealed and the case is now pending in the Superior Court of Johnston County.

At the same time the Recorder's Court entered the following order: "The court further finds as a fact that defendant W. U. Stallings has violated the conditions of the suspended sentence in Case #10,158, for that he made a voluntary statement to an officer of the law, after the search of his premises, to the effect 'when you are caught, you are caught,' and that the defendant made another voluntary statement to an officer of the law, after the search of his premises, to the effect that the officer to whom the statement was addressed would not find it necessary to attempt to apprehend him upon the highways because he had previously been caught by other officers."

Upon these findings execution of the suspended sentence was ordered.

The defendant moved before the judge of the Superior Court for writ of *certiorari* and for review of the order imposing the suspended sentence. This was allowed, and the matter came on for hearing in the Superior Court of Johnston County. The presiding judge heard additional evidence, made findings of fact based thereon, and entered judgment that the suspended sentence be put into effect. Defendant excepted and appealed.

Attorney-General McMullan, Assistant Attorney-General Moody, and Robert B. Broughton, Member of Staff, for the State.
Shepard & Wood for defendant, appellant.

DEVIN, C. J. The power of a court, in proper case, to suspend judgment on conviction of a criminal offense for a reasonable length of time, conditioned upon continued obedience to the law, is well recognized in this jurisdiction, and frequently exercised in order to carry out the more humane concept of the purpose of punishment for crime. *S. v. Tripp,* 168 N.C. 150, 83 S.E. 630; *S. v. Wilson,* 216 N.C. 130, 4 S.E. 2d 440; *S. v. Gibson,* 233 N.C. 691 (698), 65 S.E. 2d 508; G.S. 15-200. The propriety of suspending the sentence, ordinarily, is a matter resting in the sound discretion of the trial judge. The General Assembly has endeavored to implement the power of the court in this respect by making further provisions for probation and supervision. G.S. 15-197 *et seq.*

Where for violation of one or more of the conditions of suspension the sentence was ordered into effect, the defendant, having impliedly consented to the conditions, had no right of appeal. However, he was not without remedy from an improper judgment, and when it was made to appear that a substantial wrong has been done, the Superior Court had power by writs of *certiorari* or *recordari* to review the action of the lower court. But in such case the court acted on the facts as they appeared of record, considering only the questions of law thus raised, with power to affirm, reverse or revise the judgment complained of. *S. v. Tripp,* 168 N.C. 150, 83 S.E. 630; *S. v. Pelley,* 221 N.C. 487, 20 S.E. 2d 850; *S. v. King,* 222 N.C. 137, 22 S.E. 2d 241; *S. v. Maples,* 232 N.C. 732, 62 S.E. 2d 52. The defendant could contest the validity of the judgment ordering execution of the suspended sentence upon the ground that there was no evidence to support the finding that the conditions of suspension have been violated, or that the conditions were unreasonable and unenforceable, or for an unreasonable length of time. *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143; *S. v. Robinson,* 232 N.C. 418, 61 S.E. 2d 106; *S. v. Smith,* 233 N.C. 68, 62 S.E. 2d 495; *S. v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508; *S. v. Rhodes,* 208 N.C. 241, 180 S.E. 84. While it is not entirely clear that the Recorder's Court judgment in the case at bar made observance of the laws relating to intoxicating liquor a condition upon which the judgment was suspended, it was so understood by the court without objection by the defendant on that score.

It may be noted that since this case was heard below, the General Assembly has amended the procedure incident to invoking suspended sentences imposed by courts inferior to the Superior Court (Chapter 1038, Session Laws 1951, ratified 14 April, 1951), and it is now provided that in such case the defendant shall have right of appeal to the Superior Court

where the matter shall be heard *de novo,* but only on the issue whether or not the terms of the suspended sentence have been violated. The provisions of this statute, however, may not be applied to the case at bar which was heard below at February Term, 1951.

Apparently the court below heard the matter *de novo* and permitted the introduction of additional evidence and made findings of fact upon which judgment was rendered affirming the judgment of the Recorder. *S. v. Rhodes, supra.* However, treating the judgment below as an affirmance of the Recorder's Court judgment on the facts found by the Recorder, we think there was error. The only fact which formed the basis of the Recorder's ruling that the defendant had violated the condition of the suspended sentence relating to intoxicating liquor was the purported statement of the defendant to an officer, "when you are caught, you are caught." This statement, however, does not appear in the record of the evidence heard by the Recorder. The record shows that the Recorder also based his finding on testimony of a statement made by the defendant to a highway patrolman that this officer would not have to worry about catching him on the highway as the "officers had already got him."

We are constrained to hold that on the record before us the evidence heard by the Recorder and reported as forming the basis of his ruling is insufficient to support the finding that defendant had violated the conditions of the suspended sentence as set out in the original judgment. There was error in affirming the Recorder's judgment.

The charge against this defendant for the unlawful possession of intoxicating liquor on 31 December, 1950, is pending in the Superior Court of Johnston County on defendant's appeal from the Recorder's judgment. That case will be heard *de novo* unaffected by the ruling on the present appeal.

For the reason stated, the judgment affirming the ruling of the Recorder on the suspended sentence must be

Reversed.

JOHN N. SOUTHERLAND AND WIFE, CUZZIE POTTS SOUTHERLAND, AND WILLIE SOUTHERLAND JONES, v. W. H. POTTS.

(Filed 10 October, 1951.)

Partition § 4f—

Grantor conveyed the land in question to his daughter and her husband for life and to her heirs "during the term of the natural life of her heir or heirs." Grantor died intestate, and in later partition proceedings the identical land conveyed to the daughter for life was allotted to her as her entire share. *Held:* The judgment in the partition proceedings, though

not passing title, vested in severalty the title to each of the tracts to the respective tenants and operates as an estoppel as to any reversion, and upon the death of the daughter and her husband intestate without having disposed of any interest in the land, their children take the property in fee simple.

APPEAL by defendant from *Williams, J.*, April Term, 1951, of WAYNE.

This is a controversy without action upon an agreed statement of facts, the pertinent parts of which are set out in the numbered paragraphs below:

1. The plaintiffs were under contract to sell and convey to the defendant 68 acres of land for a cash consideration of $8,000, on or before 1 February, 1951. A deed, duly executed by the plaintiffs, sufficient in form to convey to the defendant the aforesaid tract of land, was tendered to the defendant in apt time.

2. The defendant declined to accept the deed and to pay the agreed purchase price therefor on the ground that the grantors therein did not own an estate in fee simple in said lands.

3. The controversy between the parties to this action arises out of a difference of opinion as to the legal effect of a deed executed by John Kornegay (owner of the land now in controversy) and his wife, Harriet Kornegay, to Bryant Southerland and his wife, Martha C. Southerland, who was a daughter of the grantors in said deed. The deed was dated 28 July, 1883 and duly recorded in the Office of the Register of Deeds in Wayne County, North Carolina, in Book 51, at page 534. This deed purports to convey the land involved herein, in consideration of natural love and affection, to Bryant Southerland and his wife, Martha C. Southerland "during the term of their natural lives and also to the heirs of the body of the said Martha C. Southerland during the term of the natural life of her heir or heirs."

4. John Kornegay died intestate leaving six other children besides his daughter, Martha C. Southerland.

5. In 1888, a proceeding was brought in the Superior Court of Wayne County, North Carolina, for a division of the lands of John Kornegay, deceased, and all the heirs at law of John Kornegay were parties to the proceeding. In the division, Martha C. Southerland was allotted, as her share in her father's estate, the identical tract of land theretofore conveyed to her, for life by her father, by deed dated 28 July, 1883. She was allotted no other acreage in the lands belonging to the estate of her father.

6. Martha C. Southerland and her husband, Bryant Southerland, died intestate, leaving two children, John N. Southerland and Willie Southerland Jones, two of the grantors in the deed tendered by the plaintiffs to the defendant, as their only heirs at law.

The court below held the deed tendered by the plaintiffs is sufficient to convey to the defendant a good and indefeasible title in fee simple, to the lands described therein, and directed the defendant to pay the agreed purchase price and to accept the tendered deed. Defendant appeals and assigns error.

Edwin C. Ipock for defendant, appellant.
Dees & Dees for plaintiffs, appellees.

DENNY, J. We deem it unnecessary to discuss the legal effect of the deed from John Kornegay to Bryant Southerland and his wife, Martha C. Southerland, since regardless of its provisions, Martha C. Southerland became vested with a fee simple title thereto, subject only, in any event, to the life estates conveyed in the above deed, by virtue of the allotment to her of the identical lands described in the deed in the division of her father's estate.

The defendant contends, however, that the commissioners in the special proceeding to divide the lands of John Kornegay, deceased, did not allot the reversionary interest of John Kornegay in the land described in his deed dated 28 July, 1883, to his daughter, Martha C. Southerland and her husband, Bryant Southerland. This contention is without merit. The decree confirming the allotment made by the commissioners directed that the report be registered, and further decreed that the report and the judgment entered pursuant thereto "shall vest and convey the title to the several parties in their respective shares accordingly by the metes and bounds set out in said report as effectively as if several conveyances were made by the parties to each other in severalty." Such a judgment is binding on all parties to the proceeding and those in privity with them. 40 Am. Jur., Partition, Section 131, page 110, *et seq.; Carter v. White*, 134 N.C. 466, 46 S.E. 983; *Buchanan v. Harrington*, 152 N.C. 333, 67 S.E. 747; *Pinnell v. Burroughs*, 168 N.C. 315, 84 S.E. 364; *Bank v. Leverette*, 187 N.C. 743, 123 S.E. 68; *Gibbs v. Higgins*, 215 N.C. 201, 1 S.E. 2d 554.

A proceeding for partition dissolves the unity of possession, and while it does not pass title, it vests in severalty the title to each of the tracts or parcels of land allotted to the respective tenants and operates "as an estoppel upon the parties to the proceeding and those in privity with them." *Bank v. Leverette, supra.*

Moreover, it must be conceded that upon the death of John Kornegay, intestate, a one-seventh undivided interest in his lands passed to his daughter, Martha C. Southerland, under our canons of descent, G.S. 29-1. She accepted the allotment of the lands previously conveyed to her and her husband for life, and to her bodily heirs for life, as her share of her

father's estate. Consequently, when she and her husband died intestate, not having disposed of any interest in said lands, her bodily heirs, to wit: her children, John N. Southerland and Willie Southerland Jones, took a fee simple title to the premises.

The judgment of the court below is

Affirmed.

LEE FRANCIS ANDERSON AND ANNIE LOU LYNN v. LIZZIE STEVENS ATKINSON, ANDREW STEVENS, FREDERICK JAMES SMITH, RUDOLPH OLLIN SMITH, RHODA SMITH BARNES, EUGENE M. SMITH, VIOLA HOWELL, HENRY STEVENS, WILLIAM ATKINSON, LEONARD OLIVER, ELIZABETH J. McCOY, BESSIE JONES, WILMA LEE JONES, SARAH JONES, MAGDALENE JONES, GERALDINE JONES, WILLIAM JONES, JR., ALPHONSO JONES, HENRY ANDERSON.

(Filed 10 October, 1951.)

1. Wills § 16—

Probate of a will is in the exclusive jurisdiction of the clerk of the Superior Court, and therefore the Superior Court has no original jurisdiction of an action to have plaintiffs declared the owners of land upon allegations that decedent devised it to them but that the will had been lost or destroyed and never admitted to probate, nor do such facts constitute a cause of action, since the will is wholly ineffectual until it is admitted to probate in the proper court. G.S. 2-16, G.S. 28-1, G.S. 28-2, G.S. 31-12 through 31-27.

2. Wills § 4—

Allegations to the effect that decedent contracted, in consideration of personal services rendered, to devise property to plaintiffs, and that decedent did so devise them the property but that the will was lost or destroyed and never admitted to probate, *held* not to state a cause of action against decedent's heirs for specific performance, since, according to the complaint, decedent did not breach the agreement but complied therewith by devising the land to them, and specific performance does not lie until there has been a breach of contract.

APPEAL by defendants from *Williams, J.*, at the April Term, 1951, of the Superior Court of JOHNSTON County.

Civil action to recover land heard upon a demurrer to the complaint.

When it is stripped of immaterial averments and conclusions, the complaint alleges these matters:

That Andrew Atkinson and his wife, Suffany Atkinson, were a childless couple who resided in Johnston County, North Carolina, on 35 acres of land owned by the former in fee simple; that they took the plaintiffs, Lee Francis Anderson and Annie Lou Lynn, into their home when the

plaintiffs were small children and kept them there until the plaintiffs reached maturity; that while they were living in such home, the plaintiffs rendered valuable personal services to Andrew and Suffany Atkinson upon an understanding that Andrew Atkinson was to devise the 35 acres to the plaintiffs subject to a life estate in Suffany Atkinson; that Andrew Atkinson died on 20 December, 1944, and his widow, Suffany Atkinson, occupied the 35 acres from that time until her death, which occurred shortly before the commencement of the action; that Andrew Atkinson left a last will devising the 35 acres to the plaintiffs, but such last will was destroyed or lost after the death of Andrew Atkinson and has never been admitted to probate; that "said will . . . operated . . . to vest title" to the 35 acres in the plaintiffs; and that the defendants, who are the heirs of Andrew Atkinson, have been in the possession of the 35 acres since the death of Suffany Atkinson, and have refused to surrender them to the plaintiffs.

The complaint prays that the plaintiffs "be declared the owners in fee and entitled to immediate possession" of the 35 acres.

The defendants demurred to the complaint in writing, asserting in specific detail that these two things appear upon the face of the complaint: (1) That the court has no jurisdiction of the subject matter of the action; and (2) that the complaint does not state facts sufficient to constitute a cause of action. G.S. 1-127.

Judge Williams entered a judgment overruling the demurrer, and the defendants appealed to the Supreme Court, assigning that decision as error.

E. R. Temple and Leon G. Stevens for plaintiffs, appellees.
Wellons, Martin & Wellons for defendant, appellants.

ERVIN, J. The claim of the plaintiffs is founded upon a complaint alleging that Andrew Atkinson devised the 35 acres to them by a last will, which has never been admitted to probate.

It appears, therefore, that the complaint undertakes to present to the court for determination this crucial issue: Did Andrew Atkinson leave a will devising the 35 acres to the plaintiffs?

This being true, the complaint discloses upon its face that the court has no jurisdiction of the subject matter of the action; for under the law of North Carolina the issue of whether an unprobated script is, or is not, a man's last will cannot be properly brought before the superior court for determination in an ordinary civil action. *Brissie v. Craig,* 232 N.C. 701, 62 S.E. 2d 330.

Under the controlling statutes, the Clerk of the Superior Court has exclusive original jurisdiction to take proofs of wills of persons dying domiciled within his county. G.S. 2-16, 28-1, 28-2, and 31-12 to 31-27,

inclusive; *Brissie v. Craig, supra; McCormick v. Jernigan,* 110 N.C. 406, 14 S.E. 971. The jurisdiction of the clerk to take proof of a particular will is not affected by its loss or destruction before probate. *Fawcett v. Fawcett,* 191 N.C. 679, 132 S.E. 796; *Ricks v. Wilson,* 154 N.C. 282, 70 S.E. 476; *In re Hedgepeth,* 150 N.C. 245, 63 S.E. 1025; *McCormick v. Jernigan, supra.*

The complaint is also subject to the second objection raised by defendants. The demurrer admits the facts pleaded in the complaint, but it does not admit the legal conclusion set out therein that such facts operated to vest title to the 35 acres in the plaintiffs. Since the complaint rests the claim of the plaintiffs to the 35 acres upon the unprobated will of Andrew Atkinson, it does not state facts sufficient to constitute a cause of action. A will is wholly ineffectual as an instrument of title until it is admitted to probate in the proper court. *Brissie v. Craig, supra; Cartwright v. Jones,* 215 N.C. 108, 1 S.E. 2d 359.

The contention of plaintiffs that the complaint states a cause of action against defendants as heirs of the deceased, Andrew Atkinson, for the specific performance of a contract by the deceased to devise the 35 acres to plaintiffs is untenable. There is no language in the complaint indicating that the action was brought for any such purpose. Indeed, that pleading negatives any right on the part of the plaintiffs to maintain an action for specific performance or its equivalent. See: 58 C.J., Specific Performance, sections 308, 309. Such an action cannot lie until there has been a breach of contract. 58 C. J., Specific Performance, sections 6, 494. According to the complaint, Andrew Atkinson did not breach the understanding with plaintiffs. The converse is true. He fully performed it by devising the 35 acres to them.

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

T. L. READ, ANCILLARY ADMINISTRATOR OF THE ESTATE OF HELEN LEWIS READ, v. YOUNG ROOFING COMPANY AND ELIJAH JUNIOR LANGLEY (ORIGINAL DEFENDANTS), AND ROSA PALMER (ADDITIONAL DEFENDANT).

(Filed 10 October, 1951.)

1. Pleadings § 10: Torts § 4: Automobiles § 21—

An answer alleging that the driver of the car in which intestate was riding was guilty of negligence constituting the sole proximate cause of the collision with defendant's truck, and that intestate and the driver of the car were engaged in a joint enterprise so that the driver's negligence barred recovery against defendant for intestate's death, but further alleging that if the facts so set up as a defense be found against defendant,

then the negligence of the driver of the car concurred with that of defendant, and demanding contribution against the driver of the car, *held* good as against demurrer interposed by the driver of the car. G.S. 1-240.

2. Pleadings § 19c—

A pleading will be liberally construed upon demurrer, and the pleading will be upheld if in any portion or to any extent it presents facts sufficient to constitute a cause of action.

3. Torts § 4—

The purpose of the statute permitting the joinder of a third party as a joint tort-feasor against whom the defendant seeks contribution, is to enable the litigants to determine in one action all matters in controversy growing out of the same subject of action.

APPEAL by Rosa Palmer, additional defendant, from *Carr, J.*, January Term, 1951, of WARREN. Affirmed.

The demurrer of Rosa Palmer, additional defendant, to the cross-action of defendant Roofing Company, was overruled and she appeals.

The action grew out of a collision on the highway between an automobile in which plaintiff's intestate Helen Lewis Read was riding, and the motor truck of defendant Roofing Company being driven at the time by its employee Langley. As result of the collision Helen Lewis Read received injuries resulting in her death, and her administrator instituted this action against the defendants to recover damages for her wrongful death (G.S. 28-173), alleging negligent operation of the truck of defendant Roofing Company by its employee Langley. Langley did not answer.

Defendant Roofing Company, answering, denied negligence on the part of its driver, and further alleged that Rosa Palmer, who was driving the automobile in which the intestate was riding, was negligent in the operation of the automobile (setting out the acts of negligence on her part complained of), and that her negligence was the sole proximate cause of the collision and consequent injury; that Rosa Palmer and the intestate were at the time engaged in a joint enterprise, and that plaintiff's action was barred by Rosa Palmer's negligence. Further, by way of cross-action against Rosa Palmer defendant alleged if it be found that defendant was negligent as alleged in the complaint, and that plaintiff's intestate and Rosa Palmer were not joint adventurers, "then the negligence of Rosa Palmer as set forth in paragraph 1(a) of this cross-action concurred with the negligence of this defendant and proximately caused the damage to plaintiff's intestate, and this defendant is entitled to judgment over and against the said Rosa Palmer as a joint tort-feasor."

Rosa Palmer having been made party defendant, demurred to the defendant's cross-action on the ground that the allegations upon which this relief was sought were insufficient to constitute a cause of action for contribution.

The demurrer was overruled and Rosa Palmer excepted and appealed.

Perry & Kittrell for Young Roofing Company, Appellee.
Gholson & Gholson for Rosa Palmer, Appellant.

DEVIN, C. J. We think the portions of the pleading quoted above, considered in connection with other allegations of fact set out in defendant's answer and cross-action, are sufficient to state a cause of action for contribution against the appellant as joint tort-feasor, as permitted by the statute G.S. 1-240, and that the demurrer was properly overruled.

The appellant's position is that in defendant's cross-action to which the demurrer was addressed it was alleged that Rosa Palmer's negligence was the sole proximate cause of the injury, and that she and plaintiff's intestate were joint adventurers, and therefore the plaintiff was barred by her negligence. But it will be noted that in the pleading challenged by the demurrer it was also alleged that if the facts so set up as a defense be found against the defendant, then the negligence of Rosa Palmer concurred with that of the defendant in causing the injury, and that she was liable to defendant for contribution as joint tort-feasor. *Freeman v. Thompson,* 216 N.C. 484, 5 S.E. 2d 434.

The rule in this jurisdiction is that as against a demurrer a pleading will be liberally construed in favor of the pleader, and that if in any portion or to any extent the pleading presents facts sufficient to constitute a cause of action it will be upheld. *Blackmore v. Winders,* 144 N.C. 212, 56 S.E. 874; *Wiscassett Mills Co. v. Shaw, Comr.,* 233 N.C. 71, 62 S.E. 2d 487; *Bryant v. Ice Co.,* 233 N.C. 266, 63 S.E. 2d 547. And a demurrer requires search of the entire record. *Harris v. Fairley,* 232 N.C. 551, 61 S.E. 2d 616.

The purpose of the statute permitting the joinder of a third party against whom the defendant seeks contribution as joint tort-feasor (G.S. 1-240), was to enable litigants in tort actions to determine in one action all matters in controversy growing out of the same subject of action. *Freeman v. Thompson,* 216 N.C. 484, 5 S.E. 2d 434; *Evans v. Johnson,* 225 N.C. 238, 34 S.E. 2d 73.

In *Evans v. Johnson, supra,* the demurrer to defendant's cross-action for contribution was sustained, but the ruling there was predicated on allegations in a material respect differing from those in the case at bar. For the same reason demurrer was sustained in *Walker v. Loyall,* 210 N.C. 466, 187 S.E. 565, where the allegation was not one of joint tort-feasorship.

The judgment overruling the demurrer in this case is

Affirmed.

COY L. GUY, T. H. GARDNER, D. A. LANGDON, OLLIE WILLIFORD, A. D. NORDAN AND R. C. WILLIAMS, JR., v. LOUIS BAER AND WIFE, SADIE BAER, WILLIE MOFF AND WIFE, PEARL B. MOFF, J. R. OWEN AND J. K. ADAMS, JR.

(Filed 17 October, 1951.)

1. Pleadings § 3a—

The complaint must contain a plain and concise statement of every material, essential, and ultimate fact which constitutes the cause of action without unnecessary repetition and with each material allegation distinctly numbered, but it should not contain allegations of evidentiary facts tending to establish the ultimate and issuable facts. G.S. 1-122.

2. Pleadings § 31—

Allegations of facts and circumstances which allegedly induced one of defendants to approach plaintiffs for the purpose of making the agreement attacked are properly stricken on motion for irrelevancy, the cause being founded solely on transactions subsequent to that time.

3. Same: Escrow § 4—

In an action to annul certain contracts and to recover money paid under certain checks on the ground that the papers were wrongfully obtained by defendants in breach of the terms of an escrow agreement, and that the contracts were wrongfully altered and enlarged while in escrow, *held*, allegations as to the purpose and intent of the delivery in escrow and allegations that defendants, without the consent of plaintiffs, altered the contracts after they were delivered in escrow and before the terms of the conditional delivery were fulfilled, are essential elements of the cause of action and are improperly stricken upon motion of defendants.

4. Pleadings § 3a—

Allegations of a first cause of action may not be incorporated into that part of the complaint stating the second cause of action merely by referring to the number of the particular paragraphs of the first cause of action considered pertinent.

5. Pleadings § 31—

Where, in an action attacking the validity of contracts and to recover money paid thereunder, the complaint states one cause of action based upon delivery of the contracts in breach of escrow agreement, and a second cause of action based upon fraud in obtaining the execution of the contracts, motion to strike the allegations constituting the second cause of action on the ground that they are repetitious is properly denied.

APPEAL by plaintiffs and defendants from *Godwin, Special Judge,* April Term, 1951, HARNETT.

Civil action to vacate and annul certain paper writings and to recover money paid, heard on motion to strike certain portions of the pleadings.

There were negotiations between plaintiffs and defendant Owen, representing himself and the other defendants, relative to the lease of a tobacco

sales warehouse in Dunn by defendants Baer and Moff to plaintiffs and a sublease thereof to defendant Owen. As a result, plaintiffs and Owen met, and plaintiffs executed two paper writings the exact nature of which is not disclosed by the complaint. We must assume they were a contract of lease and a contract subletting the warehouse. It was understood at the time that Milton Stephenson and Ed Clayton, or two other parties acceptable to plaintiffs, should join with plaintiffs in executing said contracts and that the said contracts would be redrafted before they became effective. To that end the contracts were delivered to H. C. Strickland to be held in escrow until the contracts were redrafted in final form and the execution thereof was completed in accord with the agreement between the parties. Later, without the knowledge or consent of plaintiffs, the contracts were signed by defendants Owen and Adams in lieu of Stephenson and Clayton and delivered to defendants, who had them recorded in the registry of Harnett County.

At the time the contracts were placed in escrow, the plaintiffs each deposited in escrow upon the same conditions a check in the sum of $2,250—a total of $13,500. Neither the purpose of these checks nor the name or names of the payees is disclosed except that they were to show the good faith of plaintiffs.

The plaintiffs undertook to allege two causes of action: (1) that delivery of the contracts and checks was wrongfully obtained by defendants in breach of the terms of the escrow agreement and the contracts were wrongfully altered and enlarged, by reason of which they are void and of no effect; and (2) the execution of said contracts by plaintiffs was obtained by the false pretense and fraud of the defendants as set out in the complaint.

They pray cancellation of the contracts and recovery of the amounts wrongfully obtained by defendants through the use of the checks delivered by plaintiffs to Strickland.

Defendants, before answering, moved to strike from the statement of the first cause of action all of paragraphs 5, 6, and 7, and all of paragraph 10, except the first ten lines thereof; paragraph (c) and the last paragraph of allegation number 12, for that said allegations are irrelevant, repetitious and redundant. They also move to strike all of the purported second cause of action for that it is merely repetitious of the first cause of action and fails to state any new grounds for relief.

The court entered its order striking the allegations in the first cause of action in accord with the motion and also the numerals "5, 6, and 7" in paragraph (1) of the second cause of action "in order that said Paragraphs . . . may not be restated in said Second Cause of Action." The plaintiffs excepted and appealed. Defendants excepted to the refusal of the court to strike all of the alleged second cause of action and appealed.

I. R. Williams and Neill McK. Salmon for plaintiff appellants.

Smith, Leach & Anderson, James K. Dorsett, Jr., and Wilson & Johnson for defendant appellees.

BARNHILL, J. The complaint must contain a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition; and each material allegation must be distinctly numbered. G.S. 1-122.

The function of a complaint is not the narration of the evidence but the statement of the substantive and constituent facts upon which the plaintiffs' claim to relief is founded. *Winders v. Hill,* 141 N.C. 694; *Brown v. Hall,* 226 N.C. 732, 40 S.E. 2d 412. Hence, "the facts constituting a cause of action" required by the statute are the material, essential, and ultimate facts which constitute the cause of action—but not the evidence to prove them. With few exceptions only the facts to which the pertinent legal or equitable principles of law are to be applied are to be stated in the complaint. *Chason v. Marley,* 223 N.C. 738, 28 S.E. 2d 223, and cases cited; *Long v. Love,* 230 N.C. 535, 53 S.E. 2d 661.

When a good cause of action is thus stated, evidence of the facts alleged, including every material detail, fact, and circumstance tending to establish the ultimate and issuable facts, is admissible. But it does not follow that it is either necessary or proper to allege any and every fact, evidence of which will be competent at the hearing. *Chason v. Marley, supra.*

Observance of these rules in drafting a complaint is essential to good pleading and a well prepared complaint is most helpful both to the court and the jury. However, they are all too often honored in the breach. The defendants here assert, with some justification, that the complaint contains allegations of evidentiary, probative facts not essential to a statement of plaintiffs' alleged causes of action and which tend only to confuse.

The allegations contained in paragraphs 5, 6, and 7 of the first cause of action were properly stricken. They merely relate facts and circumstances which induced defendant Owen to approach plaintiffs and solicit them to execute the contracts in question. What happened after Owen contacted plaintiffs is the essential question. The other is merely unnecessary window dressing.

We do not, however, concur in the view of the court below that the latter part of paragraph 10 should be stricken. Here the plaintiffs allege the purpose and intent of the delivery in escrow. Upon these facts the plaintiffs, in part, base their first cause of action. Nor was it proper to strike subsection (c) and the last paragraph of allegation number 12.

Allegation that defendants altered the contracts after they were delivered in escrow and before the terms of the conditional delivery were fulfilled, without the consent of the plaintiffs, constitutes the foundation stone upon which their right to relief must be made to rest.

The attempt to repeat in the statement of the second cause of action what is alleged in paragraphs 5, 6, and 7 of the first cause of action merely by referring to said paragraphs by number is violative of Rule 20 (2), Rules of Practice, 221 N.C. 557. Furthermore, these allegations are not essential to a statement of plaintiffs' second cause of action. The reference was properly stricken.

In that part of the complaint labeled "SECOND CAUSE OF ACTION" the plaintiffs allege a separate and distinct cause of action for fraud in the procurement of the execution by them of the contracts in question. Defendants' exception to the refusal of the court to strike the same is without substantial merit. In this connection, however, we may note that the allegations in paragraphs 5 and 6 in the second cause of action have no real relation to the cause of action therein stated. They more properly relate to the first cause of action and in that respect are largely repetitious.

A complete reformation of the pleadings would not be ill advised.

Let the costs be equally divided between plaintiffs and defendants.

On plaintiffs' appeal: Modified and affirmed.

On defendants' appeal: Affirmed.

GOLDSTON BROTHERS, INC., v. J. A. NEWKIRK AND WIFE, MARY A. NEWKIRK.

(Filed 17 October, 1951.)

1. Trial § 21½—

Where no exception is noted to the refusal of defendants' motion to nonsuit when plaintiff rested its case, and thereafter, upon agreement that the court find the facts upon the evidence and stipulations of the parties, the parties place in the record a series of stipulations covering numerous pertinent facts, *held*, the case is reopened to receive such stipulations, and the motion of nonsuit not being renewed, the question of defendants' right to nonsuit is not presented on the appeal.

2. Appeal and Error § 51c—

Where the question of defendants' right to nonsuit is not presented on the appeal, but the judgment of the lower court is modified to the extent that it allowed a compulsory continuance pending the determination of another action upon different issues pending in the Federal Court between a stranger to the present action and the defendants herein, the decision

does not justify dismissal of the action in the lower court after remand, but leaves the case pending in substantially the same status as if the case had been submitted to a jury and mistrial ordered.

3. Pleadings § 22b—

The court rendered judgment under agreement of the parties that the court should find the facts from the evidence and stipulations of the parties. On appeal the judgment was modified and the cause remanded. *Held:* After remand the cause was pending in the Superior Court, and the Superior Court had authority to permit amendment within the purview of G.S. 1-163, and the refusal of the court to permit amendment on the ground that it was without authority to entertain the motion will be reversed on appeal.

APPEAL by plaintiff from *Sharp, Special Judge,* June Term, 1951, of LEE.

Civil action by auction-broker to recover commissions for selling land under a special contract.

This case was here on former appeal. The opinion is reported in 233 N.C. 428, 64 S.E. 2d 424, where the background facts are set out in detail. It appears that in the course of the former trial it was agreed by the parties that the presiding judge, upon the evidence and stipulations, might find the facts and render judgment without the intervention of the jury. Judge Carr, after hearing and considering the evidence and stipulations, entered judgment adjudging that the plaintiff "is not at the present time entitled to judgment against the defendants," but ordering that the "action be not dismissed and that it be continued" for the purpose of enabling the plaintiff to file certain motions in the cause, if it be so advised. Both sides excepted to the judgment and gave notice of appeal. The plaintiff perfected its appeal; the defendants did not. The decision of this Court modified but upheld the judgment below.

When the case went back to the Superior Court, the plaintiff lodged a motion for leave to amend and for an opportunity to offer evidence in support of the complaint as amended, whereas the defendants moved the court to dismiss the action. The court below held as a matter of law that it was "without authority to allow the plaintiff's motion" to amend and, construing the decision of this Court as a mandate to dismiss the action as in case of nonsuit, denied plaintiff's motion to amend and signed judgment dismissing the action.

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 decision on the former appeal upheld the judgment of Judge Carr in its two material aspects, *i.e.,* (1) in adjudging that the

plaintiff "is not at the present time entitled to a judgment against the defendants," and (2) in ordering "that this action be not dismissed and that it be continued for the purpose of enabling the plaintiff to file" certain motions in the cause, if it be so advised. (*Goldston Brothers v. Newkirk, supra* (233 N.C. 428)).

The former decision modifies Judge Carr's judgment in only one particular, and that is in the intimation recited in the judgment, but not specifically adjudicated therein, that further proceedings in the instant case perhaps should be deferred and postponed to await developments in the related case of *Babcock Lumber Company v. J. A. Newkirk, et ux.*, pending in the U. S. District Court. This Court felt that further proceedings in the instant case should not be deferred, except by consent, to await the uncertainty of developments in the related case in the District Court, particularly so in view of the fact that neither the parties nor the issues are the same in the two cases (17 C.J.S., p. 205), and therefore, in order to guard against the eventuality that Judge Carr's judgment might be interpreted as working a forced, indefinite postponement of the case, it was thought advisable to fix it definitely so there might be no delay in the further proceedings in the case, except by consent. Such is the limited intent and meaning of the single modifying limitation placed on Judge Carr's judgment in the following language:

"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." *Goldston Brothers v. Newkirk, supra* (233 N.C. 428, mid. p. 433).

The court below on the rehearing interpreted the former decision (1) as affirming the judgment of Judge Carr in "That the plaintiff is not at the present time entitled to a judgment against the defendants," and (2) as modifying by implication the judgment in so far as it ordered "that this action be not dismissed," and so forth. The lower court on the rehearing no doubt reasoned that inasmuch as the plaintiff upon the evidence adduced at the first hearing was not entitled to recover, it necessarily followed that the defendants were entitled to have the action dismissed "as of nonsuit," and the court, assuming that such was the intent of the former decision, summarily dismissed the action.

This assumption, however, is inconsistent with the theory of the former appeal and the decision of this Court based thereon. Briefly, the procedural facts in respect to the former appeal are these: When the plaintiff rested its case, the defendants moved to nonsuit. The motion was denied. No exception was noted. Thereupon, it was agreed by the parties that the court upon the evidence and stipulations might find the

facts and render judgment thereon without the intervention of the jury. The parties then by way of supplementing and clarifying the facts already in evidence, placed in the record a series of stipulations covering numerous pertinent facts. Thus, to receive these stipulations, the case was reopened. Thereafter the motion to nonsuit was not renewed. Thus the right to press for nonsuit was waived. See G.S. 1-183; McIntosh, North Carolina Practice and Procedure, p. 613; *Hawkins v. Dallas,* 229 N.C. 561, 50 S.E. 2d 561. Moreover, when the court below entered judgment ordering "that this action be not dismissed," and so forth, the only exception noted by the defendants was "to that portion of the judgment allowing the plaintiff to file such motions in this cause as the plaintiff deems necessary in the light of future developments in the *Babcock Lumber Company case.*" Also, while the defendants gave notice of appeal, no errors were assigned, and no exception was brought forward in the brief. Therefore, as appears in the closing paragraph of the former opinion of this Court, the defendants' appeal was treated as abandoned. Thus it appears upon the face of the record, and in the former opinion, that the defendants waived their right to challenge the ruling of Judge Carr in ordering that the case "be not dismissed" but left on the docket for further proceedings.

Therefore, upon the record as presented, it was not given for this Court *ex mero motu* to strike out of Judge Carr's judgment the order "that the action be not dismissed," and the decision on the former appeal may not be interpreted as embodying such implication. This would give the defendants a delayed "second bite at the cherry," to which, under settled rules of procedure, they are not entitled.

It follows, then, that, as concerning the plaintiff's rights on motion to amend and on motion to try the case again, the effect of Judge Carr's judgment, as modified, is to leave the case pending and at issue on the docket in substantially the same status as if the case had been submitted to a jury and a mistrial ordered.

Therefore, the lower court may allow or disallow such amendments as it may think proper in the exercise of its sound discretion (G.S. 1-163; *Gilchrist v. Kitchen,* 86 N.C. 20), bearing in mind, of course, that the nature of the cause of action as previously charted may not be substantially changed. *Perkins v. Langdon,* 233 N.C. 240, 63 S.E. 2d 565.

In fairness to the able judge who presided on the rehearing, we are constrained to observe that the former opinion of this Court gave only brief mention,—in its closing paragraph,—to the facts which closed the door on the defendants' peremptory right of dismissal.

For the reasons assigned, the judgment below must be

Reversed.

STATE v. CLYDE McLEAN.

(Filed 17 October, 1951.)

1. Automobiles § 28a—

Where the violation of the provisions of G.S. 20-140 is committed in such a reckless and careless manner as to evince a complete and thoughtless disregard for the rights and safety of others, it amounts to culpable negligence, and when such violation proximately results in the death of another, it constitutes manslaughter or even murder, dependent upon the degree of negligence.

2. Automobiles § 28e—Evidence of culpable negligence held sufficient to support conviction of manslaughter.

Evidence tending to show that a person was riding on the running board of defendant's car with defendant's knowledge and acquiescence, that defendant drove the car forty to fifty miles per hour along a dirt road through a cloud of dust of sufficient density to interfere with his vision, swinging his car back and forth across the highway, and that the car sideswiped another car traveling in the opposite direction, in which collision the passenger on the running board was fatally injured, *is held* sufficient to be submitted to the jury in a prosecution for manslaughter, irrespective of the question of defendant's intoxication even though it may have been a contributing factor in defendant's reckless driving, since defendant in the exercise of ordinary prevision could have foreseen that the passenger on the running board might be seriously injured or killed as a result of such reckless operation of the car, regardless of whether it came into contact with another vehicle or not.

3. Criminal Law § 53d—

Where the charge fully instructs the jury as to the evidence and the contentions of the parties and defines the law applicable thereto, it complies with G.S. 1-180, and a defendant desiring further elaboration and explanation of the law must tender prayers for instructions.

APPEAL by defendant from *Grady, Emergency Judge,* July 1951 Special Term, LEE. No error.

Defendant was tried upon an indictment charging him with manslaughter in the death of one James Edward Medlin.

The State offered evidence which tended to show that on the evening of 17 September, 1950, E. L. Fore, a resident of Sanford, North Carolina, was traveling in an automobile in the direction of his home. The road over which he was passing was a red dirt and gravel country road and at the time was covered with a cloud of dust caused by a passing automobile, which cloud of dust was sufficient to prevent a driver from seeing clearly. The defendant, with whom witness, Fore, was not acquainted, was traveling in the opposite direction. The road was straight at the point where the two cars met, although defendant had just passed through a curve some 300 feet away.

When defendant came into view of Fore, James Edward Medlin was squatting on the left running board of defendant's car and was holding onto the car. Defendant was driving his automobile at a speed of 40 to 50 miles per hour in a zig-zag fashion, so that he crossed the center of the road six or eight times in the distance of 100 yards. Immediately before the collision, defendant swung to his left and it appeared that the two cars would meet head-on. Defendant then swung sharply to his right in such a way as to sideswipe the automobile driven by Fore. Medlin was caught between the two cars, thrown to the highway and fatally injured. It was admitted at the trial that Medlin came to his death as a result of the collision. Defendant knew that Medlin was in a squatting position on the left running board of his car. Immediately after the collision, a man who gave the appearance of holding something in his arms ran from defendant's car.

Defendant and Fore carried the injured man to the hospital. There Fore smelled the odor of liquor on defendant's breath. He was clumsy, and when the nurse asked him to hurry, he kept saying, "His foot is broke." About one and one-half hours later, two of the sheriff's deputies met the defendant in a taxi on his way from Sanford to the scene of the collision, stopped the taxi and discovered at that time that defendant was highly intoxicated.

Defendant later went to the home of Fore, in company with another man, and in a conversation with Mrs. Fore contended that he was sober when the collision occurred, but in order to settle his nerves, he drank a quantity of liquor after the injured man was taken to the hospital and that accounted for his intoxication. Defendant inquired of Mrs. Fore if she and her husband were going to get on the stand and swear that he was intoxicated and he said to her, "I have eight men to prove I wasn't drunk and you all will look mighty small to go on the stand and testify that I was." Mrs. Fore advised defendant that she did not get near enough to him to find out whether he was drunk or not, but that her husband would tell the truth. He answered, "You see, I'm kind of a red-faced man. People are always trying to say I am drunk but I'm not." The defendant also told Mrs. Fore, "If you tell I was drunk, I won't have enough money to fix the car." Defendant said in the presence of Mrs. Fore that he knew that the boy was on the running board and that he was "stooped down." There was evidence of defendant's bad character to the effect that he had been engaged in the liquor traffic.

The defendant was convicted of involuntary manslaughter and sentenced to the State's Prison for a term of five to seven years. Defendant excepted and appealed.

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

Seawell & Seawell for defendant, appellant.

VALENTINE, J. This appeal presents two questions: (1) Was the evidence, considered in the light most favorable to the State, sufficient to withstand defendant's motion for judgment as of nonsuit? (2) Did the court below comply with G.S. 1-180 in its charge to the jury? Both of these questions must be answered in the affirmative.

It has long been a violation of the common law to inflict injury upon a human being by culpable negligence, and if death results, the offender under certain circumstances may be called upon to answer to the charge of manslaughter or even murder. 99 A.L.R., 756.

With the development of civilization and the resulting transition from animal-drawn vehicles to the intricate and expansive system of motorized transportation, it has become necessary for the protection of life and property to enact and maintain a code of rules regulating the operation of motor vehicles on the highways. A part of this code is G.S. 20-140, which is as follows:

"Any person who drives any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving, and upon conviction shall be punished as provided in 20-180."

A violation of this statute may subject the offender to both civil and criminal liability. There may be a violation of this statute as a result of which the offender is subjected, in addition to civil liability, only to the penalty prescribed by statute, but when the negligent acts are reckless to the point of culpability and are sufficient to evince a complete and thoughtless disregard for the rights and safety of other persons using the highways, it then becomes criminal negligence and the driver of a motor vehicle so offending may be called upon to answer for manslaughter.

The distinction between criminal and civil liability arising out of the reckless operation of an automobile on the public highways of North Carolina is clearly pointed out in *S. v. Cope,* 204 N.C. 28, 167 S.E. 456, where it is said:

"Actionable negligence in the law of torts is a breach of some duty imposed by law or a want of due care—commensurate care under the circumstances—which proximately results in injury to another. *Small v. Utilities Co.,* 200 N.C. 719, 158 S.E. 385; *Eller v. Dent,* 203 N.C. 439;

Hurt v. Power Co., 194 N.C. 696, 140 S.E. 730; *Ramsbottom v. R. R.,* 138 N.C. 39, 50 S.E. 448; *Drum v. Miller,* 135 N.C. 204, 47 S.E. 421.

"The violation of a statute or ordinance, intended and designed to prevent injury to persons or property, whether done intentionally or otherwise, is negligence *per se,* and renders one civilly liable in damages, if its violation proximately result in injury to another; for, in such case, the statute or ordinance becomes the standard of conduct or the rule of the prudent man. *King v. Pope,* 202 N.C. 554, 163 S.E. 447; *Godfrey v. Coach Co.,* 201 N.C. 264, 159 S.E. 412; *Taylor v. Stewart,* 172 N.C. 203, 90 S.E. 134.

"Culpable negligence in the law of crimes is something more than actionable negligence in the law of torts. *S. v. Stansell,* 203 N.C. 69, 164 S.E. 580; *S. v. Rountree,* 181 N.C. 535, 106 S.E. 669.

"Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. *S. v. Whaley,* 191 N.C. 387, 132 S.E. 6; *S. v. Rountree, supra.*

"However, if the inadvertent violation of a prohibitory statute or ordinance be accompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others, then such negligence, if injury or death proximately ensue, would be culpable and the actor guilty of an assault or manslaughter, and under some circumstances of murder. *S. v. Trott, supra* (190 N.C. 674, 130 S.E. 627); *S. v. Sudderth, supra* (184 N.C. 753, 114 S.E. 828); *S. v. Trollinger,* 162 N.C. 618, 77 S.E. 957; *S. v. Limerick,* 146 N.C. 649, 61 S.E. 567; *S. v. Stitt,* 146 N.C. 643, 61 S.E. 566; *S. v. Turnage,* 138 N.C. 566, 49 S.E. 913."

The evidence of the State, which was accepted by the jury, brings the conduct of the defendant within the culpable negligence rule and subjects him to criminal responsibility for the wrongful acts which resulted in the death of James Edward Medlin.

This case does not turn upon the question of defendant's intoxication, although there was substantial evidence on that point which the jury was entitled to take into consideration. The fact of intoxication may well have been a contributing factor in the defendant's reckless operation of his automobile. He knew that Medlin was perched precariously on his running board and that he might be seriously injured or killed by the swaying motion of the automobile, whether it came in contact with another vehicle or not, and notwithstanding this fact, the defendant at a speed of 40 to 50 miles an hour drove through a cloud of dust of sufficient density to interfere with his vision, swinging his car back and forth across the highway.

The Court fully instructed the jury as to the evidence and the contentions of the parties and defined the law applicable thereto. "If the defendant desired further elaboration and explanation of the law he should have tendered prayers for instructions. In the absence thereof he cannot now complain." *S. v. Gordon,* 224 N.C. 304, 30 S.E. 2d 43 (decided prior to 1949 amendment).

The remaining exceptions in the record have been carefully examined and each is found to be without merit. The Judge's charge substantially complied with all the provisions of G.S. 1-180, as amended by Chapter 107, Session Laws 1949. On the entire record defendant appears to have had a fair and impartial trial and as no reversible error has been made to appear, the result will be upheld.

No error.

DR. VASILIOS S. LAMBROS v. THOMAS K. ZRAKAS AND MRS. SOPHIE ZRAKAS.

(Filed 17 October, 1951.)

1. **Evidence § 41: Appeal and Error § 6c (4): Principal and Agent § 13c—**

   Where testimony of an alleged agent to the effect that he was acting as agent for both his mother and father is admitted in evidence without objection, such testimony is competent to be considered by the jury even though it be hearsay and embrace the declaration of the alleged agent, since the privilege of objecting to evidence if the ground of objection is known, is waived if not seasonably taken.

2. **Principal and Agent § 13d: Physicians and Surgeons § 13—**

   Evidence to the effect that the patient's son consulted plaintiff surgeon in regard to an operation upon her, together with testimony by plaintiff without objection that the son said he was acting as agent for both his mother and father, *is held* sufficient to warrant the jury in finding the issue of agency against the mother, and overrule her motion to nonsuit in plaintiff's action to recover the balance due for professional services in performing the operation.

3. **Appeal and Error § 39e—**

   Rulings of the court in the reception of evidence do not justify a new trial when they are not prejudicial.

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

APPEAL by defendants from *Harris, J.,* and a jury, February Civil Term, 1951, of WILSON.

Civil action by plaintiff against the defendants, Thomas K. Zrakas and wife, Sophie Zrakas, to recover balance alleged to be due plaintiff for

professional services in performing a brain operation on the *feme* defendant.

The plaintiff is a brain surgeon of Washington, D. C. The defendants' son, Charles Zrakas, became acquainted with the plaintiff at a social function in Washington, and after several consultations arranged for his mother, the *feme* defendant, Sophie Zrakas, to be taken to Washington for diagnosis and surgical treatment by the plaintiff. The operation, a frontal lobotomy, was performed 10 October, 1946. It is a rare type of surgical operation, requiring a high degree of professional skill. Few members of the medical profession possess the requisite training and skill to perform this operation. The operation on Mrs. Zrakas was a technical success; she has shown satisfactory improvement.

After the operation, the defendant Thomas K. Zrakas paid the plaintiff, in four installments, a total of $1,000. The plaintiff claimed he was entitled to a fee of $3,000.

On failure or refusal of the defendants to pay the balance claimed to be due, the plaintiff instituted this action, alleging that the $3,000 charged by him was and is a fair, reasonable fee for his services, and that he is entitled to recover of both defendants the balance due of $2,000, it being further alleged in the complaint that the plaintiff's services were engaged and the operation performed in response to employment by both of the defendants.

The defendants in their answer deny that any further sum is due the plaintiff by either defendant, and they expressly deny that the *feme* defendant at any time "incurred any obligation or became obligated in any way for the payment of the plaintiff's alleged claim."

At the conclusion of all of the evidence, the *feme* defendant renewed her motion for judgment of nonsuit. The motion was denied and she excepted. Thereupon, this single issue was submitted to and answered by the jury as indicated:

"In what amount, if any, are the defendants indebted to the plaintiff? Answer: $1,738.50—No interest."

From judgment on the verdict, both defendants appealed to this Court, assigning errors.

Gardner, Connor & Lee and Lucas & Rand for defendants, appellants.

Carr & Gibbons for plaintiff, appellee.

JOHNSON, J. The defendants' chief exceptive assignment of error relates to the refusal of the court below to nonsuit the case as to the defendant Sophie Zrakas.

It is alleged in the complaint that both defendants, "acting by and through their son and agent Charles Zrakas, engaged and employed the

. . . services of plaintiff for medical diagnosis . . . and . . . surgical treatment upon defendant Mrs. Sophie Zrakas."

It is admitted in the defendants' answer that "the defendant Thomas K. Zrakas, acting by and through his son Charles Zrakas, engaged and employed the professional services of the plaintiff, for the treatment of said defendant's wife."

The plaintiff, testifying as a witness in his own behalf, related the details of the several conferences he had with Charles Zrakas in working out preliminary and final arrangements for the diagnosis and treatment, including conferences both before and after Mrs. Zrakas arrived in Washington for the operation. He also stated that he talked with Mrs. Zrakas at length the night before the operation. The plaintiff then testified that "He (Charles Zrakas) said he was acting both for his mother and his father." This testimony was received in evidence without objection. Therefore, though it is hearsay and also embraces the declaration of the alleged agent (*Parrish v. Mfg. Co.,* 211 N.C. 7, 188 S.E. 817), it went to the jury for its full evidentiary value. *S. v. Fuqua, ante,* 168, 66 S.E. 2d 667; *Maley v. Furniture Co.,* 214 N.C. 589, 200 S.E. 438; *Webb v. Rosemond,* 172 N.C. 848, 90 S.E. 306.

Dean Wigmore states the rule this way: "The initiative in excluding improper evidence is left entirely to the opponent,—so far at least as concerns his right to appeal on that ground to another tribunal. The judge may of his own motion deal with offered evidence; but for all subsequent purposes it must appear that the opponent invoked some rule of Evidence. A rule of Evidence not invoked is waived." Wigmore on Evidence, 3d Ed., Vol. I, Sec. 18, p. 321.

The reasons for this rule are succinctly stated in this excerpt from *Cady v. Norton,* 14 Pick. 236 (Mass.):

"The right to except (*i.e.,* object) is a privilege, which the party may waive; and if the ground of exception is known and not seasonably taken, by implication of law it is waived. This proceeds upon two grounds; one, that if the exception is intended to be relied on and is seasonably taken, the omission may be supplied, or the error corrected, and the rights of all parties saved. The other is, that it is not consistent with the purposes of justice for a party, knowing of a secret defect, to proceed and take his chance for a favorable verdict, with the power and intent to annul it as erroneous and void, if it should be against him." Wigmore on Evidence, 3d Ed., Vol. I, Sec. 18, p. 322.

The foregoing testimony of the plaintiff, when considered with the rest of the evidence in the case, was sufficient to warrant the jury in finding the issue of agency against the *feme* defendant.

The rest of defendants' exceptive assignments of error relate to rulings of the court on the reception of evidence. We have examined these

exceptions and find them to be without substantial merit. Prejudicial error has not been made to appear. *Fisher v. Waynesville,* 216 N.C. 790, 4 S.E. 2d 316; *Rogers v. Freeman,* 211 N.C. 468, 190 S.E. 728.

We are left with the impression that the defendants have had a fair trial at the hands of a jury drawn from their own vicinage. The verdict and judgment will be upheld.

No error.

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

STATE v. ERNEST RAY SIMMONS.

(Filed 17 October, 1951.)

Homicide § 29—

Upon a finding that defendant is guilty of murder in the first degree, the jury has the unbridled discretion to recommend life imprisonment, and no rule is prescribed for the guidance of the jury in coming to a decision as to whether or not it should do so, G.S. 14-17, and therefore an instruction to the effect that the jury should determine whether it was its duty to recommend life imprisonment must be held for prejudicial error.

APPEAL by defendant from *Carr, J.,* at June Term, 1951, of CRAVEN.

Criminal prosecution upon a bill of indictment charging that defendant on 20 April, 1951, did "feloniously, willfully, and of malice aforethought kill and murder one Joseph McGhee, contrary to the form of the statute," etc.

Defendant, upon arraignment, pleaded not guilty.

Upon trial in Superior Court the evidence offered by the State, taken in the light most favorable to the State, tends to support the charge of murder in the first degree against defendant.

On the other hand, defendant, while admitting that he was at the scene of the homicide, denied upon the witness stand that he was implicated in the killing, and offered other testimony which he contends supports his plea.

Verdict: Guilty of murder in the first degree as charged in the bill of indictment.

Judgment: Death by inhalation of lethal gas, as provided by law.

Defendant appeals therefrom to Supreme Court, and assigns error.

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

Charles L. Abernethy, Jr., for defendant, appellant.

WINBORNE, J. By his twenty-second exception on this appeal defendant challenges, and we hold properly so, the correctness of this portion of the charge given by the judge to the jury upon the trial in Superior Court:

"And in the event, if you should return a verdict of guilty of murder in the first degree, it would be your duty to consider whether or not under the statute, you desire and feel that it is your duty to recommend that the punishment of the defendant shall be imprisonment for life in the State's prison."

The error in this instruction is that it imposes upon the jury a duty not imposed by the statute, G.S. 14-17, as amended by Section 1 of Chapter 299 of 1949 Session Laws of North Carolina pertaining to punishment for murder in the first degree. This amendment to the statute merely gives to the jury the right, at the time of rendering a verdict of murder in the first degree, in open court, to recommend that the punishment shall be imprisonment for life in the State's prison. It is an unbridled discretionary right. See *S. v. McMillan,* 233 N.C. 630, 65 S.E. 2d 212, where the provisions of this amendment to G.S. 14-17 were the subject of consideration and decision. It is there stated: "The language of this amendment . . . 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" (citing cases). The opinion then continues: "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 . . . 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."

And we now add that the statute prescribes no rule for the guidance of the jury in coming to decision as to whether or not the verdict should carry the recommendation. Thus any attempt by the trial judge to give a rule in this respect must necessarily read into the statute something the language of the Legislature does not encompass. The suggestion that any cause or reason is necessary to support the recommendation would violate the intent and purpose of the statute. True, the statute expressly requires the judge to instruct the jury that in the event a verdict of guilty of murder in the first degree shall have been reached, it has the right to

recommend that the punishment therefor shall be imprisonment for life in the State's prison. No more and no less would be accordant with the intent of the amendment to the statute.

Therefore, this Court holds that the portion of the charge to which the designated exception relates is erroneous,—error for which there must be a new trial. Thus it is deemed unnecessary to consider other exceptions.

And it is here noted that the decision in *S. v. McMillan, supra,* was delivered only a few days before the trial in instant case was had. Hence, no doubt the decision there had not come to the attention of the trial judge.

Let there be a
New trial.

STATE v. L. D. CASH AND WILLIAM H. STARNES.

(Filed 17 October, 1951.)

1. Arson § 1—

The burning or procuring to be burned a dwelling house must be done willfully and wantonly, or for a fraudulent purpose, in order to constitute the offense defined by G.S. 14-65, and therefore an instruction to the effect that the jury was required to find beyond a reasonable doubt only that the dwelling was burned and that it was burned at the instance or request of defendant, must be held for prejudicial error.

2. Criminal Law § 81c (2)—

The fact that in the beginning of the charge the court stated generally the language of the bill of indictment does not cure subsequent error in the charge in omitting an essential element in defining the offense.

APPEAL by defendant Cash from *Halstead, Special Judge,* March Term, 1951, of CLEVELAND. New trial.

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

Stover P. Dunagan, C. C. Horn, and J. A. West for defendant, appellant.

DEVIN, C. J. The bill of indictment charged the defendant with willfully and wantonly and for a fraudulent purpose burning or procuring to be burned the dwelling house owned and occupied by him (G.S. 14-65).

The evidence offered by the State in support of this charge was sufficient to carry the case to the jury, and there was verdict of guilty as charged in the bill.

The defendant assigns error in the following instruction given by the court to the jury: "Now, gentlemen of the jury, there are just two things for you to find in this case, that is that the house was burned, and that it was burned at the instance and request and aiding and counseling of this defendant, through the witness Starnes. The State of North Carolina says that he did, and that he is guilty of it, and says that you should find him guilty and be satisfied of his guilt beyond a reasonable doubt."

It is obvious that the court in giving this instruction inadvertently omitted material elements of the offense with which defendant was charged. The burning or procuring to be burned the dwelling house occupied by defendant to constitute a criminal offense must have been done willfully and wantonly, or for a fraudulent purpose. To convict the defendant under this bill something more must be found than the fact that the house was burned, and that it was done at the instance and request of the defendant. By the terms of the statute an essential element of the crime charged was that it be done willfully and wantonly or for a fraudulent purpose. *S. v. McDonald,* 133 N.C. 680, 45 S.E. 582; *S. v. Morgan,* 136 N.C. 628, 48 S.E. 670; *S. v. Falkner,* 182 N.C. 793, 108 S.E. 756; *S. v. Rawls,* 202 N.C. 397, 162 S.E. 899; *S. v. McLean,* 209 N.C. 38, 182 S.E. 700.

True, the court at the outset of his charge stated generally the language of the bill of indictment, but nowhere else was any reference made to the elements of the offense necessary to be found by the jury before they could convict, and at the close of the charge the jury was clearly and pointedly instructed that there were "just two things" for them to find, that the house was burned and that it was burned at the instance and request of the defendant. *S. v. Isley,* 221 N.C. 213, 19 S.E. 2d 875 (bottom page 215).

For the error pointed out, there must be a new trial and it is so ordered. Discussion of other exceptions noted is deemed unnecessary as they may not arise on another hearing.

New trial.

CHARLES K. HEUSER v. MARJORIE BEATTY HEUSER.

(Filed 17 October, 1951.)

Divorce and Alimony § 17: Judgments § 19—

Where subsequent to decree of divorce, hearing for the custody of the children of the marriage is heard before the resident judge in another county on motion of defendant, and both parties appear there with counsel and join issue, defendant may not thereafter object on the ground that the court was without jurisdiction to hear the motion outside the county.

APPEAL by defendant from *Frizzelle, J.*, 12 May, 1951. From PITT. Affirmed.

Charles L. Abernethy, Jr., for plaintiff, appellee.
Jones, Reed & Griffin for defendant, appellant.

PER CURIAM. Subsequent to divorce decree entered in Pitt Superior Court dissolving the bonds of matrimony between the plaintiff and defendant, the plaintiff moved for the custody of two children born of the marriage. After hearing evidence and finding facts, custody was awarded plaintiff. Subsequently defendant moved before the resident judge at Snow Hill in Greene County that custody of the children be awarded to her. Upon facts found custody was again awarded to the plaintiff.

Defendant's exception to the order on the ground that Snow Hill was not the proper place is without merit, as the hearing at that place was held on defendant's motion and both parties appeared there with counsel and joined issue. *Patterson v. Patterson,* 230 N.C. 481, 53 S.E. 2d 658, is not in point. The evidence heard supported the findings and justified the order appealed from.

Judgment affirmed.

STATE OF NORTH CAROLINA UPON THE RELATION OF ROY FREEMAN, GLENN REEMS, MARTY BUCKNER, AND VAUGHN CARTER, v. E. Y. PONDER AND HUBERT DAVIS.

(Filed 31 October, 1951.)

1. **Elections § 18a—When private relators institute action, allocation of peremptory challenges is properly made on basis of parties as constituted.**

In a civil action in the nature of *quo warranto* by private relators upon leave of the Attorney-General to determine conflicting claims of defendants to a public office, G.S. 1-516, such relators may take such position as they deem consistent with truth, and the law does not require them to be neutral as between the claimants, and therefore the trial judge correctly denies the motion of one defendant that the other defendant be designated a party plaintiff on the ground that the interests of relators and such other defendant are identical, since such other defendant, not having obtained leave of the Attorney-General to sue, may not be made a party plaintiff by the trial court, and thus alter the statutory allocation of peremptory challenges to the poll.

2. Jury § 2—

In a civil action each side is entitled to not in excess of six peremptory challenges regardless of how numerous the parties on either side may be, subject only to the statutory exception that the trial judge has the discretionary power to increase the number of peremptory challenges so as to allow each defendant or class representing the same interest not more than four peremptory challenges, G.S. 9-23, in which instance the trial court's decision is final.

3. Elections § 18c—

The issues of fact in a civil action in the nature of *quo warranto* to determine conflicting claims to a public office are to be determined by the jury and not the court, G.S. 1-172, and therefore a motion by one party that the judge declare him to be the duly elected officer is properly refused, *a fortiori* when the evidence as of that time tends to establish the election of his adversary.

4. Same—

In a civil action in the nature of *quo warranto* to determine conflicting claims to a public office the returns made by the registrars and judges of election, G.S. 163-85, and the abstract of votes prepared by the county board of elections, G.S. 163-88, are official documents containing data germane to the issue, and are properly admitted as substantive evidence upon proper authentication.

5. Same—

A tally sheet of a person who assisted in counting the ballots at a particular precinct is competent to corroborate his testimony to like effect upon the trial.

6. Evidence § 24—

In order to be competent as substantive evidence testimony must be relevant and its reception must not be forbidden by any specific rule of law.

7. Same—

Testimony is relevant if it reasonably tends to establish the probability or the improbability of a fact in issue raised by the pleadings in the action.

8. Elections § 18c: Pleadings § 24c—

Where the pleadings in an action in the nature of *quo warranto* to determine conflicting claims to a public office raise the single issue as to whether returns from specified precincts were altered after they were signed by the registrars and judges of election and before they were canvassed by the county board of elections, evidence tending to show the casting of illegal ballots, or other matters relating to the election but having no relevancy to the issue as to whether the returns had been altered as alleged, is irrelevant to the issue of fact raised by the pleadings and is properly excluded.

9. Same—

In an action in the nature of *quo warranto* to determine conflicting claims to a public office, a party is precluded from offering evidence in direct conflict with a positive averment contained in his pleading.

10. Evidence § 37—

Where documents are introduced in evidence, oral testimony of their contents is properly excluded.

11. Evidence § 41: Elections § 18c—

In an action in the nature of *quo warranto* to determine conflicting claims to a public office, testimony of statements made by third persons tending to establish irregularity in the casting or counting of ballots is properly excluded as hearsay.

12. Evidence § 19—

Where testimony competent solely to impeach the later testimony of a witness is not offered a second time after the witness has testified, its exclusion cannot be held for error.

13. Appeal and Error § 39e—

The exclusion of evidence cannot be held prejudicial when the record discloses that the answer of the witness, had he been permitted to testify, would not have been favorable or that the witness had already testified that he had no knowledge of the matter.

14. Same—

The exclusion of a single item of evidence competent only for the purpose of corroborating a witness on one minute point will not be held prejudicial in a protracted trial with voluminous testimony, since upon such record its exclusion could not have affected the verdict of the jury.

15. Appeal and Error § 39f—

The charge will not be held for error when it is not prejudicial when read contextually.

16. Elections § 18c—

In an action in the nature of *quo warranto* to determine the election to public office as between two claimants, separate issues as to whether each party was duly elected to the office at the general election in question are sufficient to present all controverted matters to the jury and are proper.

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

APPEAL by defendant, Hubert Davis, from *Parker, J.*, and a jury, at April Term, 1951, of MADISON.

Civil action in the nature of *quo warranto* brought by private relators, upon leave of the Attorney-General, to determine conflicting claims to the office of Sheriff of Madison County.

For convenience of narration, the defendant, E. Y. Ponder, is hereafter called Ponder, and the defendant, Hubert Davis, is hereafter designated as Davis.

There is no substantial dispute in respect to the matters stated in the numbered paragraphs set out below.

1. Ponder, a Democrat, and Davis, a Republican, were opposing candidates for the office of sheriff at the general election held in the twenty-

four precincts of Madison County on 7 November, 1950. Both of them possessed the qualifications prescribed by law for that office.

2. After the polls were closed, the registrar and judges of election in each precinct counted the ballots cast in their precinct, and prepared and certified to the Madison County Board of Elections written returns stating the number of votes received by each candidate for each office in their precinct.

3. The Madison County Board of Elections met at the courthouse in Marshall at eleven o'clock a.m., on 9 November, 1950, and remained in session two days for the avowed purpose of canvassing the votes cast in the county at the general election, preparing abstracts of such votes, determining the results of the voting for county and township offices and for the house of representatives, and performing the other duties devolving upon it.

4. At such meeting "certain protests were filed by the Republican candidates for Sheriff and Clerk of the Superior Court and by the Democratic candidate for sheriff, all alleging irregularities. After some investigation as to the nature of these charges," the Madison County Board of Elections, by a majority vote, "found as a fact that all these charges were frivolous, . . . and accepted all returns as certified by the precinct officials."

5. When the written returns of the registrars and judges of election of all the twenty-four precincts of Madison County were opened, examined, and tabulated by the Madison County Board of Elections, they showed on their face that the total number of votes cast for each candidate for the office of sheriff in the entire county was as follows: 3,513 for Ponder, and 3,482 for Davis.

6. The Madison County Board of Elections, by a majority vote, adopted abstracts of votes conforming to the matters appearing on the face of the returns from the various precincts; found that the total number of votes cast for each candidate for the office of sheriff in Madison County was as follows: 3,513 for Ponder, and 3,482 for Davis; and declared that Ponder had been elected sheriff over Davis by a majority of 31 votes. Within the ensuing ten days, the Chairman of the Madison County Board of Elections furnished Ponder with a certificate of election, and notified him to appear at the courthouse of Madison County on the first Monday in December, 1950, to qualify for sheriff for the four-year term beginning on that day.

7. Davis was the incumbent of the Sheriffalty of Madison County for the term ending on the first Monday in December, 1950. On that day Ponder presented his certificate of election to the officials of Madison County, took the oath and gave the bond required of a sheriff by law, and demanded that Davis surrender to him the office of sheriff with its accom-

panying properties and records. Notwithstanding he had been excluded from the sheriffalty by the adjudication of the county board of elections, Davis refused to accede to Ponder's demand, and remained in physical possession of the office of sheriff and its properties and records and undertook to exercise its duties until shortly before the commencement of this action when he was required to surrender possession of the office and desist from the exercise of its functions by a mandatory injunction issued in another action. Ponder and Davis have been rival claimants of the Sheriffalty of Madison County for the four year term beginning on the first Monday in December, 1950, since the general election of 7 November, 1950. But neither of them has ever applied to the Attorney-General for leave to bring an action in the nature of *quo warranto* under the provisions of Article 41 of Chapter 1 of the General Statutes to determine their conflicting claims to the office.

8. On 5 January, 1951, Roy Freeman, Glenn Reems, Marty Buckner, and Vaughn Carter, who are private citizens, residents and taxpayers of Madison County, made application to the Attorney-General for leave to bring an action in the nature of *quo warranto* in the name of the State upon their relation against both Ponder and Davis to try the conflicting claims to the office of Sheriff of Madison County, and tendered to the Attorney-General satisfactory security to indemnify the State against all costs and expenses which might accrue in consequence of the action. On the same day, the Attorney-General granted leave to the applicants, who are hereafter called the relators, to bring such suit for such purpose, and the relators thereupon brought this action against both Ponder and Davis to try the title to the Sheriffalty of Madison County.

The complaint of the relators recounts the facts stated in the numbered paragraphs set forth above, and makes the additional averment that the total number of votes actually cast at the general election in Madison County for each candidate for the sheriffalty was as follows: 3,513 for Ponder, and 3,482 for Davis. It prays "that E. Y. Ponder be declared the duly elected and qualified Sheriff of Madison County, North Carolina, for the four-year term beginning on the first Monday in December, 1950, and ending the first Monday in December, 1954."

The answer of the defendant E. Y. Ponder admits all of the allegations of the complaint, and prays for the same relief as that sought by the relators.

The answer of the defendant Hubert Davis states in detail his claim to the sheriffalty. His answer alleges, in substance, that a true count of the votes given to each candidate for the office of sheriff was made in each of the twenty-four precincts of Madison County immediately after the polls were closed on 7 November, 1950; that such true count disclosed that Davis had received a majority of the votes actually cast for the two

candidates for sheriff, and consequently had been elected to that office; that upon the completion of the count, the registrars and judges of election of all of the twenty-four precincts prepared and certified to the Madison County Board of Elections written returns stating the true count; that before the returns were delivered to the Madison County Board of Elections, five of them, to wit, the returns for the precincts designated as Township No. 1 Ward 4, Township No. 6, Township No. 7, Township No. 8 Ward 2, and Township No. 15, were fraudulently altered "with intent to deprive . . . Davis of the office of Sheriff of Madison County to which he had been . . . duly elected"; that the returns for Township No. 1 Ward 4 were fraudulently altered to show the state of the poll for that precinct to be 117 for Ponder and 128 for Davis, whereas the true count for such precinct was 107 for Ponder and 132 for Davis; that the returns for Township No. 6 were fraudulently altered to show the state of the poll for that precinct to be 200 for Ponder and 25 for Davis, whereas the true count for such precinct was 158 for Ponder and 25 for Davis; that the returns for Township No. 7 were fraudulently altered to show the state of the poll for that precinct to be 165 for Ponder and 117 for Davis, whereas the true count for such precinct was 155 for Ponder and 117 for Davis; that the returns for Township No. 8 Ward 2 were fraudulently altered to show the state of the poll for that precinct to be 184 for Ponder and 52 for Davis, whereas the true count for such precinct was 159 for Ponder and 52 for Davis; that the returns for Township No. 15 were fraudulently altered to show the state of the poll for that precinct to be 295 for Ponder and 264 for Davis, whereas the true count for such precinct was 281 for Ponder and 264 for Davis; and that in consequence of these fraudulent alterations the so-called official returns received, tabulated, and accepted by the Madison County Board of Elections seemingly changed the result of the election by erroneously crediting Ponder with 101 votes more than the number actually received by him and Davis with 4 votes fewer than the number really cast for him. Although the answer of Davis asserts in general terms that there was much illegal voting at the election in question, it does not allege that a single illegal vote was cast or counted for Ponder. Its prayer is that the defendant Hubert Davis "be declared the duly elected and qualified Sheriff of Madison County . . . for the four-year term beginning December 4, 1950."

The relators and Ponder replied to the answer of Davis, denying that there had been any alteration of the returns of the five designated precincts.

The trial of the action consumed virtually two weeks, and produced an appeal record of 375 pages. All of the parties presented evidence before the trial jurors, who were summoned from Yancey County under

the provisions of G.S. 1-86 to insure a fair and impartial trial of the cause. The testimony of the relators and that of Ponder tended to establish their allegations and disprove those of Davis, and the evidence of Davis tended to substantiate his allegations and negative those of the relators and Ponder.

These issues were submitted to the jury:

1. Was E. Y. Ponder duly and legally elected Sheriff of Madison County at the General Election held on 7 November, 1950?

2. Was Hubert Davis duly and legally elected Sheriff of Madison County at the General Election held on 7 November, 1950?

The jury answered the first issue "Yes," and left the second issue unanswered. The trial judge entered judgment on the verdict adjudging "that the defendant E. Y. Ponder is the duly and legally elected Sheriff of Madison County, and was so elected in the General Election held on November 7, 1950." The defendant Hubert Davis excepted to the judgment, and appealed to the Supreme Court, making assignments of error sufficient to raise the questions hereinafter considered.

Kester Walton for the relators Roy Freeman, Glenn Reems, Marty Buckner, and Vaughn Carter, appellees.

J. W. Haynes, A. E. Leake, and George A. Shuford for the defendant, E. Y. Ponder, appellee.

J. M. Baley, Jr., and Clyde M. Roberts for the defendant Hubert Davis, appellant.

ERVIN, J. Before the trial jurors were selected or sworn, Davis made a motion alleging in detail that the interests of the relators and Ponder were "identical and opposed to those of the defendant Davis" and praying "that the relators and defendant Ponder be permitted to exercise the six peremptory challenges to the jury allowed by statute to one party in a civil action and that this defendant be permitted to exercise the six peremptory challenges to the jury allowed by statute to the other party to a civil action, or that the defendant . . . Ponder be, in the discretion of the court, designated as a party-plaintiff and that his answer be treated as a complaint." The motion was resisted by the relators and Ponder. The former alleged that they brought the "action in good faith and of their own volition as citizens and taxpayers of Madison County for the sole . . . purpose of having a judicial determination made of the . . . controversy . . . as to who was legally entitled to hold the office of Sheriff of Madison County . . . as a result of the election held November 7, 1950," and the latter asserted that he could not be made a party plaintiff because he did "not have leave of . . . the Attorney-General . . . to institute this action."

The trial judge ruled that the relators were entitled to six peremptory challenges under the provisions of G.S. 9-22, and entered an order denying "the motion of the defendant Davis that the defendant . . . Ponder be . . . designated as a party plaintiff and that his answer be treated as a complaint." The order recited, however, "that there are divers and antagonistic interests between the defendants Ponder and Davis" and made this adjudication: "It is ordered and decreed by the Court, in its discretion, that the number of challenges to each defendant be and is hereby increased to four, that is, the defendant Ponder is to have four challenges, and the defendant Davis is to have four challenges, under Section 9-23, General Statutes of North Carolina." Davis noted an exception to this order.

After Davis had used four peremptory challenges, he undertook to challenge two of the trial jurors, namely, Thad Bradford and Vance Hensley, peremptorily, and the trial judge disallowed such challenges on the ground that Davis had already exhausted the peremptory challenges allotted to him by law. Davis took exceptions to these rulings.

He complains that the relators and Ponder sought the same relief, and that in consequence the order and rulings of the trial judge permitted "his opposition to have ten peremptory challenges to his four."

Be this as it may, the propriety of the order and rulings relating to peremptory challenges is plain when due heed is paid to general rules of practice created by pertinent statutes. If we are to have a government of laws rather than one of men, lawsuits must be tried according to general rules of procedure established by law for all like cases. Judges cannot be expected or permitted to devise special rules on the spur of the moment to fit the supposed exigencies of particular trials.

The statutes codified as Article 41 of Chapter 1 of the General Statutes prescribe a specific mode for trying the title to a public office. *Rogers v. Powell,* 174 N.C. 388, 93 S.E. 917; *Burke v. Commissioners,* 148 N.C. 46, 61 S.E. 609; *Ellison v. Raleigh,* 89 N.C. 125. Such relief is to be sought in a civil action. G.S. 1-514; *Cozart v. Fleming,* 123 N.C. 547, 31 S.E. 822. But a private person cannot institute or maintain an action of this character in his own name or upon his own authority, even though he be a claimant of the office. *Saunders v. Gatling,* 81 N.C. 298. The action must be brought and prosecuted in the name of the State by the Attorney-General, G.S. 1-515; or in the name of the State upon the relation of a private person, who claims to be entitled to the office, *S. v. Carter,* 194 N.C. 293, 139 S.E. 605; *Harkrader v. Lawrence,* 190 N.C. 441, 130 S.E. 35; *Smith v. Lee,* 171 N.C. 260, 88 S.E. 254; *Stanford v. Ellington,* 117 N.C. 158, 23 S.E. 250, 30 L.R.A. 532, 53 Am. S. R. 580; *Rhodes v. Love,* 153 N.C. 468, 69 S.E. 436; or in the name of the State upon the relation of a private person, who is a citizen and tax-

payer of the jurisdiction where the officer is to exercise his duties and powers. *Midgett v. Gray,* 158 N.C. 133, 73 S.E. 791; *Barnhill v. Thompson,* 122 N.C. 493, 29 S.E. 720; *Houghtalling v. Taylor,* 122 N.C. 141, 29 S.E. 101; *Hines v. Vann,* 118 N.C. 3, 23 S.E. 932; *Foard v. Hall,* 111 N.C. 369, 16 S.E. 420. Before any private person can commence or maintain an action of this nature in the capacity of a relator, he must apply to the Attorney-General for permission to bring the action, tender to the Attorney-General satisfactory security to indemnify the State against all costs and expenses incident to the action, and obtain leave from the Attorney-General to bring the action in the name of the State upon his relation. G.S. 1-516; *Cooper v. Crisco,* 201 N.C. 739, 161 S.E. 310; *Midgett v. Gray,* 159 N.C. 443, 74 S.E. 1050. A single action may be brought against all persons claiming the same office to try their respective rights to the office. G.S. 1-520.

Since Ponder had no leave from the Attorney-General permitting him to sue as a relator, he was incapacitated by law to prosecute the instant action against Davis. The trial judge could not confer upon Ponder the legal power denied to him by positive legislative enactment through the simple expedient of designating Ponder a party-plaintiff and treating his answer as a complaint. For this reason, the motion of Davis was rightly denied.

Challenges to the polls, *i.e.,* to the individual jurors, are of two kinds: Challenges for cause; and peremptory challenges. A challenge for cause is a challenge to a juror for which some cause or reason is assigned. *S. v. Levy,* 187 N.C. 581, 122 S.E. 386. A peremptory challenge is a challenge "which may be made or omitted according to the judgment, will, or caprice of the party entitled thereto, without assigning any reason therefor, or being required to assign a reason therefor." 50 C.J.S., Juries, section 280. See, also, these North Carolina decisions: *Oliphant v. R. R.,* 171 N.C. 303, 88 S.E. 425; *Dupree v. Virginia Home Insurance Co.,* 92 N.C. 417. The right to challenge jurors for cause may be exercised without limit as to number so long as the cause or reason assigned is sufficient. 50 C.J.S., Juries, section 268. It is otherwise, however, with respect to peremptory challenges. A litigant cannot exercise any more peremptory challenges than the number allowed to him by law. *S. v. Powell,* 94 N.C. 965; *Capehart v. Stewart,* 80 N.C. 101.

The general rule regulating the right of peremptory challenge in civil actions is embodied in G.S. 9-22, which specifies that "the parties, or their counsel for them, may challenge peremptorily six jurors . . . without showing any cause therefor." This general rule limits all of the parties on one side of a civil case to a total of six peremptory challenges, no matter how numerous such parties may be. *Bryan v. Harrison,* 76 N.C. 360.

The general rule is subject to this statutory exception: If there are two or more defendants, and their interests are diverse and antagonistic, the judge may in his discretion, apportion the six peremptory challenges among the defendants, or he may increase the number of peremptory challenges, so as to allow each defendant or class representing the same interest not more than four peremptory challenges. The statute which creates this exception, *i.e.,* G.S. 9-23, expressly stipulates that "the decision of the judge as to the nature of the interests and the number of challenges shall be final."

The relators had plenary authority to make both Ponder and Davis party defendants in this action for the purpose of trying their respective claims to the Sheriffalty of Madison County. The law did not require them to assume a posture of neutrality between the rival claimants. Indeed, it contemplated that they should take such position in the litigation as they deemed consistent with truth. The general statutory right to six peremptory challenges devolving upon them as all the parties on one side of the case was not annulled or impaired by their assertion that justice lay with Ponder, or by Ponder's concurrence in that assertion. The statute creating the exception to the general rule regulating peremptory challenges in civil actions clothed with finality the decision of the trial judge awarding four peremptory challenges to each of the defendants. These things being true, the exceptions to the rulings on the peremptory challenges are untenable.

In passing from this phase of the litigation, we think it not amiss to make some additional observations. In conformity with their statutory duties, the Madison County Board of Elections adjudged that Ponder was elected sheriff at the general election of 7 November, 1950, and the Chairman of the Madison County Board of Elections furnished Ponder with a certificate of election reciting that conclusion. G.S. 163-86, 163-91, and 163-92. The adjudication of the Board and the resultant certificate of election constituted conclusive evidence of Ponder's right to the sheriffalty in every proceeding except a direct proceeding under Article 41 of Chapter 1 of the General Statutes to try the title to the office. *Ledwell v. Proctor,* 221 N.C. 161, 19 S.E. 2d 234; *Cohoon v. Swain,* 216 N.C. 317, 5 S.E. 2d 1; *Cozart v. Fleming, supra; Gatling v. Boone,* 98 N.C. 573, 3 S.E. 392; *Swain v. McRae,* 80 N.C. 111. Undoubtedly Davis could have obtained leave from the Attorney-General to bring such direct proceeding against Ponder and could have secured to himself as sole relator in such proceeding the statutory right to six peremptory challenges. Instead of asserting his claim to the office in the lawful mode, Davis undertook to establish it by a species of physical force. It necessarily follows that if he was disadvantaged by the rulings relating to peremptory challenges, he was simply hoisted with his own petard.

When the relators had produced their evidence and rested their case, Davis moved "that he be declared by the Court to be the duly elected Sheriff of Madison County." The judge denied the motion, and Davis excepted. The exception lacks validity. Under the Code of Civil Procedure, the relators and Ponder had the right to have the issues of fact joined on the pleadings tried by the jury. G.S. 1-172. The motion called on the judge to usurp the function of that body. *Sparks v. Sparks,* 232 N.C. 492, 61 S.E. 2d 356. Besides, all the evidence before the court at the time the motion was made tended to establish the election of Ponder.

Davis reserved exceptions to the admission of these writings: (1) The returns made by the registrars and judges of election in obedience to G.S. 163-85 stating the votes cast for the candidates for the office of Sheriff in the twenty-four precincts of Madison County; (2) the abstract of votes for county officers prepared by the Madison County Board of Elections in compliance with G.S. 163-88 reciting the votes cast for the candidates for the office of Sheriff in Madison County as a whole; and (3) a tally sheet kept by Ponder's witness, Winston Rice, who assisted in counting the ballots in the precinct known as Township No. 1 Ward 4. Inasmuch as the returns and abstract were official documents of the election officials, contained data germane to the issue, and were properly authenticated, they were admissible as substantive evidence. *Roberts v. Calvert,* 98 N.C. 580, 4 S.E. 127; 29 C.J.S., Elections, section 276. The tally sheet was identified by Winston Rice and two other witnesses, contained data agreeing with Winston Rice's testimony at the trial, and in consequence was competent to corroborate him. *Bowman v. Blankenship,* 165 N.C. 519, 81 S.E. 746.

Davis also saved exceptions to the exclusion of testimony. The task of ruling on these exceptions is much simplified by focusing the judicial gaze on the basic principle which governs the admissibility of evidence.

To be admissible as substantive evidence, testimony must satisfy this twofold requirement: (1) It must be relevant; and (2) its reception must not be forbidden by some specific rule of law. Stansbury on North Carolina Evidence, section 77; Wigmore on Evidence (3rd Ed.), Sections 9-10.

Testimony is relevant if it reasonably tends to establish the probability or the improbability of a fact in issue. *Johnson v. R. R.,* 140 N.C. 581, 53 S.E. 362; *Pettiford v. Mayo,* 117 N.C. 27, 23 S.E. 252; *S. v. Brantley,* 84 N.C. 766; *S. v. Vinson,* 63 N.C. 335; *In re Cushman's Estate,* 213 Wis. 74, 250 N.W. 873; Stansbury on North Carolina Evidence, Section 78. For this reason, the relevancy of evidence in a civil action is to be tested by the pleadings, which define the facts put in issue by the parties. *Parrish v. R. R.,* 221 N.C. 292, 20 S.E. 2d 297.

There is no allegation in the case at bar that any illegal votes were cast or counted for the defendant Ponder. The pleadings raise this single issue of fact: Were the returns from five specific precincts, to wit, Township No. 1 Ward 4, Township No. 6, Township No. 7, Township No. 8 Ward 2, and Township No. 15, altered after they were signed by the registrars and judges of election and before they were canvassed by the county board of elections by falsely crediting Ponder with more votes than the number actually received by him and Davis with fewer votes than the number really cast for him?

Davis excepted to rulings of the trial judge excluding these things: The registration and poll books of the nineteen precincts whose returns were not in dispute; testimony showing that on the first Monday in December, 1950, Davis, who had been excluded from the office by the adjudication of the county board of elections, undertook to qualify as sheriff by signing an oath and executing a bond in the forms prescribed by statute; testimony indicating that the number of county ballots delivered by the county board of elections to each precinct prior to the election exceeded the number of county ballots allegedly cast in the precinct at the election; testimony pointing out that W. Flynn, whose name was recorded on the poll book of Township No. 1 Ward 4, died at some undisclosed time before the trial; testimony showing that P. Griffin, Floyd Rector, and Mrs. Will Searcy did not vote in Township 1 Ward 4 on 7 November, 1950; testimony suggesting that Hugo Wild, a witness for Davis who stood by the polling place in Township No. 1 Ward 4 most of the day, did not see C. Ammons, L. Ammons, H. L. Bridges, Dillard Gentry, Mrs. Dillard Gentry, Jim Gentry, Elisha Griffin, Mrs. P. Griffin, T. Griffin, W. Griffin, Will Hensley, H. Hoyle, Ola Hunter, Mrs. Zade Merrill, F. Reese or C. Rice vote in Township No. 1 Ward 4 on 7 November, 1950; testimony tending to show that Troy Ramsey, a private person who did not testify in the cause, had two official ballots marked Democratic in his possession on 7 November, 1950, and made an unsuccessful effort to bribe Lee F. Briggs, a qualified voter in Township No. 1 Ward 4 and a witness for Davis, to place such marked ballots in the box in a surreptitious manner when he cast his own ballot; testimony pointing out that on the day before the election B. J. Ledford, the registrar of Township No. 6, where a total of 282 votes were allegedly given to both candidates for the sheriffalty, delivered to F. Ray Frisby a copy of the registration book for that precinct, showing that 373 persons were qualified to vote in Township No. 6; testimony indicating that one of the judges of election in Township No. 6 was not acquainted with J. R. Boyd, J. R. Brown, M. J. Clark, H. M. Roberts, Mrs. H. M. Roberts, H. C. Vaughn, B. M. West, and John West, whose names appeared on the registration book of that precinct; testimony showing that J. B.

Austin, A. J. Brown, Mrs. A. J. Brown, Ray Brown, H. E. Carter, P. V. Carter, Lawrence Hagan, Minton Robinson, and Mrs. Minerva Sprouse, whose names appeared on the registration book of Township No. 6, were dead at the time of the trial; testimony merely disclosing that Banie Lusk, the registrar of Township No. 8 Ward 2, went to Marshall, the county seat, "to see what . . . returns had been reported from No. 8" after he had assisted in counting and recording the votes cast in his precinct; and testimony of Claude Davis, an agent of the State Bureau of Investigation and a witness for the defendant Davis, describing the appearance of the entry on the return for Township No. 15 reciting the votes allegedly cast for the candidates for the house of representatives.

All of this testimony was properly excluded. None of it had any relevancy to the only controverted issue in the case, *i.e.,* whether the returns from the five specified precincts were altered in the manner alleged between the time they were signed by the precinct officials and the time they were canvassed by the county board of elections. We indulge this observation at this juncture: The evidence indicating that certain persons whose names appeared on the registration books of two of the precincts were dead at the time of the trial does not reasonably tend to establish anything except the tragic truth that registered electors are subject to the unhappy mortality which is the inescapable lot of all mankind.

The evidence proffered by Davis tending to show that more than twenty-five persons voted for him in Township No. 6 was rightly rejected under his own pleading. His answer alleged with absolute positiveness that only twenty-five ballots were cast for him in that precinct.

Davis noted exceptions to the exclusion of the testimony of the witnesses George Bridges, E. V. Ledford, and Abner Wild as to the contents of certain documents which had been received in evidence. This testimony was clearly incompetent under the specific rule of law which declares that a writing is the best evidence of its own contents. *S. v. Ray,* 209 N.C. 772, 184 S.E. 836; *Harris v. Singletary,* 193 N.C. 583, 137 S.E. 724.

The trial judge correctly held that the hearsay rule precluded Davis from introducing the statements made by his counsel to the witness Judson Edwards "that more people voted than there were names listed on poll books in some precincts" and "that returns in some precincts were changed"; the statements made by unidentified persons to the witness Claude Davis, an agent of the State Bureau of Investigation, concerning various events allegedly happening in Madison County at the election of 7 November, 1950; the statement allegedly made by Troy Ramsey to the witness Andy Gosnell that the latter was to use $7.50 handed to him by the former to pay Lenora Gosnell, a registered voter in Township No. 1

Ward 4, for voting; and the statement made by Winston Rice, a private person who assisted the precinct officials of Township No. 1 Ward 4 in counting ballots, to the witnesses W. B. Robinson and Clyde Wallin that Davis led Ponder by 30 votes in Township No. 1 Ward 4 after all ballots cast in that precinct had been counted. *Merrell v. Whitmire,* 110 N.C. 367, 15 S.E. 3. It is noted, in passing, that Davis offered the last mentioned statement in evidence before Winston Rice became a witness in the case, and that he did not tender the same a second time to impeach Winston Rice after the latter took the stand for Ponder and deposed that the final count in Township No. 1 Ward 4 "was Davis 128 and Ponder 117." 4 C.J.S., Appeal and Error, Section 291b (3).

Davis excepted to the ruling of the trial judge sustaining the objection of the relators and Ponder to this question propounded to Judson Edwards, a witness for relators, by counsel for Davis: "Did you check the poll books in any of the precincts to determine if more votes were counted than were on the poll book in that precinct?" This ruling occasioned Davis no harm, for the witness Edwards would have replied "I did not" if he had been permitted to answer. A like observation applies to the exception to the action of the trial judge upholding the objection of Ponder to this question asked his witness George Bridges by counsel for Davis: "I ask you if you don't know that he (*i.e.,* Will Hensley) has been moved for seven years from your precinct?" The witness Bridges had already testified that he did not know Will Hensley.

We have now reviewed all exceptions to the exclusion of evidence save Exception No. 65, which was taken under the circumstances delineated below.

The trial of the action engrossed the attention of the Superior Court for virtually two weeks. Upwards of a hundred persons were subpoenaed from their employments to testify as witnesses. They gave voluminous evidence. F. E. Runnion, a private citizen and a witness for Davis, testified without objection that he assisted the precinct officials in Township No. 1 Ward 4 in counting the ballots after the polls were closed; that he used a tally sheet in such undertaking; that the final count in the race for Sheriff in Township No. 1 Ward 4 was "Ponder 107 and Davis 132"; and that such final count appeared on the face of his tally sheet, which was received in evidence without objection. The witness Runnion undertook to testify to the additional fact that at the termination of the counting he told the persons present at the polling place that "Davis had 25 majority." The trial judge rejected this additional fact on objection by Ponder.

The testimony of Runnion as to the extrajudicial statement made by him at the polling place was not admissible as substantive evidence. But

it was competent to corroborate him as a witness, for he gave similar evidence on the trial. *S. v. Spencer,* 176 N.C. 709, 97 S.E. 155.

Davis offered the excluded testimony of the witness Runnion generally; Ponder made a general objection to its admission; and the trial judge sustained such general objection. Davis merely noted his Exception No. 65 to this ruling. He did not ask the judge to admit the testimony for the limited purpose for which it was competent, *i.e.,* to corroborate Runnion as a witness. There is sound authority and reason to support the view that the trial judge cannot be charged with legal error in excluding the evidence under these circumstances. Stansbury on North Carolina Evidence, section 27 (f); 4 C.J.S., Appeal and Error, section 281.

It is unnecessary, however, for us to make any adjudication on this precise point. For the purpose of this particular appeal, it will be taken for granted that the trial judge made a legal misstep when he excluded the testimony of Runnion as to his statement at the polling place that "Davis had 25 majority" in Township No. 1 Ward 4. Even so, the rejection of this statement must be held harmless on the present record. It is not conceivable that this comparatively inconsequential bit of corroborative evidence would have affected the verdict of the jury in any degree had it been admitted in evidence on the protracted trial of the action in the Superior Court. *Call v. Stroud,* 232 N.C. 478, 61 S.E. 2d 342; *S. v. Mundy,* 182 N.C. 907, 110 S.E. 93. For this reason, we are unwilling to hold that the exclusion of this small piece of corroborative evidence compels us to inflict upon the parties, the taxpayers, and the witnesses the monstrous penalty of a new trial.

We have studied the twenty-two exceptions to the charge with great care. None of them are tenable. When the charge is read as a whole, it reveals that the judge stated the evidence correctly, summed up the contentions fairly, and explained the law accurately. The rulings as to issues were sound. The issues actually submitted were joined on the pleadings and were sufficient to present all controverted matters to the jury. *Lloyd v. Venable,* 168 N.C. 531, 84 S.E. 855. The remaining exceptions are formal and merit no discussion.

An ancient axiom asserts that no wretch e'er felt the halter draw with good opinion of the law. It cannot be gainsaid, however, that the appellant has no just cause to complain. He has had a fair trial in point of law in the Superior Court before an able and learned jurist who safeguarded all his legal rights with the cold neutrality of the impartial judge. The controverted issue of fact was decided against him on sufficient evidence by a disinterested jury, the body created by law to determine truth from conflicting testimony. He has, indeed, had his day in court.

The judgment of the Superior Court will be upheld, for the record shows that there is in law

No error.

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

JOSEPH TELESPHORE MILLER, JR., v. FIRST NATIONAL BANK OF CATAWBA COUNTY.

(Filed 31 October, 1951.)

1. **Executors and Administrators § 13a—**

A court of equity has jurisdiction of an action by the personal representative to obtain approval of the court for the sale of assets of the estate to pay debts and to effectuate the purposes of the trust set up by the will, all beneficiaries of the estate being made parties.

2. **Judgments § 25—**

Mere irregularities in the rendition of a judgment within the jurisdiction of the court does not subject the judgment to collateral attack by independent action, the remedy being by motion in the cause.

3. **Fraud § 1—**

Constructive fraud is based upon breach of a fiduciary obligation, and intent to deceive and actual dishonesty are not requisite.

4. **Judgments § 27e—**

In order to be ground for collateral attack of a judgment, fraud must be extrinsic and relate to the manner in which the judgment was procured and be such fraud as prevents the court from considering the cause on its merits.

5. **Executors and Administrators § 31: Judgments § 27e—Allegations held insufficient to show extrinsic fraud in obtaining judgment authorizing sale of assets of estate.**

It appeared from the complaint and the judgment rolls attached thereto that the judgment authorizing the executor to sell to the issuing corporation certain stock constituting personal assets of the estate was entered in an action in which the minor beneficiary was represented by a competent guardian *ad litem*, who made full investigation, that the sale of the assets was necessary to pay debts of the estate and to effectuate the purposes of the trust set up by the instrument, that interested persons *sui juris* sold their stock upon identical terms, that the stock at that time was not marketable, and that a comparable sum could not be obtained by forced liquidation of the corporation. The complaint further alleged that the trustee negligently failed to sell the stock at an earlier date when the stock had a ready market, that the later sale was made necessary by the trustee's own mismanagement, that the trustee was interested in the corporation

purchasing the stock by reason of interlocking directorates and business associations, and that such sale was for less than the value of the stock and against the interest of the minor. *Held:* Even though the complaint be sufficient to allege constructive fraud it is insufficient to allege extrinsic fraud in the procurement of the judgment so as to render the judgment subject to collateral attack.

6. Judgments § 32—

While ordinarily estoppel by judgment must be pleaded, where all the facts necessary to constitute the estoppel are set out in the complaint for the purpose of attack, and defendant moves to strike the allegations on the ground that the matters alleged were precluded by the judgment, the question of estoppel by judgment is properly presented.

7. Pleadings § 31—

While the insufficiency of the complaint to state a cause of action must be raised by demurrer, where certain paragraphs thereof are precluded by prior judgment between the parties, objection to such portions may be raised by motion to strike, since in such case they are "irrelevant" for the purpose for which they were inserted. G.S. 1-153.

APPEAL by defendant from *Gwyn, J.*, May Term, 1951, of CATAWBA. Reversed.

Plaintiff's action is to surcharge and falsify the accounts of First Security Trust Company (now merged with defendant Bank) as executor and trustee of the estate of plaintiff's father, Joseph Telesphore Miller, and to recover amounts alleged to be due by reason of negligence and mismanagement by the fiduciary.

The case comes up on defendant's appeal from the ruling of the trial judge denying its motion to strike certain portions of the complaint hereinafter set out.

It is alleged in the complaint that defendant First National Bank of Catawba County is successor of First National Bank of Hickory, and that by merger or consolidation a subsidiary corporation, First Security Trust Company, was taken over and its operations and fiduciary business continued, defendant acquiring its assets and assuming its liabilities; that First Security Trust Company was made executor and trustee under the will of Joseph T. Miller, who died in 1935, and took possession of all the real and personal property of his estate, of which the plaintiff, the only son of the testator, was the principal beneficiary. It was further alleged that the named Trust Company was grossly negligent and mismanaged the estate, particularly in respect to dealing with the shares of stock of Hutton & Bourbonnais Company, which it failed to dispose of advantageously; that 754 shares of par value of $100 which would have belonged to plaintiff were wrongfully disposed of. In section 10 of the complaint it is alleged the First Security Trust Company as executor in 1939 instituted action against the plaintiff, then 17 years of age,

alleging there was no ready market for these shares and asked that the real estate devised to plaintiff be sold to prevent sacrifice of values, though the personal estate was more than sufficient, and it is alleged this was done to extricate itself from the results of its own negligence. It was alleged that the Superior Court was without jurisdiction to entertain this action.

Defendant moved to strike section 10 of the complaint, and also sections 11, 12, 13 and 14, which are quoted in full as follows:

(11) "Following the commencement of the said suit the plaintiff's mother employed counsel for the purpose of preventing the sale of the real estate belonging to him, and for the further purpose of trying to protect his and her interests in the estate and the administration thereof. Counsel so employed endeavored to get the cooperation of First Security Trust Company and of Hutton & Bourbonnais Company in making an appraisal of the assets of Hutton & Bourbonnais Company for the purposes of determining the true value of the stock of Hutton & Bourbonnais Company, and for the further purpose of attempting to work out some plan which would conserve the value of the said stock and enable the First Security Trust Company, as Executor under the will of the plaintiff's father to obtain enough cash to settle the estate. During 1939, and particularly after the invasion of Poland by Germany in September 1939, business began to improve rapidly, and there was substantial improvement in the lumber business, in which Hutton & Bourbonnais Company was engaged. These facts were well known to the First Security Trust Company and to its attorney. Notwithstanding the general improvement in business, and the specific improvement in the affairs of Hutton & Bourbonnais Company which increased the value of its stock, the First Security Trust Company failed to cooperate with counsel employed by plaintiff's mother or to act on its own account to the extent that it virtually abdicated the duties of its office as Executor under the will of the plaintiff's father in connection with the stock of Hutton & Bourbonnais Company. By its wrongful conduct, it created a situation in which the sale of the stock at a fair price was rendered impossible, and in which there were only two choices; first, to sell the stock at what could be obtained for it without resorting to an attempt to force a liquidation, or, second, to attempt to force a liquidation and reorganization of Hutton & Bourbonnais Company through a receivership, the outcome of which was doubtful both as to whether the Court would appoint a receiver, and as to the amount which could be finally derived from the liquidation. The plaintiff is informed, believes and alleges that this situation was produced by the negligence and misconduct of the First Security Trust Company as herein alleged. Counsel employed by plaintiff's mother finally agreed to a sale of the stock upon the terms hereinafter set forth, but plaintiff is informed, believes and alleges that such agreement was

made because of the situation then existing, and not because it was believed that the purchase price represented the actual and true value of the said stock."

(12) "In the meantime, on September 11, 1939, counsel employed by plaintiff's mother had been appointed his guardian *ad litem* in the action then pending and there had been several extensions of time to file answer therein. The plaintiff's mother was not made a party to said action until the May Term in 1940. On June 17, 1940, First Security Trust Company filed in said action a purported pleading, described as an amended petition, in which it sought the authority of the Court to transfer 1171 shares of the stock of Hutton & Bourbonnais Company to that corporation in exchange for the stocks described in Paragraph 11 of the petition, $6,500.00 in cash, $6,500.00 in real estate and $21,500.00 payable at the rate of $5,000 twelve months after date, $5,000 two years after date and $11,500 three years after date. The said amended petition among other things alleges that Alice Williamson Miller, the decedent's widow, Mary Alice Coyle Carter and Natalie Coyle desire that their shares of the stock of Hutton & Bourbonnais Company be sold and that they accept in lieu thereof their proportionate part of the net proceeds of the sale. It further alleges that the petitioner has made a careful investigation of the affairs of Hutton & Bourbonnais Company and that it is convinced that the offer is a fair and reasonable one and that 'it is far more than your petitioner can hope to secure by a public sale of said stock and that it is as much as your petitioner could realize by a forced liquidation of Hutton & Bourbonnais Company.' Nowhere in the said petition is there any allegation as to the true value of the said stock nor as to the true value of the stocks, real estate and notes for which the said stock was exchanged. One of the conditions imposed upon the acceptance of the offer by the First Security Trust Company was the consent of all of the stockholders of Hutton & Bourbonnais Company and the plaintiff's Guardian *Ad Litem* imposed an additional condition that it be consented to by all the creditors of Hutton & Bourbonnais Company, and that the Court in its judgment finds that the offer made by Hutton & Bourbonnais Company was made with the approval of its creditors and the consent of all its stockholders. Answers to the amended petition were filed by the Guardian *Ad Litem* of the plaintiff and by the other defendants on June 17, 1940, the same day on which the said amended petition was filed. Counsel for First Security Trust Company in the action above referred to was Charles W. Bagby, and the plaintiff is informed and alleged that the said Charles W. Bagby represented the First Security Trust Company, Executor under the Will of Joseph Telesphore Miller, at the time of the commencement of said action and throughout all the negotiations and proceedings in said cause."

(13) "The plaintiff is informed, believes and alleges that Hutton & Bourbonnais Company was a debtor of First National Bank of Hickory at the time of the said proceedings, that it was a depositor in said bank, and that it had other business relations with said bank; that one or more of the officers and directors of Hutton & Bourbonnais Company were directors of the First National Bank of Hickory and also of First Security Trust Company; that officers and directors of Hutton & Bourbonnais Company also had private business transactions with First National Bank of Hickory, and also with First Security Trust Company; that First Security Trust Company and Charles W. Bagby, with others, were Executors and Trustees under the will of A. B. Hutton, deceased, and as such Trustees they owned 505 shares in a trust for A. B. Hutton, Jr. and 195 shares in a trust for Doris Hutton Councill, making a total of 700 shares of the stock of Hutton & Bourbonnais Company owned by them as such Trustees. During the month of June 1940 about the same time that the amended petition and answers were filed in the action brought by First Security Trust Company, Charles W. Bagby and others through their attorney, C. David Swift, who was partner of Charles W. Bagby, commenced a civil action in the Superior Court of Catawba County as Executors and Trustees under the will of A. B. Hutton for the purpose of obtaining the authority of the Court to consent to the purchase by Hutton & Bourbonnais Company of the Miller stock. The complaint in said action is verified by Donald Hutton, Charles W. Bagby and by George D. Taylor, an officer of First Security Trust Company. The answer of one guardian *ad litem* in said action was filed on July 3, 1940 and answer of another guardian *ad litem* on July 10, 1940. Judgment in said cause was entered on July 10, 1940, the same day on which the judgment was entered in the case involving the Miller estate. All of the summonses, complaints, answers, orders, judgments and other documents constituting the judgment roll in the two civil actions are hereby referred to and made a part of this complaint, and will be offered in evidence at the trial of this cause, not for the purpose of proving the truth of the contents thereof, but for the purpose of showing the irregularities, inconsistencies, contradictions and omissions therein. The plaintiff had no knowledge of the irregularities in the civil actions referred to in paragraphs 12 and 13 of this complaint nor of the inconsistent positions of the First Security Trust Company and Charles W. Bagby therein until about June 1950."

(14) "The plaintiff is informed, believes and alleges, as hereinbefore alleged, that the Superior Court of Catawba County had no jurisdiction in the action commenced on May 1, 1939, above referred to, that having no jurisdiction, the filing of the amended petition and answers thereafter conferred no jurisdiction; that plaintiff's guardian *ad litem* also represented his mother and two sisters in the said action; that the court did

not hear evidence relating to the true value of the stock of Hutton & Bourbonnais Company or as to the value of the assets of Hutton & Bourbonnais Company so that the Court could arrive at an independent judgment as to the value of the said stock, but that the court's order approving the sale was based upon the alternative of a forced liquidation. The plaintiff is informed, believes and alleges that First Security Trust Company by reason of conflicts of interest had been wholly disqualified to act as executor and trustee under his father's will from the date of its qualification on August 1, 1935, until the sale of said stock of Hutton & Bourbonnais Company in 1940, such conflict of interest arising out of the facts hereinafter set forth. First Security Trust Company was a wholly owned subsidiary of the First National Bank of Hickory, and, by reason of stock ownership and common officers and directors, was under the domination of, and in fact, was the *alter ego* of said bank. The First National Bank of Hickory was, as plaintiff is informed, believes and alleges, directly or indirectly a creditor of Hutton & Bourbonnais Company. The relationship between First National Bank of Hickory and Hutton & Bourbonnais Company and its officers and directors and with members of the Hutton family had been very close for many years. Some of the officers and directors of Hutton & Bourbonnais Company were directors of the said bank. G. N. Hutton, one of the founders of Hutton & Bourbonnais Company, was, until his death, a director of First National Bank of Hickory, and was one of the incorporators and a director of First Security Trust Company. Hutton & Bourbonnais Company and its officers and directors were depositors in the First National Bank of Hickory. First Security Trust Company and its attorney, Charles W. Bagby, were executors and trustees under the will of A. B. Hutton, and as such owned 700 or more shares of the stock of Hutton & Bourbonnais Company. The will of A. B. Hutton prohibited his executors and trustees from selling his stock in Hutton & Bourbonnais Company at a sacrifice. In view of the fact that the sale of the Miller stock to Hutton & Bourbonnais Company was conditioned upon the consent of all of its stockholders and creditors, the executors and trustees of A. B. Hutton were, in effect, buyers of the Miller stock to the extent of their interest in Hutton & Bourbonnais Company so that First Security Trust Company and its attorney on the same day, in the same Court, and before the same judge were representing a buyer and a seller, or were at least representing such conflicting interests as to totally disqualify them from acting as executor and trustee or as attorney for the executor and trustee in the action relating to the sale of the Miller stock. The plaintiff is informed, believes and alleges that the attention of the court was not called to these inconsistencies and conflicts of interest, and that there was no disclosure to the court of the conflicts of interest arising out of the other facts hereinbefore alleged. The plaintiff is further informed, believes and alleges

that the facts herein alleged disqualified First Security Trust Company from acting as Executor or as Trustee under the will of Joseph Telesphore Miller either under the judgment or under the will of Joseph Telesphore Miller or by virtue of its qualifications as executor or trustee."

Defendant also moved to strike the following portion from section 16: "The plaintiff is informed, believes and alleges that throughout the year 1940 and continuously since that time the stock of Hutton & Bourbonnais Company had a fair market value and an intrinsic value much higher than the amount for which said stock was disposed of or which was actually derived therefrom by the First Security Trust Company. The plaintiff is further informed, believes and alleges that on March 25, 1947, the said stock had a fair market value of not less than $100.00 per share."

Defendant's motion to strike, except as to a small portion of paragraph 12 of the complaint, was denied and defendant appealed.

Wade Lefler and Ratcliff, Vaughn, Hudson & Ferrell for plaintiff, appellee.

T. P. Pruitt and Willis & Geitner for defendant appellant.

DEVIN, C. J. The defendant Bank appealed from the denial of its motion to strike certain paragraphs from the complaint filed in the suit instituted by the plaintiff to surcharge the accounts of First Security Trust Company as executor and trustee of his father's estate. It is alleged the defendant Bank had absorbed by consolidation or merger the named Trust Company and assumed its liabilities. The gravamen of the charge in the complaint is negligence and mismanagement on the part of the Trust Company constituting a breach of trust, particularly in respect to the sale of 754 shares of stock of the Hutton & Bourbonnais Company which had been bequeathed in trust for the plaintiff under his father's will. Plaintiff, now of full age, seeks to recover damages for the loss alleged to have resulted. He alleges that the conduct of the Trust Company, for which the defendant Bank is now liable, under the circumstances set out at length, amounted to a constructive fraud upon his rights. In order to present the entire matter plaintiff has also set out in his complaint the fact that a judgment of the Superior Court was rendered in a proceeding instituted by the Trust Company as executor in which all interested persons were made parties, including the present plaintiff, approving the sale of the shares of stock now complained of. The judgment roll, including the pleadings, findings and judgment, is attached to the complaint and for the purpose of attack made part of it.

Plaintiff's allegation that the sale of the shares of stock complained of was approved by a judgment of the Superior Court in an adversary action in which the plaintiff here was party defendant and appeared by

a guardian *ad litem* and answered, nothing else appearing, would raise a complete defense to his complaint on that ground, and his allegations of negligence and mismanagement in respect to the sale of this stock would not avail against a valid judgment rendered by a court having jurisdiction of the parties and of the subject matter.

It is alleged that the Superior Court which rendered the judgment was without jurisdiction of the subject matter, but we do not think the judgment is open to attack on this ground, as a court of equity has power to entertain a petition to sell land to pay debts, though personal property remains undisposed of, in order to preserve the personal property from being sacrificed (*Settle v. Settle,* 141 N.C. 553, 54 S.E. 445; *King v. R. R.,* 184 N.C. 442, 115 S.E. 172). However, no action was taken on this petition, and some time later an amended petition was filed, which the present plaintiff's guardian *ad litem* and the adult defendants answered, presenting a proposal for the sale of this stock and asking the court's approval and authority to the executor to conclude the sale for the reasons assigned.

The facts set out would seem to indicate the court had jurisdiction both of the parties and of the subject matter. Hence mere irregularities in the rendition of the judgment would not justify an independent action to avoid its effect. Irregularities may be corrected by motion in the cause. McIntosh, sec. 652; *Simms v. Sampson,* 221 N.C. 379, 20 S.E. 2d 554; *Carter v. Rountree,* 109 N.C. 29, 13 S.E. 716.

The remaining ground left the plaintiff upon which to maintain his action, in the face of the judgment which would otherwise bar his access to the relief demanded, is that of fraud. He alleges the judgment was void for constructive fraud on the part of the Trust Company which entered into the rendition of the judgment.

Constructive fraud differs from active fraud in that the intent to deceive is not an essential element, but it is nevertheless fraud though it rests upon presumption arising from breach of fiduciary obligation rather than deception intentionally practiced. 23 A.J. 756; *Rhodes v. Jones,* 232 N.C. 547, 61 S.E. 2d 725; *Hatcher v. Williams,* 225 N.C. 112, 33 S.E. 2d 617; *City Bank Farmers Trust Co. v. Cannon,* 291 N.Y. 125; *Ryan v. Plath,* 18 Wash. (2) 839.

Constructive fraud has been frequently defined as "a breach of duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive, to violate confidence or to injure public interests. Neither actual dishonesty nor intent to deceive is an essential element of constructive fraud." 37 C.J.S. 211; *Greene v. Brown,* 199 S.C. 218.

The plaintiff alleges in substance that the sale of the shares of stock by the trustee, to the injury of plaintiff, under the circumstances set out in the complaint, constituted a breach of the fiduciary obligation im-

posed upon the Trust Company in good conscience to guard the interests of the infant beneficiary, and was hence constructively fraudulent.

But if plaintiff's complaint be sufficient to allege constructive fraud, he is confronted by another hurdle.

In order to sustain a collateral attack on a judgment for fraud it is necessary that the allegations of the complaint set forth facts constituting extrinsic or collateral fraud in the procurement of the judgment. It is well settled that the fraud for which a judgment may be vacated or enjoined in equity must be in the procurement of the judgment. *Horne v. Edwards,* 215 N.C. 622, 3 S.E. 2d 1; *McCoy v. Justice,* 199 N.C. 602, 155 S.E. 452; *Mottu v. Davis,* 153 N.C. 160, 69 S.E. 63; *U. S. v. Throckmorton,* 98 U.S. 61; Freeman on Judgments, sec. 1233. "Extrinsic or collateral fraud operates not upon matters pertaining to the judgment itself but relates to the manner in which it is procured." Freeman on Judgments, sec. 1233.

In *McCoy v. Justice, supra, Justice Adams* quotes with approval from Freeman on Judgments: "For judgments are impeachable for those frauds only which are extrinsic to the merits of the case, and by which the court has been imposed upon or misled into a false judgment. They are not impeachable for frauds relating to the merits between the parties. All mistakes and errors must be corrected from within by motion for a new trial, or to reopen the judgment, or by appeal." Where the fraud is extrinsic or collateral, operating without, the remedy also is without, and the judgment may be collaterally attacked or set aside by an independent action. McIntosh 745; *Carter v. Rountree,* 109 N.C. 29, 13 S.E. 716.

To avoid a judgment on this ground there must be shown extrinsic fraud, or fraud collateral to the matters in issue and heard by the first court, and not fraud in the matter on which the judgment was rendered. *U. S. v. Throckmorton, supra.* "The fraud which warrants equity in interfering with such a solemn thing as a judgment must be such as is practiced in obtaining the judgment and which prevents the losing party from having an adversary trial of the issue." *Mottu v. Davis, supra.*

The question here is whether the fraud charged relates to inequitable conduct on the part of the trustee which prevented the court from considering the plaintiff's case, or whether the court was imposed upon to the extent that facts material to the present plaintiff's case and in his interest were concealed or were not presented. *McLean v. McLean,* 233 N.C. 139, 63 S.E. 2d 138.

The plaintiff's position is that the allegations of his complaint considered in the light favorable for him are sufficient to make out a case of constructive fraud. He contends the facts alleged show that the Trust Company, executor and trustee under the will, in breach of its trust negligently failed in 1938 to sell a portion of the shares of stock referred

to at a time when a price of $50 per share was obtainable, and that in the suit it instituted in 1939 it was seeking to extricate itself from the consequences of its mismanagement; that in the proceeding now attacked it occupied inconsistent positions, and that in consequence of interlocking directorates and close business associations among those who controlled the defendant Bank, its subsidiary the Trust Company, and the Hutton & Bourbonnais Company, the corporation whose stock was the subject of negotiation and sale, interests represented by the executor and trustee were conflicting, and that the trustee in breach of the trust did not act in the interest of the plaintiff who was then 18 years of age; that as result of negligence valuable shares of stock were sold for an inadequate price; that at the same time the sale of 700 shares of stock in the same corporation were being negotiated and sold by the Hutton Estate of which the Trust Company was one of the executors and trustees; that some of the officers and directors of Hutton & Bourbonnais were also directors of the defendant Bank, and the Bank was a creditor of Hutton & Bourbonnais Company.

Plaintiff further alleged that no evidence was presented to the court which rendered the judgment in 1940 as to the true value of the shares of stock; that while judgments were rendered by the court in this case and the Hutton Estate case on the same day, the attention of the court was not called by the trustee to the conflict of interest among the parties in the purchase and sale of this stock. Plaintiff cites as authority for his position, among others: *Graham v. Floyd*, 214 N.C. 77, 197 S.E. 873; *Hatcher v. Williams*, 225 N.C. 112, 33 S.E. 2d 617; *McNinch v. Trust Co.*, 183 N.C. 33, 110 S.E. 663; *City Bank Farmers Trust Co. v. Cannon*, 291 N.Y. 125; *City Bank Farmers Trust Co. v. Taylor*, 69A (2) 234 (R.I.); *Ryan v. Plath*, 18 Wash. (2) 839; G.S. 36-28.

On the other hand, the defendant's motion to strike as irrelevant the allegations in the complaint which relate to the sale of these shares of stock, was based on the ground that according to the complaint and the exhibits attached the sale was approved by a valid judgment of the Superior Court, and that any irregularities alleged are insufficient to justify a collateral attack on this judgment.

It appears from the complaint and the judgment rolls attached thereto that plaintiff's father died testate in 1935, and that at the date of the judgment referred to, July 10, 1940, there was no personal property, except the shares bequeathed in trust for the plaintiff, with which to pay the balance of the debts of the estate and to provide for the maintenance of plaintiff, testator's son; that it had been necessary to ask for orders of court authorizing the executor to borrow money to pay for the education of the plaintiff. In 1939 the executor instituted an action to sell real property for this purpose rather than sacrifice the shares of stock for which it was alleged there was no market. In that suit the court

appointed as guardian *ad litem* of the present plaintiff L. P. McLendon, an experienced and reputable lawyer of the Guilford bar, who had no connection or association with any of the parties interested. The petition to sell land was not prosecuted, but in 1940, a year later, the executor filed an amended petition asking for authority to sell the shares of stock to the issuing corporation the Hutton & Bourbonnais Company upon the terms therein set out. The guardian *ad litem* filed an answer in which he set out that since his appointment as guardian *ad litem* he had personally attended meetings of the stockholders of Hutton & Bourbonnais Company and had repeatedly conferred with officials of the Trust Company, with the mother of the present plaintiff, and with the attorneys representing all parties; that he had familiarized himself with the financial affairs of Hutton & Bourbonnais Company and obtained all information available with respect to that company's assets and liabilities; that he was convinced that there had been and was then no market for the stock owned by the Miller Estate, and that it would be necessary to liquidate this Company in order to realize the present value thereof; that as result of discussions with stockholders and other interested parties the guardian *ad litem* was instrumental in securing an offer for this stock $6,500 in cash, $6,500 in real estate conveyance, and $21,500 endorsed notes of the Company, and the proportionate share of the investment of Hutton & Bourbonnais Company in various local corporations. The guardian *ad litem* expressed the view that funds to be derived from the contemplated sale were presently needed for the education and maintenance of plaintiff, then about to enter college

The guardian *ad litem* incorporated in his answer the following recommendation: "After the most careful consideration of all the circumstances involved this defendant is convinced that it is to the best interest of the minor, J. T. Miller, Jr., that the offer for the purchase of the stock of the J. T. Miller Estate, as set forth in the amended petition, should be accepted and approved by the Court, and in reaching this conclusion this defendant has been influenced by the fact that the acceptance of said offer will enable the executor to close, with reasonable promptness, the administration of the estate and to set up the trust fund provided by the will of the minor's father and thereby carry out the purpose and intention of the testator to insure the existence of a fund sufficient to support, maintain and educate said minor, and secondly, this defendant believes that a liquidation of the Hutton & Bourbonnais Company, either voluntarily or by a receiver, would in all probability produce less money for the use of said minor than will be obtained by the acceptance of this offer." The adult defendants, the widow and legatees of the testator, who together owned more than 400 shares of this stock filed answer asking that the sale be made as proposed, and elected to sell their own shares on the same terms.

Judge Phillips, who was presiding at July Term, 1940, of Catawba Superior Court, had all the parties before him, and in his judgment set out his findings fully and, among other things, found that the shares of stock were not now marketable, that the trustee had repeatedly endeavored to sell them but was unable to secure an offer; that Hutton & Bourbonnais Company had made no profit since 1926, paid no dividend since 1930, and had a substantial deficit, and entered his conclusion as follows: "The Court, after careful inquiry and investigation, is of the opinion and finds that in order to carry out the purpose of the trust created by the testator, it is now advisable that the offer for the purchase of said stock be accepted and the executor and trustee be authorized to do and perform all things necessary for the consummation of said sale and purchase."

It also appeared that on the same day a similar judgment was rendered authorizing the trustees of the Hutton Estate to sell the shares of stock of Hutton & Bourbonnais Company belonging to that estate upon identical terms. All these facts are set forth in the exhibits which plaintiff has attached to his complaint. Thus it appears from the answer of the guardian *ad litem* and the findings of the court, incorporated in the complaint, that the charge that the judgment was rendered without information as to the value of the shares, and without knowledge of the alleged conflicting interests, is not borne out.

After examination of the complaint and of the judgment rolls attached thereto and made a part thereof, we conclude that insufficient facts are alleged to show extrinsic fraud in procuring the judgment rendered 10 July, 1940. It follows that the judgment would constitute a bar to an action to surcharge the executor's accounts on account of the sale of the shares of stock authorized and approved by that judgment.

Estoppel by judgment is a matter of defense and ordinarily must be pleaded, but this rule does not apply where all the facts necessary to constitute an estoppel are set out in the complaint for the purpose of attack. *Alston v. Connell,* 140 N.C. 485 (494), 53 S.E. 292; 120 A.L.R. 110n. Here the plaintiff in order to raise the question has inserted the judgment roll in his complaint and at the same time set out allegations attacking the validity of the judgment in the effort to have it declared void and of no effect. The defendant has moved to strike these allegations on the ground that the matters alleged have been determined by the judgment. Thus both parties have squarely presented the question for our decision whether the allegations sought to be stricken are sufficient for the purpose intended.

The case is here on motion to strike. The statute G.S. 1-153 authorizes the court to strike from a pleading irrelevant or redundant matter. *Rhodes v. Jones,* 232 N.C. 547, 61 S.E. 2d 725; *Poovey v. Hickory,* 210 N.C. 630, 188 S.E. 78. See 29 N. C. Law Review 1, where this statute

is discussed and pertinent decisions cited. And the right of the defendant to strike portions of a complaint which are insufficient to state a cause of action attempted to be set up is upheld in *Development Co. v. Bearden,* 227 N.C. 124, 41 S.E. 2d 85, upon the view that such allegations are in fact "irrelevant." If the complaint be wholly insufficient to state a cause of action, objection should be raised by demurrer; but when only a portion of the pleading or certain paragraphs are insufficient for the purpose for which they are inserted, relief may properly be had by motion to strike the objectionable paragraphs. *Thalhimer v. Abrams,* 232 N.C. 96, 59 S.E. 2d 358.

For the reasons stated we think the motion to strike from the complaint the portions designated should have been allowed, with right to the plaintiff to amend his complaint or file an amended complaint if so advised.

Reversed.

ERWIN MILLS, INC., v. TEXTILE WORKERS UNION OF AMERICA, C.I.O.; TEXTILE WORKERS UNION OF AMERICA, C.I.O. LOCAL #250, ERWIN, NORTH CAROLINA; HOWARD HARRIS; B. F. MORRISON; ERNEST PHILLIPS; JAMES F. CAMERON; FRANK RALPH; J. THOMAS WEST; DAVID MORRISON; EDWARD HOLMES; E. C. JOHNSON, JR.; JAMES LACEY JONES; EARL SUGGS; BILLY SLOAN; KATHLEEN NORRIS; JOSEPH D. BEASLEY; JOHNNIE LUCAS; SHERRILL ENNIS; CORBETT LLOYD; ODELL MORRISON; WILEY B. TEW; WOODROW NORRIS; JAMES COX; LESSIE PRICE; RODERICK MORRISON; WILLIAM POINDEXTER; PRENTIS FARMER; EDITH McLAMB; IRA MATTHEWS, JR.; JESSIE WILLIFORD; AND OTHER PERSONS UNKNOWN TO PLAINTIFF, TO WHOM THIS ACTION MAY BECOME KNOWN.

(Filed 31 October, 1951.)

1. Constitutional Law § 11: Courts § 12—

While the regulation of peaceful strikes in industries engaged in interstate commerce is in the exclusive jurisdiction of the Federal Government, 29 USCA, section 141, *et seq.*, our State Court in the exercise of the State's inherent police power has jurisdiction of an action to restrain mass picketing, obstructing or interfering with factory entrances, and the threatening and intimidation of employees in the conduct of a strike.

2. Contempt of Court § 2b—

Where a temporary order is issued against defendants and also against all others to whom notice and knowledge of its contents might come, such others who violate its provisions after notice and knowledge of the contents of the order may be held in contempt to the same extent as if they had been formally served.

3. Contempt of Court § 4—

An order to show cause why named persons should not be held in contempt of court for willful violation of a court order is not required to be based upon a petition, but such order may be issued upon affidavit or other verification charging violation of the order. G.S. 5-7.

APPEAL from *Williams, J.*, at Chambers, Sanford, North Carolina, 16 June, 1951. From HARNETT.

This appeal arises out of a civil action instituted on 12 April, 1951, wherein the plaintiff petitioned the Superior Court of Harnett County for injunctive relief against the alleged acts of defendants and others in preventing and impeding plaintiff in the operation of its textile plant at Erwin, North Carolina, by mass picketing, and interference with the free ingress and egress to and from its plant, by the use of threats, abuse, and violence against employees and others seeking ingress and egress to and from its plant.

A temporary restraining order was issued on 24 April, 1951, by Williams, J., Resident Judge of the Fourth Judicial District of North Carolina, based upon the plaintiff's verified application and verified complaint theretofore filed in the action, the same being treated as an affidavit which, among other things, restrained the defendants and all those to whom notice and knowledge of the order might come, as follows:

"1. From interfering in any manner with free ingress and egress to and from plaintiff's premises.

"2. From assaulting, threatening, abusing, or in any manner intimidating persons who work or seek to work in, or lawfully seek to enter the plaintiff's plant.

"3. From having more than 25 persons at any one time as peaceful pickets at any gate to the plaintiff's plant provided that no person, including pickets, may approach closer to any gate of plaintiff's plant than 50 feet; and provided further that no person, or persons, shall block driveways leading to gates of said plant or right of way of railroad which enters said plant.

"It is the intent and purpose of this paragraph 3 that no person, whether engaged in picketing or not, other than persons lawfully seeking to approach and enter the plaintiff's premises for the purpose of transacting lawful business, shall approach closer to any gate of plaintiff's plant than 50 feet.

"4. No person shall abuse, intimidate, strike, threaten or use any vile, abusive, or violent or threatening language at or towards any person on the plaintiff's premises, or any person entering or leaving said premises, and shall in no manner interfere with or impede any motor vehicle, wagon, cart, truck, animal, or railroad trains or cars or engines thereof in approaching or leaving plaintiff's premises, and shall in no manner

interfere with the free ingress and egress of any person or vehicle, or any animal, to or from the plaintiff's plant, and along and over any of the streets or roads adjacent to the plaintiff's plant.

"This order shall become effective upon the plaintiff's filing with the Clerk of the Superior Court of Harnett County, a written undertaking with sufficient sureties justified before and approved by said clerk in the amount of $2,000."

The court further ordered the sheriff of Harnett County to post copies of the order in conspicuous places at and in the vicinity of the plaintiff's plant, and particularly at all entrance gates to said plant; and further directed the defendants to appear before said court on Saturday, May 5, 1951, at 10:30 a.m., at the Courthouse in Lee County, North Carolina, or as soon thereafter as they may be heard, then and there to show cause, if any they may have, why this order should not be continued to the trial of the action on its merits.

Bond was given as required by the order and copies of the order and notice to show cause were served on the defendants David Holt Morrison and Ira Matthews, Jr., on 24 April, 1951, and on the defendant William Poindexter on 26 April, 1951. Thereafter, certain affidavits were filed with the court, charging six employees of the plaintiff with wilfully having done certain acts and things prohibited by the temporary restraining order. Whereupon, on 3 May, 1951, Williams, J., issued against the six striking employees of the plaintiff, two orders to show cause why they should not be punished for contempt, one order being directed against the defendants David Holt Morrison, Ira Matthews, Jr., and William Poindexter, and the other being directed against the respondents Ellis Coats, Cecil Turnage, and Mrs. Rena Matthews who were not parties to the cause.

The hearing on these show cause orders was set before his Honor, Williams, J., in Chambers at the Lee County Courthouse at Sanford, North Carolina, at 10:00 a.m., on 12 May, 1951.

The order against David Holt Morrison, William Poindexter and Ira Matthews, Jr., recited that after service of the restraining order on them it appeared from the various affidavits referred to therein and attached thereto that the defendants had wilfully done certain acts prohibited in the restraining order. The order to show cause against Ellis Coats, Cecil Turnage, and Mrs. Rena Matthews, recited that after posting of notices of the restraining order at the plant gates, these respondents "had full knowledge of the fact that the temporary restraining order had been issued and of the contents thereof" and it appeared from various affidavits referred to therein and attached thereto, that the respondents had wilfully done certain acts prohibited in the restraining order. The orders to show cause and copies of the affidavits affecting the respective parties, were served on each of the defendants and respondents.

By consent of all parties to this action, an order was entered on 11 May, 1951, continuing the temporary restraining order until the final hearing on its merits.

The defendants filed a demurrer to the complaint on 11 May, 1951, and moved for a dismissal of the action on the ground (1) that the plaintiff's complaint failed to state a cause of action; and (2) that the action arises out of a labor dispute between the plaintiff, a corporation engaged in the manufacture and sale of textile products in interstate commerce, and its employees and their union, a labor organization, and that the allegations of the complaint amount to no more than an allegation of an unfair labor practice on the part of the defendant labor organization and its agents in violation of Section 8 (b) (1) and other sections of the Labor Management Relations Act of 1947, and that the exclusive jurisdiction of the controversy is in the National Labor Relations Board and in the federal courts, thereby excluding the courts of North Carolina from having any jurisdiction in the controversy.

Likewise, each of the defendants and respondents on 19 May, 1951, filed a demurrer to and a motion to dismiss the contempt proceeding on the ground (1) that the court is without jurisdiction, stating the same ground therefor as set out in the demurrer to the complaint; and (2) that there is no petition or other proper document which states facts sufficient to constitute a cause of action, or upon which the court may issue an order to show cause or punish the defendants or respondents for contempt.

This cause finally came on to be heard before his Honor, Williams, J., at Chambers in Sanford, North Carolina, on 15 June, 1951, upon the demurrer to the complaint and the demurrer to and the motion to dismiss the contempt proceeding. All parties having appeared through counsel and the court having heard arguments of counsel on the demurrers and motion to dismiss the contempt proceeding, the court overruled the demurrers, and denied the motion to dismiss the contempt proceeding and entered judgments accordingly on 16 June, 1951.

The defendants appealed to the Supreme Court from the judgment overruling the demurrer to the complaint, and the defendants and respondents appealed from the judgment overruling the demurrer to and motion to dismiss the contempt proceeding, assigning error.

Robert S. Cahoon for appellants.

Fuller, Reade, Umstead & Fuller and James L. Newsom for appellee.

DENNY, J. The first assignment of error is based upon the exception to the ruling of the court below in overruling the defendants' demurrer to the complaint. This exception is bottomed upon the contention of the appellants that plaintiff's cause of action, if any, arises out of a labor

dispute between the plaintiff, a corporation engaged in the manufacture and sale of textile products in interstate commerce, and its employees and their union, a labor organization. The defendants contend, therefore, that the allegations of the complaint are in substance to the effect that defendants by concerted action, directed by and through the defendant labor organization, are engaged in picketing, accompanied by violence, threats of violence, and mass picketing which is designed to and does intimidate and cause employees who do not desire to participate in the strike, so as to compel them against their wishes to refrain from working in plaintiff's textile plant. These allegations, the defendants contend, amount to no more than an allegation of an unfair labor practice on the part of the defendant labor organization and its agents in violation of section 158 (b) (1), 29 USCA, and other sections of the Labor Management Relations Act of 1947 which Act, defendants contend, vested the exclusive power to regulate and prevent the conduct complained of in plaintiff's complaint, in the National Labor Relations Board and in the federal courts, thereby excluding the courts of the several states from jurisdiction in such controversies.

The appellants are relying upon certain provisions of the Labor Management Relations Act, popularly known as the Taft-Hartley Act, and hereinafter referred to as such, the pertinent parts of which are set forth in the numbered paragraphs below.

1. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title." 29 USCA, section 157.

2. "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title . . ." 29 USCA, section 158 (b) (1).

3. "The Board is empowered as hereinafter provided to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . ." 29 USCA, section 160 (a).

4. "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to

issue and cause to be served upon such person a complaint stating the charges in that respect . . ." 29 USCA, section 160 (b).

5. "The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in unfair labor practice, to petition any district court of the United States . . . for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper." 29 USCA, section 160 (j).

The question for determination before us is simply this: Does the conduct of the defendants, complained of in the plaintiff's complaint, come within the unfair labor practices referred to in the above provisions of the Taft-Hartley Act?

It is now established by decisions of the Supreme Court of the United States that the regulation of peaceful strikes for higher wages, in industries engaged in interstate commerce, is closed to state regulation by the National Labor Relations Act as amended by the Taft-Hartley Act. 29 USCA, section 141, *et seq.; International Union of U.A.A.&A. v. O'Brien,* 339 U.S. 454, 94 L. ed. 978; *Amalgamated Asso. v. Wisconsin Employment Relations Board,* 340 U.S. 383, 95 L. Ed. 364. However, this does not mean that the courts of the several states are left powerless to exercise their traditional police power and injunctive control over violence and unlawful conduct committed during the course of a strike or labor dispute, and it makes no difference whether such unlawful acts are committed by a labor organization or its agents, by non-union employees, or by the employer or its agents, or by others.

In the case of *Allen-Bradley Local v. Wisconsin Employment Relations Board,* 315 U.S. 740, 86 L. Ed. 1154, decided in 1942, prior to the enactment of the Taft-Hartley Act, the labor union appealed from a decision of the Supreme Court of Wisconsin, affirming the judgment of the Circuit Court for Milwaukee County, sustaining and enforcing an order of the Wisconsin Employment Relations Board in which the conduct complained of on the part of the labor union and certain of its officers and members, was alleged to be similar in character to that alleged in the instant case. The Wisconsin Employment Relations Board issued an order which, among other things, ordered the union, its officers, agents, and members to cease and desist from: "(a) Mass picketing. (b) Threatening employees. (c) Obstructing or interfering with the factory entrances. (d) Obstructing or interfering with the free use of public streets, roads, and sidewalks . . ." The union challenged the jurisdiction of the state Board on the identical ground interposed by the appellants, that is, that the matters in controversy were subject to the provisions of the National Labor Relations Act and that the National Labor Relations

Board had exclusive jurisdiction of the matters in controversy. The Supreme Court of the United States did not agree with the contention of the appellant, and in affirming the judgment of the Supreme Court of Wisconsin said, among other things: "We agree with the statement of the United States as *amicus curiæ* that the federal Act was not designed to preclude a State from enacting legislation limited to the prohibition or regulation of this type of employee or union activity. The Committee Reports on the federal Act plainly indicate that it is not 'a mere police court measure' and that authority of the several states may be exerted to control such conduct. Furthermore, this Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested,'" citing numerous authorities. The Court further said: "Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board. Nor are we faced here with the precise problem with which we were confronted in *Hines v. Davidowitz,* 312 U.S. 52, 85 L. Ed. 581. In the *Hines Case,* a federal system of alien registration was held to supersede a state system of registration. But there we were dealing with a problem which had an impact on the general field of foreign relations . . . Therefore we were more ready to conclude that a federal act in a field that touched international relations superseded state regulation than we were in those cases where a State was exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways. *Maurer v. Hamilton,* 309 U.S. 598, 84 L. Ed. 969, 60 S. Ct. 726, 135 A.L.R. 1347. Here we are dealing with the latter type of problem. We will not likely infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard . . . Here, as we have seen, Congress designedly left open the area for state control . . . But, as we have said, the federal Act does not govern employee or union activity of the type here enjoined. And we fail to see how the inability to utilize mass picketing, threats, violence, and other devices which were here employed impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the federal Act. Nor is the freedom to engage in such conduct shown to be so essential or intimately related to a realization of the guarantees of the federal Act that its denial is an impairment of the federal policy. If the order of the state Board affected the status of the employees or if it caused a forfeiture of collective bargaining rights, a distinctly different question would arise, but since no such right is affected, we conclude that this case is not basically different from the common situation where a State takes steps to prevent breaches of the peace in connection with labor disputes."

In *International Union v. Wisconsin Employment Relations Board,* 336 U.S. 245, 93 L. Ed. 651, the controversy arose over the conduct of

the union and its members after efforts to negotiate a new bargaining agreement had reached a deadlock. The labor union, for the purpose of putting pressure upon the employer, instigated intermittent and unannounced work stoppages by calling on twenty-six occasions special meetings of the union during working hours at any time the union saw fit. The employees would leave work to attend these meetings, without warning to the employer or notice as to when or whether they would return and without informing the employer of any specific demands which these tactics were designed to enforce nor of the concession it could make to avoid them. The Wisconsin Employment Relations Board directed the labor union to cease and desist from instigating these intermittent and unannounced work stoppages. The order of the state Board was upheld by the Supreme Court of the State of Wisconsin, 250 Wis. 550, 27 N.W. 2d, 875, 28 N.W. 2d 254, and in affirming the judgment of the Wisconsin Court, the Supreme Court of the United States said: "This procedure was publicly described by the Union leaders as a new technique for bringing pressure upon the employer. It was, and is candidly admitted that these tactics were intended to and did interfere with production and put strong economic pressure on the employer, who was disabled thereby from making any dependable production plans or delivery commitments. And it was said that 'this can't be said for the strike. After the initial surprise or walkout, the company knows what it has to do and plans accordingly.' It was commended as a procedure which would avoid hardships that a strike imposes on employees and was considered 'a better weapon than a strike.'"

It will be noted that when the orginial order of the State Board and the decision of the State Supreme Court were made, the National Labor Relations Act was in effect, but since the order imposed a continuing restraint which it was contended, at the time of the hearing in the Supreme Court of the United States, was in conflict with the provisions of the Taft-Hartley Act, 29 USCA, sections 141-197, which amended the earlier statute, the Court considered the State action in relation to both Federal Acts. The Court said: "The Labor Management Relations Act declared it to be an unfair labor practice for a union to induce or engage in a strike or concerted refusal to work where an object thereof is any of certain enumerated ones . . . Nevertheless the conduct here described is not forbidden by this Act and no proceeding is authorized by which the Federal Board may deal with it in any manner. While the Federal Board is empowered to forbid a strike when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left wholly to the states. In this case there was also evidence of considerable injury to property and in-

timidation of other employees by threats and no one questions the state's power to police coercion by those methods. It seems to us clear that this case falls within the rule announced in *Allen-Bradley (supra)* that the state may police these strike activities as it could police the strike activities there . . . There is no existing or possible conflict or overlapping between the authority of the Federal and State Boards, because the Federal Board has no authority either to investigate, approve, or forbid the union conduct in question. This conduct is governable by the states or it is entirely ungoverned . . . We think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by federal statute nor was it legalized and approved thereby. Such being the case the state police power was not superseded by congressional Act over a subject normally within its exclusive power and reachable by federal regulation only because of its effects on that interstate commerce which Congress may regulate." See also *Ackerman v. International Longshoremen's & W. Union,* 187 F. 2d 860; and *Oil Workers International Union v. Superior Court,* 103 Cal. App. 2d 512, 230 P. 2d 71.

The cases of *International Union of U.A.A.&A. v. O'Brien, supra,* and *Amalgamated Asso. v. Wisconsin Employment Relations Board, supra,* strongly relied upon by the appellants, do not support their position. In the *International Union case* the controversy arose out of a conflict between the provisions of a Michigan statute and the provisions of the Taft-Hartley Act as to the time and manner of calling a strike. The Court held, and properly so, that since the Taft-Hartley Act contained express provisions prescribing when and how notice shall be given of an intention to strike, State legislation in conflict therewith must yield. And in the *Amalgamated Asso. case* the question involved was whether the State of Wisconsin could by statute prohibit a strike against a public utility and compel arbitration of a labor dispute after the parties had failed to reach an agreement through collective bargaining. The action which was instituted by the union involved only the constitutionality of the State statute and presented no question with respect to the right of the state to exert its police power to prevent violence and other conduct of the character complained of herein.

In our opinion there is nothing in the provisions of the Taft-Hartley Act or in the decisions of the Supreme Court of the United States in construing the provisions thereof that interferes with the right of a State to exercise its traditional police power to suppress violence, to prevent breaches of the peace, to prevent an employer and his employees from being intimidated by violence or the threat of violence or to protect property and to safeguard its lawful use during a strike or labor dispute. The proper exercise of such power does not impinge upon the lawful rights of labor within the purview of the Constitution of this State, the

Constitution of the United States, or the Taft-Hartley Act. Therefore, the first exception and assignment of error is overruled.

The appellants' second exception and assignment of error challenges the method of obtaining the order to show cause why the defendants and respondents should not be punished for contempt.

The restraining order was duly issued and served on the defendants David Holt Morrison, William Poindexter, and Ira Matthews, Jr. The order was also issued against all others to whom notice and knowledge of its contents might come. It follows, therefore, if the respondents Ellis Coats, Cecil Turnage, and Mrs. Rena Matthews knew that such order had been issued and knew the contents thereof, they would be subject to its provisions to the same extent as if they had been formally served with the order. *Hart Cotton Mills, Inc. v. Abrams,* 231 N.C. 431, 57 S.E. 2d 803.

The defendants contend, however, that an order to show cause why a person should not be attached for contempt, must be based upon a petition or other proper document and that the affidavits filed with the court in this action do not meet such requirement. The contention is without merit. G.S. 5-7, which reads as follows: "When the contempt is not committed in the immediate presence of the court, or so near as to interrupt its business, proceedings thereupon shall be by an order directing the offender to appear, within reasonable time, and show cause why he should not be attached for contempt. At the time specified in the order the person charged with the contempt may appear and answer, and, if he fail to appear and show good cause why he should not be attached for the contempt charged, he shall be punished as provided in this chapter." And whether the movent uses a petition or other document to obtain an order to show cause in such proceeding, it is the affidavit or verification that imports the verity to the charge of violating the judgment or order of the court, which is required upon which to base an order to show cause in such instances. G.S. 5-7; *Safie Manufacturing Co. v. Arnold,* 228 N.C. 375, 45 S.E. 2d 577; *In re Deaton,* 105 N.C. 59, 11 S.E. 244.

The rulings of the court below on both demurrers and the motion to dismiss the contempt proceeding will be upheld on the respective judgments entered.

Affirmed.

R. M. GAINES v. LONG MANUFACTURING COMPANY, INC., W. R. LONG, JOHN G. LONG, MARY ELLEN FORBES, INDIVIDUALLY, AND AS STOCKHOLDERS AND DIRECTORS OF LONG MANUFACTURING COMPANY, INC., AND J. O. HALL, SECRETARY AND TREASURER OF LONG MANUFACTURING COMPANY, INC.

(Filed 31 October, 1951.)

1. **Pleadings § 19c—**

A demurrer admits the truth of every material fact properly alleged.

2. **Same—**

A pleading will be liberally construed upon demurrer, giving the pleader every reasonable intendment, and the demurrer will be overruled if the pleading to any extent or in any portion presents facts sufficient to constitute a cause of action.

3. **Corporations § 16—**

Granting that the stockholders of a corporation have the discretionary power to set aside any part of its earned surplus for working capital, G.S. 55-115, such discretion is not unlimited but must be exercised in good faith and not in arbitrary disregard of the rights of minority stockholders, and courts of equity may grant relief against arbitrary action resulting in injury to minority stockholders, even in the absence of actual fraud, since it amounts in effect to a breach of trust.

4. **Same—**

Allegations in an action by a minority stockholder alleging that the corporation had a large earned surplus, that the majority stockholders passed a resolution setting aside the entire surplus as working capital and authorizing the issuance of additional stock in a large amount, and that the action was arbitrary and taken for the single purpose of defeating the minority stockholder's right to dividends and to lessen the book value of his stock and "freeze" him out of his rightful interest in the corporation, together with allegations of fact disclosing that plaintiff had exhausted all efforts to obtain relief from within the corporation, *is held* sufficient to state a cause of action, and demurrer thereto is properly overruled.

5. **Corporations § 10—**

A stockholder may maintain an action against the corporation to redress a corporate wrong when he alleges facts sufficient to show that he has exhausted reasonable efforts to obtain relief within the corporate management.

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

APPEAL by defendants from *Harris, J.*, at May Term, 1951, of EDGECOMBE.

Civil action by minority stockholder of corporation for relief against alleged arbitrary manipulation of corporate finances by majority stockholders for the purpose of promoting their own gain, to the detriment of

the plaintiff, and for writ of *mandamus* to force declaration of dividend, either in stock or in cash, heard upon demurrer to the complaint for failure to state facts sufficient to constitute a cause of action.

From judgment overruling the demurrer, the defendants excepted and appealed.

Ruark & Ruark, Joseph C. Moore, Jr., and Battle, Winslow, Merrell & Taylor for plaintiff, appellee.

Henry C. Bourne for defendants, appellants.

JOHNSON, J. The defendants by demurring to the sufficiency of the complaint to state a cause of action admit as true every material fact properly alleged. *Gaines v. Long Manufacturing Company, Inc., post,* 340; *Hall v. Dairies, ante,* 206; *Bryant v. Ice Co.,* 233 N.C. 266, 63 S.E. 2d 547. Under the Code system of pleading which prevails in this jurisdiction, it is settled policy that actions shall be tried upon their merits, and to that end pleadings are construed liberally, with every reasonable intendment being adopted in favor of the pleader, so that a pleading will not be overthrown by a demurrer unless it be wholly insufficient. "If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, . . . It must be fatally defective before it will be rejected as insufficient." *Hoke v. Glenn,* 167 N.C. 594, 83 S.E. 807; *S. v. Trust Co.,* 192 N.C. 246, 134 S.E. 656.

In substance, the pertinent facts alleged in the complaint are these:

1. That the defendant, Long Manufacturing Company, Inc., was chartered under the laws of North Carolina 13 September, 1946, with an authorized capital stock of 1,000 shares of $100 par value each. The corporation began business with an original paid-in capital of only $1,000, represented by 10 shares of stock. No further stock has ever been issued. The original ten shares are now outstanding. The plaintiff owns two shares, with the remaining eight shares being owned by these defendants, in the proportions as indicated: W. R. Long, six shares; John G. Long, one share; and Mary Ellen Forbes, one share.

2. The plaintiff paid full value for his two shares of stock and served as Secretary and Treasurer of the corporation from the time of its organization in 1946 until 30 June, 1949, when he resigned, and since that time he has not been an officer of the corporation.

3. The defendants W. R. Long, John G. Long, and Mary Ellen Forbes (who are brothers and sister) constitute the present board of directors of the corporation. They were elected at the 8 January, 1951, annual meeting of the stockholders. At the meeting of the board of directors held the same day, W. R. Long was elected President; John G. Long was

elected Vice-President; and J. O. Hall (although being neither a director nor a stockholder) was elected Secretary and Treasurer of the corporation.

4. The corporation has prospered from its inception: for the fiscal year ending 31 October, 1947, the first year of operations, net profits after all taxes were $193,707.62; for the year ending 31 October, 1948, net profits after taxes amounted to $32,142.57; for the year ending 31 October, 1949, net profits after taxes were $19,317.43; and for the year ending 31 October, 1950, net profits after taxes were $50,367.05.

At the end of the fiscal year 31 October, 1950, the corporation had current assets of $352,130.24, including cash on hand in banks of $146,124.92. At that time the corporation had paid-in capital and earned surplus of $296,387.47 "and was amply solvent and was not in need of any additional operating capital"; that at the time of the commencement of this suit the financial condition of the corporation was substantially the same as on 31 October, 1950.

5. At the 8 January, 1951, annual meeting of the stockholders of the corporation two resolutions "were introduced by the defendant John G. Long and carried by the votes of the defendants W. R. Long, John G. Long and Mary Ellen Forbes, over the protest(s) of the plaintiff, who was present and voted his 2 shares of stock against said resolutions."

The first resolution recites that whereas the books of the corporation show as of 31 October, 1950, an earned surplus of $295,387.47, nevertheless the corporation "is badly in need of additional working capital to carry on its business." And, thereupon, the resolution directs the payment from earned surplus of a dividend of six per centum on the outstanding capital stock to stockholders of record as of 8 January, 1951 (amounting in all to $60.00), with further direction "that the remaining part of the surplus fund in the amount of $295,327.47 is hereby fixed and designated by the stockholders as working capital of said corporation."

The second resolution recites in substance that the defendant corporation at its inception and during subsequent years was and has been short of working capital and that funds for capital investment and operations were advanced by W. R. Long, trading as Long Supply Company, and subsequently Long Supply Company, Inc., and that on 31 October, 1950, these advances to the defendant corporation amounted to $100,338.06. The resolution further recites that the remaining unissued authorized capital stock of the defendant corporation should be issued and sold for the purpose of paying off this indebtedness due Long Supply Company, Inc. And, thereupon, the resolution directs that the remaining 990 shares of unissued capital stock be issued and sold at not less than $100 per share, and that the indebtedness due the Long Supply Company, Inc., be paid out of the proceeds. The resolution further directs that each stock-

holder of the defendant corporation shall be entitled to subscribe for 99 shares of the new stock for each share owned as of 8 January, 1951, and that each stockholder be allowed to subscribe and pay for the new stock at $100 per share. The resolution contains a forfeiture provision providing in effect that a failure on the part of any stockholder, his heirs or assigns, to exercise this pre-emptive right on or before 10 o'clock a.m., 10 February, 1951, shall work a forfeiture or waiver of the right to subscribe for such additional stock, with the directors being authorized to make sale of such remaining stock.

6. That after the adoption of the aforesaid resolutions at the 8 January, 1951, meeting of the stockholders of the corporation, the plaintiff, by written communications delivered by special delivery, U. S. Mail, on or about 26 February, 1951, to W. R. Long, President of the defendant corporation, and to all of the other directors of the corporation, demanded that a meeting of the stockholders be called immediately, as allowed by the By-laws, to consider rescission of the former action of the stockholders in undertaking to set aside as working capital the entire earned surplus of the corporation, and further to consider the declaration of dividends in accordance with a proposed, or alternate, resolution to be submitted to the meeting by the plaintiff, copies of which proposed, and alternate, resolutions were transmitted to each director with the written demand for call of a stockholders meeting. The proposed resolutions are incorporated in the complaint. They contain the following recitals:

"WHEREAS, it is desirable that the corporation's debt to Long Manufacturing Company of $100,338.06 as of October 31, 1950, be paid;

"AND WHEREAS the payment thereof out of earned surplus will leave a surplus of $195,049.41 as of the same date;

"AND WHEREAS the payment of cash dividends in the sum of $25,000 would leave remaining a working capital of $122,600 (cash, receivables and inventories of $233,400 against current liabilities of $110,800, a ratio of more than 2 to 1);

"AND WHEREAS such working capital is sufficient for the needs of the business;

"AND WHEREAS the resolution adopted January 8, 1951, directing the issuance of $99,000 in new stock for cash was improvident, and its execution would result in over-capitalizing the business, and leaving large funds idle a good part of each year, and would further result in the destruction of a major part of the interest in the corporation of any stockholder not exercising his pre-emptive right to subscribe to the new stock;"

The proposed resolution then resolves and directs:

"(1) That so much of the resolution of January 8, 1951, as sets aside $295,327.47 as working capital be rescinded.

"(2) That the officers and directors are directed to pay a dividend of two thousand four hundred ninety-four per cent (2,494%) on the outstanding stock, from earned surplus, to stockholders of record January 8, 1951, amounting to $24,940.00, in addition to the $60 in dividends declared January 8, 1951.

"(3) That the debt of Long Supply Company be paid out of the $146,000 cash on hand October 31, 1950.

"(4) That $122,600 be set aside as working capital.

"(5) That the resolution of January 8, 1951, directing the issuance of new stock, 990 shares for $99,000 cash, be, and the same is hereby rescinded."

The alternate resolution proposed by the plaintiff for consideration on failure of the adoption of the foregoing proposed resolution, provides:

"(1) That the resolution of January 8, 1951, directing the issuance of 990 shares of new stock for $99,000 cash be rescinded.

"(2) That the directors proceed to increase the authorized capital stock to 4,000 shares of $100 par value each.

"(3) That a stock dividend of $295,000 be then declared, out of earned surplus, making the capital $296,000 consisting of 2960 shares.

"(4) That if additional working capital then be found necessary, the directors be authorized to issue and sell 1,000 new shares for $100 cash each, to the stockholders of record according to their pre-emptive rights, or on their waiver, to other persons."

7. That the officers and directors of the corporation have failed to consider the foregoing resolutions and proposals of the plaintiff, and "they have failed to call a meeting for the purpose of considering the resolutions and plaintiff has exhausted his remedies within the corporation and is without adequate remedy, save only a Court of Equity."

8. That the "defendants have failed and refused to declare dividends from the . . . profits of the corporation save only the . . . dividend totaling $60.00 as purportedly declared at the meeting of said corporation on January 8, 1951; that the resolutions of January 8, 1951, attempting to set aside the entire surplus as working capital was not adopted in good faith, but arbitrarily and fraudulently for the single purpose of defeating plaintiff's statutory right to dividends; that the payment of a dividend as demanded would not impair either the capital stock of the corporation, paid in and outstanding, or any working capital legally fixed pursuant to the provisions of the laws of North Carolina."

9. That "the defendants have resolved to and are threatening to issue additional capital common stock in the corporation in the amount of $99,000; that if said stock is issued plaintiff is unable financially to purchase the portion of said stock which, in accordance with said resolution, would be tendered to plaintiff, and in the event that said additional

stock is issued by defendants before the declaration of a dividend or some proper distribution of the enormous profits of defendant corporation, either in cash dividend, stock dividend, or otherwise, the plaintiff will be irreparably damaged in that, after the issuance of such additional stock, plaintiff would be entitled to share in said profits only to the extent of 2/10 of 1%, whereas plaintiff is rightfully entitled to share in said profits and ownership of said business to the extent of 20%."

10. That "the action of the defendants in ignoring the requests of the plaintiff for some proper distribution of the profits of the defendant corporation and the threatened action of the defendants in undertaking to issue additional stock for the purpose of rendering valueless the right of the plaintiff to participate in any distribution of the profits of the defendant corporation are arbitrary, unlawful, and in violation of legal duties owed by the defendants to the plaintiff; that the stock of the plaintiff represents 20% of the net worth of said defendant corporation, and regardless of the enormous profits made by the defendant corporation, . . . the defendants have arbitrarily and unlawfully failed, neglected, and refused to pay out the accumulated profits of said corporation, and . . . that said defendants are willfully and deliberately failing to pay dividends, and are operating said business for their own gain and advantage and for the purpose of rendering the stock of the plaintiff valueless and to the great loss and damage of the plaintiff, and with the deliberate intent of 'freezing out' plaintiff from his ownership in said corporation."

Upon the allegations of the complaint, the plaintiff prays judgment, among other things, "that the defendants be commanded and directed to declare and pay out among the stockholders of Long Manufacturing Company, Inc., the whole of the accumulated profits of said corporation, or such part thereof as the court shall find should be so declared, either in cash or by way of a stock dividend as provided by the resolutions proposed by the plaintiff . . ., and in accordance with the provisions of G.S. 55-115 and other pertinent laws of North Carolina."

Here, then, the defendants by demurrer test the legal sufficiency of the foregoing allegations to state a cause of action. They set up and rely upon the provisions of G.S. 55-115, which read as follows:

"The directors of every corporation created under this chapter shall, in January of each year, unless some specific time for that purpose is fixed in its charter, or bylaws, and in that case at the time so fixed, after reserving, over and above its capital stock paid in, as a working capital for the corporation, whatever sum has been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount reserved, and pay it to the stockholders on demand. The corporation may, in its certificate of incorporation or

bylaws, give the directors power to fix the amount to be reserved as working capital."

The defendants contend it affirmatively appears from the complaint that in accordance with this statute the entire surplus of $295,327.47, after the payment of a 6% dividend, was duly and properly reserved and set aside as working capital, and that therefore there remains no surplus out of which dividends may be legally declared, and, this being so, that the complaint fails to state facts sufficient to constitute a cause of action.

But there is more to it than that. Conceding, as we may, that under the general law, including the foregoing statute, the controlling authorities of a corporation necessarily are clothed with broad discretionary powers in fixing the amount to be reserved and set aside as working capital from accumulated corporate profits, and conceding further that in the exercise of this discretion, corporate management, acting in good faith and with due regard for the affairs of the corporation as a whole and the welfare of its stockholders, may treat and deal with accumulated profits or earned surplus in a wide variety of ways: it may withhold the profits from the payment of dividends in whole or in part, so as to provide for the retirement of debts, or to build up additional capital, either on a temporary basis or by transfer to the permanent capital account by means of a stock dividend, or it may invest the surplus earnings in betterments and corporate expansion. However, this discretion is not an unlimited one. It must not be abused. The controlling management must act in good faith and not in arbitrary disregard of the rights of the minority stockholders. The controlling corporate authorities will not be permitted to use their powers arbitrarily or oppressively by refusing to declare a dividend where net profits and the character of the business clearly warrant it. Accordingly, if it be made to appear that the controlling management is acting in bad faith, for their own gain and advantage, in oppressive disregard of the rights of minority stockholders, in a manner amounting in effect to a breach of trust, even though no actual fraud be shown, a court of equity may be invoked to break the shackles of any such oppressive control. See *Amick v. Coble,* 222 N.C. 484, 23 S.E. 2d 854; *Mitchell v. Realty Co.,* 169 N.C. 516, 86 S.E. 358; *White v. Kincaid,* 149 N.C. 415, 63 S.E. 109; 13 Am. Jur., Corporations, Sections 422, 423 and 708; Annotations: 55 A.L.R. 8, p. 44 *et seq.;* 76 A.L.R. 885; 109 A.L.R. 1381; *Gaines v. Long Manufacturing Co., post,* 340; *Anderson v. W. J. Dyer & Bro.,* 94 Minn. 30, 101 N.W. 1061; *Star Publishing Co. v. Ball,* 192 Ind. 158, 134 N.E. 285; *Mulcahy v. Hibernia Savings & Loan Soc.,* 144 Cal. 219, 77 P. 910; *Wilson v. American Ice Co.,* 206 Fed. 736.

In *Anderson v. W. J. Dyer & Bro., supra,* the action was instituted by a minority stockholder against the majority stockholders, alleging a course of conduct, including the withholding of dividends, amounting in

effect to a conspiracy to deprive the plaintiff of his stock. The defendants demurred to the complaint for failure to state a cause of action. The demurrer was overruled. This was affirmed on appeal, with the Minnesota Court making these observations:

"While it is true that the courts cannot ordinarily compel a corporation to declare a dividend at the suit of a minority stockholder, yet it is not to be doubted that where dividends are withheld for an unlawful purpose —to deprive a particular stockholder of his rights—he may have the aid of equity for adequate protection. It appears in this complaint that the earnings and surplus of the company amounted to more than $70,000, upon an authorized capital of $50,000; that a portion of the capital stock has not been issued, and that the failure and refusal to declare a dividend is for the purpose of defrauding plaintiff; . . . Under such circumstances, it is too plain to admit of doubt, as held by the trial court, that these facts entitled plaintiff to some relief." (94 Minn. p. 35.)

In 13 Am. Jur., Corporations, Sec. 423, p. 475, it is stated:

"The devolution of unlimited power imposes on the holders of the majority of the stock a correlative duty, the duty of a fiduciary or agent, to the holders of the minority of the stock, who can act only through them —the duty to exercise good faith, care, and diligence to make the property of the corporation produce the largest possible amount, to protect the interests of the holders of the minority of the stock, and to secure and pay over to them their just proportion of the income and of the proceeds of the corporate property."

It is further stated in 13 Am. Jur., Corporations, Sec. 708, as follows:

"It is well settled that in a proper case a court of equity has jurisdiction to compel the declaration and payment of corporate dividends wrongfully withheld from minority stockholders. . . .

"While a strong case must be made to justify such relief and while the court will not generally infringe upon the discretion vested in the corporation and its officers, where the right to a corporate dividend is clear, a court of equity will interfere to compel the directors to declare it. . . . Some courts have declared that fraud or bad faith is necessary in order to warrant such relief, but according to the weight of authority courts of equity may also compel the declaration of dividends in extreme cases of arbitrary, oppressive, or wrongful conduct amounting in effect to a breach of trust, even though no actual fraud is shown."

In the instant case the gravamen of the plaintiff's complaint is that: "the resolutions of January 8, 1951, attempting to set aside the entire surplus as working capital of $295,327.47 . . . was not adopted in good faith, but arbitrarily and fraudulently for the single purpose of defeating plaintiff's statutory right to dividends, . . . and that the defendants have arbitrarily and unlawfully failed, . . . and refused to pay out the

accumulated profits . . . and are willfully and deliberately failing to pay dividends, and are operating said business for their own gain and advantage . . . for the purpose of rendering the stock of the plaintiff valueless . . . and with the deliberate intent of 'freezing out' plaintiff from his ownership in said corporation."

These allegations put to test the validity of the resolution of 8 January, 1951. If the allegations be true, no valid corporate action has been taken, and the earned surplus of the corporation does not stand set aside as working capital. These allegations would seem to be sufficient to afford the plaintiff an opportunity to be heard,—a chance to produce his proofs and see if he can make good his charges. *Amick v. Coble, supra* (222 N.C. 484).

As a general rule, a stockholder may not maintain suit against the corporation to redress a corporate wrong unless and until he has exhausted reasonable efforts in seeking relief within the corporation; and, ordinarily, he is required to allege in his complaint that he has sought, but has been unable to obtain, correction of the wrongs complained of by the controlling authorities of the corporation, or show facts excusing such demand. See *Winstead v. Hearne,* 173 N.C. 606, bot. p. 611, 92 S.E. 613; 13 Am. Jur., Corporations, Sec. 454, p. 500. Here, it would seem that the plaintiff has alleged in detail sufficient efforts to obtain relief, before suit, from within the corporate management.

We have not overlooked the decision in *Steele v. Cotton Mills,* 231 N.C. 636, 58 S.E. 2d 620, cited and relied upon by the defendants. That case, however, is distinguishable. There it was not made to appear that at the time of the commencement of the action funds were available for the payment of dividends, as is specifically alleged in the instant case.

For the reasons given, the judgment below overruling the demurrer is

Affirmed.

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

R. M. GAINES v. LONG MANUFACTURING COMPANY, INC., W. R. LONG, JOHN G. LONG, MARY ELLEN FORBES, INDIVIDUALLY, AND AS STOCKHOLDERS AND DIRECTORS OF LONG MANUFACTURING COMPANY, INC., AND J. O. HALL, SECRETARY AND TREASURER OF LONG MANUFACTURING COMPANY, INC.

(Filed 31 October, 1951.)

1. Pleadings § 19c—

A demurrer tests the sufficiency of the complaint to state facts constituting a cause of action, admitting for the purpose the truth of every material fact properly alleged.

2. Corporations § 8—

The majority stockholders of a corporation exercise complete control, but such power imposes the correlative duty to protect the interests of minority stockholders, in relation to whom they occupy a position in the nature of a fiduciary.

3. Corporations § 12—Allegations held sufficient to allege cause of action to restrain issuance of additional stock.

Allegations of a minority stockholder to the effect that the corporation had a large surplus, including cash sufficient to pay an outstanding obligation of the corporation, that additional capitalization was not necessary, and that the majority stockholders had passed a resolution authorizing the issuance of additional stock to pay the outstanding obligation with pre-emptive rights to the then stockholders to purchase the additional stock proportionately, but that plaintiff was financially unable to exercise his pre-emptive right, that the issuance of such additional stock would greatly decrease the book value of his stock to his irreparable injury and that the majority stockholders were acting arbitrarily for the sole purpose of "freezing" plaintiff out of his just rights, *is held* sufficient to state a cause of action as against demurrer of the majority stockholders.

4. Same—

Where, in a minority stockholder's suit to restrain the corporation and the majority stockholders from issuing additional stock, the conflicting evidence raises a serious controversy as to whether additional capitalization was necessary or whether the issuance of the additional stock was authorized by defendants arbitrarily for the sole purpose of "freezing" plaintiff minority stockholder out of his lawful interest in the corporation, the temporary order is properly continued to the hearing.

5. Injunctions § 8—

Where, upon the return of a temporary restraining order, the conflicting evidence raises serious question as to whether plaintiff is entitled to the relief sought, the continuance of the order to the final hearing upon the merits is proper.

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

APPEAL by defendants from *Bone, Resident Judge,* at Chambers in Nashville, 28 March, 1951, in action pending in the Superior Court of EDGECOMBE.

Civil action by minority stockholder of corporation for permanent injunction to prevent proposed issuance of additional capital stock. A temporary order of injunction was issued when the action was instituted. The defendants filed demurrer alleging that the complaint fails to state facts sufficient to constitute a cause of action. The cause was heard below on the demurrer and also on the question of continuing the temporary order of injunction until the final determination of the cause.

The court below entered two orders, one overruling the demurrer and the other continuing the temporary order of injunction until the final hearing. To the signing of each order the defendants excepted and appealed.

Ruark & Ruark, Joseph C. Moore, Jr., and Battle, Winslow, Merrell & Taylor for plaintiff, appellee.

Henry C. Bourne for defendants, appellants.

JOHNSON, J. This appeal challenges the action of the court below in (1) overruling the demurrer to the complaint, and (2) continuing the temporary order of injunction until the final hearing. The record seems to sustain both rulings.

1. *The demurrer.*—"The office of a demurrer is to determine the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of fact contained therein." *Brick Co. v. Gentry,* 191 N.C. 636, 132 S.E. 800. By demurring to the sufficiency of the complaint to state facts sufficient to constitute a cause of action, the defendants admit as true every material fact properly alleged. *Hall v. Dairies, ante,* 206, 67 S.E. 2d 63; *Bryant v. Ice Co.,* 233 N.C. 266, 63 S.E. 2d 547, and cases cited.

In substance, the facts alleged in the complaint are as follows:

1. That the defendant, Long Manufacturing Company, Inc., was chartered under the laws of North Carolina 13 September, 1946, with an authorized capital stock of 1,000 shares of $100 par value each. The corporation began business with an original paid-in capital of only $1,000, represented by 10 shares of stock. No further stock has ever been issued. The original ten shares are now outstanding. The plaintiff owns two shares, with the remaining eight shares being owned by these defendants, in the proportions as indicated: W. R. Long, six shares; John G. Long, one share; and Mary Ellen Forbes, one share.

2. The plaintiff paid full value for his two shares of stock and served as Secretary and Treasurer of the corporation from the time of its organization in 1946 until 30 June, 1949, when he resigned, and since that time he has not been an officer of the corporation.

3. The defendants W. R. Long, John G. Long, and Mary Ellen Forbes (who are brothers and sister) constitute the present board of directors of the corporation. They were elected at the 8 January, 1951, annual meeting of the stockholders. At the meeting of the board of directors held the same day, W. R. Long was elected President; John G. Long was elected Vice-President; and J. O. Hall (although being neither a director nor a stockholder) was elected Secretary and Treasurer of the corporation.

4. The corporation has prospered from its inception: for the fiscal year ending 31 October, 1947, the first year of operations, net profits after all taxes were $193,707.62; for the year ending 31 October, 1948, net profits after taxes amounted to $32,142.57; for the year ending 31 October, 1949, net profits after taxes were $19,317.43; and for the year ending 31 October, 1950, net profits after taxes were $50,367.05.

At the end of the fiscal year 31 October, 1950, the corporation had current assets of $352,130.24, including cash on hand in banks of $146,124.92. At that time the corporation had paid-in capital and earned surplus of $296,387.47 "and was amply solvent and was not in need of any additional operating capital"; that at the time of the commencement of this suit the financial condition of the corporation was substantially the same as on 31 October, 1950.

5. At the time of the stockholders meeting on 8 January, 1951, as well as "at the present time, the actual or book value of the stock of Long Manufacturing Company, Inc., was at least $29,638.74 per share; and the plaintiff's two shares of stock had an actual or book value of $59,277.48."

6. At the 8 January, 1951, annual meeting of the stockholders of the corporation a resolution "was introduced by the defendant John G. Long and carried by the votes of the defendants W. R. Long, John G. Long, and Mary Ellen Forbes over the protest of the plaintiff, who was present and voted his 2 shares of stock against" the resolution. The resolution recites in substance that the defendant corporation at its inception and during subsequent years was and has been short of working capital and that funds for capital investment and operations were advanced by W. R. Long, trading as Long Supply Company, and subsequently Long Supply Company, Inc., and that on 31 October, 1950, these advances to the defendant corporation amounted to $100,338.06. The resolution further recites that the remaining unissued authorized capital stock of the defendant corporation should be issued and sold for the purpose of paying off this indebtedness due Long Supply Company, Inc. And, thereupon, the resolution directs that the remaining 990 shares of unissued capital stock be issued and sold at not less than $100 per share, and that the indebtedness due the Long Supply Company, Inc., be paid out of the proceeds. The resolution further directs that each stockholder

of the defendant corporation shall be entitled to subscribe for 99 shares of the new stock for each share owned as of 8 January, 1951, and that each stockholder be allowed to subscribe and pay for the new stock at $100 per share. The resolution contains a forfeiture provision providing in effect that a failure on the part of any stockholder, his heirs or assigns, to exercise this pre-emptive right on or before 10 o'clock a.m. 10 February, 1951, shall work a forfeiture or waiver of the right to subscribe for such additional stock, with the directors being authorized to make sale of such remaining stock.

7. . . . "that the purported basis of the need for the issuance of additional capital stock as provided for by the foregoing resolution is twofold, first, purportedly to provide badly needed additional working capital as set forth in the minutes, and secondly, for the purpose of providing funds purportedly needed to retire an indebtedness to Long Supply Company, Inc., a corporation which is wholly owned, dominated and controlled by the defendants Long and Forbes. That there is no need for additional funds for either purpose, but that in truth and in fact the defendant corporation has ample funds for working capital and could at any time pay from its cash all of the indebtedness to Long Supply Company, Inc., and leave current assets of $251,792.18, which would be more than ample working capital for all of the operations of the Long Manufacturing Company, Inc. . . . that to put additional capital into Long Manufacturing Company, Inc., as aforesaid, would over-capitalize the Long Manufacturing Company, Inc., and it would have on hand considerable idle funds for a good part of the year which would be contrary to good business practice and would constitute a mismangement of the corporation."

8. . . . "that there is no valid reason for the adoption of a resolution such as was adopted by the defendants for the sale of additional capital stock of Long Manufacturing Company, Inc., but that in truth and in fact the adoption of said resolution was nothing but the culmination of an agreement on the part of the defendants Long and Forbes, in bad faith, and in breach of their trust as officers and directors of said corporation to render the stock of the plaintiff in said corporation practically valueless and so to deprive the plaintiff of the value of his said stock, . . . that the deliberate purpose of said resolution was to make it impossible for the plaintiff to continue his ownership in said corporation and to deprive him of the value of his said stock; and if defendants are permitted to continue and persist in their action as evidenced by the adoption of said resolution this plaintiff will be irreparably damaged and deprived of the value of his stock, and the book or actual value of plaintiff's stock will be reduced from approximately $60,000 to approximately $800.00, plaintiff not having sufficient funds with which to purchase the additional stock."

9. . . . "Plaintiff has exhausted all of his remedies within the corporation by attending the aforementioned Annual Stockholders Meeting of Long Manufacturing Company, Inc., and voting against the resolution above set forth and notwithstanding such action on the part of the plaintiff, the defendants are persisting in their wrongful action and purposes as aforesaid and plaintiff is without any remedy at law and will be irreparably damaged unless the defendants are restrained or enjoined."

Upon the allegations of the complaint, the plaintiff prays judgment that the defendants, individual and corporate, "be permanently restrained and enjoined from issuing the additional capital stock in Long Manufacturing Company, Inc., provided for in the resolution" . . .

Here, then, the demurrer has put to test the legal sufficiency of the complaint to state a cause of action. Thus is raised an issue of law, the answer to which requires application of the principles of law which control the facts as alleged.

The individual defendants are majority stockholders, officers and directors of the corporation. The plaintiff is a minority stockholder. The general duties which majority stockholders ordinarily owe minority stockholders in such circumstances are set out in broad outline in 13 Am. Jur., Corporations, sections 422 and 423, pp. 474, 475 and 476:

"The holders of the majority of the stock of a corporation have the power, by the election of directors and by the vote of their stock, to do everything that the corporation can do. Their power to . . . direct the action of the corporation places them in its shoes and constitutes them the actual, if not the technical, trustees for the holders of the minority of the stock. They draw to themselves and use all the powers of the corporation. . . .

"The devolution of unlimited power imposes on holders of the majority of the stock a correlative duty, the duty of a fiduciary or agent, to the holders of the minority of the stock, who can act only through them—the duty to exercise good faith, care, and diligence to make the property of the corporation produce the largest possible amount, to protect the interests of the holders of the minority of the stock, and to secure and pay over to them their just proportion of the income and of the proceeds of the corporate property. The controlling majority of the stockholders of a corporation, while not trustees in a technical sense, have a real duty to protect the interests of the minority in the management of the corporation, especially where they undertake to run the corporation without giving the minority a voice therein. This is so because the holders of a majority of the stock have a community of interest with the minority holders in the same property and because the latter can act and contract in relation to the corporate property only through the former. It is the fact of control of the common property held and exercised, and not the

particular means by which or manner in which the control is exercised, that creates the fiduciary obligation on the part of the majority stockholders in a corporation for the minority holders. Actual fraud or mismanagement, therefore, is not essential to the application of the rule.

"It is well established that courts of equity will entertain jurisdiction, at the instance of minority stockholders of a private corporation who are unable to obtain redress within the corporation and have no adequate remedy at law, to restrain threatened *ultra vires* acts on the part of the majority or to prevent any other act on the part of the majority which may be denominated as a breach of trust or a breach of the fiduciary duties owing to the minority."

In *White v. Kincaid,* 149 N.C. 415, 63 S.E. 109, with *Justice Hoke* speaking for the Court, this principle of *quasi*-trust relationship is recognized and discussed at length:

. . . "the directors of these corporate bodies are to be considered and dealt with as trustees in respect to their corporate management; and that this same principle has been applied to a majority or other controlling number of stockholders, in reference to the rights of the minority or any one of them, when they are as a body in the exercise of this control, in the management and direction of the corporate affairs, . . . if it could be clearly established that this resolution was not taken for the benefit of the corporation, or in furtherance of its interest, but for the mere purpose of unjustly oppressing the minority of the stockholders or any of them, and causing a destruction or sacrifice of their pecuniary interests or holdings, giving clear indication of a breach of trust, such action could well become the subject of judicial scrutiny and control."

In *Southern Pacific Co. v. Bogert,* 250 U.S. 483, 63 L. Ed. 1099, at p. 1106, *Justice Brandeis,* speaking for the Court, makes this observation in applying what has become popularly known as the majority stockholders rule:

"The rule of corporation law and of equity invoked is well settled and has been often applied. The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority; as much so as the corporation itself or its officers and directors."

Testing the sufficiency of the allegations of the complaint by the foregoing rules of law, it would seem that the court below properly overruled the demurrer.

2. *The question of continuing the temporary order of injunction to the final hearing.*—As bearing on this question, each side offered voluminous evidence in the form of affidavits and exhibits tending to show the financial condition of the defendant corporation. It appears from the evidence that the defendant corporation is engaged in the manufacture and sale of farm equipment and machinery, principally oil burning tobacco

curers. All the evidence tends to show that the corporation has enjoyed a steady growth since its formation in 1946. However, the evidence is sharply in conflict as to the need and necessity for the issuance of the proposed stock in accordance with the plan outlined in the resolution adopted at the meeting of the stockholders on 8 January, 1951. The gist of the defendants' evidence is that the proposed plan to issue new stock should be carried out in order to provide funds with which to retire the indebtedness of $100,338.06 due to Long Supply Company, Inc., and to provide needed additional working capital to facilitate operations and carry out the corporation's planned expansion program.

The plaintiff's evidence, on the other hand, tends to show there is no need for additional working capital at the present time; that the corporation had on hand at the end of the last fiscal year (31 October, 1950) $146,000 in cash; that from this amount of cash the entire indebtedness due Long Supply Company, Inc., of $100,338.06 could be paid, leaving the corporation with cash of approximately $46,000 and with $206,000 of other current assets; that the current assets of the corporation would then amount to $252,000 as against current liabilities of $110,000, giving the corporation a ratio of current assets to current liabilities of 2.3 to 1, which the plaintiff contends is entirely adequate to take care of the present financial needs of the corporation and any reasonable expansion of its business.

The plaintiff offered further evidence tending to show that the present book value of each share of stock in the defendant corporation is $29,638.74, and since he owns two shares, the book value of his interest is $59,277.48; that he is financially unable to purchase the additional shares in accordance with his pre-emptive rights under the stock resolution adopted at the annual meeting on 8 January, 1951; that if the defendants are permitted to effectuate the issuance of the stock as provided in the resolution, the book value of each share of stock would be reduced to $395.38 per share, and the plaintiff's interest in the corporation would be diminished from $59,277.48 to $790.76, with the resultant loss to plaintiff of $58,486.72 inuring by absorption to the benefit of the defendants Long and Forbes, who own the rest of the stock and control the corporation.

It is established by well considered decisions of this Court that in actions of this character, the main purpose of which is to obtain a permanent injunction, if the evidence raises a serious question as to the existence of facts which make for the plaintiff's right, and sufficient to establish it, that a preliminary restraining order will be continued to the final hearing. *Springs v. Refining Co.*, 205 N.C. 444, 171 S.E. 635; *Proctor v. Fertilizer Works*, 183 N.C. 153, 110 S.E. 861; *Tise v. Whitaker-Harvey Co.*, 144 N.C. 507, 57 S.E. 210; *Hyatt v. DeHart*, 140 N.C. 270,

52 S.E. 781; *Harrington v. Rawls,* 131 N.C. 39, 42 S.E. 461; *Whitaker v. Hill,* 96 N.C. 2, 1 S.E. 639; *Marshall v. Commissioners,* 89 N.C. 103.

Upon this record it appears that the court below properly continued the temporary order of injunction until the final hearing.

For the reasons given, the orders overruling the demurrer and continuing the temporary injunction until the final determination of the case are

Affirmed.

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

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, A CORPORATION, AND ALBION DUNN, TRUSTEE, v. THOMAS G. BASNIGHT, JR., AND WIFE, VIRGINIA PIERCE BASNIGHT, AND W. G. DUNN.

(Filed 31 October, 1951.)

1. **Laborers' and Materialmen's Liens § 8—**

A contractor's lien for work done and materials furnished, when notice thereof is properly filed within six months of the completion of the structure, relates back to the time when claimant began the performance of the work and the furnishing of materials and has priority over a deed of trust executed and recorded subsequent to that date but prior to the date of the filing of the notice, the doctrine of relation back not only being established by uniform decisions but also being inherent in the statute granting such lien. G.S. 44-1.

2. **Laborers' and Materialmen's Liens § 6—**

A contractor's lien for work done and materials furnished is inchoate until perfected by the filing of proper notice of lien in the office of the Clerk of the Superior Court of the proper county within six months after completion of the work, G.S. 44-38, G.S. 44-39, and by bringing action to enforce the lien within six months of the date of the filing of notice of claim of lien, G.S. 44-43, G.S. 44-48 (4).

3. **Parties § 3—**

Necessary parties are those whose rights must be ascertained and settled before the rights of the parties to the suit can be determined.

4. **Laborers' and Materialmen's Liens § 10: Parties § 4—Subsequent encumbrancers are not necessary but are proper parties in action to enforce contractor's lien.**

An action by a contractor to enforce his lien is for the purpose of selling whatever interest the owner or contractee may have and to apply the proceeds of sale of such interest to the satisfaction of the lien, and therefore subsequent encumbrancers are not necessary parties to the action to

enforce the lien, and the contractor's failure to join them does not have the effect of losing his priority as against such subsequent encumbrancers. When not joined as parties in the contractor's action against the owner or contractee, they are not bound by the judgment, and the purchaser of the property under the judgment takes it subject to their rights, whatever they may be. They are proper parties, since they have an ascertainable interest in the subject matter of the controversy.

APPEAL by plaintiffs from *Grady, Emergency Judge,* at February Term, 1951, of PITT.

Civil action involving the question of the priority of a contractor's lien over a deed of trust.

For convenience of narration, the plaintiff, Equitable Life Assurance Society of the United States, is called Equitable; the defendants, Thomas G. Basnight, Jr., and wife, Virginia Pierce Basnight, are styled Basnight and wife; and the defendant, W. G. Dunn, is designated as Dunn. The facts are summarized in the numbered paragraphs set forth below:

1. Basnight and wife owned a lot in Greenville, North Carolina. On 5 August, 1948, Dunn, a building contractor, made a contract with them whereby Dunn bound himself to build a residence on such lot with labor and materials furnished by him, and whereby Basnight and wife obligated themselves to pay Dunn $12,000.00 for so doing on the completion of the structure. Dunn began the construction of the residence on 14 August, 1948, and finished it on 27 November, 1948. Basnight and wife forthwith accepted the residence, but failed to pay Dunn the stipulated sum of $12,000.00.

2. On 17 February, 1949, Basnight and wife borrowed $8,000.00 from Equitable and executed a deed of trust to Albion Dunn, Trustee, to secure the repayment of such sum. The deed of trust was registered in the office of the register of deeds of Pitt County on the day of its execution. Basnight and wife still owe Equitable $7,890.00 together with interest thereon at the rate of four per cent per annum from 1 August, 1949, on the loan secured by the deed of trust.

3. Within six months after the completion of the residence, to wit, on 15 March, 1949, Dunn filed notice in the office of the clerk of the Superior Court of Pitt County, North Carolina, specifying in detail that he claimed a lien on the residence and lot in the amount of $12,000.00 for work done and materials furnished in the construction of the residence as set out above.

4. Within six months from the date of the filing of the notice, to wit, on 26 April, 1949, Dunn brought an action against Basnight and wife in the Superior Court of Pitt County to enforce the lien claimed by him. Consent decrees were entered in such action at the September and November Terms, 1949, of the Superior Court of Pitt County, awarding Dunn

judgment against Basnight and wife for $12,000.00; declaring such judgment to be a lien on the residence and lot dating from 14 August, 1948, the day on which Dunn began to perform work and furnish materials under his contract with Basnight and wife; appointing a commissioner to sell the property at public sale after statutory advertisement for the satisfaction of the judgment and lien; and granting Dunn leave to bid at the sale. Subsequent to these events, the commissioner sold the property at public outcry after statutory advertisement for $12,000.00 to Dunn, who received his deed on 7 March, 1950.

5. Neither Equitable nor Albion Dunn, Trustee, was a party to the action mentioned in the preceding paragraph, which is hereafter called the former action to distinguish it from the present proceeding.

6. On 7 April, 1950, Equitable and Albion Dunn, Trustee, brought the present action against Basnight, Mrs. Basnight, and Dunn to foreclose the deed of trust of 17 February, 1949, for the satisfaction of the unpaid portion of Equitable's loan to Basnight and wife, and to obtain an adjudication that the deed of trust has precedence over the lien claimed by Dunn.

The action narrowed itself on the trial to a contest between Equitable and Albion Dunn, Trustee, on the one side, and Dunn on the other. The pleadings raised these successive questions: Whether the commissioner's deed to Dunn was effectual as against Equitable and Albion Dunn, Trustee; whether the lien claimed by Dunn has priority as against the deed of trust; and whether Dunn lost the right to assert that the lien claimed by him has priority over the deed of trust by failing to make Equitable and Albion Dunn, Trustee, parties to the former action to enforce the lien brought by him against Basnight and wife within the six months period prescribed by G.S. 44-43.

When the present action was heard, the parties waived trial by jury, and Judge Grady, who presided, made findings conforming to the facts stated in the six numbered paragraphs. He concluded that the commissioner's deed to Dunn is ineffectual as against Equitable and Albion Dunn, Trustee, because they were not parties to the former action, that the lien claimed by Dunn has priority as against the deed of trust, and that Dunn is entitled to have such priority enforced.

Judge Grady thereupon rendered a decree, awarding Equitable judgment against Basnight and wife for the unpaid portion of its loan; appointing commissioners to sell the residence and lot at public sale after statutory advertisement; and ordering such commissioners to use the proceeds of the sale "first to pay off and discharge the judgment entered in the former action between W. G. Dunn, plaintiff, and Thomas G. Basnight, Jr., and wife," defendants. The decree specifies that the commissioners will apply "any balance" of the proceeds of sale remaining

"in their hands after satisfying the former judgment of W. G. Dunn against said Basnight and wife . . . on the amount hereinbefore adjudged to be due" Equitable from Basnight and wife, and that "if there be any balance in hand after satisfying the two judgments, first in the former case and the judgment in the present case, then such balance will be paid to Thomas G. Basnight, Jr., and wife."

Equitable and Albion Dunn, Trustee, excepted to Judge Grady's decree and appealed to the Supreme Court, assigning as error the portions of the decree concluding and adjudging that the lien claimed by Dunn has priority as against their deed of trust.

J. L. Emanuel and Albion Dunn for plaintiffs, appellants.

James & Speight for defendant, W. G. Dunn, appellee.

ERVIN, J. This question arises at the outset: Where a lien claimant files notice of a contractor's lien against a building and the lot on which it stands in the office of the clerk of the Superior Court on 15 March, 1949, for work done and materials furnished by him in the construction of the building under contract with the owners of the lot between 14 August and 27 November, 1948, does the lien relate back to the time when the lien claimant began the performance of the work and the furnishing of the materials, and take precedence by reason of such relation back over an intervening recorded deed of trust made by the owners of the lot on 17 February, 1949?

The trial judge answered this query in the affirmative when he adjudged that the lien of the contractor Dunn has priority as against the deed of trust under which Equitable and Albion Dunn, Trustee, claim. We affirm his ruling on the authority of these decisions: *King v. Elliott*, 197 N.C. 93, 147 S.E. 701; *Harris v. Cheshire*, 189 N.C. 219, 126 S.E. 593; *Porter v. Case*, 187 N.C. 629, 122 S.E. 483; *McAdams v. Trust Co.*, 167 N.C. 494, 83 S.E. 623; *Dunavant v. Railroad*, 122 N.C. 999, 29 S.E. 837; *Pipe & Foundry Co. v. Howland*, 111 N.C. 615, 16 S.E. 857, 20 L.R.A. 743; *Burr v. Maultsby*, 99 N.C. 263, 6 S.E. 108, 6 Am. S. R. 517; and *Chadbourn v. Williams*, 71 N.C. 444.

In so doing, we do not ignore the contentions of Equitable and Albion Dunn, Trustee, on this phase of the case. They advance these successive and interdependent arguments with much earnestness and industry: (1) The doctrine that a contractor's lien for work done or materials furnished relates back to the time when the claimant commenced the performance of the work or the furnishing of the materials has no foundation in law save that embodied in a statute originally enacted as section 2 of chapter 206 of the Public Laws of 1869-70 and subsequently codified as section 1782 of the Code of 1883, which was couched in these words:

"The lien for work on crops or farms or materials given by this act shall be preferred to every other lien or encumbrance which attached upon the property subsequent to the time at which the work was commenced, or the materials were furnished." (2) This foundation of the relation back doctrine was removed as to all liens arising under the laws now incorporated in chapter 44 of the General Statutes except liens for work on crops in 1905 when the codifiers of the Revisal changed the statute, *i.e.*, section 2 of chapter 206 of the Public Laws of 1869-70 and section 1782 of the Code of 1883, to its present form, to wit: "The lien for work on crops given by this chapter shall be preferred to every other lien or encumbrance which attached to the crops subsequent to the time at which the work was commenced." G.S. 44-41; C.S. 2472; Rev. 2034. (3) As a consequence, the relation back doctrine has no application to the lien of the contractor Dunn, and the deed of trust under which Equitable and Albion Dunn, Trustee, claim has priority because it was made and recorded before the notice of Dunn's lien was filed.

These arguments are untenable for reasons even more cogent than the significant fact that their acceptance would constitute a repudiation of all germane decisions handed down since the adoption of the Revisal of 1905.

Two of the present statutes giving liens to contractors for labor performed or materials furnished, namely G.S. 44-1 and G.S. 44-2, had their genesis in chapter 206 of the Public Laws of 1869-70. Section 2 was not put in that chapter to establish the relation back doctrine, and did not do so. It simply selected three specific liens, *i.e.*, liens "for work on crops or farms or materials," out of all the liens given to contractors by sections 1 and 3 of the chapter, and conferred upon such three specific liens preference over all other liens and encumbrances (including other liens given to contractors) "which attached upon the property subsequent to the time at which the work was commenced or the materials were furnished." These considerations show that the relation back doctrine was not begotten by section 2 of chapter 206 of the Public Laws of 1869-70, and is not nurtured by its present day counterpart. G.S. 44-41.

The doctrine is inherent in the very statutes which give the contractor the lien upon the property improved by his labor or materials, and allow him six months after the completion of the labor or the final furnishing of the materials in which to claim it; for it is plain that unless the contractor's lien when filed relates back to the time at which the contractor commenced the performance of the work or the furnishing of the materials, the object of the statutes can be defeated at the will of the owner of the property, by his selling or encumbering his estate. *Burr v. Maultsby, supra; Chadbourn v. Williams, supra.* To hold that the doctrine of relation back is not inherent in these statutes would be to "keep the word of promise to our ear, and break it to our hope."

This brings us to the second and final question presented by the appeal: Does a contractor's prior lien become unavailable as against subsequent encumbrancers by the contractor's failure to make the subsequent encumbrancers parties to his action to enforce the lien brought against the owners within the statutory period?

Dunn, the builder, bottoms his claim to a contractor's lien against the real property in controversy on this statutory provision: "Every building built, rebuilt, repaired or improved, together with the necessary lots on which such building is situated . . ., shall be subject to a lien for the payment of all debts contracted for work done on the same, or material furnished." G.S. 44-1.

A contractor's lien on real property is inchoate until perfected by compliance with legal requirements, and is lost if the steps required for its perfection are not taken in the manner and within the time prescribed by law. 36 Am. Jur., Mechanics' Liens, Section 124; 57 C.J.S., Mechanics' Liens, Section 119.

To perfect his lien on real property, the contractor must comply with these statutory requirements:

1. He must file a notice or claim of lien in the office of the clerk of the Superior Court of the county where the labor has been performed or the materials furnished within six months after the completion of the labor or the final furnishing of the materials specifying in detail the labor performed or the materials furnished and the time thereof. G.S. 44-38 and 44-39; *Beaman v. Hotel Corp.*, and *Roofing Co. v. Beaman*, 202 N.C. 418, 163 S.E. 117; *Supply Co. v. McCurry*, 199 N.C. 799, 156 S.E. 91.

2. He must bring an action in the Superior Court to enforce the lien within six months from the date of the filing of the notice or claim of lien. G.S. 44-43 and 44-48 (4); *Norfleet v. Cotton Factory*, 172 N.C. 833, 89 S.E. 785.

These things being true, the present position of Equitable and Albion Dunn, Trustee, *i.e.*, that the lien claimed by Dunn is not available as against them, is sound, if subsequent encumbrancers are necessary parties to a statutory action to enforce a contractor's lien on real property.

The term "necessary parties" embraces all persons who have or claim material interests in the subject matter of a controversy, which interests will be directly affected by an adjudication of the controversy. *Wiggins v. Harrell*, 200 N.C. 336, 156 S.E. 924. A sound criterion for deciding whether particular persons must be joined in litigation between others appears in this definition: Necessary parties are those persons who have rights which must be ascertained and settled before the rights of the parties to the suit can be determined. 67 C.J.S., Parties, section 1.

The statute does not undertake to specify who shall be made parties to the action to enforce the contractor's lien, which it requires to be brought

within the period of six months designated by it. The solution of this problem is, therefore, to be found in the nature and object of the action to enforce the lien.

Such action is designed to enforce the lien by the sale of whatever interest the person who caused the building to be erected or repaired had in the land improved by the labor or materials of the contractor at the time the lien attached. G.S. 44-46; *Pipe and Foundry Co. v. Howland, supra; Burr v. Maultsby, supra; Chadbourn v. Williams, supra.* Since the judgment in the action will directly affect his interest in the real property involved in the suit, the landowner who contracted the debt for which the lien is claimed is certainly a necessary party to the action to enforce the lien. 57 C.J.S., Mechanics' Liens, Section 284b.

But the action to enforce the lien is not created to determine the validity or the priority of the adverse claims of third persons in the premises subject to the lien. The contractor can obtain the complete relief sought, *i.e.*, the sale of the interest owned by the person who caused the improvement to be made at the time the lien attached, in his action against the landowner, without having the rights of adverse claimants ascertained and settled. In consequence, subsequent encumbrancers and other adverse claimants are not necessary parties to an action to enforce a contractor's lien. This holding is expressly or impliedly sanctioned by earlier decisions of this Court. *Porter v. Case, supra; Lumber Co. v. Hotel Co.,* 109 N.C. 658, 14 S.E. 35; *Kornegay v. Steamboat Co.,* 107 N.C. 115, 12 S.E. 123.

It necessarily follows that neither the contractor nor any other interested party is precluded from relying on the contractor's prior lien as against subsequent encumbrancers because of the contractor's failure to make the subsequent encumbrancers parties to his action to enforce the lien brought against the owners within the statutory period. *Sandquist & Snow v. Kellogg,* 101 Fla. 568, 133 So. 65.

We deem it appropriate to make certain observations relating to this aspect of the case. While the court can adjudicate the rights of the contractor and the landowner in an action to enforce a contractor's lien without necessarily affecting them, subsequent encumbrancers and other adverse claimants are proper parties to such action, for they have ascertainable interests in the subject matter of the controversy. 36 Am. Jur., Mechanics' Liens, section 249. It is highly desirable that they be made parties to the action to enforce the lien so that the decree or judgment in such action may conclude the rights of all persons having any interest in the subject matter of the litigation.

If a subsequent encumbrancer is not joined, he is not bound by the judgment in the action between the contractor and the owner, and one who purchases the property under that judgment takes it subject to the

rights of the encumbrancer, whatever they may be. *Jones v. Williams*, 155 N.C. 179, 71 S.E. 222, 36 L.R.A. (N.S.) 426.

It is to be noted that we are presently concerned with the rights of those who become encumbrancers after the lien attaches and before the action to enforce it is brought, and that none of the parties to the present action challenge the provisions of Judge Grady's decree ordering a resale of the property.

For the reasons given, the judgment is

Affirmed.

STATE v. GLENN HOLLAND.

(Filed 31 October, 1951.)

1. Assault § 13—Circumstantial evidence held sufficient to show that defendant was present and gave active encouragement to perpetrator of assault.

Evidence tending to show that defendant engaged a cab, directed the driver to go by a junk yard to pick up defendant's friend, who was waiting in semi-darkness, that defendant, under pretext of going for a drink of liquor, diverted the cab from the main highway toward the destination he had given to a deserted side road, and that while the three of them were riding in the cab, the driver was struck several times and knocked unconscious with a piece of iron pipe similar to pipe found later at the junk yard, *is held* sufficient to be submitted to the jury on the charge of felonious assault in violation of G.S. 14-32, since the circumstances are such as to clearly indicate that defendant was present and, if he did not actually make the assault himself, was acting in concert with his friend in making the felonious assault.

2. Criminal Law § 8b—

Persons present at the scene who aid, abet, assist or advise the commission of the offense, or who are present for such purpose to the knowledge of actual perpetrator, are principals and are equally guilty.

3. Criminal Law § 52a (1)—

On motion to nonsuit, the evidence must be taken in the light most favorable to the State.

4. Criminal Law § 52a (3)—

Circumstantial evidence is a recognized instrumentality in the ascertainment of truth, and where the circumstances fall into a pattern which clearly indicates that defendant was present and acted in concert with the perpetrator of the offense, it makes out a *prima facie* case and is properly submitted to the jury.

5. Robbery § 3—

Evidence tending to show that a victim of an assault was knocked unconscious, that some seven and one-half hours thereafter he was found in

his bed with his cab parked in the driveway, that some money was still on his person, but without evidence in reference to his money in the interim, *is held* insufficient to be submitted to the jury on the question of the guilt of his assailants of the offense of armed robbery, notwithstanding the victim's testimony that some of his money was gone, since the circumstances show no more than an opportunity for his assailants to have taken the money with equal opportunity for it to have been lost or disposed of in other ways. G.S. 14-87.

6. Criminal Law § 52a (3)—

In order to be sufficient to be submitted to the jury, circumstantial evidence must exclude any reasonable hypothesis of innocence, and circumstances which merely show an opportunity for defendant to have committed the offense but raise a mere conjecture of his guilt are insufficient.

APPEAL by defendant from jury trial before *Gwyn, J.*, at May Term, 1951, and judgment entered by *Phillips, J.*, at August Term, 1951, of CALDWELL.

Criminal prosecutions tried upon two bills of indictment, consolidated for trial by consent, charging the defendant with (1) felonious assault, in violation of G.S. 14-32; and (2) armed robbery, in violation of G.S. 14-87.

After the State had produced its evidence and rested its case, the defendant moved for judgment of nonsuit in each case. The motions were overruled and exceptions were noted. The defendant then, after announcing he would offer no evidence, renewed his motions for nonsuit, and to the adverse rulings of the court thereon, exceptions again were duly noted.

The jury returned a verdict finding the defendant guilty of assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, and armed robbery, as charged in the bills of indictment.

Thereupon, by consent, Judge Gwyn entered an order continuing the prayer for judgment and also continuing the defendant's motion to set the verdict aside until the August, 1951, term of court, at which term Judge Phillips, then presiding, entered judgments imposing penal servitude in each case of "not less than five nor more than ten years," with direction that the sentences run concurrently. From the judgments so pronounced, the defendant appealed, assigning errors.

Attorney General McMullan, Assistant Attorney General Bruton, and Robert B. Broughton, member of staff, for the State.

Kenneth D. Thomas for defendant, appellant.

JOHNSON, J. The exceptions brought forward by the defendant test only the sufficiency of the evidence to carry the two consolidated cases to

the jury over the defendant's motions for judgment of nonsuit, made in apt time under the provisions of G.S. 15-173.

1. *The felonious assault case.*—The evidence bearing upon this case discloses that in September, 1950, William Penley, the prosecuting witness, age 22, was living in Hickory, North Carolina, and driving a taxicab. On Saturday night, 23 September, 1950, between eight and nine o'clock, Penley picked up the defendant at Hutto's Grocery, just outside of Hickory. The defendant, after arranging with Penley to take him to North Wilkesboro, requested that they drive by Whitten's junk yard and get a friend who was to accompany the defendant. This was done. The friend was picked up at the junk yard, which is about 150 yards from where the defendant got in the cab. At the junk yard there was a building, and scrap was piled up all around it. The friend was at the back of the building. He was standing there alone. It was getting dusk dark but Penley, the taxi driver, said he could see all right. When the cab stopped, the defendant's friend got in the back seat. The defendant remained in the front seat. Penley did not know the defendant's friend,—said he had never seen him before. As he got in the cab, there was no conversation except the defendant stated, "I used to work with this boy here." The defendant then said he wanted to go get a drink before they went to North Wilkesboro, and after crossing the Catawba River, going toward Lenoir, the defendant told Penley to pull off at the next side road. He did so. When they had gone a short distance down the side road, the defendant requested Penley to pull off on a dirt road, and while the cab was traveling down this road it struck a small bump,—"slowed down for the bump,"—and that was the last thing Penley remembered until "he woke up eight days later in the hospital," suffering from serious head wounds.

Penley was found the following morning about 3:30 o'clock in his own bed at Hickory in an unconscious condition. The taxicab was parked in his yard and was locked. His glasses were broken and lying in the front seat. There was an iron pipe about 18 inches long and 1½ inches in diameter lying on the front seat of the cab. It had blood on it. The cab was bloody inside,—more blood on the back than in front. "Looked like the man had laid in the back longer than in the front. . . . It looked like he had laid in the back seat for several hours." Some pieces of pipe material "were later found at the junk yard." The evidence discloses that Penley had a fractured skull, near his right ear. The ear was cut off except for a small piece of skin holding it. He had two cuts near the right ear,—"One behind the ear and the other just a little farther behind than that one." He had four deep cuts across his forehead, each cut being approximately four inches long. The attending physician gave as his opinion that the wounds were not produced by a knife, but

by a blunt instrument. The doctor further said that Penley's unconsciousness most likely "was produced at the time the blow was delivered." On cross examination the doctor also stated that in his opinion a person sitting in the front seat alongside Penley could not have inflicted the lick from that angle, "but if the head were turned, it might be possible. I can't say for sure as to that." The prosecuting witness remained in the hospital fifteen days and did not regain his memory until some five weeks later.

John Clark, owner of the taxicab, testified that Penley called him and said he had a trip to North Wilkesboro and that he, Penley, said he knew one of the parties but did not tell who he was. R. W. Turkelson, of the State Bureau of Investigation, testified he was called in to investigate the case; that he was unable to develop any finger prints in or upon the automobile or on the iron pipe. He said he visited the area where the attack is alleged to have taken place and that "there is no one that lives on the . . . road that winds up around the hill and there are no houses on it." This witness further testified that Penley for a time could not remember anything that happened on the night of 23 September, but later, on 2 November, he told the witness that "the fellow who had been in the cab that night used to work with him at the Blue Ridge Ice Cream Company. . . . said he didn't know his last name but that he used to call him 'Glenn,' " said he knew him well. The witness found the defendant's name on the records of the Ice Cream Company and then "Penley said that was his last name." The witness Turkelson showed Penley a picture of the defendant and "he said that was the man." The defendant was arrested under warrant issued 11 November, 1950. His friend who was in the cab has not been found or identified.

The foregoing evidence points unerringly to the fact that Penley's wounds were inflicted either by the defendant or by his friend who was sitting on the back seat of the taxicab. And if it be conceded, as contended by the defendant, that the evidence is insufficient to support a finding that he, from his seat alongside of Penley, inflicted the blow or blows, nevertheless this record impels the view that the defendant and his friend were acting by pre-arrangement. It was the defendant who arranged the trip. First, he engaged the cab, ostensibly for a trip to North Wilkesboro. Then, he directed the driver to go by the junk yard where the friend was waiting in semi-darkness. Next, it was the defendant who, under the pretext of going for a drink of liquor, diverted the cab from the main highway onto a lonely, deserted side road along which Penley, without previous warning, was struck with a piece of iron pipe similar to pipe found later at the junk yard where the friend was picked up. Thus, the events leading up to the assault fall into a pattern which clearly indicates concert between the defendant and his friend, and where this appears each may be found equally guilty. *S. v. Gibson,*

226 N.C. 194, 37 S.E. 2d 316; *S. v. Williams,* 225 N.C. 182, 33 S.E. 2d 880; *S. v. Hart,* 186 N.C. 582, 120 S.E. 345; *S. v. Kendall,* 143 N.C. 659, 57 S.E. 340; *S. v. Jarrell,* 141 N.C. 722, 53 S.E. 127.

It is settled law that all who are present (either actually or constructively) at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose, to the knowledge of the actual perpetrator, are principals and are equally guilty. *S. v. Jarrell, supra* (141 N.C. 722); *S. v. Gaston,* 73 N.C. 93; *S. v. Hoffman,* 199 N.C. 328, 154 S.E. 314.

"A person aids when, being present at the time and place, he does some act to render aid to the actual perpetrator of the crime though he takes no direct share in its commission; and an abettor is one who gives aid and comfort, or either commands, advises, instigates or encourages, another to commit a crime." *S. v. Johnson,* 220 N.C. 773, at p. 776, 18 S.E. 2d 358.

This evidence, taken in its light most favorable to the State, as is the rule on motion to nonsuit (*S. v. Hovis,* 233 N.C. 359, 64 S.E. 2d 564), is sufficient to justify a finding that the defendant's presence amounted to active encouragement of his friend in the commission of the felonious assault shown to have been committed. *S. v. Williams, supra* (225 N.C. 182, 33 S.E. 2d 880); *S. v. Allison,* 200 N.C. 190, 156 S.E. 547; *S. v. Jarrell, supra* (141 N.C. 722).

In *S. v. Williams, supra* (225 N.C. 182, at p. 184), it is stated: "Though when the bystander is a friend of the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement, and in contemplation of law this was aiding and abetting."

True, the evidence relied on here is largely circumstantial, but even so, such evidence is a recognized and accepted instrumentality in the ascertainment of truth, *S. v. Cash,* 219 N.C. 818, 15 S.E. 2d 277; *S. v. King,* 219 N.C. 667, 14 S.E. 2d 803.

Here, the series of incriminating facts, taken in its entirety, makes out a *prima facie* case. The court below properly submitted the felonious assault case to the jury. The verdict and judgment in that case will be upheld.

2. *The armed robbery case.*—The evidence is briefly this: Penley said: "I had about $100 on or about my person and all except $49.91 was gone." On cross examination he testified: "I don't know the exact date that I found that money was gone, but I woke up in the hospital 8 days later. . . . I don't know for sure how much was missing, but do know some was missing." It was in evidence that nine people lived at the Penley home, either members of his family or distant relatives. John Clark, owner of the cab, said when he saw the cab parked in the Penley yard next morning "the money changer was there. It had $6.00 in it."

The foregoing evidence is inconclusive. It is full of hiatuses. Approximately 7½ hours elapsed from the time of the assault until Penley was found in bed with his car parked in the driveway. The evidence shows nothing in reference to his money during this interim, nor during the ensuing period of eight days while he was unconscious. True, the evidence of the brutal assault bulks large as tending to furnish a motive for robbery, but this seems to be negatived by most of the other facts and circumstances developed in the case. It is significant that $49.91 of the money on Penley's person was not missing, and that the money changer with $6.00 in it was found in the cab the next morning. These circumstances are inconsistent with the theory of robbery.

The evidence here discloses no more than an opportunity for the defendant to have taken the money, with equal opportunity for it to have been lost or disposed of in other ways. This is insufficient. *S. v. Murphy,* 225 N.C. 115, 33 S.E. 2d 588.

Where circumstantial evidence is relied on to convict, as in the present case, the rule is: "that the facts established or adduced on the hearing must be of such a nature and so connected or related as to point unerringly to the defendant's guilt and to exclude any other reasonable hypothesis." *S. v. Harvey,* 228 N.C. 62, at p. 64, 44 S.E. 2d 472. "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. Webb,* 233 N.C. 382, at p. 387, 64 S.E. 2d 268. Evidence "which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict, and should not be left to the jury." *S. v. Vinson,* 63 N.C. 335, at p. 338.

A careful perusal of the record leaves us with the impression that the evidence is insufficient to support the armed robbery indictment and that the defendant's motion for nonsuit should have been allowed.

The results, then, are:

In the armed robbery case: Reversed.

In the felonious assault case: No error.

SAWYER CANAL COMPANY AND HOOKER CANAL, INC., v. ELIZABETH M. KEYS AND ELIZABETH KEYS ALLEMAN, EXECUTRIX OF ELIZABETH M. KEYS, DECEASED.

(Filed 31 October, 1951.)

1. Drainage Districts § 9—Owner constructing ditch draining into canal may be assessed proportionate expense for necessary improvements to canal.

It appeared that defendant's predecessor in title cut a drainage canal through his lands draining into plaintiff's canal. Thereafter enlargement and improvement of plaintiff's canal was necessary, and assessments to pay for such improvements were levied against the lands benefited, including defendant's lands, in proceedings had after notice in accordance with the statute. On appeal to the Supreme Court, the cause was remanded to ascertain whether defendant's predecessor in title acquired the right to construct his canal by proceedings under G.S. Chap. 156, sub-chapter 1. *Held:* Upon the court's finding after remand that no legal proceeding was had by which defendant's predecessor in title acquired the right to construct the canal on his land draining into plaintiff's canal, order refusing to remand the proceeding to the clerk and sustaining the assessments is without error, there being no evidence offered tending to show that the assessments were excessive.

2. Drainage Districts § 5—

Proceedings to levy drainage assessments are *in rem* and can be brought forward from time to time upon notice to all of the parties for orders in the cause, and are not highly technical but are to be molded from time to time by the orders of the court as may best promote the results contemplated by the statutes.

APPEAL by defendant Elizabeth Keys Alleman from *Carr, J.*, at May Term, 1951, of PAMLICO.

Special proceeding upon petition of petitioners to have the Keys-Hudnell land of defendant assessed for part of expense of enlarging the outlets of petitioners' drainways into which defendant drains her said land,—heard in Superior Court following rendition of opinion of this Court on former appeal reported in 232 N.C. 664, 62 S.E. 2d 67.

Petitioners, upon such hearing, made motion for judgment confirming the judgment of clerk of Superior Court which confirmed the original and supplemental reports of the commissioners filed in this cause,—defendant contending that, pursuant to the opinion on the former appeal, the cause should be remanded to the clerk of Superior Court for further proceedings, in the manner provided by law. In connection therewith, the court made these findings of fact:

"1. The defendant, Elizabeth Keys Alleman, has succeeded to all right, title and interest which was at one time held in the property of the defendants by Elizabeth M. Keyes and Elizabeth Keyes Alleman, Exec-

utor of Elizabeth M. Keyes, deceased, and is now the owner of said property.

"2. The statements in the record in this case to the effect that there was at one time a proceeding instituted whereby Joseph Keyes, predecessor of the defendant in title, acquired the right to drain his land, known as the Keyes-Hudnell land, into the drainways of the petitioners, were incorrect and were an inadvertence on the part of the plaintiffs' and defendants' counsel. There is no record on file in the office of the clerk of the court of Pamlico County of any proceeding whereby said Joseph Keyes, predecessor of the defendants in title, did acquire the right to drain his land known as the Keyes-Hudnell land into the drainways of the petitioners.

"3. There is in the Commissioners' Supplemental or Amended Report filed on December 27, 1949, a finding being #3 of the findings in said report, reading as follows: 'That during the summer or fall of 1928 the defendants' ancestor in title, Joseph Keyes, did construct and cut into the Sawyer Canal, Inc., plaintiff's named drainway, a large canal several miles in length, 20 feet wide and 6 feet deep, for the purpose of draining his land known as Hudnell land, and other land owned by the said Joseph Keyes; that the said Keyes Canal diverted and turned into plaintiffs' drainway large volumes of water that had never flowed into said drainways prior to the cutting of said canal.'

"There is no exception in the record to this finding by the Commissioners, and the court adopts said finding as a finding of the court, and finds the facts in respect to the manner in which defendants' predecessor in title cut into the plaintiffs' canal to be as set out in said Commissioners' Report."

Upon these facts the court made these conclusions of law:

"In the opinion of the court the defendant Elizabeth Keyes Alleman is not entitled as a matter of law to now change the course of the canal which her predecessor in title has used since 1928 for the purpose of draining her lands through plaintiffs' canal and by so doing avoid responsibility for her proportionate share for the upkeep and repair of the plaintiffs' canal.

"And the court is further of the opinion that for all intents and purposes when her predecessor in title cut into plaintiffs' canal he, by so doing, under the circumstances of this case made himself a party to the original proceeding by which the plaintiffs' canal was authorized, and that this proceeding should be and is considered a motion in said original cause whereby the Sawyer Canal Company was created, the proceeding being entitled 'William B. Sawyer, and others, *v.* William Potter and others.'

"The court is further of the opinion that the defendant is not entitled to have this proceeding remanded to the clerk of the Superior Court for

further action by said clerk, and that there are no issues arising upon the pleadings, and the exceptions to the reports of the commissioners and the judgment of the clerk of the court which the defendant is entitled to have submitted to a jury at term-time."

And the court further found as facts that:

"At said hearing there was no evidence offered tending to show that the assessment made by the commissioners was excessive, and no witnesses were tendered to the court for the purpose of showing that said assessment, as stated in the Commissioners' Report, was excessive."

Thereupon, the court, after incorporating therein such findings of fact and conclusions of law, signed judgment approving and confirming the judgment of the clerk.

The record shows that defendant excepted (1) to the signing of the judgment, (2) to finding No. 3 in the judgment, and (3) to each of the conclusions of law. The record also shows that defendant also excepted to the finding by the court that there was no evidence offered tending to show that the assessment made by commissioners was excessive, and that no witnesses were tendered to the court, for the reason that defendant, under the opinion of the Supreme Court so heretofore rendered in this case, is entitled now to show to the commissioners and to the clerk, and subsequently to a jury upon appeal, such evidence as may be available tending to show that said assessment by the commissioners and as adopted by the clerk in his judgment, are erroneous and not justified by the facts. Upon each of these exceptions, defendant appeals to Supreme Court.

Z. V. Rawls and R. A. Nunn for plaintiff, appellee.

R. E. Whitehurst for defendant, appellant.

WINBORNE, J. The question presented on this appeal, as stated in brief of appellant, is this: "Did the court below properly interpret the former decision in this case reported in 232 N.C. Reports at page 664, and did the court below have authority and jurisdiction to enter judgment without following the directions of this Court in said former decision when the cause was remanded for the ascertainment of certain facts?" The answer is "Yes."

I. On the former appeal the record revealed that in the proceeding before the clerk of Superior Court, and in the Superior Court on appeal thereto, and on appeal to this Court, defendant relied, in the main, upon the provisions of G.S. 156-51 as a bar to petitioners' right to maintain this proceeding,—contending that the only remedy available to them against defendants' failure or refusal to share with them the burden of maintaining and repairing the drainage was to obstruct and dam up her canal so as to effectually prevent drainage therefrom into their canal.

The judge of Superior Court held with defendant, reversed the order of the clerk confirming report of commissioners, and adjudged that petitioners take nothing by the proceeding. But this Court held that the statute G.S. 156-51 is inapplicable to the factual situation in hand.

II. Also on the former appeal it was made to appear from the reply of petitioners to the answer of defendant and the supplemental report of the commissioners that in the year 1928 Joseph Keys, predecessor in title of defendant, constructed, and cut into the Sawyer Canal, a large canal, several miles in length, 20 feet wide and 6 feet deep, for the purpose of draining his land, known as the Hudnell land, and other lands owned by him; and that the canal, called the Keys Canal, diverted and turned into petitioners' drainage large volumes of water that had not theretofore flowed therein. And that the commissioners, appointed in the present proceeding, found that the land of defendant has been greatly benefited by the recent improvements of plaintiffs' drainways and should bear a reasonable and proportionate part of the expenses of enlarging the outlets of said drainways, and that they also found in what proportion and amount the lands of defendant are benefited.

In this connection, the former opinion called attention to, and reviewed in part provisions of sub-chapter 1 of Chapter 156 of the General Statutes of North Carolina entitled "Drainage by Individual Owners," which, among other provisions, grants to "any person desirous of draining into the canal or ditch of another person as an outlet," the privilege of cutting into and draining through such canal or ditch, and prescribes the procedure for acquiring such privilege, and for assessing damages against the petitioner for the privilege, and for apportioning the labor which the petitioner and defendants therein shall severally contribute towards repairing the canal or ditch into which or through which the petitioner drains water from his land.

It is then stated in the former opinion: "In the light of these provisions, it may be assumed that, since there was litigation in respect thereto, Joseph Keys, the predecessor in title of defendant, in exercising the right to cut into the canals of plaintiffs, did so under, and pursuant to the provisions of the statute granting such right—G.S. 156-10. And if Joseph Keys did not initiate such proceeding, it may be assumed that the assessment of damages in the litigation to which reference is made in the record was made under the provisions of the statute."

The former opinion then went on to say: "Nevertheless, the record and case on appeal fail to show the proceeding, or report of commissioners, or that commissioners assessed and apportioned the labor which he, the said Joseph Keys, should contribute towards repairing the canal into or through which he drained the water from his land. Hence it seems expedient that the cause be remanded for the ascertainment of the facts

in these respects. And if it should appear either that in the proceedings had no commissioners were appointed in accordance with the statute, or that commissioners were appointed and failed to assess and apportion the labor which Joseph Keys should contribute, as aforesaid, the petition filed by the petitioners in the proceeding in hand may be considered a motion in the cause,—and the rights of the parties determined in accordance with law and justice."

It now appears as a fact found by the court that, though Joseph Keys, defendant's predecessor in title, during the summer or fall of 1928, did construct a large canal several miles in length, 20 feet wide and 6 feet deep, for the purpose of draining his land, the Hudnell land, and other lands owned by him, and did cut the canal, so constructed by him, into the Sawyer Canal, petitioners' named drainway, thereby diverting and turning into petitioners' drainway large volumes of water that had never theretofore flowed therein, there was no proceeding in court by which Joseph Keys acquired the right to do so. Hence the direction in the former opinion that the facts in respect to such a proceeding be ascertained came to nought. The proceeding then reverted to consideration of defendant's exceptions to the judgment of the clerk confirming the report and supplemental report of the commissioners,—petitioners having moved for confirmation of the clerk's judgment. The judgment from which this appeal is taken followed.

In this connection, this Court declared in *Staton v. Staton,* 148 N.C. 490, 62 S.E. 596, referring to a proceeding similar to that in hand, that "these proceedings are not highly technical, but are intended to be inexpensive and to be moulded from time to time, by the orders of the court, as may best promote the beneficial results contemplated by the statute."

And it is observed that in *Adams v. Joyner,* 147 N.C. 77, 60 S.E. 725, it is said: "While the several statutes, passed at different times, to provide for the drainage of the swamp lands of Eastern North Carolina have not in all respects the same provisions, they have been collected and are found in the Revisal of 1905, in Chapter 88. They should, as far as practicable, be so construed as to harmonize, and constitute with such variations as they contain, a system of drainage laws for the State. Their constitutionality has been settled by several decisions of this Court." The statutes comprising Chapter 88 of the Revisal of 1905, are now embodied in Chapter 156 of the General Statutes of North Carolina.

Moreover, in *Staton v. Staton, supra,* the Court had this further to say: "This is in effect a motion in the cause. From the nature of the proceeding, the judgment in 1886 is not a final judgment, conclusive of the rights of the parties for all time, as in a litigated matter. But it is a proceeding *in rem,* which can be brought forward from time to time,

upon notice to all the parties to be affected, for orders in the cause, dividing (as here sought) the amount to be paid by each of the new tracts into which the former tract has been divided by partition or by sale; to amend the assessments, when for any cause the amount previously assessed should be increased or diminished, for repairs; for enlarging or deepening the canal or for other purposes, or to extend the canal and bring in other parties. It is a flexible proceeding, and to be modified or moulded by decrees from time to time to promote the objects of the proceeding. The whole matter remains in the control of the court. It is not necessary, however, to keep such cases on the docket, but they can be brought forward from time to time, upon notice to the parties, upon supplementary petition filed therein, and further decrees made to conform to the exigencies and changes which may arise."

In the light of the provisions of the Drainage Statute, Chapter 156 of General Statutes, so interpreted by this Court, applied to the factual situation in hand, it would seem that, in accordance with law and justice, the judgment from which this appeal is taken is "right in substance." *Taylor, C. J.*, in *Lanier v. Stone*, 8 N.C. 329.

Affirmed.

IN THE MATTER OF THE WILL OF J. C. MORROW, DECEASED.

(Filed 31 October, 1951.)

1. Wills § 17—

A caveat proceeding is *in rem* to ascertain whether the paper writing purporting to be a will is in fact a testamentary disposition of property, and caveators may attack any part of the will or attack it *in toto* upon the grounds set forth.

2. Wills § 22—

In caveat proceedings, propounder has the burden of proving the due execution of the instrument, *i.e.*, that it was written in testator's lifetime, signed by him or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least. G.S. 31-3.

3. Wills § 24—

The issue of *devisavit vel non* must be determined by the jury and may not be determined by the court even upon agreement of the parties, nor may the case be submitted upon an agreed statement of facts, nor may either party take a nonsuit.

4. Same—

Since the propounder has the burden of proving the due execution of the instrument, he cannot be entitled to a directed verdict in his favor on the issue of due execution, the weight and credibility of propounder's testimony being for the determination of the jury.

APPEAL by propounder from *Sharp, Special Judge,* at June Term, 1951, of RUTHERFORD.

This is a proceeding for the probate of a paper writing propounded as the last will and testament of J. C. Morrow, who died on 10 March, 1951.

The alleged will was probated in common form on 17 March, 1951, by Barney Morrow, a son, who under the purported will would take the bulk of the estate. On the same day that the paper writing was probated, the widow dissented. On 19 March, 1951, a caveat was filed by some of the heirs at law. The proceeding was thereupon transferred to the civil issue docket for trial.

At the call of the case, the three subscribing witnesses, Clark Matheny, Herman Price and Lillian Price, were, upon motion of the caveators, separated so that each witness testified in the absence of the other two. The testimony of these witnesses agreed that the paper writing was drawn and signed in the building of Matheny Motor Company in Forest City, North Carolina, but differed in other material particulars.

Clark Matheny said that about 6 o'clock in the afternoon of 22 July, 1948, J. C. Morrow came with his son, Barney, to the Matheny Motor Company and brought with him a form book; that at the request of J. C. Morrow he wrote the alleged will on the typewriter in the private office of the Motor Company, which office is adjacent to the waiting room; that he wrote the name of J. C. Morrow to the alleged will in the private office at the request of J. C. Morrow and in his presence and in the presence of Barney Morrow, Herman Price and Lillian Price; that he was the first to sign as a witness and this was done in the private office; that J. C. Morrow then took the paper out into the waiting room where the other two witnesses signed; that he and Barney remained in the private office and did not go into the waiting room until after the others had signed. The testimony of Lillian Price differed substantially in that she said that J. C. Morrow, Barney Morrow and Matheny all came out of the private office together and laid the paper on the desk in the waiting room; that she was sure that she signed as the first witness at the request of Matheny and that Matheny said he would sign later; that Matheny wrote the name of J. C. Morrow on the paper out in the waiting room.

The testimony of Herman Price was that he and his wife, Lillian, remained in the waiting room while Barney, his father and Matheny went into the private office and remained from 25 to 35 minutes; that when the paper was laid on the desk in the waiting room, the name of J. C. Morrow was not on it; that all of the signing was done on the desk in the waiting room, Lillian Price signing first, Herman Price second, and Matheny last; that J. C. Morrow just touched the pen after the others had signed; that he knew J. C. Morrow to be an educated man and could not understand why he signed by his mark.

Mrs. Perry Price impeached the testimony of her brother-in-law, Herman Price, in that when he was visiting in her home, she asked him where the will was made, and he said, "It was made in the car along between the Davis Shoppe and the Post Office in Forest City." When she asked him who signed J. C. Morrow's name, he said, "All I know, I didn't know what I was signing. I didn't know it was a will at that time and if I had I would not have signed it." This witness was positive that Herman said that he and his wife signed the will in front of the Post Office.

Barney Morrow testified that he took the alleged will on the day it was made and concealed it under a brick on a sill in the barn, where it remained until the death of his father. No other member of the family knew about the paper writing or where it was located. Barney admitted that he has a criminal record.

The widow testified that immediately after the funeral she asked her son, " 'Barney, has Pa got a will made?' and he kind of dropped his head and I asked him again on Wednesday and he said, Pa had a will and he had it, and I said, 'Let the other children read it,' and he said, 'I can't,' and I said, 'Why can't you?' and he said, 'I ain't got no witnesses to it,' and I said, 'I never saw a will but what had witnesses to it,' and he said, 'My witnesses work in the cotton mill and I can't get them till 4 o'clock.' He was gone all day Thursday until 5:30 or 6:00 o'clock and he said I could see the will at the courthouse. I had an opportunity to observe my husband on July, 1948. We were living together. In my opinion, about July 22, 1948, he did not know his friends or his property, or nothing. I have lived with him and I ought to know."

There was substantial evidence on the question of mental capacity and undue influence.

The following issues were submitted: (1) Was the paper writing offered for probate as the last will and testament of J. C. Morrow signed and executed according to law? (2) Did the said J. C. Morrow have sufficient mental capacity to make and execute a will on 22 July, 1948, and at the time of the execution of said paper writing? (3) Was the execution of said paper writing procured by the undue influence of Barney Morrow as alleged? (4) Is the paper writing propounded, and every part thereof, the last will and testament of J. C. Morrow, deceased? The jury answered the first issue "No." Answers to the other issues thereupon became unnecessary.

From a judgment upon the verdict, propounder prosecutes this appeal.

Jones & Davis for propounder, appellant.

Zeb C. Camp and Stover P. Dunagan for caveators, appellees.

VALENTINE, J. In the court below the grounds upon which caveators relied were nonexecution, mental incapacity and undue influence.

In order for propounder to be successful in this proceeding, he must prove that the paper writing propounded as a will was written in the testator's lifetime, signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, or the paper writing is ineffectual as a last will and testament and is not sufficient in law to give or convey any estate in real or personal property. G.S. 31-3.

The answer "No" upon the first issue is determinative of this controversy. Therefore, the only question presented by this appeal is the validity of the verdict. This requires a discussion of the procedure necessary to establish the testamentary value of a document. Such a proceeding is usually initiated by the filing of a caveat, which is a proceeding *in rem* having as its only purpose the function of ascertaining whether the paper writing purported to be a will is in fact the last will and testament of the person for whom it is propounded. This initial pleading may be so drawn as to challenge all or any part of the will and issues must be submitted accordingly. *McDonald v. McLendon*, 173 N.C. 172, 91 S.E. 1017.

In the instant case, the entire will was challenged and the court properly submitted the issues *devisavit vel non*, which drew into question the alleged will *in toto*. This constituted a demand that the alleged will be produced and probated in open court in term time, so that the parties interested, either under the paper writing or as heirs at law, could have an opportunity to attack it for the causes and upon the grounds set forth in the caveat. In such litigation the attack is upon the paper writing itself and a strict application of the law involved is necessary.

The status of such a paper writing when drawn into question by a caveat must be determined by a jury's verdict. *In re Will of Chisman*, 175 N.C. 420, 95 S.E. 769; *In re Will of Rowland*, 202 N.C. 373, 162 S.E. 897. Neither the caveators nor the propounders can waive a jury trial nor submit the case upon an agreed statement of facts for determination by the court. The judge cannot upon an agreed statement of facts which is supplemented by his own findings upon evidence establish the validity of a will in solemn form without the intervention of a jury. A jury's verdict is absolutely indispensable upon the issues "will or no will." *In re Will of Hine*, 228 N.C. 405, 45 S.E. 2d 526; *In re Will of Roediger*, 209 N.C. 470, 184 S.E. 74.

So exacting are the requirements of the law that neither the propounder nor the caveators can submit to a nonsuit, nor can a nonsuit be entered for any reason. *In re Will of Brock*, 229 N.C. 482, 50 S.E. 2d 555; *In re Will of Hine*, *supra*; *In re Hinton*, 180 N.C. 206, 104 S.E. 341; *In re*

Westfeldt, 188 N.C. 702, 125 S.E. 531; *In re Will of Redding,* 216 N.C. 497, 5 S.E. 2d 544.

The main complaint appearing in appellant's brief and urged by him on this appeal revolves around the contention that the "court should have charged the jury to answer the first issue 'Yes' upon the evidence." He contends that "the evidence of the formal execution of the paper writing on July 22, 1948, is so overwhelming as to leave no question of doubt about it and there is no evidence to the contrary." This argument overlooks the most important aspect of the case, that is, that the validity of the paper writing in question rests, in the first instance, upon its due execution as provided by law, and that the weight and credibility of the evidence offered for the purpose of showing due execution is for the jury to decide under appropriate instructions from the court. *In re Fuller,* 189 N.C. 509, 127 S.E. 549. It further fails to take into consideration the fact that the propounder has the burden of proving the formal execution of the will and that he must do so by the greater weight of the evidence. He must prove the paper writing *per testes* in solemn form. *In re Hedgepeth,* 150 N.C. 245, 63 S.E. 1025; *In re Will of Rowland, supra; In re Will of Chisman, supra.*

The propounder failed to carry this burden. In what particulars he failed is not a matter for us to decide. It is exclusively the province of the jury to weigh the evidence and determine its credibility and sufficiency. In so doing, it has found that propounder's evidence does not possess the probative quality necessary to warrant an affirmative answer to the first issue. Its verdict resolves the issue of due execution against the propounder and no reason appears on the record why this verdict should not stand.

We have examined the entire record, including the charge of the court, and find no reversible error. The judgment of the lower court is upheld.

No error.

The motion of caveators to dismiss the appeal is denied.

JOHN WASHBURN, SR., AND WIFE, SARAH H. WASHBURN, BOBBY JEAN WASHBURN AND WIFE, GERTRUDE B. WASHBURN, RACHEL WASHBURN BRIDGES AND HUSBAND, HAROLD BRIDGES, AND ANN WASHBURN (SINGLE), v. JOHN WASHBURN, JR. (SINGLE), MINOR; BETTY WASHBURN (SINGLE), MINOR; AND PATRICIA WASHBURN (SINGLE), MINOR.

(Filed 31 October, 1951.)

1. Partition § 4a: Judgments § 23—

The holders of judgment liens on the undivided interest of a tenant in common, while proper parties, are not necessary parties to a proceeding to partition the land by sale, but when not made parties the purchaser at the partition sale takes the land subject to the judgment liens which are not affected in any degree by the partition sale. G.S. 46-30.

2. Partition § 4e—

Holders of judgment liens on the undivided interest of a tenant in common who are not made parties to the proceedings for sale for partition may not interfere after final decree of sale to have the debtor's share of the proceeds paid to them and may not maintain that the officer making the sale committed a wrong against them by distributing the proceeds of sale in conformity with the decree without applying their debtor's share to the payment of the judgment liens.

APPEAL by petitioners, defendants, and Joseph M. Wright, Commissioner, from *Phillips, J.*, at the July Term, 1951, of the Superior Court of CLEVELAND County.

Proceeding to partition land by sale heard upon a motion in the cause.

When the record is properly interpreted, it reveals these salient facts:

1. Bobby Jean Washburn, Rachel Washburn Bridges, Ann Washburn, John Washburn, Jr., Betty Washburn, and Patricia Washburn owned certain land in Cleveland County, North Carolina, as tenants in common, subject to the life estate of their father, John Washburn, Sr., as tenant by the curtesy.

2. These judgments were docketed in the office of the clerk of the superior court of Cleveland County in such manner as to constitute liens on the interest of John Washburn, Sr., as life tenant in the land: (1) Judgment in favor of C. S. Thompson and against John Washburn, Sr., for $65.45, docketed March 1, 1948; (2) judgment in favor of Alfred Eskridge and Charles L. Eskridge, trading as Eskridge Oil Company, and against John Washburn, Sr., for $36.26, docketed 26 July, 1949; (3) judgment in favor of George D. Washburn and S. Max Washburn, trading as Cleveland Hardware Company, and against John Washburn, Sr., for $53.09, docketed 29 August, 1949; and (4) judgment in favor of Charles W. Washburn, trading as Washburn Coal and Oil Company, and against John Washburn, Sr., for $39.09, docketed 23 April, 1951.

3. On 16 December, 1950, the petitioners, John Washburn, Sr., Bobby Jean Washburn, Rachel Washburn Bridges, and Ann Washburn, brought this proceeding against the defendants, John Washburn, Jr., Betty Washburn, and Patricia Washburn, before the clerk of the superior court of Cleveland County to sell the land for partition under Article 2 of Chapter 46 of the General Statutes. The petitioners, Sarah H. Washburn, Gertrude B. Washburn, and Harold Bridges, united in the proceeding to manifest their consent to the partition sale, and the petitioner, John Washburn, Sr., joined in the proceeding to obtain the value of his life estate out of the proceeds of the partition sale. The defendants, who are infants, have been represented by their guardian *ad litem,* Bynum E. Weathers, at all stages of the proceeding. The judgment creditors of John Washburn, Sr., were not made parties to the proceeding.

4. The clerk entered a decree in the proceeding designating Joseph M. Wright a commissioner to sell the land for partition and specifying that the petitioner, John Washburn, Sr., was to receive the value of his share as life tenant out of the proceeds of the sale. The commissioner sold the property and made report of that fact with full particulars to the clerk who, on 7 May, 1951, rendered a final decree confirming the sale and directing the commissioner to execute a conveyance to the purchaser and to partition the net proceeds of the sale, to-wit, $913.62, among the parties according to their respective interests in them. At that time John Washburn, Sr., was 42 years of age.

5. The commissioner forthwith collected the sale price of the land and executed a conveyance to the purchaser. On 10 May, 1951, John Washburn, Sr., signed a document which recited, in substance, that he quitclaimed to his children any interest in the proceeds of the partition sale in excess of $75.00. On the following day, Joseph M. Wright, Commissioner, filed his final account with the clerk, showing that he had disbursed $75.00 out of the net proceeds of the partition sale to John Washburn, Sr., "in settlement of curtesy," and had divided the remainder of such net proceeds, to-wit, $838.62, equally among Bobby Jean Washburn, Rachel Washburn Bridges, Ann Washburn, John Washburn, Jr., Betty Washburn, and Patricia Washburn. The commissioner effected such division by paying the sums allotted to the three adults, Bobby Jean Washburn, Rachel Washburn Bridges, and Ann Washburn, directly to them, and by delivering the sums assigned to the three infants, John Washburn, Jr., Betty Washburn, and Patricia Washburn, to the clerk of the superior court of Cleveland County for the use of such infants. John Washburn, Sr., has been insolvent since the events described in this paragraph.

6. Although they did not seek or obtain leave of court to intervene in the proceeding, the judgment creditors of John Washburn, Sr., appeared

before the clerk on 6 June, 1951, and filed a motion in the cause wherein they asserted that the share of John Washburn, Sr., in the proceeds of the partition sale constituted the major portion of such proceeds; that such share was subject to the liens of their judgments because the partition sale had automatically transferred such liens from the interest of John Washburn, Sr., in the land to his share in the proceeds of the sale of the land; and that in consequence the commissioner had committed a legal wrong against the judgment creditors by disbursing the share of John Washburn, Sr., in the proceeds of the partition sale to John Washburn, Sr., and his children instead of applying or securing them to the satisfaction of their judgments. The judgment creditors prayed that the final account of the commissioner "be stricken out and that the commissioner be directed to file a proper settlement showing disbursement in accordance with the rights of the parties, including the lien holders . . . as well as . . . the other parties in interest."

7. On 21 June, 1951, the clerk made an order setting aside the final account of the commissioner "for mistake in not paying from the curtesy right in said estate judgment creditors of John Washburn, Sr.," and directing the commissioner to file "an amended settlement in accordance with this order." The original parties to the proceeding and the commissioner, who resisted the motion of the judgment creditors, appealed from the order of the clerk to the judge, and the judge affirmed the order of the clerk in a judgment which directed the commissioner to file "an amended and proper settlement showing disbursements in accordance with the rights of the parties, including the lien holders, to-wit, C. S. Thompson, Alfred Eskridge and Charles R. Eskridge, George D. Washburn and S. Max Washburn, and Charles W. Washburn, as set out in the . . . motion in this cause." The original parties to the proceeding and the commissioner excepted to the judgment of the judge and appealed to the Supreme Court, assigning error.

Reuben L. Elam for the petitioners, appellants.

Bynum E. Weathers for the guardian ad litem of the defendants, appellant.

Joseph M. Wright for the commissioner, appellant.

L. T. Hamrick and Falls & Falls for the judgment creditors, appellees.

ERVIN, J. The judge was undoubtedly prompted to enter his judgment by quotations from various texts appearing in the opinion in *Edmonds v. Wood,* 222 N.C. 118, 22 S.E. 2d 237. These quotations state, in substance, that a partition purchaser takes title to real property free of judgment liens against the interest of one of the co-owners and that such judgment liens are transferred to the judgment debtor's share of

the proceeds of the partition sale, even though the judgment creditors are not parties to the proceeding for partition.

A scrutiny of the texts cited reveals that the statements embodied in the quotations are based on decisions of courts in other jurisdictions having statutes which provide in varying phraseology that a partition sale frees the land from all preexisting liens, and deprives the lien holders of all remedies save that of seeking payment out of the proceeds of sale. Inasmuch as the supposed judgment lien involved in the *Edmonds case* had been extinguished by the satisfaction of the underlying judgment, the statements incorporated in the quotations from the texts were unnecessary to the determination of that case, and must be regarded as *obiter dicta.*

The statements under scrutiny are, indeed, in direct conflict with the North Carolina statute, which describes the title acquired by a partition purchaser. Such statute specifies that "the deed of the officer or person designated to make such sale shall convey to the purchaser such title and estate in the property as the tenants in common, or joint tenants, (and all other parties to the proceeding) had (therein)." G.S. 46-30. The words embraced in the two parentheses were inserted in the statute by Chapter 719 of the 1949 Session Laws, and are in complete harmony with the earlier decisions of the Supreme Court relating to the question now under consideration.

These decisions establish these propositions:

1. The holders of judgment liens on land sought to be partitioned or on undivided interests in such land are not necessary parties to a proceeding to partition the land by sale. *Holley v. White,* 172 N.C. 77, 89 S.E. 1061; *Jordan v. Faulkner,* 168 N.C. 466, 84 S.E. 764; *Matter of Harding,* 25 N.C. 320. But they are proper parties to such proceeding. *Holley v. White, supra.*

2. The partition purchaser takes the land subject to the judgment liens of creditors not made parties to the partition proceeding. *Holley v. White, supra; Jordan v. Faulkner, supra.*

3. Since they are in nowise affected by the partition sale, judgment creditors, who are not parties to the partition proceeding, have no right to apply to the court after final decree to have their debtor's share of the proceeds paid to them. *Holley v. White, supra; Jordan v. Faulkner, supra; Matter of Harding, supra.* Moreover, they cannot be permitted to intervene for such purpose after the officer or person making the partition sale has put an end to the proceeding by disposing of the proceeds of sale in conformity with the final decree. *Sanders v. May,* 173 N.C. 47, 91 S.E. 526; *Wilson v. Bank of Lexington,* 77 N.C. 47.

These things being true, it follows that the judge erred in rendering the judgment challenged by the appeal.

Inasmuch as they were not parties to the proceeding, the rights of the judgment creditors of John Washburn, Sr., were not affected in any degree by the partition sale. They retained their judgment liens on the interest of John Washburn, Sr., as tenant by the curtesy in the land sold for partition, and did not acquire any rights in his share of the proceeds of the sale. As a consequence, the commissioner committed no legal wrong against the judgment creditors by paying such share of the proceeds of the sale to John Washburn, Sr., and his appointees, *i. e.*, his children. For present purposes, such payment was a substantial compliance with the order of the clerk directing payment of that share to John Washburn, Sr. It thus appears that the commissioner put an end to the proceeding before the attempted intervention of the judgment creditors by disposing of the proceeds of sale according to the final decree.

For the reasons given, the judgment is

Reversed.

IN THE MATTER OF ATKINSON-CLARK CANAL COMPANY, SPECIAL PROCEEDING NO. 802.

(Filed 31 October, 1951.)

1. Judgments § 33e—

A judgment of the clerk of the Superior Court in a special proceeding in which such clerk has jurisdiction is *res judicata* as to the matters presented by the allegations of the petition in the absence of appeal, and failure to perfect an appeal has the same effect as if no appeal had been attempted.

2. Drainage Districts § 15—

A drainage corporation petitioned the clerk to pass upon and approve its acts in making improvements and to declare the assessments levied to be judgments *in rem* against the lands drained. The clerk entered judgment refusing to approve the certificate of assessment. Appeal therefrom was dismissed in the Superior Court on the ground that the appeal had not been perfected in accordance with statutory requirements. Appeal from judgment of dismissal was not perfected. *Held:* The clerk's judgment is *res judicata*, and bars a subsequent petition by the corporation upon substantially identical allegations.

APPEAL by petitioner from *Grady, Emergency J.*, February Term, 1951, of PITT.

The validity of the assessments involved herein were challenged by one of the present respondents, Estelle Harris Bunting, in *In the Matter of Atkinson-Clark Canal Company*, Special Proceeding No. 471, which was before this Court at the Fall Term, 1949, the opinion of the Court being reported in 231 N.C. 131, 56 S.E. 2d 442.

The assessments at that time were purported to have been made pursuant to the statute now codified as G.S. 156-42, and that the Atkinson-Clark Canal Company was duly organized as a corporation as set forth in Special Proceeding No. 471, filed in Pitt County, North Carolina, 18 January, 1886. The record disclosed, however, that the Canal Company was not created or intended to be created in that proceeding.

It now appears from the present record that the petitioner herein was created as a drainage corporation in Special Proceeding No. 802, instituted in the Superior Court of Pitt County, North Carolina, 8 February, 1894. Thereafter, an assessment of 85c an acre was made on the lands in the district. In 1926 an assessment of $10.00 per acre was made, and in 1929 an assessment of $32.06 per acre.

It is alleged in the petition to the Clerk of the Superior Court of Pitt County, dated 9 January, 1950, and filed 16 January, 1950, that the owners of land and stockholders in Atkinson-Clark Canal Company met on 5 April, 1946, a majority being present; that the meeting was held for the purpose of considering the advisability of cleaning out the canal, or canals, owned by the drainage corporation; that a majority of the stockholders signed the petition attached thereto (the petition referred to is not shown in the record), requesting that the directors proceed to clean the canal and do what work was necessary to cause the canal to be put in an efficient, operating condition, and that J. H. Blount, G. V. Smith and A. J. Harris were duly elected directors of the corporation.

It further appears from the petition that the board of directors undertook to follow the recommendations of the Soil Conservation Service of the United States in cleaning and repairing the canal and had the work done under its supervision.

It is alleged that an assessment was made for this work on 21 June, 1947, of $17.00 per acre on the land in the district, one for $10.00 per acre 16 February, 1948, and another for $10.00 per acre on 27 April, 1948, making a total of $37.00 per acre; that the total of these three assessments amounted to $13,246.04, and that all of this amount had been paid except the sum of $2,274.67, due by the respondents, Paul Nelson, Estelle Harris Bunting, W. J. McLawhorn and J. Sam Fleming.

The petition then states: "The Directors of the Atkinson-Clark Canal Company do hereby submit to the court the names of the stockholders and land owners who have not paid their assessments, together with the amounts due by them, and these assessments are hereby certified by the Directors as being true and correct, and as having been made in the same manner and upon a *pro rata* basis among the stockholders and land owners as have been the other assessments made by the Atkinson-Clark Canal Company. . . .

"Wherefore, the Directors of the Atkinson-Clark Canal Company do pray the court: That it pass upon and approve their acts as hereinbefore

set out and that it declare the assessments due by the stockholders as shown by the attached list to be judgments *in rem* against their lands."

On 28 February, 1950, the Clerk of the Superior Court of Pitt County, North Carolina, entered an order in which it is recited that after giving careful consideration to the petition and supporting evidence, the court being of the opinion the Certificate of Assessment ought not be approved, entered judgment as follows: "It is now, therefore, considered and ordered that the said Certificate of Assessment tendered as aforesaid under date of January 9, 1950, be, and the same hereby is not approved. Done at Greenville, North Carolina, this the 28th day of February, 1950."

The petitioner caused the following entry to be made 28 February, 1950: "To the above order the petitioner appeals to the Superior Court."

The cause was calendared for trial in Superior Court before his Honor, Walter J. Bone, Judge Presiding, at the May Term, 1950, of Pitt, and at the call of the calendar counsel for Estelle Harris Bunting, appellee, moved the court to dismiss the appeal on the ground that it had not been perfected in accordance with statutory requirements therefor. The motion was allowed and the court entered the following judgment: "It is now therefore considered, ordered and adjudged that the appeal of Atkinson-Clark Canal Company, from that certain order of D. T. House, Jr., C. S. C., entered herein on February 28, 1950, be and the same hereby is dismissed. Done in open court at Greenville, North Carolina, this 31st day of May, 1950."

The petitioner excepted to the judgment and gave notice of appeal to the Supreme Court, which appeal was never perfected.

Thereafter, on 20 June, 1950, the petitioner filed another petition with the Clerk of the Superior Court of Pitt County which in every essential particular is identical with the first petition filed on 16 January, 1950. A hearing was held by the Clerk of the Superior Court on the second petition and the Clerk being of the opinion, based upon the petition and evidence offered in support thereof, that the Certificate of Assessment ought not to be approved, entered an order on 2 February, 1951, to the effect that the same is not approved.

The petitioner again appealed to the Superior Court and when the cause came on for hearing, it was agreed that his Honor might hear the evidence, find the facts, and enter judgment, out of Term, and out of the County.

The court reviewed Special Proceeding No. 471, which was before this Court as set forth above, and held that proceeding had no relation to the present one.

His Honor then held that since there was no appeal from the judgment entered in the Superior Court by Bone, J., dismissing the appeal of the

petitioner from the judgment of the Clerk of the Superior Court, entered 28 February, 1950, the judgment of the Clerk of the Superior Court is *res judicata* and that the petitioner cannot now prosecute the same matter in the same court and dismissed the proceeding. The petitioner appeals, assigning error.

William H. Watson and Frank M. Wooten, Jr., for appellant.
Sam B. Underwood, Jr., for appellees.

DENNY, J., after stating the facts as above: The appellant contends that its petition to the Clerk of the Superior Court to have its assessments docketed as a lien upon the lands of the respective respondents was based on the law as set out in the first paragraph of G.S. 156-43, unaffected by the amendments thereto enacted by Chapter 180, Public Laws of 1939. Therefore, it argues and contends that there was nothing for the Clerk to pass upon, and that it was the duty of the Clerk to docket the assessments and if the respondents were dissatisfied therewith, they had the right to appeal and have the matter heard by a jury. This contention runs counter to the allegations of the petition and the prayer for relief contained therein.

It appears from the petition that the petitioner requested the Clerk of the Superior Court to pass upon and approve its acts and to declare the assessments due as shown on the Certificate of Assessment attached thereto. And it further appears from the record that the Clerk passed upon the petition as requested but declined to approve the assessments and entered judgment to that effect. Consequently, we deem it unnecessary to consider or discuss whether the procedure adopted by the petitioner was based on the law as amended in 1939, or that portion thereof which was in effect prior thereto, or both. For the question before us is not one on the merits of the cause, but on the single question as to whether the Clerk's judgment entered on 28 February, 1950, is *res judicata* as to the matters alleged in the petition. *Land Co. v. Guthrie,* 123 N.C. 185, 31 S.E. 601.

A judgment entered by a clerk of the Superior Court in a special proceeding in which such clerk has jurisdiction, will stand as a judgment of the court, if not excepted to and reversed or modified on appeal, as allowed by statute. *Brittain v. Mull,* 91 N.C. 498; *Gold v. Maxwell,* 172 N.C. 149, 90 S.E. 115; *Bank v. Leverette,* 187 N.C. 743, 123 S.E. 68. See, also, concurring opinion in *Wilson, Ex parte,* 222 N.C. at page 104, 22 S.E. 2d 262.

Conceding, but not deciding, that the Clerk's decision was erroneous, when the petitioner undertook to appeal therefrom and the appeal was dismissed in the Superior Court, and it gave notice of appeal to the

Supreme Court but did not perfect the appeal, the judgment of the Clerk of the Superior Court was as final and effective as if no appeal therefrom had been attempted. *Cameron v. McDonald,* 216 N.C. 712, 6 S.E. 2d 497; *Northcott v. Northcott,* 175 N.C. 148, 95 S.E. 104; *Moore v. Packer,* 174 N.C. 665, 94 S.E. 449; *Weeks v. McPhail,* 128 N.C. 130, 38 S.E. 472. A judgment from which no appeal is taken, however erroneous, is *res judicata. North Carolina R. R. v. Story,* 268 U.S. 288, 69 L. Ed. 959.

The judgment of the court below is
Affirmed.

ELLA GAY, WIDOW OF JOHN THOMAS GAY, v. J. EXUM & COMPANY, INC.

(Filed 31 October, 1951.)

1. Dower § 2—

A widow is entitled to dower in all lands of which her husband was seized during coverture, unless she forfeits her rights or voluntarily relinquishes same, G.S. 30-4, subject to all liens legally created by the husband prior to the marriage. G.S. 30-5.

2. Dower § 3—

Except for purchase money mortgages and deeds of trust, G.S. 30-6, conveyance or encumbrancing of land by the husband without the joinder of his wife does not affect the wife's right to dower.

3. Dower § 9: Adverse Possession § 4e—

Ordinary statutes of limitation, even though they bar the husband's rights, do not run against the wife's right to assert her dower upon his death unless they so provide, since until his death she has no right to act to protect her dower, and his non-action cannot adversely affect her interests any more than a conveyance by him. Moreover, she has ten years to petition for allotment of dower in lands not in actual possession following his death. G.S. 1-47 (5).

4. Mortgages § 16b: Dower § 9—

The mortgagee in an instrument executed prior to the mortgagor's marriage went into possession without foreclosure. The husband's right to redeem was barred by such possession for more than ten years after such right accrued. G.S. 1-47 (4). *Held:* The wife's right to dower was not barred.

5. Mortgages § 17c—

Where the widow asserts her dower right in the equity of redemption in lands in possession of the mortgagee, she is entitled to an accounting for the rents and profits from the death of her husband up to the assignment of dower, but an accounting for the period prior to her husband's death is competent solely for the purpose of ascertaining the value of the equity of redemption to which her dower right attaches.

APPEAL by respondent from *Carr, J.*, at Chambers in Burlington, North Carolina, 13 July, 1951. From GREENE.

This proceeding was instituted 20 April, 1951, by the petitioner to have dower allotted and assigned to her in the land referred to in the petition filed herein.

According to the agreed statement of facts, the petitioner and John Thomas Gay were lawfully married in Greene County, North Carolina, in 1929 and lived together as man and wife until his death in September, 1950. He died intestate.

At the time of the marriage of the petitioner and John Thomas Gay, the said John Thomas Gay was seized of a tract of land in Snow Hill Township, in the County of Greene, State of North Carolina, consisting of approximately 117 acres, subject to certain mortgages executed by John Thomas Gay prior to his intermarriage with the petitioner. One of these mortgages was executed 14 November, 1922, in favor of the Greensboro Joint Stock Land Bank to secure a principal indebtedness of $1,500; and the other to J. Exum & Co., a partnership, to secure a principal indebtedness of $5,000.

John Thomas Gay and his wife, the petitioner, lived on the land in question from the time of their marriage in 1929 until early in 1932, when they surrendered the possession thereof to J. Exum & Co., one of the mortgagees. J. Exum & Co., the partnership, and its successor, J. Exum & Co. Inc., a corporation, have been in continuous possession of said land as mortgagee or assignee of the mortgagee since 1932. Neither of the mortgages has been foreclosed, but J. Exum & Co. paid off and discharged the mortgage to the Greensboro Joint Stock Land Bank in 1937.

The Clerk of the Superior Court of Greene County, North Carolina, entered a decree to the effect that petitioner is the owner of a dower interest in the lands described in the petition and ordered that her dower be allotted as provided by law. The respondent appealed to the Superior Court.

Upon the agreed statement of facts, the court below held that petitioner is entitled to have her dower allotted to her in the manner provided by law in the equity of redemption which her deceased husband, John Thomas Gay, had in the said land during coverture.

The court being of the opinion that in determining the value of said equity of redemption the petitioner is entitled to an accounting between her and the respondent from the time the mortgagee went into possession up to the time of the accounting, entered judgment accordingly.

The respondent appealed and assigned error.

Geo. W. Edwards and K. A. Pittman for respondent, appellant.
Lewis & Rouse for petitioner, appellee.

DENNY, J. The appellant argues and contends that the mortgagor lost his right to redeem the lands involved herein prior to his death and therefore the widow's right to dower in the equity of redemption was lost when the husband ceased to have an enforceable right to redeem the property. G.S. 1-47 (4).

In this jurisdiction a widow has the common-law right of dower. G.S. 30-4. And subject to the provisions of the above statute with respect to certain conduct on the part of a married woman which may be pleaded in bar of any action to have dower allotted, "every married woman, upon the death of her husband intestate, or in case she shall dissent from his will, shall be entitled to an estate for her life in one-third in value of all the lands, tenements and hereditaments whereof her husband was seized and possessed at any time during coverture, . . . she shall in like manner be entitled to such an estate in all . . . equities of redemption or other equitable estates in lands, tenements and hereditaments whereof her husband was seized in fee at any time during the coverture, subject to all valid encumbrances existing before the coverture or made during it with her free consent lawfully appearing thereto." G.S. 30-5.

Therefore, under the general rule and our statutory provisions, a widow is entitled to dower in all the lands of which her husband was seized during coverture, unless in the meantime she has voluntarily released same, but her right to dower in lands of which her husband was seized at the time of their marriage, is subject to all subsisting liens legally created by the husband prior to the marriage. G.S. 30-5; 28 C.J.S. Dower, section 39 (a), page 105.

Unquestionably, the husband of the petitioner, John Thomas Gay, had lost his right to redeem the premises in question prior to his death by permitting the mortgagee to remain in possession for more than ten years after his right to redeem accrued, provided the provisions of G.S. 1-47 (4) had been pleaded in bar thereof. *Anderson v. Moore,* 233 N.C. 299, 63 S.E. 2d 641; *Hughes v. Oliver,* 228 N.C. 680, 47 S.E. 2d 6; *Crews v. Crews,* 192 N.C. 679, 135 S.E. 784; *Bernhardt v. Hagamon,* 144 N.C. 526, 57 S.E. 222.

Even so, the loss of the husband's right to redeem by surrendering the possession of the premises to the mortgagee for a period sufficient to bar an action by him for redemption, does not have any greater force and effect upon his widow's right of dower in the equity of redemption than if he had conveyed all his right, title, and interest in such equity of redemption to the mortgagee by deed without the joinder of his wife. Such a conveyance would have passed the husband's interest alone and would not have affected the wife's right to dower in such equity. *Artis v. Artis,* 228 N.C. 754, 47 S.E. 2d 228; *Rook v. Horton,* 190 N.C. 180,

129 S.E. 450, 41 A.L.R. 1111; 1 Am. Jur. Adverse Possession, Section 93, page 844. The only instance where a husband may execute a conveyance without the joinder of his wife, and pass the whole interest, is where he executes a mortgage or deed of trust to secure the purchase money or any part thereof, of land bought by him. G.S. 30-6.

It is said in 17 Am. Jur., Dower, section 91, page 746: "In those jurisdictions where a wife is entitled to dower in all lands of which her husband is seized at any time during coverture, provided there is no relinquishment of her dower right, the weight of authority holds that no adverse possession against the husband in his lifetime, however long continued, will bar the wife's dower."

Moreover, a widow is given ten years by statute to petition for the allotment of dower upon lands not in her actual possession following the death of her husband. G.S. 1-47 (5).

In the case of *Rook v. Horton, supra,* it is said: "Since the wife may not maintain an action for dower prior to the husband's death she is not put to her right of action against a disseizor during the coverture; and, therefore, adverse possession by a disseizor with or without color of title, after her marriage, does not bar or affect her right to dower." And her right to dower cannot be defeated or impaired by any act of the husband or by any title emanating from him. 17 Am. Jur., Dower, section 50, page 704, citing numerous authorities.

The reason why the ordinary statutes of limitation do not, unless otherwise provided, apply to dower is well stated in the case of *Williams v. Williams,* 89 Ky. 381, 12 S.W. 760, where the husband had lost his title to lands by adverse possession. The Court said: "The wife cannot be heard until she becomes a widow; and the law is unwilling to make the silence of a party deprive her of a right when it at the same time forbids her to speak. The statute of limitations is founded upon the idea that if one has a right, and neglects to avail himself of the remedy which the law affords within the time limited, it is presumed that he has abandoned the right. It would be unreasonable to divest the wife of her inchoate right of dower for non-action, when she has no power to protect or save it, and is guilty of no laches. If so, she would suffer from silence enjoined by law."

The petitioner is entitled to an accounting from the time J. Exum & Co. went into possession in 1932 until the death of her husband in 1950 for the sole purpose of ascertaining the value of the equity of redemption to which her right of dower attaches, however, upon the ascertainment of the value of the equity of redemption, the widow is entitled to an accounting of the *mense* profits from the death of her husband up to the assignment of dower. *In re Gorham,* 177 N.C. 271, 98 S.E. 717. With this modification, the judgment of the court below will be upheld.

Modified and affirmed.

WILL WIDENHOUSE, TRADING AS CAROLINA BUILDING & SUPPLY COMPANY, v. W. B. RUSS, SR., AND LELIA L. SMART.

(Filed 31 October, 1951.)

Laborers' and Materialmen's Liens § 10—

In a materialman's suit to enforce his lien asserted in accordance with statutory requirements, the owner may allege as a defense that because of defective materials and unworkmanlike construction she had been damaged to such extent that she owes the contractor nothing, and the striking of the allegations of the answer setting up such defense is error, since the materialman's lien is based on the substitution of his claim to the rights of the contractor against the owner. G.S. 44-6.

APPEAL by defendant Lelia L. Smart from *Phillips, J.*, at June Term, 1951, of CABARRUS.

Civil action to recover for building materials furnished defendant W. B. Russ, Sr., for use in constructing a building for defendant Lelia L. Smart on certain of her land in Cabarrus County, N. C., and to declare a lien therefor.

Plaintiff alleges in his complaint substantially the following:

(1) That on 2 September, 1949, Lelia L. Smart, the owner and in possession of certain described land in No. 10 Township of Cabarrus County, North Carolina, entered into a written contract with defendant W. B. Russ, Sr., for the erection of a concrete block building thereon, at price of $6,600.00, and later an oral contract for an addition to said building for the price of $390.00, making a total contract price of $6,990.00 for said building;

(2) That on 15 August, 1949, plaintiff entered into a contract with defendant W. B. Russ, Sr., to furnish certain building materials and supplies for use in the erection of said building,—plaintiff to receive pay therefor upon completion of the building; and that pursuant thereto plaintiff did, with knowledge of defendant Lelia L. Smart, so furnish materials for use, and used in construction of said building, the price of which amounted to the sum of $1,422.48;

(3) That though W. B. Russ, Sr., had completed the building and addition thereto, and defendant Lelia L. Smart has accepted the building from defendant W. B. Russ, Sr., all demands for payment for materials so furnished have been refused, and the whole amount is due with interest;

(4) That in March, 1950, plaintiff has duly filed a notice of materialman's lien on the said land and building, etc.

Defendant Lelia L. Smart, answering, denied in material aspects the allegations of the complaint, except as set forth in her further answer and defense. And she, in her further defense, averred:

"1. That during the early Fall of 1949 this defendant did enter into a contract with W. B. Russ, Sr., to erect for her a cement block building

upon the lands as described in paragraph 3 of the complaint, same to be a good and sufficient building in material and workmanship in every detail, and this defendant did agree to pay him the sum of $6,600.00 if he would build her a building according to their contract; and within a few days after said first contract, this defendant did make an agreement with W. B. Russ, Sr., for him to build a shed to the rear of said concrete building, and it was to be of good material and workmanship in all respects, for the sum of $390.00. . . .

"4. That about the time W. B. Russ, Sr., began the building, he came to this defendant and requested some money to pay for material and labor, whereupon this defendant paid him the sum of $800.00."

And in paragraphs 2, 3 and 5 she averred in substance that W. B. Russ, Sr., began the construction of the building during September, 1949, and erected same in such defective material and in such unworkmanlike manner as to render the building unfit for use, to her damage in such large amount that she owes to him nothing. She, thereupon, prays the court that in so far as she is concerned, the prayer of plaintiff be denied, and that she go without day.

When the cause came on for hearing in Superior Court motion of plaintiff "to strike from the further answer and defense of defendant Lelia L. Smart, all of paragraphs 2, 3 and 5 on the ground that it was immaterial and prejudicial and evidence would not be competent to prove same," was granted, and same were stricken. Defendant Lelia L. Smart objected and excepted. Exception No. 1.

Plaintiff proceeded to offer evidence over objection by defendant Lelia L. Smart. Neither she nor defendant Russ offered evidence. The case was submitted to the jury, and the jury answered the issues under peremptory instruction of the court, to which in detail and in so far as adverse to her, Lelia L. Smart objected and excepted.

Thereupon the court entered judgment that plaintiff have and recover of defendants the amount of $1,422.48, with interest from 24 October, 1949, until paid, declared same a lien on the said property of defendant Lelia L. Smart from the date the materials were first furnished, 15 August, 1949, and appointed commissioner to advertise and sell the property for purpose of satisfying the amount of the judgment, etc.

Defendant Lelia L. Smart appeals therefrom to Supreme Court and assigns error.

E. Johnston Irvin and Hartsell & Hartsell for plaintiff, appellee.

W. S. Bogle, Morton & Williams, and Marion B. Morton for defendant, appellant.

WINBORNE, J. The first assignment of error presented by appellant, based upon her exception to the ruling of the trial court in striking out

all of paragraphs two, three and five of her further answer and defense is well taken.

While the averments in paragraphs two and three are in the main evidentiary, they were not stricken for that cause. And the averments in paragraph five are sufficient to constitute a denial that she was indebted to defendant Russ in any amount on account of construction of building in question, and to admit of proof in the respects averred.

The statute G.S. 44-6 in pertinent part provides all subcontractors who furnish material for the building of any building or other improvement on real estate, have a lien on said house and real estate for the amount of material furnished, when notice thereof shall be given as provided by statute, which may be enforced as provided by the statute, but that "the sum total of all liens due subcontractors and materialmen shall not exceed the amount due the original contractor at the time of notice given." That is, the statute gives the lien against the property enforceable to the extent of the amount due from the owner to the contractor. *Brick Co. v. Pulley,* 168 N.C. 371, 84 S.E. 513; *Schnepp v. Richardson,* 222 N.C. 228, 22 S.E. 2d 555.

Hence it is material to ascertain and determine what amount, if any, was due by the owner, Lelia L. Smart, to the contractor Russ at the time of notices given. The ruling of the court in striking out the averments contained in the paragraphs in question, denied to her a substantial right.

If the contractor were suing the owner for the balance of contract price for the construction of the building in question, the owner could set up as a defense, claim for damages arising out of the failure of the contractor to construct the building in accordance with the terms of the contract.

And where the lien arises under the provisions of G.S. 44-6 it does so by substituting the claimant to the rights of contractor limited as therein stated. *Powder Co. v. Denton,* 176 N.C. 426, 97 S.E. 372; *Brick Co. v. Pulley, supra.*

Hence we hold that, for the purpose of ascertaining the amount due by the owner to the contractor at the time of notice given to the owner by a subcontractor or materialman, the owner may, in a suit by such subcontractor or materialman, set up, as a defense, any actual damages caused by the failure of the contractor to complete the building in accordance with the terms of the contract.

The cases cited and relied upon by appellee are distinguishable from, and are not controlling on case in hand.

Other assignments of error need not be considered.

For error pointed out, there must be a

New trial.

M. L. SKINNER v. GAITHER CORPORATION.

(Filed 31 October, 1951.)

1. **Arbitration and Award § 1a—**

An agreement to arbitrate all disputes, claims and questions arising in performance of the work is not an agreement to arbitrate the contract price for the construction of the building, and therefore action by the contractor to recover balance due on the contract in addition to amount due for labor and materials used in repairing and replacing plastering which fell, is not barred by the arbitration agreement as to the action for balance of contract price, at least, and demurrer for failure of the complaint to state a cause of action is properly overruled.

2. **Pleadings § 19c—**

If the complaint in any part or to any extent is sufficient to state a cause of action, demurrer thereto is properly overruled.

3. **Arbitration and Award § 1a—**

The Uniform Arbitration Act does not apply to an agreement to arbitrate differences under contract when the arbitration agreement is executed at the time of the contract, since the Act applies only to agreements to arbitrate executed after controversy has arisen. G.S. Chap. I, Art. 45.

4. **Arbitration and Award § 2—**

An agreement to arbitrate all disputes or questions arising under a contract incorporated into the contract as a part thereof cannot bar either party from maintaining an action for breach of the contract, since the courts will not decree specific performance of the agreement to arbitrate either directly or indirectly by refusing to entertain a suit prior to arbitration.

APPEAL by defendant from *Carr, J.*, May Term, 1951, CRAVEN. Affirmed.

Civil action to recover (1) balance due on contract to erect a building, and (2) amount due for labor and material used in repairing and replacing plastering and for commissions, heard on demurrer.

Plaintiff, a building contractor, agreed to erect a building on property of defendant for the contract price of $88,454. The written contract contained provision for the arbitration of "all disputes, claims or questions" subject to arbitration under the contract "in accordance with the provisions, then obtaining, of the Standard Form of Arbitration Procedure of The American Institute of Architects."

The architect was to make decisions on all claims of the owner or contractor and on all other matters relating to the execution and progress of the work or the interpretation of the contract documents and his decisions, except as to "matters relating to artistic effect" were made subject to arbitration on written notice and demand of either party.

After the building was completed and occupied by a tenant, part of the ceiling plastering fell. Plaintiff and defendant agreed that plaintiff should repair the ceiling, substituting Cellotex or fiberboard for the plaster and that the defendant would pay the plaintiff the cost of labor and material plus 10% commission unless it should be determined later that the falling of the plaster was due to the fault of the plaintiff. The question of responsibility was reserved for future determination under the original contract.

The total contract price of said repairs was $7106.56.

The plaintiff instituted this action to recover said amount plus $2,000 alleged to be due on the contract price and in his complaint alleges the facts substantially as stated, except that the arbitration agreement is made a part of the complaint by reference only.

The defendant demurred for that the complaint fails to state a cause of action in that it is not made to appear that the plaintiff has complied with the arbitration agreement in the particulars specified in the demurrer; that in said contract it is stipulated "that the decision of the arbitrators shall be a condition precedent to any right of legal action that either party may have against the other"; and that under the contract plaintiff must first resort to arbitration before he may maintain this action.

The demurrer was overruled and defendant appealed.

Barden, Stith & McCotter, W. B. R. Guion for plaintiff appellee.
Worth & Horner, R. E. Whitehurst for defendant appellant.

BARNHILL, J. The amount to be paid to the plaintiff for constructing the building and the balance, if any, still due and unpaid thereon are not subject to arbitration under the contract. Plaintiff sues, in part, to recover an alleged balance due. In this respect, in any event, the complaint is sufficient to repel the demurrer. *Mills Co. v. Shaw, Comr. of Revenue,* 233 N.C. 71, and cases cited.

But defendant insists that as to the repair bill the arbitration provisions of the contract prevail and preclude plaintiff's right to resort to the courts until after the arbitration is had as agreed by the parties. Its position in this respect is likewise untenable.

This is not a contract to arbitrate under the provisions of our Uniform Arbitration Act. That Act, G.S. Chap. 1, Art. 45, applies only to agreements to arbitrate controversies existing between the parties at the time of the execution of the agreement to adopt this method of settlement. Hence, decision here is controlled by our cases pertaining to contracts of this type to which the common law rule applies.

It is settled law in this jurisdiction, as in most others, that when a cause of action has arisen, the courts cannot be ousted of their jurisdiction

by an agreement, previously entered into, to submit the rights and liabilities of the parties to arbitration or to some other tribunal named in the agreement. *Kelly v. Trimont Lodge,* 154 N.C. 97, 69 S.E. 764; *Williams v. Manufacturing Co.,* 153 N.C. 7, 68 S.E. 902; *Nelson v. R. R.,* 157 N.C. 194, 72 S.E. 998; *Hargett v. DeLisle,* 229 N.C. 384, 49 S.E. 2d 739; *Brown v. Moore,* 229 N.C. 406; *Stephenson v. Ins. Co.,* 54 Me. 55; *Blodgett Co. v. Bebe Co.,* 26 A.L.R. 1070; Anno. 26 A.L.R. 1077 and 135 A.L.R. 80; Anno. 47 L.R.A. ns 352; 3 A.J. 871 (See numerous cases cited in notes).

At any time before an award is rendered under the contract, either party may elect to breach his contract, 3 A.J. 891, and seek his remedy in the tribunal provided by law, *Carpenter v. Tucker,* 98 N.C. 316; *Williams v. Manufacturing Co., supra; Tarpley v. Arnold,* 226 N.C. 679, 40 S.E. 2d 33; 3 A.J. 871, and "where the right of action is complete without an arbitration, an agreement is not taken out of the scope of the rule by an express stipulation that suit shall be subject to the condition that arbitration first be had." 3 A.J. 872.

The rule comes to this: The agreement of the parties to arbitrate is a contract. The relation of the parties is contractual. Their rights and liabilities are controlled by the law of contract. A breach of the contract may give rise to a cause of action for damages, but the contract itself is not a defense against a suit on the cause of action the parties agreed to arbitrate. *Carpenter v. Tucker, supra; Sprinkle v. Sprinkle,* 159 N.C. 81, 74 S.E. 739. In an action on the contract the courts will not decree specific performance of the agreement. Neither will they, by indirection, compel specific performance by refusing to entertain a suit until after arbitration is had under the agreement.

It is not amiss to note here that the courts uniformly recognize the difference between an agreement to arbitrate and a submission consummated by an award. After the agreement has been consummated by an award there can be no revocation. *Nelson v. R. R., supra; Williams v. Manufacturing Co., supra;* 3 A.J., sec. 41, p. 870. The award is binding on the parties and will be enforced.

It follows that the executory agreement to arbitrate controversies which might arise in the course of the fulfillment of the contract between the parties is no bar to this action.

The judgment overruling the demurrer is

Affirmed.

A. C. WARD T/A VICTORY CAB CO. v. MARTIN WESLEY CRUSE AND AKERS MOTOR LINES, INC.

(Filed 31 October, 1951.)

1. **Trial § 48½: Appeal and Error § 40b—**
The action of the trial court in setting aside the verdict in the exercise of its discretion is not reviewable.

2. **Trial § 51: Appeal and Error § 40b—**
The action of the trial court in setting aside a verdict for error of law committed in the trial is reviewable.

3. **Trial § 52½—**
After verdict the trial judge may dismiss the action only for want of jurisdiction or for failure of the complaint to state a cause of action.

4. **Trial § 26—**
The court may not dismiss the action for insufficiency of the evidence by judgment as of nonsuit after the jury has rendered its verdict.

5. **Appeal and Error § 51b—**
A rule established by decisions of the Supreme Court should not be departed from save for clear and compelling reasons, certainly not when the prevailing rule is as sound and free from objectionable features as the proposed rule.

APPEAL by plaintiff from *Sharp, Special Judge,* January-February Term, 1951, RANDOLPH.

Civil action to recover for damages to plaintiff's taxicab resulting from a taxi-tractor-trailer collision at a highway intersection.

On 13 October 1950 plaintiff was operating his taxi westwardly along Highway 49 near Asheboro on his way to "pick up" passengers at one Whitley's home near the intersection of Highways 49 and 64. Defendant Cruse, operating the corporate defendant's tractor-trailer, was following plaintiff about 250 or 300 feet to the rear. When plaintiff approached Highway 64, he slowed down and gave a hand signal of his intention to turn to the left. As he neared the intersection he cut to the center of the road "astraddle the white line" and began to turn to the left. Cruse proceeded to pass him on his right. About that time plaintiff heard some boys to his right whistle and, thinking they were his passengers, swerved back to his right to enter Highway 64 on that side. There was a sideswiping collision causing considerable damage to the right side of plaintiff's taxi. "The first contact of my car with his truck was right in the middle of the intersection."

The usual issues of negligence, contributory negligence, and damages were submitted to the jury which answered the first issue "yes," the second issue "no," and the third issue "$450."

Upon the coming in of the verdict, the court, on motion of defendants, set the same aside. The court then stated it was of the opinion the motion to nonsuit should have been allowed and thereupon entered judgment dismissing the action as in case of nonsuit.

Ottway Burton for plaintiff appellant.
H. M. Robins for defendant appellees.

BARNHILL, J. The trial judge set aside the verdict in the exercise of her sound discretion. Her action in so doing is not reviewable. *Riley v. Stone,* 169 N.C. 421, 86 S.E. 348; *Jones v. Insurance Co.,* 210 N.C. 559, 187 S.E. 769; *S. v. Caper,* 215 N.C. 670, 2 S.E. 2d 864.

The decisive question is this: Did the court below have authority to allow the motion to nonsuit and dismiss the action after the jury had rendered its verdict? This Court has consistently held to the negative view.

As stated, a trial judge may set aside a verdict in his discretion. He may set it aside as a matter of law for errors committed during the trial, and from this order the aggrieved party may appeal. *Culbreth v. Mfg. Co.,* 189 N.C. 208, 126 S.E. 419; *Akin v. Bank,* 227 N.C. 453, 42 S.E. 2d 518.

But it is settled law in this State that a trial judge may dismiss an action after verdict rendered only on two grounds: (1) want of jurisdiction, or (2) failure of the complaint to state a cause of action. *Riley v. Stone, supra; Jernigan v. Neighbors,* 195 N.C. 231, 141 S.E. 586; *Godfrey v. Coach Co.,* 200 N.C. 41, 156 S.E. 139.

When the issuable facts are settled by the verdict of the jury, the rights of the parties are thereby fixed and determined and the successful litigant is entitled to judgment on the verdict, subject only to (1) the right of the presiding judge to set aside the verdict, or to dismiss the action for want of jurisdiction or for failure of the complaint to state a cause of action, and (2) the right of the aggrieved litigant to appeal.

This rule applies to and forbids dismissal of the action by judgment as in case of nonsuit, after verdict, for insufficiency of the evidence. *Dickey v. Johnson,* 35 N.C. 450; *Riley v. Stone, supra; Vaughan v. Davenport,* 159 N.C. 369, 74 S.E. 967; *Nowell v. Basnight,* 185 N.C. 142, 116 S.E. 87; *Jernigan v. Neighbors, supra; Price v. Insurance Co.,* 201 N.C. 376, 160 S.E. 367; *Godfrey v. Coach Co., supra; Batson v. Laundry,* 202 N.C. 560, 163 S.E. 600; *Jones v. Insurance Co., supra; Bruton v. Light Co.,* 217 N.C. 1, 6 S.E. 2d 822.

The power of the court to grant an involuntary nonsuit is altogether statutory and must be exercised in accord with the statute. G.S. 1-183. *Riley v. Stone, supra.* While the motion is *in fieri* until verdict is

rendered, *Bruton v. Light Co., supra,* the ruling on the motion may not be reversed, *Price v. Insurance Co., supra,* or entered for the first time, *Jernigan v. Neighbors, supra; Batson v. Laundry, supra,* after the issuable facts are determined by the jury.

Of course, the question here presented involves a matter of adjective law, and the Court, in the beginning, might have adopted the procedure followed by the court below. It did not elect to do so. Each course has its merits. Both are subject to criticism. The writer has been among those who have looked with some disfavor on the prevailing rule. Even so, everything considered, it is the wiser rule. In any event, certainty in the law is much to be desired. For that reason, the Court should not depart from a long-established rule save for clearly impelling reasons. Certainly it should not do so when the prevailing rule is as sound and free from objectionable features as the alternate or proposed rule.

If the motion to nonsuit had been duly overruled and this Court, on defendants' appeal, had reversed, the cause would have been dismissed. Had this Court sustained the court below, the verdict and judgment would have stood. In either event, the litigation would have terminated.

Here the plaintiff can gain nothing that was not assured him had the prevailing rule been followed. Even if we entertained a contrary view on the merits of the motion to nonsuit and reversed on that ground, the verdict has been set aside and so the plaintiff would still be put to a new trial.

The judgment of nonsuit will be vacated and the cause restored to the civil issue docket for trial. At the rehearing the trial judge will be free to enter judgment as in case of nonsuit if he deems it proper so to do, unrestricted by anything said in this opinion.

Reversed.

STATE v. DAVID BROCK.

(Filed 31 October, 1951.)

1. Criminal Law § 22—

Where, in a prosecution for assault with a deadly weapon, a mistrial is ordered, defendant's plea of former jeopardy upon the subsequent trial is properly denied.

2. Criminal Law § 83—

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

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

APPEAL by defendant from *Harris, J.*, March Term, 1951, of EDGECOMBE. Affirmed.

The defendant was indicted for secret assault on J. D. Wyatt and several others, 16 September, 1949 (G.S. 14-31).

There was verdict of guilty of assault with a deadly weapon, and from judgment imposing sentence defendant appealed, assigning error in the denial of his plea of former jeopardy and in the admission of certain testimony.

Attorney-General McMullan, Assistant Attorney-General Moody, and Charles G. Powell, Jr., Member of Staff, for the State.

Robert S. Cahoon for defendant, appellant.

DEVIN, C. J. This Court is of the opinion unanimously that defendant's plea of former jeopardy was properly denied. *S. v. Dove,* 222 N.C. 162, 22 S.E. 2d 231; *S. v. Guice,* 201 N.C. 761, 161 S.E. 533. But the members of the Court are evenly divided in opinion (*Justice Valentine* not sitting) whether error in the admission of testimony as to declarations and conduct of Jim Cook in the absence of the defendant was prejudicial requiring a new trial. Hence the judgment of the Superior Court must stand affirmed, without becoming a precedent.

Judgment affirmed.

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

STATE v. DAVID BROCK, DEFENDANT, AND NATIONAL SURETY CORPORATION, SURETY.

(Filed 31 October, 1951.)

1. Appeal and Error § 6c (3)—

An exception to the "foregoing findings of fact" without pointing out any specific finding to which exception is taken is a broadside exception and is insufficient to challenge the sufficiency of the evidence to support the findings or any one or more of them.

2. Arrest and Bail § 8—

The fact that a mistrial has been ordered does not relieve the defendant of his obligation to appear at a later term after personal notice to do so, and will not support his contention that he had theretofore been put in jeopardy and was under no obligation to appear because the court had no further jurisdiction over him or the case, and forfeiture of his bail may be had for his failure to appear at the later term.

3. Same—

Subsequent arrest of defendant on a capias and the filing of a new bond does not relieve the surety on the previous bond of liability for failure of defendant to appear as required by law.

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

APPEAL by defendants from *Harris, J.*, March Term, 1951, of EDGECOMBE. Affirmed.

Judgment absolute on bail bond.

The defendant Brock was arrested charged with secret assault, and the defendant Surety Corporation signed bond 16 September, 1949, for his appearance at next term of Superior Court for Edgecombe County to answer indictment for secret assault and not depart same without leave. A mistrial of the case was ordered at October Term, 1949, and the case was continued from time to time until November Special Term, 1950, when the case was called and the defendant failed to appear. Judgment *nisi* was entered and *sci. fa.* and capias were ordered. *Sci. fa.* was served on defendant and his surety. Capias was served on defendant Brock 13 November and he gave a new appearance bond.

Defendant and his surety filed answer to the *sci. fa.* 4 December, 1950, alleging that Brock had at all times complied with the conditions of his bail, had at all times appeared in court when obligated to do so either in law or under the terms of his bail bond and had not departed the same without leave.

Judgment absolute for the penalty of the bail bond was entered against Brock and his surety March Term, 1951, of Edgecombe Superior Court, the judgment reciting that Brock was personally notified to appear at November Special Term as his case had been calendared for trial at that term; that he failed to appear, and was called out in open court 8 November, and *sci. fa.* issued against him and his bail; that answer was filed thereto as set out in the record; that capias was served on Brock 13 November, and that he could not be found prior to that date. The court further found that Brock without just cause willfully absented himself from court and failed to appear as he was bound to do. It was ordered that the judgment *nisi* heretofore entered against the defendant and his bail be made absolute for the amount of the bond.

Defendant and the National Surety Corporation excepted "to the foregoing findings of fact and judgment."

It further appears from the record that the notation in defendants' case on appeal that the findings of fact and judgment were made by the court without hearing evidence and over defendants' objection, was corrected by the State's exception to defendants' case on appeal, which exception became part of the record. From this it appears that at the hearing in

the Superior Court on the motion for judgment absolute, it was stated in open court in the presence of attorney of record for defendant and National Surety Corporation that the only defense set up in the answer was a general denial of failure to comply with the obligation of the bond, and that the State was ready to show by witnesses that Brock did not appear at November Special Term, 1950, though personally notified of the day and hour to appear. Upon inquiry by the court of defendants' counsel whether the solicitor's statement was controverted, defendants' counsel advised the presiding judge in open court that he did not controvert those facts but that it was his contention that Brock had been theretofore put in jeopardy and was under no obligation to appear as the court had no further jurisdiction over him or the case. Thereupon the court made the findings and rendered the judgment above set out.

Defendant Brock and National Surety Corporation appealed.

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

Robert S. Cahoon for defendant David Brock and National Surety Corporation, surety, appellants.

DEVIN, C. J. On the record before us the judgment absolute decreeing forfeiture of defendant Brock's bail bond, on which National Surety Corporation was surety, must be affirmed.

The writ of *scire facias* served on the defendant and his surety recited that judgment *nisi* had been rendered against them and they were commanded to appear and show cause if any they had why the judgment should not be made absolute. They answered with general denial of liability. When the matter came on regularly for hearing and the solicitor had indicated his readiness to offer evidence of defendant Brock's failure to appear, the court asked counsel for defendant and his surety whether these facts were controverted, to which counsel replied, in substance, that they were relying on defendant's plea of former jeopardy.

Thus it appears that the material facts which the court found and upon which judgment was rendered were not controverted. Hearing evidence thereon was waived. The record before the Presiding Judge showed that the defendant Brock had been duly called and failed to answer, that judgment *nisi* had been entered, and capias ordered at November Special Term, 1950.

Furthermore, appellants' general exception "to the foregoing findings of fact" failed to point any specific finding to which exception was taken, and may be regarded as a broadside exception. "Such exception presents nothing for review." *Hoover v. Crotts,* 232 N.C. 617, 61 S.E. 2d 705. "It is insufficient to challenge the sufficiency of the evidence to support

the findings, or any one or more of them." *Weaver v. Morgan,* 232 N.C. 642, 61 S.E. 2d 916.

The fact that a mistrial was ordered and the case continued at October Term, 1949 (*S. v. Brock, ante,* 390), did not relieve the defendant or his surety from his obligation to appear at a later term while the case was still pending. *S. v. Eure,* 172 N.C. 874, 89 S.E. 788. Nor would the subsequent arrest of Brock on a capias and the filing of a new bond relieve the surety. *Tar Heel Bond Co. v. Krider,* 218 N.C. 361, 11 S.E. 2d 291.

Judgment affirmed.

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

R. F. McLAWHON, GENTRY McLAWHON AND BERNICE McLAWHON, TRADING AS R. F. McLAWHON & SONS, v. H. I. BRILEY.

(Filed 31 October, 1951.)

1. Evidence § 39—

Prior negotiations are merged into the written contract, and parol evidence is not competent to contradict, vary or add to the terms as expressed in the writing.

2. Same—

If only a part of the agreement has been reduced to writing, parol evidence is competent to establish the unwritten part provided it does not contradict that part which has been written.

3. Same—

The signing of a receipt for machinery delivered does not preclude the purchaser from introducing parol evidence that the entire agreement was that the seller would deliver such machinery and also equipment to be used with it and without which the machinery delivered would be practically useless.

4. Contracts § 9: Sales § 9—

Where the jury finds that the agreement of the seller to deliver certain machinery together with equipment without which the machinery would be practically useless constituted an entire and indivisible contract, the delivery of the machinery alone because of the seller's inability to deliver the equipment contracted for entitles the purchaser to return the machinery delivered and to recover the partial payments made under the contract.

APPEAL by plaintiffs from *Carr, J.,* March Term, 1951, of PITT. No error.

Plaintiff sued for the balance due on certain farm machinery sold and delivered to defendant, consisting principally of a tractor, one 14-inch lift plow and one six-foot mower. The total charge was $1,752.10, on which defendant has paid $1,000, leaving $752.10 alleged to be due and owing.

The defendant admitted the receipt of the articles mentioned, but alleged that the plaintiffs had contracted to sell and deliver to him the tractor with full equipment necessary for use in farming, which included distributor and cultivator and other attachments, without which the tractor could not be profitably used. He alleged the contract for the tractor and full equipment was an *entire and indivisible contract*; that the plaintiffs delivered the tractor, plow and mower which defendant received and on which he paid $1,000, with the understanding that plaintiffs would obtain the equipment referred to and deliver to him within a few days; that plaintiffs failed to deliver this equipment and finally admitted their inability to do so; that he did not use the tractor and offers to return it upon repayment of the money advanced to them, and that the plaintiffs promised to repay the $1,000, but have not done so.

Plaintiffs replied that defendant had received all the equipment he purchased; that the cultivator and distributor were not included in the price of the machinery sold and delivered, and denied that they promised to refund the money paid by defendant. They alleged that defendant signed a written receipt embodying the contract for the articles delivered, and paid thereon $1,000.

Defendant, over objection, was permitted to testify as to the terms of the contract substantially as alleged in his answer. Issues were submitted to the jury and answered in favor of the defendant finding thereby that plaintiffs had sold the farm machinery described in the complaint under an indivisible contract providing for the sale and delivery of the additional equipment alleged in the answer; that plaintiffs had failed to deliver the additional equipment, and that defendant was entitled to recover $1,000 upon return of the machinery described in the complaint.

From judgment on the verdict, plaintiffs appealed.

Albion Dunn for plaintiffs, appellants.
James & Speight for defendant, appellee.

DEVIN, C. J. The plaintiffs challenge the validity of the verdict and judgment below chiefly on the ground that the court permitted oral testimony from the defendant as to the terms of the contract inconsistent with the written receipt signed by defendant when the machinery described in the complaint was delivered to him.

It is a well settled rule that when parties have reduced their agreement to writing parol evidence is not admissible to contradict it for the reason that the written memorial is the best evidence of what the parties have agreed to. *Evans v. Freeman,* 142 N.C. 61, 54 S.E. 847. Prior negotiations are deemed merged in the written contract of the parties, and the law excludes oral testimony which tends to contradict, vary or add to the terms as expressed in the writing. *Potato Co. v. Jenette,* 172 N.C. 1, 89 S.E. 791. Under this rule parol testimony as to communications or declarations of the parties at or before the execution of a written contract will not be received for the purpose of substituting a different agreement for the one expressed in the writing. *Potter v. Supply Co.,* 230 N.C. 1, (9), 51 S.E. 2d 908. But this rule applies only when the entire contract has been reduced to writing, for if merely a part has been written and the remainder rests in parol, it is competent to establish the latter by oral evidence, provided it does not contradict what has been written. *Evans v. Freeman, supra.*

Here, the defendant testified the plaintiffs orally contracted to sell and deliver to them certain farm machinery with necessary equipment; that the contract was entire and indivisible since a part of the machinery contracted for would be practically useless without the remainder; that when a portion of the machinery and equipment was delivered he merely signed a receipt showing that which was actually delivered.

We think the rule invoked by plaintiffs is inapplicable to the facts here shown, and that the evidence to which plaintiffs' exception was directed was competent. The issues submitted to the jury were those arising on the pleadings and testimony.

Defendant's contention that the plaintiffs' inability to deliver the other equipment contracted for and essential for use with the tractor absolved him from obligation to accept and pay for the parts delivered, was upheld by the jury.

Where the contract is entire the obligation imposed stands or falls as a whole (*Oil Co. v. Baars,* 224 N.C. 612, 31 S.E. 2d 854), and defendant would have the right to refuse to accept delivery of a part of the machinery contracted for as a compliance with the entire contract. Hence, the defendant upon return of the parts received would be entitled to recover the partial payments made on the contract, as found by the jury.

We have examined the other exceptions noted and brought forward in plaintiffs' assignments of error and find they afford insufficient ground to disturb the result.

No error.

STATE v. LEWIS SHINN.

(Filed 31 October, 1951.)

Criminal Law § 53f—

In a prosecution for violation of the liquor laws upon evidence obtained by an investigator for the State ABC Board, an instruction to the effect that it was commendable for a law enforcement officer to use all reasonable and proper means in the apprehension of violators and that his acts in so doing were to his credit rather than to his discredit, *is held* reversible error as an expression of opinion by the court as to the court's estimate of the witness. G.S. 1-180.

APPEAL by defendant from *Phillips, J.*, at April Term, 1951, of CABARRUS.

Criminal prosecution upon warrant charging defendant with unlawful possession of, unlawful possession of for purpose of sale, and selling intoxicating liquors.

Defendant entered plea of not guilty.

Upon trial in Superior Court the State introduced as witnesses two men, each of whom characterized himself as an investigator for the State ABC or State ABC Board. Their testimony tended to show that on night of 17 February, 1951, defendant had in his possession intoxicating liquors, and that one of them bought a pint of Calvert's whiskey from defendant, and paid him $3.00 for it; and that the sale took place in a certain room over Shinn's Grocery store in Kannapolis.

On the other hand, defendant, as a witness for himself, testified that he did not see either of the men, who testified for the State, on 17 February, 1951, and that he did not sell whiskey to either of them, or anyone else, on 17 February, 1951, or to them at any other time; and that the room described by them as the place of sale was not his room, but that of others. And defendant further testified, and offered other testimony which he contends tends to support him in his plea of not guilty.

The case was submitted to the jury.

Verdict: Guilty.

Judgment: Confinement in common jail of Cabarrus County and assigned to work under the supervision of the State Highway and Public Works Commission for six months,—suspended for a period of two years on conditions stated.

Defendant appeals therefrom to Supreme Court, and assigns error.

Attorney General McMullan, Assistant Attorney General Bruton, and Charles G. Powell, Member of Staff, for the State.

B. W. Blackwelder for defendant, appellant.

WINBORNE, J. Defendant takes exception to, and assigns as error that portion of the charge of the court to the jury which reads as follows:

"Now in regard to the evidence of a detective or officer who has on the face of it violated the law, but when he is under subpoena and comes in and testifies for that purpose, goes out and buys it for the purpose of prosecuting and a subpoena is served on him and he comes in and testifies under that subpoena, under the statute I have just read to you, then he is immune from prosecution and he is forgiven by the law for his violation in buying the whiskey.

"The court charges you that it was commendable on the part of a detective and it is commendable of a law enforcement officer to use all reasonable and proper means in the apprehension of those who are violating the law of the land, and when they do so in that spirit that will enable the law to place its hands upon offenders and violators, and it is to the credit rather than to the discredit of the persons so acting."

These instructions tend to bolster the witnesses for the State, and to impair the effect of defendant's plea of not guilty. Hence the exception is well taken. The instructions must be held to be violative of the statute G.S. 1-180 which declares that "no judge, in giving a charge to a 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." This inhibition has been applied uniformly in decisions of this Court, among which are these: *S. v. Dick,* 60 N.C. 440; *Crutchfield v. R. R.*, 76 N.C. 320; *S. v. Ownby,* 146 N.C. 677, 61 S.E. 630; *S. v. Cook,* 162 N.C. 586, 77 S.E. 759; *Chance v. Ice Co.*, 166 N.C. 495, 82 S.E. 845; *Bank v. McArthur,* 168 N.C. 48, 84 S.E. 39; *S. v. Rogers,* 173 N.C. 755, 91 S.E. 854; *Morris v. Kramer,* 182 N.C. 87, 108 S.E. 381; *S. v. Owenby,* 226 N.C. 521, 39 S.E. 2d 378; *S. v. Benton.* 226 N.C. 745, 40 S.E. 2d 617; *S. v. Woolard,* 227 N.C. 645, 44 S.E. 2d 29; *S. v. Dooley,* 232 N.C. 311, 59 S.E. 2d 808.

In *S. v. Ownby, supra* (146 N.C. 677), *Walker, J.*, for the Court wrote in this manner: "The slightest intimation from a judge as to the strength of the evidence, or as to the credibility of the witness, will always have great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial." This expression is quoted with approval in *S. v. Owenby, supra* (226 N.C. 521), and in *S. v. Woolard, supra.*

In *S. v. Benton, supra,* it is said that "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 . . . follow the use of language or from an expression calculated to impair the credit which might not

otherwise and under normal conditions be given to the testimony of one of the parties."

And it may follow the use of language or from an instruction calculated to strengthen the credit which might not otherwise and under normal conditions be given to the testimony of a witness.

Indeed, in *Crutchfield v. R. R., supra,* this Court expressly declared that "a judge ought not to state to the jury his estimate of a witness or how he appears to him."

"Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge' and the equally unbiased mind of properly instructed jury. This right can neither be denied or abridged," as stated by the Court in *Withers v. Lane,* 144 N.C. 184, 56 S.E. 855, and quoted in *S. v. Woolard, supra.*

No doubt the language appearing in the instructions under challenge was inadvertently used by the trial judge. Nevertheless, it is "the probable effect or influence upon the jury, and not the motive of the judge," that "determines whether the party whose right to a fair trial has thus been impaired is entitled to another trial." *S. v. Ownby, supra.*

Applying the provisions of the statute G.S. 1-180 as interpreted and applied in decisions of this Court, the conclusion that the charge under challenge is prejudicial to defendant is inescapable and, for error so pointed out, he is entitled to a new trial.

Other assignments of error are not considered since the matters to which they relate may not recur upon another trial.

New trial.

D. R. OBERHOLTZER v. GEORGE W. HUFFMAN.

(Filed 31 October, 1951.)

1. Damages § 10—

Special damages, which are the natural but not the necessary result of the wrongful act of defendant, must be pleaded with sufficient particularity to put defendant on notice.

2. Malicious Prosecution § 7—

In an action for malicious prosecution, plaintiff's allegations to the effect that he was imprisoned without privilege of bail for one evening and that the account of his arrest and the nature of the charges made against him were published in a newspaper having a wide circulation in the section and particularly in plaintiff's county, are proper allegations of special damage and are improperly stricken on defendant's motion.

APPEAL by plaintiff from *Rudisill, J.*, in Chambers, 24 March, 1951, CATAWBA. Reversed.

Civil action to recover damages for malicious prosecution, heard on motion to strike certain allegations in the complaint.

Plaintiff alleges facts sufficient to constitute a cause of action for malicious prosecution under a warrant charging the felony of embezzlement. He further alleges by way of damages that (1) he was imprisoned without the privilege of bail from the evening of 23 January to the morning of 24 January, 1951, and (2) an account of his arrest and the nature of the charges made against him was published in the Hickory Daily Record, a newspaper having a wide circulation throughout the Piedmont section of North Carolina and particularly in Catawba County where he resides.

The court below, on motion of defendant, ordered the latter allegations stricken from the complaint. Plaintiff excepted and appealed.

Theodore F. Cummings for plaintiff appellant.
George D. Hovey and G. A. Warlick for defendant appellee.

BARNHILL, J. Special damages, that is, damages which are the natural but not necessary result of the alleged wrongful act of the defendant, must be pleaded with sufficient particularity to put the defendant on notice. *Conrad v. Shuford,* 174 N.C. 719, 94 S.E. 424; *Binder v. Acceptance Corp.,* 222 N.C. 512, 23 S.E. 2d 894. This the plaintiff has done. The allegations stricken are a proper and necessary part of his complaint. Hence the order striking same must be

Reversed.

LUCIAN AUTREY, EMPLOYEE, v. VICTOR MICA COMPANY, EMPLOYER, AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CARRIER.

(Filed 7 November, 1951.)

1. Master and Servant § 43—Evidence held to sustain finding that claimant was first advised he had silicosis shortly before filing of claim.

Defendants contended that claimant was advised that he was suffering from silicosis some eight years prior to filing claim. The evidence tended to show that competent medical authority wrote to other doctors that claimant had some silicosis and that such authority advised claimant that he "might have silicosis" and that claimant filed a claim therefor with his former employer, which claim was dismissed, claimant being told that he did not have silicosis. Claimant testified that the first time he was informed that he had silicosis by competent medical authority was subsequent to the termination of his employment with defendant employer, and that he gave notice thereof to defendant a month later. *Held:* The evidence is sufficient to sustain the finding of the Industrial Commission

that claimant was first advised by competent medical authority that he had silicosis subsequent to the termination of his employment with defendant employer.

2. Same—

Where claimant is first advised that he had silicosis by competent medical authority some two and one-half years after he quit his employment because of disability, and he files claim for compensation with his employer a month after having been so advised, claimant's claim is filed in apt time. G.S. 97-58 (a), (b).

APPEAL by defendants from *Gwyn, J.*, at July Term, 1951, of MITCHELL.

Proceeding under the North Carolina Workmen's Compensation Act, Chapter 97 of General Statutes, for compensation, G.S. 97-57, for disablement from performing normal labor in the last occupation in which plaintiff was remuneratively employed, that is, by Victor Mica Company, G.S. 97-54, because of the occupational disease of silicosis. G.S. 97-53 (25).

The parties hereto stipulate, among other things, that plaintiff Lucian Autrey was, during the year 1945, an employee of Victor Mica Company at an average weekly wage of $35.00; that the company employed more than five people, and was subject to and bound by the Workmen's Compensation Act; that American Mutual Liability Insurance Company was compensation insurance carrier; that plaintiff filed his claim for compensation for disability from silicosis, and notified defendant employer by copy thereof, on 24 April, 1948; and that defendants deny that plaintiff has silicosis or any other lung disease resulting from his employment with defendant Victor Mica Company.

The proceeding was first heard by Chairman J. Frank Huskins, of North Carolina Industrial Commission at Spruce Pine, N. C., on 23 August, 1948, upon testimony of plaintiff, and Dr. C. D. Thomas, Medical Director of the Western North Carolina Sanatorium, admitted to be an "expert physician and surgeon in so far as t.b. is concerned," and Dr. E. H. Sloop, admitted to be an "expert physician and surgeon," and Dr. Otto J. Swisher, Director of Industrial Hygiene of the State of North Carolina, admitted to be an "expert physician and surgeon dealing with diseases of the chest and lungs," and upon certain records pertaining to examinations of plaintiff from files of the Western North Carolina Sanatorium and from files of Department of Industrial Hygiene of the State of North Carolina.

Plaintiff, Lucian Autrey, testified: That he is 39 years of age; that he was employed by Victor Mica Company in 1942, and last worked for them on 20 December, 1945, since which time he has been unemployed; that his job with this company for eighteen months was a truck driver

hauling mica from the plant in Yancey County,—loading cars; that he was exposed to dust, loading boxcars, and in the plant loading the truck; that for the remainder of the period '42 to '45 he fed the crusher and bagged on the inside of the plant,—the dust being a continual thing; that the nature of the illness that he contracted was shortness of breath; that he has not been able to work, nor has he worked any at all,—not even light work, for anybody since he was last employed by Victor Mica Company, because he hasn't had breath to work; and that he has been physically unable to do any work.

Plaintiff continued, saying that when he quit work in December, 1945, he went to several doctors, who treated him for asthma, and allergy to dust, and then in March, 1948, he had X-rays made by the Health Office; that that was when Dr. Thomas made report that he had silicosis; that this was the first time he had been informed that he had silicosis; that this was 24 March, 1948; that prior thereto he did not know, nor had he been advised by any doctor that he had silicosis; that he reported to Victor Mica Company in April, 1948, that he was suffering from silicosis; that since then his general physical condition has been worse; and that he is fifty-one pounds underweight,—doesn't sleep too good; and is unable to climb steps or to do any kind of work whatsoever.

Plaintiff also testified: That from 1935 to 1940 he worked for Tennessee Mineral Company in fine grinding department loading cars and bagging; that he was exposed to dust in that department,—just plenty of dust, foggy dust that surrounded his work, and that the effect on him was "just shorten your breath"; that before he worked for Tennessee Mineral he worked for Carolina Mineral Corporation six or seven or eight years, as a drill runner, mucker,—part of it open, and part of it was heading drill,—dry drilling all of it; and that it was pretty dusty—just a foggy dust, about all the time he worked.

The doctors were in disagreement as to whether or not plaintiff had silicosis. Dr. Thomas, basing his opinion on an examination made by him 6 May, 1948, gave it as his opinion in this manner: "X-ray of his chest shows on the right level of the first interspace small area of density which is suspicious of tuberculosis infiltration. There is a slight general accentuation of the trunks throughout both lungs, with very mild nodulation in their outline, probably due to very early silicosis . . . Whatever tubercular infection he has, in my opinion, is not a result of silicosis." And the doctor referring to X-ray films made in 1940 and 1942, said: "It was my opinion at that time that he did have a mild case of silicosis."

Dr. Thomas, on cross-examination, testified: (1) That the record of first examination of plaintiff by a doctor at the sanatorium is 13 June, 1940, following which Dr. S. M. Bittinger wrote letter 18 June, 1940, brief outline of which is: "We made X-ray pictures of Mr. Autrey's

chest and also obtained X-rays from the Division of Industrial Hygiene in Raleigh, which were made from 1936 to June 4, 1948 (patently 1938). These old films when compared with the present ones show, in my opinion, slight progression of the chronic lesion. In fact, I think there are present now definite nodulations which were not so evident in previous film, and I believe that Mr. Autrey has now definite evidence of pneumonokoniosis of the silicotic type, though I do not believe that it is very extensive as yet. I see no evidence of t.b."

(2) That on 30 October, 1940, in letter to Dr. J. T. McDuffie of Spruce Pine, N. C., Dr. S. M. Bittinger wrote: "Your patient, Mr. Lucian Autrey of Spruce Pine, was re-examined in the Sanatorium October 30, 1940. As you will remember, when Mr. Autrey was examined here 6-13-40, we found that he did not have any tuberculosis, though he did have some chronic lung fibrosis or bronchitis, the former we thought due to the changes from silicosis and we advised at that time that Mr. Autrey change his occupation and get some light work. Since his examination here, Mr. Autrey tells us that his condition has been just about the same. He still has a good deal of cough and expectoration, the latter with a streak of blood occasionally, and he also complained especially of dyspnea. His examination today and fluoroscopic study when compared with previous findings show practically no change has occurred in the lung pathology. Thus, we still believe that Mr. Autrey has no tuberculosis, and we also believe that he has some silicosis with quite a good deal of chronic bronchitis and a slight amount of pneumonosis. We advise that Mr. Autrey find some light work such as around a filling station or a job as a night watchman. I told him to talk the matter over with his former employers and see if they could not find some work of this nature for him to take up. I also told him I felt sure you would be glad to help him out in locating some such type of work. I also told Mr. Autrey he should be re-examined here in something like 5 or 6 months."

(3) That subsequent to October, 1940, the date of examination made by Western North Carolina Sanatorium is a chart of examination on 3-3-41, but there is no written report on it, and the doctor says, "I do not have any record of an examination made between 1940 and 1948."

Dr. Thomas also testified that subsequent to the examination, October, 1940, the next medical record he has on Mr. Autrey is a letter dated 29 November, 1940, addressed to the North Carolina Industrial Commission, in the case of *Lucian Autrey v. Tennessee Mineral Products,* following examination made in office of Dr. McDuffie at Spruce Pine, on 15 November, 1940, signed by Dr. H. F. Easom, member of Advisory Medical Committee, on the last page of which he says, "I do not think this is a case of silicosis."

And Lucian Autrey, plaintiff, being recalled, testified, "Speaking of the letter of November 29, 1940, that was at the time that I had the case pending against the Tennessee Mineral Products Company. I was told at that time that I did not have silicosis. Dr. Vestal told me that. I was not given a work card to go back to work until August '42. When I was given that work card, I went to work for Victor Mica Company. From then until December 1945 I was never refused one."

Then plaintiff, under cross-examination, continued: "I made a claim against the Tennessee Mineral Company in 1940. Dr. Bittinger, he said I might have some silicosis and he wanted me out of the plant. I made the claim against Tennessee Mineral Company because he said that I had some silicosis and I was not able to work in the plant . . . I didn't get to where I wasn't able to work for Tennessee Mineral Co. . . . I made a claim against them because they laid me off, wouldn't give me work, and I were making claim against them for silicosis at that time. I was a little bit short of breath at that time—not bad . . . I regained my breath in 1942. I didn't work any for two years—had no trouble at all in 1942. Breathed as good as I ever could . . . I didn't exactly know in 1942 when I went to work for Victor Mica Company what silicosis was. I had not been told by Dr. Bittinger that . . . a man that was short of breath might have silicosis . . . He said I might have silicosis . . . There was no trial to it. They just throwed it out . . . He told me I might have some symptoms of silicosis and he said he thought I should come out of the plant and work on the outside . . ."

Dr. Sloop, basing his opinion on his own examination, in his testimony stated that "it is my opinion then that he does have silicosis."

Dr. Otto J. Swisher, basing his opinion on X-ray films of examinations in his department, (1) 28 August, 1936, by Dr. Plyler, (2) 6 November, 1937, by Dr. Easom, (3) 4 June, 1938, by Dr. Vestal, (4) 28 July, 1942, by Dr. Vestal, and (5) 28 July, 1948, by himself, testified that the diagnosis of each was "essentially negative" to silicosis; that on 3 August, 1942, Autrey was given a work card; that he was approved for a work card 28 July, 1948; and that "in the five examinations we have made of Mr. Autrey we found no evidence of silicosis . . . that this man is not disabled by reason of anything pertaining to silicosis . . . This man is disabled, but his disability is in no way related to silicosis."

Thereupon, on 14 October, 1949, the hearing commissioner entered an order, in which after reviewing the differences in opinions expressed by the doctors, reserved decision and award of the Industrial Commission, until it shall have received a report from the Advisory Medical Committee, and then referred the case to the committee under "mandatory" provisions of G.S. 97-68,—directing the attention of the committee to the provisions of G.S. 97-69, G.S. 97-70 and G.S. 97-71 for strict com-

pliance and to "set forth its opinion regarding all medical questions involved in this case, and particularly the following:

"(1) Does the plaintiff have an occupational disease, to wit, silicosis?

"(2) If so, is the plaintiff actually incapacitated because of such occupational disease from performing normal labor in the last occupation in which remuneratively employed; that is, driving a truck and loading and unloading burlap bags filled with ground mica?

"(3) If the plaintiff has silicosis, has such disease progressed to such degree as to make it hazardous for him to continue employment in a dusty trade?"

The record shows that in a letter dated 27 December, 1949, to the Chairman of the North Carolina Industrial Commission, Dr. Swisher, Director of Division of Industrial Hygiene, reported that the full Advisory Medical Committee, naming them, met at the Division of Industrial Hygiene on 15 December, 1949, for a conference regarding plaintiff; that the committee had very thoroughly reviewed the case reports and medical findings, along with all X-rays from the first examination of 28 August, 1936, through that of 28 July, 1948, and has arrived at a final diagnosis; and that the answer to question #1 is "No"; and that the committee states that plaintiff does not have an occupational disease, to wit, silicosis.

However, the record also shows in letter dated 25 July, 1950, to North Carolina Industrial Commission, signed by all three members of Advisory Medical Committee, it is reported that at the request of the Commission the committee met at Spruce Pine, N. C. (Drs. Thomas and Swisher, Dr. Phillips, and one of plaintiff's attorneys being present) and examined plaintiff on 14 March, 1950, and is of opinion, "after studying the case as a whole, that the patient has moderately advanced silicosis, mild emphysema, chronic bronchitis, and lymphadenitis (etiology undetermined), and believes that he does have disability resulting from silicosis in the second stage."

Thereafter, Dr. Vestal appeared for the committee for examination and cross-examination, and testified, concluding, in pertinent part with this statement: "Our final finding, though, was that he had silicosis in the second degree, moderately advanced silicosis."

Thereafter on 19 September, 1950, Chairman J. Frank Huskins, as hearing commissioner, after reviewing the evidence and proceedings had, made findings of fact, in addition to those covered by stipulation of parties as herein first above stated, in pertinent part as follows:

"2. That from 1942 to 20 December, 1945, the plaintiff was regularly employed by defendant employer at an average weekly wage of $35.00. That plaintiff was exposed to silica dust in North Carolina for a period of two years or longer within the 10 years immediately preceding 20 De-

cember, 1945, within the meaning of G.S. 97-63; and was exposed to the hazards of silicosis while working for the defendant employer for as much as 30 working days, or parts thereof, within the 7 consecutive calendar months immediately preceding the last day of exposure on 20 December, 1945.

"3. That the plaintiff is now suffering from silicosis in its second stage.

"4. That plaintiff worked for defendant employer from 1942 to 20 December, 1945, and has been unemployed since he quit work for defendant employer on that date; . . . that all this work was carried on in the State of North Carolina and constituted an injurious exposure within the meaning of G.S. 97-57; that from 1935 to 1940, plaintiff worked for Tennessee Mineral Corporation in the fine grinding department, loading and bagging, and was exposed to silica dust during that period; that prior to 1935, he worked for Carolina Mineral Company for 6 to 8 years as a mucker and drill runner, doing dry drilling, and was exposed to silica dust during that period; . . . that plaintiff's work for Victor Mica Company was performed under conditions constituting an injurious exposure to the hazards of silicosis, and that his last injurious exposure, as defined in G.S. 97-57, occurred on and immediately prior to 20 December, 1945, while plaintiff was employed by defendant employer and while defendant carrier was on the risk.

"5. That 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 20 December, 1945.

"6. That plaintiff was first advised by competent medical authority that he had silicosis on or about 24 March, 1948, when Dr. Thomas wrote a letter to that effect.

"7. That plaintiff filed his claim for compensation, and notified his employer by copy thereof, on 24 April, 1948.

"8. . . . that plaintiff is therefore not a fit subject to rehabilitation under the provisions of G.S. 97-61, and is actually incapacitated because of silicosis from performing normal labor in the last occupation in which remuneratively employed."

And "upon all the stipulations, competent evidence, and the foregoing findings of fact, the commission makes the following conclusions of law:

"The question as to whether or not the plaintiff is suffering from silicosis is essentially a question of fact. It has been surrounded with much doubt and uncertainty since 1940, when Dr. Bittinger intimated that plaintiff had silicosis and a claim was filed against plaintiff's then employer. Dr. Vestal decided that plaintiff did not have silicosis at that time, plaintiff's case was dismissed, the usual work card was issued, and

plaintiff eventually returned to work for Victor Mica Company in 1942. He continued in that employment until 20 December, 1945, at which time he ceased working due to shortness of breath, loss of weight, and general physical inability to do the job. Then followed a period of medical treatment by various doctors finally culminating in X-rays of the lungs and an interpretation thereof in March, 1948, by Dr. C. D. Thomas, Director of the Western North Carolina Sanatorium at Black Mountain, who found plaintiff to be suffering from silicosis and so informed him. Medical opinion continued to disagree as to the presence of silicosis in plaintiff's lungs throughout the first hearing in this case on 23 August, 1949, and the controverted medical question was referred to the Advisory Medical Committee under the provisions of G.S. 97-68 through 97-71. That committee, composed of three eminent specialists in the field of lung diseases, made a detailed study of all X-rays of plaintiff's lungs from 1936 to date and took additional X-rays of their own. This committee's final conclusion is to the effect that plaintiff has moderately advanced silicosis, mild emphysema, chronic bronchitis, and lymphadenitis (etiology undetermined), indicating that his disability results from silicosis in its second stage.

"The commission therefore concludes as a matter of law that the plaintiff is suffering from silicosis in its second stage and that he is actually incapacitated because of that disease from performing normal labor in the last occupation in which he was remuneratively employed, that is, driving a truck and loading and unloading burlap bags filled with ground mica. He is therefore disabled within the meaning of G.S. 97-54, and due to the fact that he is now 39 years of age, trained and experienced only in the field of mining, possessing only a limited education, physically weak and underweight, there is no reasonable basis for the conclusion that he possesses the capacity of body and mind to work with substantial regularity during the foreseeable future in some gainful occupation free from the hazards of silicosis. He is thus an unfit subject for rehabilitation. . . .

"With reference to defendants' second contention, that plaintiff's right to compensation is barred by G.S. 97-58, the commission is of the opinion that plaintiff's claim was filed in apt time and that defendants' contention cannot be sustained. This aspect of the case, however, is not without difficulty, but our conclusion appears to be consonant with the legislative intent and with judicial interpretation."

Thereupon, and in conformity therewith, an award was made.

Defendants appealed therefrom to the full commission, which, after "review of the competent evidence, findings of fact, conclusions of law, and award made, adopted as its own the findings of fact and conclusions

of law of the hearing commissioner, and ordered that the result reached by him be affirmed,"—and that accordingly an award issue.

Defendants appealed therefrom to Superior Court, setting forth specific exceptions to certain findings of fact and conclusions of law,—and made motion to remand the proceeding to the Industrial Commission for specific finding whether, from the record in the case and particularly the evidence of Dr. C. D. Thomas, the plaintiff (claimant) was advised by Dr. Bittinger, in the year 1940, that plaintiff (claimant) had silicosis and should come out of the dusty trades on account thereof, and whether plaintiff (claimant) suffered a disablement in 1940 to 1942 from silicosis; and for a specific finding whether the plaintiff (claimant) was advised by competent medical authority in the year 1940 that he had silicosis.

Upon hearing in Superior Court, the presiding judge overruled each exception taken by defendants, and denied the motion of defendants to remand the proceeding, and affirmed the award of the Industrial Commission.

Defendants appeal therefrom to Supreme Court, and assign error.

W. C. Berry and Warren H. Pritchard for plaintiff, appellee.
Smathers & Meekins for defendants, appellants.

WINBORNE, J. Defendants, the appellants, state in their brief three questions as involved on this appeal, the first two of which call for express consideration,—decisions on which are determinative of the third.

I. It is insisted that the court below erred (1) in overruling defendants' exception to the finding of fact, No. 6, by the Industrial Commission that plaintiff was first advised by competent medical authority that he had silicosis on or about 24 March, 1948, when Dr. Thomas wrote a letter to that effect, and (2) in overruling defendants' motion that the cause be remanded to the Industrial Commission for a specific finding whether plaintiff was advised by competent medical authority in 1940 that he was under disablement from silicosis.

It is urged that this finding involves mixed questions of law and fact, which are not supported by the evidence, and that hence the award based thereon cannot be upheld. It is pertinent here to note that the statute G.S. 97-58 (b) provides that "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 the same."

In this connection it is contended that the record shows without contradiction that plaintiff was advised by Dr. Bittinger, in 1940, that he was under disablement from silicosis, and that, from the exhibits in the case and the medical reports, Dr. Bittinger was in the employment of the State of North Carolina, as Medical Director of the Western North

Carolina Sanatorium for tuberculosis at Black Mountain, and, hence, it is assumed that the court will take judicial notice of the public record of the State showing the appointment and employment of Dr. Bittinger in such capacity.

However, granting that Dr. Bittinger be a "competent medical authority" within the purview of the statute, G.S. 97-58 (b), as contended by defendants, the finding of fact No. 6 is tantamount to a finding that Dr. Bittinger had not advised plaintiff that he had silicosis. And the evidence shown in the record, when taken in light most favorable to claimant, is sufficient to support the finding as made.

True, it is made to appear from the Sanatorium records that Dr. Bittinger wrote two letters (1) 18 June, 1940, referring to examination of 13 June, 1940, in which he said: "I believe that Mr. Autrey has now definite evidence of pneumoconiosis of the silicotic type, though I do not believe that it is very extensive as yet"; and (2) 30 October, 1940, to Dr. McDuffie, in which he said: "We also believe that he has some silicosis with quite a good deal of chronic bronchitis and slight amount of pneumonosis." Neither of these letters appears to be addressed to plaintiff.

On the other hand, plaintiff, testifying on direct examination, stated that when Dr. Thomas made report that he, the plaintiff, had silicosis, this was the first time he had been informed that he had silicosis; and that prior thereto he did not know nor had he been advised by any doctor that he had silicosis. And in respect to the claim filed by him against Tennessee Mineral Products Company, plaintiff testified: "Dr. Bittinger . . . said I might have some silicosis and he wanted me out of the plant . . . I had not been told by Dr. Bittinger that a man that was short of breath might have silicosis . . . He said I might have silicosis . . . He told me I might have some symptoms of silicosis and he said he thought I should come out of the plant and work on the outside."

This testimony is positive and undenied.

II. Defendants also insist that the court below erred in overruling defendants' exceptions to the conclusions of the Industrial Commission holding, generally and in substance, that plaintiff's claim was filed in apt time, and that plaintiff should recover notwithstanding the provisions of G.S. 97-58 (a).

The question here presented is resolved against the contention of defendants on the authority of the case of *Duncan v. Carpenter,* 233 N.C. 422, 64 S.E. 2d 410.

In the *Duncan case,* opinion by *Denny, J.*, it is said: "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 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."

In the light of the above holding, the Industrial Commission finds, in the present case, that plaintiff is actually incapacitated because of silicosis from performing normal labor in the last occupation in which remuneratively employed, and concludes that he is thus disabled within the meaning of G.S. 97-54; that such disablement occurred at the time of plaintiff's last exposure on 20 December, 1945; that he was first advised on or about 24 March, 1948, by competent medical authority that he had silicosis; and that he filed his claim for compensation and notified his employer on 24 April, 1948.

Hence, the judgment from which appeal is taken is hereby

Affirmed.

R. J. CLINARD v. ROY LAMBETH AND MRS. ROY LAMBETH; JOE LAMBETH AND MRS. JOE LAMBETH; B. C. LAMBETH AND MRS. B. C. LAMBETH.

(Filed 7 November, 1951.)

1. Pleadings § 15—

A demurrer admits for its purpose the truth of the allegations of fact contained in the pleading and relevant inferences of fact necessarily deducible therefrom, but not conclusions or inferences of law.

2. Same—

Upon demurrer a pleading will be liberally construed with a view to substantial justice, giving it every intendment in favor of the pleader, and the demurrer will not be sustained unless the pleading is fatally defective. G.S. 1-151.

3. Highways §§ 3b, 11—

A complaint alleging that upon relocation by the State Highway and Public Works Commission of an old county road which had been maintained by the Commission, a segment of the old road was abandoned, and that defendants closed both ends of the segment of the old road running through their lands so as to leave plaintiff without ingress or egress to his lands, and praying mandatory injunction requiring defendants to reopen the road, *is held* not subject to demurrer on the ground that the cause of action was within the exclusive jurisdiction of the clerk of the Superior Court under the statutes relating to neighborhood public roads. G.S. 136-67 through G.S. 136-70.

4. **Highways § 3b—**

Where plaintiff alleges that the segment of road in question had been used for a highway for a period of twenty-eight years as a matter of right, and that upon abandonment of this segment of the road in its relocation by the State Highway and Public Works Commission, defendants closed both ends of the segment of road abandoned so that plaintiff was cut off from his farm with no way of ingress or egress, the complaint is sufficient to state a cause of action for mandatory injunction to compel defendants to reopen the segment of road notwithstanding the fact that plaintiff does not allege that he has a dwelling on his property.

5. **Injunctions § 6—**

Upon motion for the issuance of a temporary restraining order, both parties are entitled to a hearing on their respective affidavits.

6. **Appeal and Error § 40c—**

On appeal in injunction cases the findings of fact in the lower court are not conclusive, and the Supreme Court may review the evidence, but this will be done in the light of the presumption that the judgment and proceedings below were correct, with the burden on appellant to assign and show error.

7. **Injunctions § 1—**

Restraining orders may be prohibitory, to preserve the *status quo* until the rights of the parties can be determined, or mandatory, to require the party enjoined to do a positive act.

8. **Same: Injunctions § 6—**

A mandatory injunction will not be issued as a temporary or preliminary order except where the threatened injury is immediate, pressing, irreparable and clearly established or the party sought to be restrained has done a particular act in order to evade injunction which he knew had been or would be issued, a mandatory injunction being ordinarily in the nature of an execution to compel compliance with the final judgment upon the merits.

9. **Injunctions § 6: Highways § 3b—Evidence held not to show imminent injury justifying issuance of preliminary mandatory injunction.**

Where, in an action by plaintiff to compel defendants to reopen a segment of highway which they had closed at both ends on their lands after the segment of road had been abandoned by the State Highway and Public Works Commission, plaintiff contending that he was thus deprived of all ingress and egress to and from his property, it appears from the affidavits that no one had lived on plaintiff's land for a period of five years prior to the institution of the suit and that plaintiff had himself closed the road on his property for a year and had not removed the stakes on his property closing the road until a few days before institution of the action, *held*, the evidence fails to show such immediate, pressing, irreparable and clearly established right as to justify the issuance of a preliminary mandatory injunction to compel defendants to reopen the highway pending determination of the controversy upon its merits, defendants having controverted plaintiff's allegation that he was deprived of all ingress and egress

to and from his lands, and maintaining that the Commission and not defendants had removed culverts, etc.

APPEAL by defendants from *Phillips, J.*, holding courts of 15th Judicial district at Statesville, N. C., on 29 May, 1951.

Civil action (1) to recover damages for the alleged claim by defendant of a section of road abandoned by the State Highway Commission, and (2) for mandatory injunction (a) requiring defendants to re-open said section of the road and to put it in good condition, and (b) enjoining them from interfering with use of it by plaintiff and by the public.

Plaintiff alleges in his complaint that he is the owner of a tract of land in Trinity Township, Randolph County, North Carolina, containing approximately sixty-three acres, and having a frontage of approximately 2,500 feet on the Old Hopewell Public Road; that defendants own lands adjoining plaintiff's land and the Old Hopewell Road,—some of which fronts both sides of the road; that some distance north of land of defendants, the Roy Lambeths, said road begins to curve, and the curve continues in a southerly direction passing the lands of plaintiff and the lands of Joe Lambeth and Mrs. Joe Lambeth, and B. C. Lambeth and Mrs. B. C. Lambeth; that at the time plaintiff bought the lands above described, 23 March, 1936, the said Old Hopewell Road was being used and has been since used continuously and adversely by the neighbors living on the adjoining lands to defendants and plaintiff and by the general public as a main highway for past 28 years or more; that it was used as mail route; that it has been worked and kept up and improved by the public at public expense; that the public has used said road for said period of years without interference and as a matter of right and adversely to all persons whatsoever up and until recently, when the defendants attempted to close it; that on account of the unlawful acts of defendants in attempting to close said road, the plaintiff is cut off from his farm, the above described lands, with no way to get to and from his farm, or to the new road built by the State Highway Commission . . . in order to straighten and improve said Old Hopewell Road; that the said State Highway Commission has abandoned the section of the Old Hopewell Road on which plaintiff's lands abut; that the new section is in close proximity to the old road; that on account of the unlawful and wrongful acts of the defendants, plaintiff has been damaged in the sum of $2,000, and if that section of the Old Hopewell Road which has been unlawfully and wrongfully closed by defendants is allowed to stay closed plaintiff will be irreparably damaged; and that plaintiff is informed and believes that he is entitled to mandatory injunction requiring defendants to re-open and put in good condition said portion of said road, and permanently restraining them from interfering with the use of same by plaintiff and by the general public.

Wherefore plaintiff prays judgment (1) that he have and recover of defendants the sum of $2,000, (2) that an order be made by the court directing defendants to re-open and put in good condition that portion of said road they have attempted to close; and (3) for costs, and for other and further relief to which he may be entitled.

The cause was heard at Statesville, N. C., on an order requiring defendants to appear and show cause, if any they have, "why the injunction prayed for by plaintiff should not be granted until the final determination of the action." Both plaintiff and defendants offered affidavits—the verified complaint of plaintiff with attached map, being treated as such.

Plaintiff also stated, in his affidavit, that the State Highway Commission began in Fall of 1950 to rebuild the Old Hopewell Road from Trinity South, and, in order to straighten it, cut a new road across the lands of defendants, leaving his, the plaintiff's, land 298.40 feet from it; that he has no way to enter the new road since both ends of the segment of the old road on which his property abuts had been plowed up and closed by defendants; and that the Old Hopewell Road is the only way he has in going to and from his land.

On the other hand, the affidavits and photographs offered by defendants tend to show: That the Hopewell Road, a county road of Randolph County, constructed in 1921, was taken over on 1 July, 1931, for maintenance, and was maintained by State Highway Commission, which, upon its own initiative, relocated, straightened and re-constructed it; that as relocated it crossed defendants' land, and eliminated the segment constituting the curve which started on, and ran south through land of defendant Roy Lambeth to and along the east side of plaintiff's land to and through the lands of defendant Joe Lambeth, and of defendant B. C. Lambeth; that this segment of said road was abandoned by the State Highway Department, at which time it took up the culverts; that this segment of the road is no longer considered a county road under supervision of the State Highway Commission and in future will not be maintained by it, and, in so far as it is concerned, reverts to the abutting owners, as stated in affidavit of the Division Engineer of State Highway Commission under whose supervision the road was re-located; that plaintiff is the only property owner on the abandoned segment of the road affected by the change; that there is another passable road along the western side of plaintiff's property; that it parallels the road on the east; that the dwelling house that was on plaintiff's land, which he rented, burned in the year 1949,—since which no one has lived on the land; that the outbuildings on plaintiff's property are much nearer the road on the west than they are to the road on the east; that plaintiff's land has not been cultivated or farmed or used in any husbandry-like manner for a period of five years; that (as stated in affidavit of Curtis Reddick) the

only driveway entrance to plaintiff's property from the Hopewell Road before the relocation of it, was closed, at request of plaintiff, "one year ago," by stakes or posts driven into the ground across the driveway,—five of them, which remained there until a few days prior to the institution of this suit on 30 April, 1951, when plaintiff removed, or caused to be removed, the three center posts; that after the State Highway relocated the road, and abandoned portions of the road at end of defendant Roy Lambeth's property defendants resumed use of the property, and defendant Roy Lambeth erected a fence across the abandoned segment of the road at his line; that defendants never have committed any act themselves to render the Hopewell Road impassable; and that all things complained of by plaintiff were done by the State Highway Department, except the erection of the fence by defendant Roy Lambeth.

The court, at such hearing, entered an order in pertinent part as follows: "(And it appearing to the court from the allegations of the complaint that said public road described in the complaint has been adversely used by the plaintiff and his predecessors in title and the public generally for more than 50 years, and that by such adverse and continuous use by the plaintiff and the general public the plaintiff has acquired an easement in and over said public road or strip of land as described and shown on the map attached to the complaint). Exception by defendants to portion in parenthesis.

"It further appearing from the allegations of the complaint that unless the defendants are restrained from interfering with plaintiff's right to the free use of said public road, that the plaintiff will be irreparably damaged, for the reason that they have no ingress or egress to said farm.

"It further appearing to the court that the road in question (the Old Hopewell Road) enters the new road built by the State Highway Commission, both the north and south end of said Old Hopewell Road, and (the court is of the opinion that the plaintiff is only entitled to one end of the Old Hopewell Road and the new highway and he is given the election to choose which end he will take, and the plaintiff informs the court that he elects to take the north entrance to his property which passes in front of defendants' Roy and Mrs. Roy Lambeth's home). Exception by defendants to portion in parenthesis.

"Now, therefore, upon motion of John G. Prevette, attorney for the plaintiff, it is ordered, adjudged and decreed that (the defendants above named be, and they are hereby ordered to re-open the north portion of the Old Hopewell Road as alleged in the complaint and put it back into as good condition as it was prior to being closed, as alleged by the plaintiff). Exception by defendants to portion in parenthesis.

"It is further ordered, adjudged and decreed that the defendants above named be, and they are hereby restrained from interfering with the

plaintiff's free use and occupancy of the northern part of said road in going to and from his farm pending the trial of this cause.

"(It is further ordered that the defendants are given 18 days within which to re-open and put said portion of the road above mentioned in as good condition as it was before, including any culverts removed from said road when it was closed)." Exception by defendants to portion in parenthesis.

"To the signing of the foregoing judgment, and for errors assigned and to be assigned, the defendants except and appeal to Supreme Court and assign error."

Upon motion of defendants the court stayed action on the mandatory injunction, pending final disposition of defendants' appeal to Supreme Court,—defendants to execute *supersedeas* bond in amount of $500 within five days. Bond given.

Defendants also demur *ore tenus* to plaintiff's complaint for that:

"1. This court has no jurisdiction of the subject of the action in that it is alleged in the plaintiff's complaint that the road in controversy has been abandoned by the State Highway Department and it is provided in General Statutes, Chapter 136, Article 4, that the clerk of the Superior Court shall have original and exclusive jurisdiction of an action to re-open an abandoned country road.

"2. That the complaint does not state facts sufficient to constitute a cause of action against the defendants in that the plaintiff does not allege that he has a dwelling on his property without means of egress and ingress thereto and cannot as a matter of law maintain said action."

John G. Prevette for plainitff, appellee.

Schoch & Schoch and Ferree, Gavin & Anderson for defendants, appellants.

WINBORNE, J. I. At the threshold of this appeal the demurrer *ore tenus* comes up for consideration and decision.

"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, but the principle does not extend to the admissions of conclusions or inferences of law," *Stacy, C. J.*, in *Ballinger v. Thomas*, 195 N.C. 517, 142 S.E. 761. See also *McCampbell v. B. & L. Assn.*, 231 N.C. 647, 58 S.E. 2d 617, and cases there cited.

Too, 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 *King v. Motley,* 233 N.C. 42, 62 S.E. 2d 540.

Applying these principles to the complaint in the case in hand, we are unable to say that in no view of the case the court is without jurisdiction of the cause, or that the complaint fails to state facts sufficient to constitute a cause of action.

The contention of defendants, appellants, that since it is alleged in the complaint that the segment of the road in controversy has been abandoned by the State Highway Department, the General Statutes, Chapter 136, Article 4, vests in Clerk of Superior Court original and exclusive jurisdiction of an action to re-open it, does not follow. The statute G.S. 136-67 defines what is a neighborhood public road, and as so defined declares that such roads shall be subject to all the provisions of G.S. 136-68, G.S. 136-69 and G.S. 136-70 with respect to the alteration, extension, or discontinuance thereof, and authorizes any interested party to institute such proceeding. However, it does not appear that the allegations of the complaint bring the abandoned segment of the road in controversy within the definition. The pertinent parts of the definition read as follows: "All those portions of the public road system of the State which have not been taken over and placed under maintenance, or which have been abandoned by the State Highway and Public Works Commission, but which remain open and in general use as a necessary means of ingress to and egress from the dwelling house of one or more families . . . and all other roads or streets or portions of roads or streets whatsoever outside the boundaries of any incorporated city or town in the State which serve a public use and as a means of ingress or egress for one or more families, regardless of whether the same have ever been a portion of any State or county road system, are hereby declared to be neighborhood roads . . . etc." And there is no allegation in the complaint that the abandoned portion of the road remains open and in general use "as a means of ingress to and egress from the dwelling house of one or more families," or serves "a public use and as a means of ingress or egress for one or more families."

And the contention that complaint does not state a cause of action against defendants in that it is not alleged that plaintiff has a dwelling on his property without means of egress and ingress thereto, is not tenable.

It is true that there is a provision in G.S. 136-67 which defines what portions and segments of old roads that do not come within the definition of "neighborhood public roads," as above recited, and which provides that "the owner of the land, burdened with such portions and segments of such old road, is hereby invested with the easement of right of way for such old roads heretofore existing." The first part of the proviso reads: "That this definition of neighborhood public roads shall not be construed

to embrace any street, road or driveway that serves an essentially private use, and all those portions and segments of old roads, formerly a part of the public road system, which have not been taken over and placed under maintenance and which have been abandoned by the State Highway and Public Works Commission and which do not serve as a necessary means of ingress to and egress from an occupied dwelling house are hereby expressly excluded from the definition of neighborhood public roads, and the owner . . .," etc. (as above stated).

Thus it appears that the allegations of the complaint fail to bring the abandoned segment of road in controversy within the definition of roads excluded from the definition of "neighborhood public roads" as set forth in the proviso.

But regardless of whether or not the segment of road in controversy comes within the proviso, the allegation of the complaint is that the public used the highway for a period of 28 years, or more, without interference and as a matter of right and adversely to all persons until recently, when defendants attempted to close it, and that by defendants so doing, he, plaintiff, is cut off from his farm, as aforesaid, "with no way to get to and from" it, or "to the new road built by the State Highway Commission." These allegations, admitted for the purpose of considering the demurrer, are sufficient to withstand the demurrer. Whether or not plaintiff is able to make good his allegations is not now of concern. He is entitled to an opportunity to do so. *Muse v. Morrison, ante,* 195. And when the facts are established, questions of law arising thereon, and bearing upon the relative rights of the parties in respect of the segment of the road in controversy, may then be determined.

II. Defendants challenge next the orders of injunction entered on the hearing on notice to show cause, etc., G.S. 1-492, and we hold properly so, on the ground, among others, that the judge not only failed to find any facts on which to base the orders, but founded the orders solely upon the allegations of the complaint.

When a motion for an injunction is made returnable before the proper judge for a hearing, the parties may appear before him at the time and place designated, and the motion is heard upon affidavits. Both parties, plaintiff and defendant, are entitled to a hearing on their respective affidavits. McIntosh's N. C. P. & P., Sec. 873, p. 991. But in the present case the language appearing in the orders would seem to show that the affidavits and photographic exhibits offered by defendants were not taken into consideration.

However on appeal in injunction cases the findings of fact, if made, by the judge of the Superior Court are not conclusive and the Supreme Court may "look into and review the evidence." Still there is a presumption always that the judgment and proceedings below are correct and the burden is upon the appellant to assign and show error. *Hyatt v. DeHart,*

140 N.C. 270, 52 S.E. 781; *Plott v. Commrs.*, 187 N.C. 125, 121 S.E. 190; *Sineath v. Katzis*, 219 N.C. 434, 14 S.E. 2d 418.

Looking into and reviewing the affidavits and exhibits offered by defendants, in the present case, the purport of which is summarized in the statement of the case hereinabove set forth, there is evidence of facts which bear materially upon the questions as to whether a prohibitory injunction, and a mandatory injunction, or either, should issue, and, if the latter, in what respect.

McIntosh, in his work on North Carolina Pleading and Practice in Civil Cases, treating of these forms of injunction summarizes the law as it prevails in this State as follows: "A prohibitory injunction is one that restrains a party from doing a particular act and preserves the *status quo* until the rights can be determined. This has always been the most usual form and the term 'injunction' carries with it the general idea of prevention . . .

"A mandatory injunction requires the party enjoined to do a positive act, and since this may require him to destroy or remove certain property, which upon a final hearing he may be found to have the right to retain, it is not so frequently used as a temporary or preliminary order. As a rule such an order will not be made as a preliminary injunction, except where the injury is immediate, pressing, irreparable and clearly established, or the party has done a particular act in order to evade an injunction which he knew had been or would be issued. As a final decree in the case it would be issued as a writ to compel compliance in the nature of an execution . . . The mandatory injunction is distinguished from a mandamus, in that the former is an equitable remedy operating upon a private person, while the latter is a legal writ to compel the performance of an official duty." McIntosh's N. C. P. & P. in Civil Cases, Sec. 851, p. 972. See also *Telephone Co. v. Telephone Co.*, 159 N.C. 9, 74 S.E. 636; *Woolen Mills v. Land Co.*, 183 N.C. 511, 112 S.E. 24; *Arey v. Lemons*, 232 N.C. 531, 61 S.E. 2d 596.

If it be that the land of plaintiff in the case in hand has not been cultivated or farmed or used in husbandry-like manner for a period of five years, and the dwelling house on it burned in 1949, and no one has since lived on the land, and the only driveway entrance to the land from the Hopewell Road was closed by plaintiff a year prior to May, 1951, the date on which the affidavits were executed, and remained closed until a few days before this suit was instituted, as shown by the affidavits of defendants, and not specifically denied by plaintiff, it would not seem that the injury to plaintiff, of which he complains against defendant, is so "immediate, pressing, irreparable, and clearly established" as to justify the extraordinary equitable remedy of preliminary mandatory injunction.

Moreover, it appears from defendants' affidavits that the culverts, which the court ordered defendants to replace, were taken up by the State Highway and Public Works Commission.

Furthermore, it appears from defendants' affidavits that they take issue with plaintiff as to his contention that he is without a way of ingress to and egress from his land.

In the light of the above, this Court holds that the order for mandatory injunction, from which appeal is taken, was improvidently entered, and is, therefore, set aside, and the cause remanded for further proceedings in accordance with law.

Error.

J. C. DELLINGER v. J. A. CLARK AND WIFE, IVA CLARK.

(Filed 7 November, 1951.)

1. **Judgments § 20a—**

After term, the presiding judge may not vacate a judgment entered during the term or substitute another therefor except in conformity with a proper proceeding brought for that purpose.

2. **Judgments § 19—**

Judgment may not be rendered out of the county except upon statutory authority or by consent of the parties appearing upon the face of the record.

3. **Appeal and Error § 22—**

The record on appeal imports verity, and the Supreme Court is bound by what it contains.

4. **Judgments § 19—Jurisdiction to render judgment out of term and district is coextensive with consent of parties.**

The court dictated his findings and judgment to the court stenographer, including the taxing of costs. Upon objection as to this phase, the court requested briefs on the matter of costs, and it was agreed that the stenographer should mail her transcript to the judge for signature, and it appeared of record that the parties agreed that the judge might enter judgment out of term and out of the district. *Held:* The consent of the parties was without limitation, and therefore the trial judge had jurisdiction to correct a finding and render a different judgment upon his conclusion that the judgment dictated to the reporter was erroneous, and the contention that he had jurisdiction to determine only the matter of costs out of the district and out of term is untenable, the presumption being in favor of jurisdiction, with the burden on the party asserting the contrary to show want of jurisdiction.

5. **Judgments § 20a—**

Where the judge dictates his findings of fact and judgment during term time, and it is agreed the stenographer should mail her transcript to him

under consent of the parties that he might render judgment out of term and out of the district, the matter is *in fieri* until final rendition of the judgment, and the judge has the power to alter his findings as contained in the transcript and to correct the judgment for error of law.

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

APPEAL by defendants from *Gwyn, J.*, at June Term, 1951, of BURKE.

Civil action for trespass, which, on answer filed, resolved itself into an action in ejectment to try title to land, involving issues of (1) the location of a disputed boundary line and (2) adverse possession.

The parties, by oral consent entered in the minutes as provided by G.S. 1-184, waived a jury trial and agreed that the court might hear the evidence, find the facts, and render judgment.

The case was the last one tried during the term, and the parties stipulated "that the Court might sign the Findings of Fact and Judgment . . . out of Term . . ." Nevertheless, the trial judge, before leaving the bench, announced his intention of finding and adjudging that the defendants had acquired by adverse possession two small corners of the land in controversy, and that the rest was owned by the plaintiff. It appears, however, that the judge later, and before signing the findings of fact and judgment, concluded that his original impression as to the validity of the defendants' claim of title by adverse possession was erroneous (in failing, *inter alia,* to take into consideration the rule that one adverse possession may not be tacked to another to make out title by prescription under color of title when the deed under which the last occupant claims title does not include the land in dispute. *Jennings v. White,* 139 N.C. 23, 51 S.E. 799). At any rate, by the findings and judgment as later signed by Judge Gwyn at Reidsville, it is found and adjudged that the plaintiff is the owner of all the land in controversy. The defendants, by this appeal, challenge the action of the court in signing, out of the county and out of the district, findings and judgment at variance with the court's intended decision as announced at the end of the trial. The single question raised by the appeal is whether the court had jurisdiction to enter such findings and judgment after expiration of the term at which the case was tried.

The case on appeal as settled by the court below discloses in substance these controlling factual recitals:

1. That at the conclusion of the trial and after the taking of evidence, including documentary proofs of title and the testimony of some ten witnesses, "arguments by counsel were addressed to the court, lasting approximately two hours or longer and relating to various disputed matters, among which was the taxing of costs."

2. "At various times during the arguments comments were evoked by the court. At one stage . . . the court remarked in substance that it was

half a mind to convene a special venire for the following Monday, and return to Morganton, impanel a jury and start the trial anew, striking out the agreement of the parties waiving jury trial . . ., to which remark counsel for the plaintiff kept silent, and counsel for defendant said, in effect, 'Oh, no, your Honor, don't do that,' and further and in the same exchange between counsel and court, counsel for the defendant suggested that the court take the case out of the district . . . and render verdict and judgment."

3. "In response to this suggestion from counsel for defendant, counsel for plaintiff expressed acquiescence, and the court thereupon dictated such an order to the stenographer . . . in words as follows: 'It is agreed that the Court might sign the Findings of Fact and Judgment out of the County, and out of Term, and mail same back.' "

4. "During the last several hours of the trial, the court dictated to the stenographer several proposed findings relating to more than one matter. At one stage of the proceedings the Court began the dictation of a portion of a proposed judgment in words taxing the defendants with all costs, although in the same proposed judgment allowing the defendants a small portion of the land by adverse possession. Upon urgent objection by counsel for the defendants, the Court reconsidered what it had already announced with respect to costs, and announced that it desired of both counsels briefs submitted upon the matter."

5. Before leaving Morganton on 21 June, the court "indicated that its judgment would be adverse to the plaintiff as to two corners of the land in controversy," and went back upon the land and pointed out to the surveyor these two areas, and "said areas . . . were actually surveyed and marked in the presence of the court." Thereupon, "the plaintiff gave notice to the Court of his intention to appeal from the proposed Findings of Fact and proposed Judgment to the extent, and in case, said Judgment may be favorable to the defendants. Whereupon, the Court, at Morganton on 21 June, dictated and signed" regular form entries of appeal to the Supreme Court for the plaintiff.

6. "As a result of extensive argument of the counsel and colloquy between counsel and Court, . . . a proposed draft of findings of fact and judgment as dictated by the Court was transcribed by the stenographer from her notes and pursuant to agreement by counsel . . . was sent by the stenographer to" Judge Gwyn at Reidsville, N. C., and later "counsel for the plaintiff sent the Court at Reidsville a brief appertaining to the question of cost, and also cited to the Court an authority with respect to the question of adverse possession."

The "proposed draft of findings and judgment" (transcribed by the stenographer and sent to the Judge) for the sake of brevity is omitted herefrom. However, it contains in substance these findings: (1) "that

the record title in the plaintiff is paramount . . . to the record title of the defendant"; (2) that no part of the land in controversy is "embraced in the defendants' deed"; but that (3) "a part of the land in controversy has been possessed by the defendant(s) and those under whom he claims adversely, . . . and as of right for a period of more than 20 years prior to the institution of this suit, and by virtue of such actual possession the defendant is now the owner thereof."

7. "Whereupon, at Reidsville, N. C., out of the district, in accordance with agreement of the counsel, the Court, considering the matter *in fieri*, signed and executed the Findings of Fact, striking from the stenographic draft certain portions," the portions so struck out being those indicating that the defendants have been in adverse possession of, and have thereby acquired title to, parts of the land in controversy.

8. This further recital appears in the statement of case on appeal, as settled by the court below: "The Court, upon further consideration, at Reidsville, concluded that the Court was in error in applying the principles of law relative to adverse possession. The Court considered that although it had announced what it intended as its Judgment, that final Judgment was not rendered until the Judgment was signed, and that it remained *in fieri*. By agreement of the parties, the question of costs was to be briefed and determined by the Court and the Judgment was to be signed out of the District. Thereupon, the Court signed the Judgment as appears of record, together with the findings of fact, as modified."

9. "At the same time that the Court signed . . . the foregoing findings of fact . . ., and at the same place, Reidsville, N. C., and pursuant to agreement of counsel, the Court signed and executed" two judgments thereon. These judgments, for the sake of brevity, are not copied herein. In substance they embrace the following:

The first judgment adjudicates "that the Findings of Fact heretofore made in this case be modified as follows: the findings that the defendants are owners of two small irregular parts of the lands in controversy are stricken"; (2) "that the defendants are not the owners of any portion of the lands in controversy"; (3) as to adverse possession, "that the possession of the defendants (a) was not sufficiently hostile and exclusive as to meet legal requirements"; or (b) if sufficiently hostile and exclusive, "the duration of such possession is not satisfactorily disclosed."

The second judgment refers to the findings of fact and adjudicates that the plaintiff is the owner and entitled to the possession of all of the land in controversy, describing it, and taxes the defendants with the costs.

To the findings of fact filed and the judgments entered by the court below, the defendants excepted and appealed, assigning errors.

Mull, Patton & Craven for plaintiff, appellee.
Horton & Carter and Russell Berry for defendants, appellants.

JOHNSON, J. It is settled law in this jurisdiction that after a term of Superior Court has ended, the presiding judge may not vacate a judgment entered during the term, or substitute another therefor, except in conformity with a proper proceeding brought for that purpose. *Bisanar v. Suttlemyre,* 193 N.C. 711, 138 S.E. 1; *Dunn v. Taylor,* 187 N.C. 385, 121 S.E. 659; *Ramsour v. Raper,* 29 N.C. 346. Nor may a judge of the Superior Court render judgment outside of the county in which the action is pending, unless authorized to do so by statute, or by consent of the parties. *Patterson v. Patterson,* 230 N.C. 481, 53 S.E. 2d 658; *Gaster v. Thomas,* 188 N.C. 346, 124 S.E. 609; *Brown v. Mitchell,* 207 N.C. 132, 176 S.E. 258. And where consent is relied upon as authority to sustain a judgment entered outside of the county, the facts in respect to the consent must appear on the face of the record. *Jeffreys v. Jeffreys,* 213 N.C. 531, 197 S.E. 8.

Here, it is conceded that the trial judge had no statutory authority to render judgment out of the county. But it does appear on the record that it was stipulated and agreed "that the Court might sign the Findings of Fact and Judgment out of the County, and out of Term, and mail same back." Where this appears, the judge's authority to enter judgment is coextensive with the consent conferred. *Gaster v. Thomas, supra* (188 N.C. 346); *Pate v. Pate,* 201 N.C. 402, 160 S.E. 450).

The defendants contend that the foregoing stipulation is insufficient to support the findings and judgment entered by the court. They point to these facts disclosed by the record: (1) that the judge before leaving the bench announced his intention to render judgment finding and adjudicating that the defendants had acquired by adverse possession two corners of the land in controversy, with the rest being owned by the plaintiff; (2) that the judge went with the parties and their attorneys upon the land and pointed out to the surveyor these two areas and had them actually surveyed out and marked in the court's presence; (3) that on returning to the courtroom the judge then dictated to the court stenographer his intended findings of fact and judgment in accordance with his previous announcement, with direction that the stenographer mail transcript of the dictation to him at Reidsville; (4) in concluding the dictation, the judge indicated that the defendants would be taxed with the costs; (5) that on objection by counsel for the defendants, the judge reconsidered his announcement as to costs, and requested counsel on both sides to submit briefs upon the question of costs; (6) that the plaintiff gave notice of his intention to appeal to the Supreme Court, and the judge dictated into the record his appeal entries.

The defendants urge that these facts appearing of record, it follows as a matter of law therefrom that the judge rendered judgment on all issuable matters before the term of court expired; that therefore nothing remained *in fieri* except the matter of costs. Thus, the defendants reason that when the judge left the bench, his authority over the case was expended, except as to taxing the costs and performing the ministerial act of signing the findings of fact and judgment as previously dictated to the court stenographer. (*Brown v. Harding,* 170 N.C. 253, p. 261, 86 S.E. 1010; *Belcher v. Cobb,* 169 N.C. 689, 86 S.E. 600). Accordingly, the defendants insist that the judgment later signed by the judge, in Reidsville, substantially modifying his previously announced findings and decision, is a nullity for want of jurisdiction.

But the stipulation authorizing the court to sign the findings of fact and judgment out of term and out of the county goes beyond the limits conceded by the defendants. The stipulation does not limit the court to any specific decision, announced or unannounced; nor does it relate to any specific phase or phases of the case. In fact, the record indicates that the stipulation was dictated into the record by the presiding judge after counsel for the defendants had suggested without qualification "that the Court take the case out of the District and render judgment and verdict."

The record on appeal imports verity, and this Court is bound by what it contains. *Southerland v. Crump,* 199 N.C. 111, 153 S.E. 845; *Tomlinson v. Cranor,* 209 N.C. 688, 184 S.E. 554.

The court below had the power to consider and inquire into the facts in respect to, and determine, subject to review, the question of its jurisdiction. *Jones v. Oil Co.,* 202 N.C. 328, 162 S.E. 741; 21 C.J.S., Courts, Sec. 113. And the court having acted in the matter, every presumption not inconsistent with the record will be indulged in favor of jurisdiction. *McKellar v. McKay,* 156 N.C. 283, 72 S.E. 375; 21 C.J.S., Courts, Sec. 96. See also *Henderson County v. Johnson,* 230 N.C. 723, 55 S.E. 2d 502; *Williamson v. Spivey,* 224 N.C. 311, 30 S.E. 2d 46; *Graham v. Floyd,* 214 N.C. 77, 197 S.E. 873. The burden is on the party asserting want of jurisdiction to show such want. 21 C.J.S., Courts, Sec. 96, p. 149.

It appears that the trial court interpreted the stipulation as holding *in fieri* the decision *in toto* until the final findings and judgment should be signed. Upon this record the contrary has not been made to appear. Therefore, the trial and judgment below will be upheld.

No error.

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

J. L. HAGAN v. L. B. JENKINS, MARY TAPP JENKINS, W. H. JONES AND LULA B. JONES, PARTNERS, TRADING AS JENKINS-JONES MOTOR COMPANY.

(Filed 7 November, 1951.)

1. Master and Servant § 6f—

In this action by an employee for wrongful discharge, plaintiff's evidence *held* not to show that he voluntarily terminated his employment or was guilty of such derelictions of duty as would justify his discharge, and nonsuit was properly overruled.

2. Master and Servant § 2b—

Upon acceptance of employment the law implies a promise or covenant on the part of employee to render in good faith efficient service and not to give legal ground for dismissal or discharge during the term of the employment, but an instruction to the effect that the law implies that the employee would fulfill his obligations in this respect is erroneous.

3. Appeal and Error § 22—

The record imports verity and the Supreme Court is bound by its contents.

4. Master and Servant § 6f—

Plaintiff was employed at a stipulated weekly salary plus additional incentive pay to accrue if he remained with the employer twelve months and planned to continue with the company thereafter. *Held:* In plaintiff's action for wrongful discharge, an instruction to the effect that plaintiff was not obligated to serve any specified time but that he would forfeit his right to incentive pay if he voluntarily quit or was discharged for inefficient service or other legal grounds, before the twelve month period, is erroneous, since the incentive pay would not accrue unless he remained in the employment for twelve months at least, and he cannot forfeit a right which had not accrued.

5. Trial § 31b—

The conclusion as to the law as expressed in an opinion of the Supreme Court is the guide and not the reasoning by which the conclusion is reached, and it is not always proper or permissible for a trial judge to charge in the language used by the Supreme Court in discussing the reasons for its conclusion in the case.

6. Master and Servant § 6f—

Where the contract of employment of plaintiff is at a weekly wage with incentive pay to accrue if he remained with the company twelve months and planned to continue in its employment thereafter, it is necessary upon the trial that it be determined whether the contract was one of employment from year to year or a hiring at will from week to week with the understanding that the employee was to receive the incentive pay if he remained with the company for at least twelve months, since until this question is determined the rights of the parties cannot be correctly adjudicated.

7. Same—

In an action for wrongful discharge in which defendant offers evidence of justification for the discharge for inefficient service, the court should define the terms "legal justification," "sufficient cause," and "wrongful discharge."

APPEAL by defendants from *Morris, J.,* June Term, 1951, LENOIR.

Civil action to recover loss of salary and incentive commission resulting from the alleged wrongful discharge of plaintiff.

Plaintiff, a parts salesman for defendants, was, on 1 January 1949, promoted to the position of manager of the parts department at $60 per week plus an additional incentive payment of 3% of the net profits of the company "before income taxes," the incentive payment to accrue if he remained with the company the entire twelve months and planned to continue with it thereafter.

On 23 June 1949, defendant W. H. Jones, manager of defendant company, notified plaintiff that he was being reduced to the rank of parts salesman and would not be entitled to his incentive commission at the end of the year. Jones requested him to sign a written waiver of his right to the commissions. Plaintiff refused to sign and was thereupon told that he was "through" with the company. This is plaintiff's version of the alleged discharge.

Defendant offered evidence of various derelictions of duty on the part of plaintiff as justification for the discharge—repair orders were lost, sales of parts diminished materially, defective Ford parts were not returned promptly, the inventory of parts readily salable was insufficient to meet current demands, and the like—which caused defendants substantial loss. They also plead and offer evidence tending to show that plaintiff voluntarily terminated his employment as manager and accepted his old position as parts salesman.

Plaintiff admitted some of the charges, such as the loss of repair orders and the depreciated volume of sales, but contended such apparent failures of his department to measure up to a reasonable standard in these respects was not due to causes which would justify his discharge.

The court submitted appropriate issues to the jury which were answered in favor of plaintiff. From judgment on the verdict, defendants appealed.

Thos. J. White for plaintiff appellee.

Jones, Reed & Griffin for defendant appellants.

BARNHILL, J. While defendants offered substantial evidence tending to show that plaintiff failed to perform his part of the contract, and

plaintiff made certain admissions in respect thereto, plaintiff's evidence is not such as to warrant the conclusion, as a matter of law, either that he voluntarily terminated his employment or was guilty of such derelictions of duty as would justify his discharge. On this record these are questions for the jury to decide. Hence the motion to nonsuit was properly overruled.

During its charge to the jury the court instructed it as follows:

"You will understand, of course, that upon the acceptance of such offer, if in fact you find such offer was made and the same was accepted by the plaintiff, the law itself implied or does imply that during the employment the employee, in this case the plaintiff, would in good faith render efficient service and that he would not give legal grounds for his dismissal or discharge from the service of defendants."

When plaintiff accepted employment as manager of defendants' parts department, the law implied a promise or covenant on his part to comply with, and render the services contemplated by, the contract; that he would render efficient, faithful, and continuous service; and in all other respects comply with and fulfill his part of the contract. *Ivey v. Cotton Mills*, 143 N.C. 189; Anno. 49 A.L.R. 474.

The law does not, however, raise any presumption or implication that plaintiff had performed the contract on his part and had not given any legal grounds for the termination of his employment.

The correct rule and the one stated by the court below are so similar in wording as to raise a conjecture that the error was due to a slip of the pen of the court reporter rather than a slip of the tongue of the judge. Insert after the words "does imply" the words "a promise or covenant" and we have a correct statement of the true rule. Even so, the record imports verity and we are bound by its contents as it comes to this Court.

The court also instructed the jury as follows:

"Under such incentive plan the plaintiff was not obligated to serve any specified time, but the penalty imposed upon him, if in fact you find such plan existed, for voluntarily quitting the employment of the defendants, or if he was discharged for inefficient service or other legal ground, he would have forfeited or did forfeit the rights accruing to him to participate in the incentive plan agreement."

No rights accrued to plaintiff under the incentive plan unless he remained with the company "the entire twelve months" and planned "to continue with the company." The defendants contend that plaintiff voluntarily abandoned the contract or quit without legal justification. To say that by so doing he incurred a penalty and forfeited a right that did not then exist presented a persuasive reason for the jury to find the discontinuance of the contract was not due to his fault.

No doubt the charge was prompted by what was said in *Roberts v. Mills,* 184 N.C. 406, 114 S.E. 530. But it is not, in every instance, proper or permissible for a trial judge, in his charge, to adopt the language used by this Court in discussing the reasons for its conclusion in a given case. *Quinn v. R. R.,* 213 N.C. 48, 195 S.E. 85. The conclusion as to the law, as expressed in the opinion, and not the reasoning, is the guide. Strictly speaking, there can be no forfeiture of a right which has not accrued. Hence the instruction involves an interpretation of the contract which might well have influenced the verdict of the jury.

We have taken note of the exception to this excerpt from the charge for another and more important reason. The plaintiff alleges a contract of hiring on an annual basis. The first issue is framed in accord with this allegation and the theory of the trial, with the exception of the noted departure, was that plaintiff was relying upon a contract that was to run from year to year.

It is evident that only the incentive plan part of the contract was reduced to writing. As to the oral provisions, the plaintiff merely testified he was promoted and was to receive $60 per week for his services.

Therefore, when plaintiff's testimony is considered as a whole, the court's conclusion that under the incentive plan plaintiff was not obligated to serve any specified time may constitute the correct interpretation of the contract. On the other hand, "the full twelve months" might possibly refer to the twelve months plaintiff had agreed to serve, if such was the fact. This we need not now decide. Indeed, the record does not leave us in position to decide with any degree of certainty.

The point is, the only interpretation the court placed on the contract is contained in this instruction and under its interpretation the contract was a hiring at will, or from week to week, with the understanding that plaintiff was to receive additional compensation if he remained with the company for at least twelve months. If it is or was this type of contract, the defendants were as free to discontinue the employment as plaintiff was to leave. They would be liable in damages only in the event they discontinued the employment for the ulterior purpose of depriving plaintiff of his incentive pay, and then only to the extent of such loss.

Thus it appears that the instruction is in direct conflict with the plaintiff's allegations, the theory of the trial, and other parts of the charge. Upon its correctness the rights of the parties in large measure depend. Neither plaintiff nor defendants can have a fair trial under the law until the question is settled and the case is disposed of under the rules applicable to the contract as it actually existed. This may resolve itself into an issue of fact for the jury to decide from the evidence under appropriate instructions from the court. This, as other questions, must be left for determination by the trial judge.

What, under the circumstances of this case, constitutes legal justification for a discharge of plaintiff and what a wrongful discharge? The exceptions of defendants are not sufficient to present these questions as they seek to do. However, as the terms "legal justification," "sufficient cause," and "wrongful discharge" are essential to a proper charge in this case, it would be well for the judge presiding at the next trial to define and explain their meaning as applied to the evidence in this case.

For the reasons stated there must be a

New trial.

MARY BEAN LUTHER v. ERVIN CHARLIE LUTHER.

(Filed 7 November, 1951.)

1. **Contempt of Court § 2a—**

A proceeding for contempt under G.S. 5-1 and a proceeding as for contempt under G.S. 5-8 are distinct, the first relating to acts or omissions having a direct tendency to interrupt the proceedings of the court or to impair the respect due its authority, and the latter to acts or neglects tending to defeat, impair, impede, or prejudice the rights or remedies of a party to an action pending in the court, the distinction being important because of difference in procedure, punishment and the right of review.

2. **Same: Contempt of Court § 7—**

Punishment for refusing to sign a consent judgment upon the court's finding that the consent judgment incorporated the agreement of the parties to settle the matters in litigation and that the refusal to sign same constituted misconduct by which the rights or remedies of the other party were defeated, impaired, delayed or prejudiced, is a punishment as for contempt under G.S. 5-8, and is appealable, G.S. 5-2 having no application.

3. **Waiver § 2—**

A waiver is the voluntary and intentional relinquishment of a known right.

4. **Contempt of Court § 7—**

The payment of a fine imposed in proceedings as for contempt to prevent having to go to jail is not a waiver of the right to appeal from the order.

5. **Contempt of Court § 2d—**

Where the parties to litigation agree to a settlement, but one of them refuses to sign the consent judgment embodying the terms of the agreement, such party may not be held as for contempt under G.S. 5-8, since such party is not a person selected or appointed to perform a ministerial or judicial service.

6. **Judgment § 1—**

A consent judgment is merely a contract between parties to litigation entered on the records of the court with its approval.

7. Contempt of Court § 2d—

In a suit for alimony without divorce the parties agreed to settlement. Thereafter plaintiff wife refused to sign the consent judgment incorporating the agreement, which included relinquishment of her dower. *Held:* She may not be held as for contempt in refusing to sign the judgment, since parol promises to surrender dower are unenforceable, G.S. 22-2, and since contracts between husband and wife made during coverture must be reduced to writing and adjudged not to be injurious to the wife, G.S. 52-12, G.S. 52-13, and therefore she cannot be held guilty of misconduct in refusing to execute a contract outlawed by the Legislature.

8. Same—

Contempt proceedings will not be entertained at the instance of a person attempting to coerce his adversary into making a contract.

9. Same—

A breach of contract, even though it be a refusal to sign a consent judgment embodying settlement of matters in litigation, cannot be held punishable as for contempt under G.S. 5-8.

APPEAL by plaintiff from *Bennett, Special Judge,* at the July Term, 1951, of the Superior Court of RANDOLPH County.

Proceeding as for contempt.

The facts are these:

1. The defendant, Ervin Charlie Luther, and the plaintiff, Mary Bean Luther, are husband and wife. Unhappy differences arose between them, and the defendant was bound over to the superior court of Randolph County on the charge of assaulting and seriously injuring the plaintiff with a deadly weapon with intent to kill.

2. The plaintiff forthwith sued the defendant in the superior court of Randolph County for alimony without divorce upon a complaint stating several matrimonial offenses, and the defendant answered, denying such offenses and pleading affirmative defenses.

3. The plaintiff made application to the presiding judge at the July Term, 1951, of the superior court of Randolph County for alimony pending the action. After hearing the affidavits and testimony relating to the application, the judge announced orally that "he found the facts to be as alleged by the plaintiff," and that he would sign an order during the term allowing her temporary subsistence from the estate or earnings of the defendant.

4. The plaintiff and the defendant thereupon parleyed for sometime. Counsel for plaintiff thereafter "stated in open court . . . that plaintiff had agreed to accept certain property and money in full settlement of all claims against the defendant . . . and that a consent judgment embracing said agreement was to be signed by the parties."

5. Subsequently the defendant tendered to plaintiff for signing a proposed consent judgment aptly phrased to transfer the defendant's shares in an electric stove, a refrigerator, and a washing machine to plaintiff; to bind the defendant to convey "his interest in . . . the homeplace in Randolph County, and his interest in 34 acres of land in Montgomery County" to plaintiff; to obligate the defendant to make specified payments totaling $194.00, including $94.00 for hospital and medical expenses incurred in the treatment of plaintiff for personal injuries allegedly inflicted on her by him; to release the "respective curtesy and dower interests" of the defendant and plaintiff "in and to any property owned now or in the future by the other"; and to release the defendant from liability to plaintiff "for alimony, support, maintenance, or for any other purpose whatsoever."

6. The plaintiff refused "in open court . . . . to sign a consent to (the proposed) judgment" tendered by defendant, and assigned as the reason for her refusal that the proposed judgment did not conform to the oral compromise agreement made by the parties.

7. The judge found as a fact "that said judgment substantially incorporates the agreement" between the parties; and concluded as matters of law "that said refusal . . . of the plaintiff constitutes a violation of duty and misconduct by which the rights or remedies of the defendant in the . . . cause now pending . . . may be defeated, impaired, delayed and prejudiced" and that by reason thereof "the plaintiff is in direct contempt of court." The judge thereupon entered an order fining plaintiff $50.00 for such "contempt of court."

8. The plaintiff excepted to the order and appealed from it to the Supreme Court, giving notice of her appeal in open court and assigning the order as error. As she noted her appeal, she paid the fine under protest to avoid commitment to jail for its nonpayment.

Ottway Burton for plaintiff, appellant.
Smith & Walker for defendant, appellee.

ERVIN, J. This question arises at the outset: Does G.S. 5-2 preclude the plaintiff from prosecuting this appeal from the judgment imposing the penalty upon her?

A person guilty of any of the acts or omissions enumerated in the eight subsections of G.S. 5-1 may be punished for contempt because such acts or omissions have a direct tendency to interrupt the proceedings of the court or to impair the respect due to its authority. A person guilty of any of the acts or neglects catalogued in the seven subdivisions of G.S. 5-8 is punishable as for contempt because such acts or neglects tend to

defeat, impair, impede, or prejudice the rights or remedies of a party to an action pending in court.

It is essential to the due administration of justice in this field of the law that the fundamental distinction between a proceeding for contempt under G.S. 5-1 and a proceeding as for contempt under G.S. 5-8 be recognized and enforced. The importance of the distinction lies in differences in the procedure, the punishment, and the right of review established by law for the two proceedings.

We are concerned on this appeal with only one of these differences, *i. e.*, the right of review.

The right of review in proceedings for contempt is regulated by G.S. 5-2, which denies to persons adjudged guilty of contempt in the superior court the right of appeal to the Supreme Court in all cases arising under subsections one, two, three, and six of G.S. 5-1, and also in those cases arising under subsections four and five of G.S. 5-1 where the "contempt is committed in the presence of the court." *S. v. Little,* 175 N.C. 743, 94 S.E. 680.

G.S. 5-2 has no application, however, to proceedings as for contempt under G.S. 5-8. *Cromartie v. Commissioners,* 85 N.C. 211. As a consequence, no legal impediment bars a person, who is penalized as for contempt, from obtaining a review of the judgment entered against him in the superior court by a direct appeal to the Supreme Court. Our decisions show that such right of appeal has been exercised in proceedings as for contempt without question for upwards of a hundred years. *Patterson v. Patterson,* 230 N.C. 481, 53 S.E. 2d 658; *Lamm v. Lamm,* 229 N.C. 248, 49 S.E. 2d 403; *Elder v. Barnes,* 219 N.C. 411, 14 S.E. 2d 249; *Smithwick v. Smithwick,* 218 N.C. 503, 11 S.E. 2d 455; *Dyer v. Dyer,* 213 N.C. 634, 197 S.E. 157; *S. v. Moore,* 146 N.C. 653, 61 S.E. 463; *In re Young,* 137 N.C. 552, 50 S.E. 220; *Green v. Green,* 130 N.C. 578, 41 S.E. 784; *In re Gorham,* 129 N.C. 481, 40 S.E. 311; *Delozier v. Bird,* 123 N.C. 689, 31 S.E. 834; *Cromartie v. Commissioners, supra; LaFontaine v. Southern Underwriters,* 83 N.C. 133; *Wood v. Wood,* 61 N.C. 538. The right was successfully invoked by the appellants in the comparatively recent proceeding entitled *S. v. Clark,* 207 N.C. 657, 178 S.E. 119, which is virtually on "all fours" with the case at bar.

Despite the legal conclusion recited in the order under scrutiny "that the plaintiff is in direct contempt of court," it is indisputable that this is a proceeding as for contempt, and not a proceeding for contempt. The order itself confesses as much, for it imposes the penalty on the plaintiff on the theory that her act offends this provision of subsection one of G.S. 5-8: "Every court of record has power to punish as for contempt . . . any . . . person in any manner selected or appointed to perform any ministerial or judicial service, for any neglect or violation of duty or

any misconduct by which the rights or remedies of any party in a cause or matter pending in such court may be defeated, impaired, delayed or prejudiced." Besides, the plaintiff's act does not bear any legal resemblance to any of the contempts enumerated in any of the subdivisions of G.S. 5-1.

Since this is a proceeding as for contempt, the plaintiff has the legal right to prosecute her appeal, unless she has waived it by paying the fine.

A waiver is the voluntary and intentional relinquishment of a known right. *Aldridge v. Insurance Co.,* 194 N.C. 683, 140 S.E. 706. A party to a proceeding as for contempt undoubtedly waives his right to have the judgment in the proceeding reviewed on appeal by voluntarily paying the fine imposed upon him by the judgment. But such is not this case. The record reveals that the plaintiff paid the fine under protest at the precise moment she noted her appeal from the order imposing it, and that she took this course to avoid being committed to jail until the fine was paid. Inasmuch as the payment was the product of coercion, we hold that the plaintiff did not waive her right of appeal by making it. If the law afforded the plaintiff no way out of her dilemma except that of forfeiting her right of appeal on the one hand or going to jail on the other, she might well exclaim with the poet: "Which way I fly is hell!" Our conclusion on this aspect of the case finds support in well considered opinions. *Bank v. Miller,* 184 N.C. 593, 115 S.E. 161, *State v. Winthrop,* 148 Wash. 526, 269, P. 793, 59 A.L.R. 1265.

This brings us to this final question: Do the facts found in the order show plaintiff to be guilty of an act or neglect made punishable as for contempt by G.S. 5-8?

This query must be answered in the negative. The plaintiff is not a person "selected or appointed to perform . . . ministerial or judicial service," and consequently the statutory provision invoked by the order, *i. e.,* subsection one of G.S. 5-8, does not apply to her. When all is said, the plaintiff acted wholly within her legal rights in refusing to give her consent to the judgment tendered by defendant.

The case made out against plaintiff by the findings is simply this: The plaintiff and the defendant made an oral contract to settle their lawsuit on agreed terms to be incorporated in a subsequent consent judgment; and the plaintiff breached the oral contract by withholding her consent when the proposed judgment embodying the agreed terms was drafted and presented to her for signing.

It is to be remembered that a consent judgment is merely a contract between parties to litigation entered on the records of the court with its approval. *Pack v. Newman,* 232 N.C. 397, 61 S.E. 2d 90.

The oral contract undertook to bind plaintiff to release her dower interest in the lands of the defendant, and runs afoul of the statute of

frauds, which renders parol promises to surrender dower unenforceable. G.S. 22-2; *Houston v. Smith,* 88 N.C. 312. In addition, the agreement is invalidated by the statutory requirements that certain contracts between husband and wife made during coverture must be reduced to writing and adjudged not to be unreasonable or injurious to the wife. G.S. 52-12, 52-13. The plaintiff cannot be held guilty of legal misconduct because she refuses to perform an oral contract outlawed by the legislature.

The defendant set the proceeding as for contempt in motion to compel the plaintiff to substitute a binding agreement for an invalid one, and the order penalizing the plaintiff runs counter to the sound rule that the court will not entertain contempt proceedings where the mover's purpose is to coerce his adversary into making a contract. *S. v. Clark, supra; Howard v. Durand,* 36 Ga. 346, 91 Am. D. 767. The order would not enjoy legal vitality, however, even if the agreement were binding on plaintiff. A breach of contract is not punishable as for contempt under G.S. 5-8. *Stanley v. Stanley,* 226 N.C. 129, 37 S.E. 2d 118; *Brown v. Brown,* 224 N.C. 556, 31 S.E. 2d 529; *Davis v. Davis,* 213 N.C. 537, 196 S.E. 819.

Randolph County will doubtlessly refund the fine to plaintiff on request. The order imposing it is hereby

Reversed.

J. BRUCE THOMPSON, WILLIAM B. THOMPSON AND JOHN W. THOMPSON, EXECUTORS OF THE ESTATE OF B. G. THOMPSON, DECEASED, v. PILOT LIFE INSURANCE COMPANY AND EZRA S. PATE, EXECUTOR OF THE ESTATE OF J. H. GARDNER, DECEASED.

(Filed 7 November, 1951.)

1. Insurance § 26—

The assignee of an insurance policy pledged as additional security for a loan is entitled to pay premiums on the policy to protect his rights, and it is not necessary that he have an insurable interest in the life of the insured.

2. Pleadings § 10—

Matters which may be set up as a cross action, G.S. 1-137 (1), are subject to the same rules governing the joinder of causes, G.S. 1-123 (1), and it is required that the matters alleged in the cross action be so related to those alleged in the complaint that an adjustment of both is necessary to a full determination of the controversy, and be so related that the parties must be assumed to have had the matters alleged in the cross action in view when they dealt with each other, and further that there be a mutuality of parties.

3. Mortgages §§ 35c, 39e (2), 39e (8)—

The purchase, in effect, by a *cestui* at the foreclosure sale conducted by him as trustee renders the foreclosure voidable and not void, and the foreclosure can be avoided only by the mortgagor or his heirs and assigns, and accounting for rents and profits subsequent to foreclosure cannot be demanded until the foreclosure deed is first vacated.

4. Insurance § 36b (3): Pleadings § 10—Cross action held improperly alleged because of want of mutuality of parties and sufficient connection with plaintiff's cause.

In an action to determine the right to the proceeds of a life insurance policy as between insured's executor and the assignee of the policy pledged as additional security for a debt primarily secured by a deed of trust executed by insured, *held* the executor is not entitled to allege that the debt had been fully paid by reason of the assignee's taking title to the land at the foreclosure sale and the receipt of the rents and profits from the land after foreclosure upon his contention that the foreclosure was wrongful in that the assignee was a *cestui* in the deed of trust and, in effect, purchased at his own sale, since such cross action lacks mutuality of parties and has no such direct and immediate connection with the assignee's cause of action as to permit it to be set up as a cross action or offset.

5. Pleadings § 31—

Matters alleged in the answer which are improper as a cross action or as an offset to plaintiff's cause are properly stricken upon motion.

APPEAL by plaintiffs from *Burgwyn, Special J.*, April Civil Term, 1951, WAYNE.

This is a civil action to determine the rights of the parties with respect to the proceeds of a life insurance policy issued upon the life of J. H. Gardner and by him assigned to B. G. Thompson as additional security for a $10,000.00 note dated January 28, 1927, which note was secured by a deed of trust on real property.

The plaintiffs allege a foreclosure of the deed of trust on December 17, 1930, from which the note was reduced to $2,181.74. This balance with interest to October 1, 1950, amounts to $4,772.19, which balance plaintiffs allege is unpaid. Plaintiffs further allege that all premiums on said insurance policy accruing from February 13, 1932, through February 13, 1950, were paid by B. G. Thompson, which premiums with interest to October 1, 1950, total $4,907.13. From the complaint it appears that the balance due on the original note, the premiums paid, and the accrued interest on the note and premiums to October 1, 1950, amount to a total of $9,679.32. Upon the death of J. H. Gardner, the plaintiffs, who as executors of B. G. Thompson had possession of the said policy, filed proofs of claim with the defendant, Pilot Life Insurance Company. After deducting a policy loan made to J. H. Gardner prior to the assignment, the sum of $4,399.97 is due under the policy, which amount the plaintiffs claim by virtue of the assignment of the policy.

The defendant, Insurance Company, admits liability and requests permission to deposit the amount due on the policy *in custodia legis.*

The defendant, executor of J. H. Gardner, filed an answer admitting the original debt, the execution of the deed of trust, and the assignment of the policy, and that the plaintiffs having possession of the policy filed the proofs of claim upon the death of J. H. Gardner, but denies the existence of a balance due on account of said indebtedness or on account of the payment of premiums, and pleads the three and ten years statutes of limitations. The further answer of the defendant, executor, contains the following paragraphs:

"First: That as this defendant is informed and believes, and upon such information and belief alleges, at the time the policy of insurance went into the possession of B. G. Thompson, this defendant's intestate was indebted to B. G. Thompson, William B. Thompson and John W. Thompson, in certain amounts; that the indebtedness was evidenced by a promissory note which was secured by a deed of trust to William B. Thompson, Trustee; that the deed of trust covered certain valuable lands of this defendant's intestate.

"Second: That the indebtedness due by this defendant's intestate to B. G. Thompson, and evidenced by said note, which was secured by said deed of trust, was due, in fact, to B. G. Thompson, William B. Thompson and John W. Thompson, who were operating under the firm name of B. G. Thompson.

"Third: That as this defendant is informed and believes, and upon such information and belief alleges, the deed of trust was in fact and in law a mortgage deed by reason of the fact that one of the *cestui que trust* was named in the deed of trust as trustee.

"Fourth: That under the deed of trust, or mortgage, whichever the instrument may have been, the Trustee or Mortgagee conveyed the property to John W. Thompson, who, in reality, was one of the beneficiaries, and was reconveyed to B. G. Thompson, who held title for himself, William B. Thompson and John W. Thompson. That thereafter B. G. Thompson held title to the property as Trustee for himself, William B. Thompson and John W. Thompson, having through John W. Thompson, purchased the same indirectly.

"Fifth: That at the time of the purported deed to John W. Thompson by William B. Thompson, Trustee, and by John W. Thompson to B. G. Thompson, the fair market value of the land was more than $25,000.00; that B. G. Thompson went into possession of the said land, and collected large amounts for the rents and profits for the same.

"Sixth: That as this defendant is informed and believes, and upon such information and belief, alleges, *by reason of taking title to the land, and*

by reason of various amounts of money paid to B. G. Thompson, by J. H. Gardner, all the indebtedness due B. G. Thompson, has been paid and satisfied.

"Seventh: That as this defendant is informed and believes, and upon such information and belief alleges, if there was any indebtedness due B. G. Thompson by J. H. Gardner, which had not been paid *by the receipt of the land, the rent and other payments,* then the indebtedness is barred by the ten-year statute of limitation, which statute of limitation this defendant pleads in bar of the plaintiffs' right to recover in this action.

"Eighth: That as this defendant is informed and believes, and upon such information and belief alleges, if there was any indebtedness due B. G. Thompson by J. H. Gardner, which had not been paid *by the receipt of the land, the rent and other payments,* then the indebtedness is barred by the three-year statute of limitation, which statute of limitation this defendant pleads in bar of the plaintiffs' right to recover in this action.

"Ninth: That if the plaintiffs' testate (*sic*) made certain payments of premiums on the policy of life insurance, which payments this defendant does not admit, and demands strict proof, this defendant is informed and believes that certain payments of premiums were voluntary acts on the part of the plaintiffs' testate, (*sic*) and that they were made at a time when the plaintiffs' intestate had no insurable interest in the policy." (Italics in paragraphs 6, 7 and 8 added.)

Plaintiffs in apt time and as a matter of right moved to strike from the further answer of defendant, executor, all of paragraphs 1, 2, 3, 4, 5, 9 and so much of 6, 7 and 8 as appear in italics, on the ground that such allegations contain improper, impertinent, irrelevant and immaterial matter and are prejudicial to the plaintiffs.

When the cause came on to be heard on the motion to strike, the court below denied the motion, and from the judgment plaintiffs excepted and appealed, assigning error.

James N. Smith for plaintiffs, appellants.
Charles P. Gaylor and J. Faison Thomson for defendant, appellee.

VALENTINE, J. This is not an action to recover from the estate of J. H. Gardner a balance due upon the indebtedness secured by the deed of trust, but is an action to establish the rights of the parties with respect to the proceeds of a life insurance policy assigned by J. H. Gardner to B. G. Thompson as security for the debt. Therefore, the statutory principle of law regulating the recovery of deficiency judgments (G.S. 45-21.36) has no application here.

The controversy is between the plaintiffs and the defendant, Ezra S. Pate, executor of J. H. Gardner. There is no dispute with the defendant, Pilot Life Insurance Company. Hence, the appellation "defendant" is hereafter used to designate only the defendant, Ezra S. Pate, executor of J. H. Gardner.

The policy of insurance was properly and lawfully assigned to B. G. Thompson by the insured as additional security for the loan. No insurable interest was necessary. He had a right to pay the premiums on the policy in order to keep it in force and protect his rights. *McNeal v. Insurance Co.*, 192 N.C. 450, 135 S.E. 300.

Plaintiffs' motion to strike draws into question the validity of defendant's cross action as it relates to the alleged wrongful taking of title to the land, receipt of rents and profits therefrom, and the payment of premiums on the insurance policy. This appeal challenges the correctness of his Honor's action in overruling plaintiffs' motion.

We must, therefore, consider whether the challenged allegations set up facts sufficiently related to the transactions involved in the original loan to bring the cross action within the purview of G.S. 1-137.

"The language of G. S. 1-123 (1), relating to causes which may be joined in the same action, and G.S. 1-137 (1), defining causes of action which may be pleaded as counterclaims, is substantially the same. The purpose and intent of each is to permit the trial in one action of all causes of action arising out of any one contract or transaction.

"Whether joined in the complaint with another cause of action or pleaded as a cross action, the claim must arise out of the contract or transaction sued upon by plaintiff or it must be connected with the same subject of action. Hence, decision on the one is authority on the other. . . . . It must appear that there is but one subject of controversy." *Hancammon v. Carr,* 229 N.C. 52, 47 S.E. 2d 614, and authorities cited.

The cross action must be so related to the matters alleged in the complaint that an adjustment of both is necessary to a full determination of the controversy. *Schnepp v. Richardson,* 222 N.C. 228, 22 S.E. 2d 555.

"To be connected with the subject of the action 'the connection of the case asserted in the counterclaim and the subject of the action must be immediate and direct, and presumably contemplated by the parties. . . . The connection must be immediate and direct. A remote, uncertain, partial connection is not enough to satisfy the requirements of the statute. . . . The connection must be such that the parties could be supposed to have foreseen and contemplated it in their mutual acts; in other words, that the parties must be assumed to have had this connection and its consequences in view when they dealth with each other.' " *Hancammon v. Carr, supra.* There must also be a mutuality of parties. *Hoyle v. Carter,* 215 N.C. 90, 1 S.E. 2d 93.

The transaction giving rise to plaintiffs' cause of action transpired at the time the loan was made and the policy of insurance assigned. The matter about which the defendant complains in his cross action occurred long after the transactions by which the original debt was created, and is bottomed upon subsequent wrongs charged against the plaintiffs and their testator. Hence, the alleged wrong committed by the plaintiffs in respect to the deed of trust and its foreclosure is not so related to the rights of the plaintiffs arising upon the assignment of the insurance policy as to bring defendant's claim within the purview of the statute.

It must be borne in mind that upon the death of the owner, title to his real estate vests in his heirs at law and not in his executor or administrator. If the foreclosure of the deed of trust was voidable, as hinted in defendant's cross action, this question could be raised only in a suit by the heirs at law of J. H. Gardner. *Council v. Land Bank,* 213 N.C. 329, 196 S.E. 483; *Smith v. Land Bank,* 213 N.C. 343, 196 S.E. 481. On this question the Court has said: "The sale of the mortgagee (*i. e.,* the sale under the power in the mortgage by the mortgagee to himself) is not void, but only voidable, and can be avoided only by the mortgagor or his heirs or assigns." *Joyner v. Farmer,* 78 N.C. 196; *Shuford v. Bank,* 207 N.C. 428, 177 S.E. 408; *Peedin v. Oliver,* 222 N.C. 665, 24 S.E. 2d 519, and cases cited.

Thus it appears that if defendant's further defense be treated as a cross action, the alleged cause of action rests in the heirs at law of defendant's testator, and, if considered as an offset, nothing could be due for rents and profits until the foreclosure deed is first vacated. So long as this deed is unassailed by those having a right to attack it, the purchaser may not be treated as a mortgagee in possession and required to account for rents and profits.

There is, therefore, in this case a lack of sufficient mutuality of parties and of direct and immediate connection between the cause of action of the plaintiffs and the cross action of the defendant. The matters contained in the further answer of the defendant and challenged by plaintiffs' motion do not constitute a defense to the cause of action alleged in the complaint and should have been stricken as irrelevant, immaterial and prejudicial matter. *Bank v. Stewart,* 208 N.C. 139, 179 S.E. 463.

The judgment of the court below is

Reversed.

HENRY M. WALKER v. AMERICAN BAKERIES COMPANY.

(Filed 7 November, 1951.)

1. Statutes § 5a—

Subsections of an act should be read together so as to harmonize them and give effect to each without repugnancy or inconsistency if possible.

2. Automobiles § 14—

Neither G.S. 20-150 (b) nor G.S. 20-150 (d) applies unless the driver is proceeding upon a curve, in which event if the curve is marked by a center line the driver is forbidden to drive to the left thereof, and if the curve is not so marked he may not drive to the left of the highway to pass an overtaken vehicle unless his view is unobstructed for a distance of 500 feet.

3. Same—

Where there is conflicting evidence as to whether the accident occurred on a curve and whether there was a center line on the highway, an instruction to the effect that if plaintiff had an unobstructed view for 500 feet or more the law did not prohibit him from driving to the left of the center line, must be held for prejudicial error.

4. Same—

Although G.S. 20-150 (b) and G.S. 20-150 (d) are designed primarily to prevent a vehicle, in passing an overtaken vehicle, from colliding with another vehicle approaching from the opposite direction, the statutes are germane in an action involving a collision between overtaking and overtaken vehicles, since the driver of the overtaken vehicle is not required to anticipate that the other vehicle will attempt to pass in violation of statute.

APPEAL by defendant from *Phillips, J.*, and a jury, at the February Term, 1951, of the Superior Court of CABARRUS County.

Civil action to recover damages for injury to plaintiff's tractor-trailer combination allegedly caused by actionable negligence of driver of defendant's truck.

The accident occurred upon United States Highway No. 29 in Cabarrus County, North Carolina, on 8 December, 1949, when the plaintiff's tractor-trailer combination overtook and attempted to pass the defendant's panel truck, which was admittedly being operated by its regular driver on a business mission for the defendant.

The plaintiff's evidence made out this case:

The two vehicles were traveling south along the right side of the highway at a speed of 35 miles an hour, the tractor-trailer combination in the rear of the truck. On reaching a point where the highway was virtually level and straight, the plaintiff observed that the left side of the highway was clearly visible and free of oncoming traffic for about 600 feet ahead. The plaintiff forthwith gave the driver of the defendant's truck an audible warning with his horn of his intention to pass the truck,

and drove his tractor-trailer combination onto the left side of the highway at an accelerated speed in order to pass the defendant's truck, which was still proceeding southward along the right side of the highway. Just as the tractor-trailer combination was catching up with the truck, the driver of the truck swerved the truck sharply to the left without prior signal or warning, and entered upon the left side of the highway directly in front of the overtaking tractor-trailer combination for the apparent purpose of crossing the left side of the highway and going to a service station standing nearby. On being confronted by this emergency, the plaintiff turned his tractor-trailer combination to the left and drove it from the highway to avoid the impending collision with the truck. As a consequence, the tractor-trailer combination was overturned and substantially damaged.

According to the defendant's testimony, the accident happened in this way:

The driver of the southbound truck intended to visit the store of a customer on the left of the highway. After looking and listening in vain for approaching vehicles, and giving a hand signal from the left side of the truck during the last 100 feet traveled indicating his purpose to make a left turn across the highway at the store, the driver pulled the truck to the left. As the left front wheel of the truck crossed the center of the highway, the plaintiff's tractor-trailer combination came upon the scene from the rear at a speed of approximately 60 miles an hour, passed between the truck and the store, left the highway, and overturned.

The evidence for the plaintiff indicated that he attempted to pass the overtaken truck on a straight stretch of unmarked highway, whereas the testimony for the defendant tended to show that the accident occurred upon a curve in the highway marked by a visible center line placed upon the highway by the State Highway and Public Works Commission.

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

1. Was the plaintiff's vehicle damaged by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Was the plaintiff guilty of contributory negligence, as alleged in the answer? Answer: No.

3. What damage, if any, is plaintiff entitled to recover? Answer: $2,650.00.

The court entered judgment on the verdict, and the defendant appealed, assigning excerpts from the charge as error.

John Hugh Williams for plaintiff, appellee.
Hartsell & Hartsell for defendant, appellant.

ERVIN, J. The defendant deems the question of the sufficiency of the plaintiff's evidence to carry the case to the jury foreclosed against it by prior decisions. *Grimm v. Watson,* 233 N.C. 65, 62 S.E. 2d 538; *Pridgen v. Produce Co.,* 199 N.C. 560, 155 S.E. 247; *Stevens v. Rostan,* 196 N.C. 314, 145 S.E. 555. For this reason, it does not assign as error the refusal of the trial judge to dismiss the action upon a compulsory nonsuit.

Its counsel earnestly contend, however, that the judge committed error in giving the jury this instruction: "The court charges you if there was a solid line and if the plaintiff had a clear unobstructed view for a distance of 500 feet or more, the law did not require him to wait until he got away from this line before he could pass."

The driver of an automobile desiring to pass an overtaken vehicle must observe the statutory regulations which prohibit passing at certain places on the highway. Two of these regulations forbid the overtaking and passing of vehicles upon curves in the highway where specified conditions exist. They are as follows:

1. "The driver of a vehicle shall not overtake and pass another vehicle proceeding in the same direction . . . upon a curve in the highway where the driver's view along the highway is obstructed within a distance of five hundred feet." G.S. 20-150 (b).

2. "The driver of a vehicle shall not drive to the left side of the center line of a highway . . . upon a curve in the highway where such center line has been placed upon such highway by the state highway and public works commission, and is visible." G.S. 20-150 (d).

These regulations are parts of the same statute. It is a basic rule of statutory construction that "the various provisions of an act should be read so that all may, if possible, have their due and conjoint effect without repugnancy or inconsistency, so as to render the statute a consistent and harmonious whole." 50 Am. Jur., Statutes, section 363. See, also, in this connection: *Rice v. Panel Co.,* 199 N.C. 154, 154 S.E. 69; *Jones v. Board of Education,* 185 N.C. 303, 117 S.E. 37.

When this rule is applied in this case, it is evident that the statutory provisions under consideration are harmonious rather than conflictive. They are not designed to regulate the behaviour of the operator of an overtaking automobile in any event unless he is traveling upon a curve in the highway. Whether the one statutory regulation or the other applies to the driver of an overtaking vehicle proceeding upon a curve in the highway depends on whether the curve is marked by a visible center line placed upon the highway by the State Highway and Public Works Commission. Where the curve is so marked, the action of the operator of the overtaking automobile is governed by G.S. 20-150 (d), which forbids him to drive to the left side of the center line in order to pass the overtaken vehicle; and where the curve is not so marked, the conduct of the driver

of the overtaking automobile is controlled by G.S. 20-150(b), which permits him to pass the overtaken vehicle unless his view along the highway is obstructed within a distance of five hundred feet.

The instruction under examination would be unobjectionable if all of the testimony supported the plaintiff's contention that he overtook and attempted to pass the defendant's truck upon a straight stretch of highway. Furthermore, it would be harmless if all the evidence indicated that the event occurred upon an unmarked curve. But the defendant introduced testimony tending to show that the plaintiff undertook to pass the overtaken truck upon a curve in the highway marked by a visible center line placed upon the highway by the State Highway and Public Works Commission. In the light of this evidence, the wholly unqualified instruction that the plaintiff had the legal right to cross the center line in order to pass the overtaken truck constituted prejudicial error, entitling defendant to a new trial. The unqualified instruction nullified the provisions of G.S. 20-150(d).

Although the statute is designed primarily to prevent collision between an overtaking automobile and a vehicle coming from the opposite direction, its provisions are germane to litigation between an overtaking motorist and the driver of an overtaken vehicle if there is evidence to the effect that the underlying accident was occasioned by an unsuccessful effort on the part of the former to pass the latter upon a marked curve. The driver of the overtaken vehicle is certainly not required in such case to anticipate that the latter will attempt to pass in violation of the statute.

New trial.

A. ROCHLIN v. P. S. WEST CONSTRUCTION COMPANY, INC.

(Filed 7 November, 1951.)

1. **Trial § 25—**

Upon intimation of opinion by the court adverse to plaintiff on the law upon which the action is founded, or the exclusion of evidence offered by plaintiff which is necessary to make out his case, plaintiff may submit to nonsuit and appeal.

2. ***Frauds, Statute of, § 9: Vendor and Purchaser §§ 22, 24—***

While in the face of denial of liability parol evidence is not competent to establish an oral contract to convey realty for the purpose of obtaining specific performance, G.S. 22-2, it is competent for the purpose of determining whether the purchaser is entitled to recover the amount paid under such parol agreement which has been breached by the seller, and conversely whether the seller is entitled to retain the payment made for breach by the purchaser.

APPEAL by plaintiff from *Phillips, J.*, January Term, 1951, of IREDELL.

This action was brought to recover a deposit of $1,000 made with the defendant pursuant to the terms of an alleged parol agreement for the purchase of land which the plaintiff alleges the defendant refused to perform in accordance with the terms thereof.

The plaintiff alleges in his complaint that the plaintiff and defendant entered into an agreement on or about 20 January, 1946, "whereby the defendant agreed to erect and convey to the plaintiff a house and lot on East Front Street in the City of Statesville, North Carolina, with sidewalk and all improvements; the price to be between $10,000 and $11,000. The exact amount to be itemized and furnished to the plaintiff upon completion of the house; that pursuant to the above agreement, the plaintiff made a deposit of $1,000 to the defendant on the said house and lot; that sometime thereafter . . . the defendant tendered a deed and demanded of the plaintiff a balance of $12,000, making a total purchase price of $13,000, whereas, the agreement was between $10,000 and $11,000."

The defendant admits there was a verbal agreement entered into by and between the parties for the purchase and sale of the property referred to in the complaint. However, it denies that the amount of the purchase price was not to exceed $11,000 as alleged in the complaint. The defendant alleges in its answer that the house was to be constructed according to specifications furnished by the plaintiff on the basis of the actual cost of the labor and materials entering into the construction thereof, plus ten per cent and the agreed cost of the lot.

The defendant pleaded as an offset to the plaintiff's alleged cause of action damages in the sum of $1,000 caused to it by reason of the plaintiff's wrongful breach of contract.

At the trial below the plaintiff offered testimony tending to establish the terms of the parol agreement and upon objection by the defendant, the objection was sustained and a motion to strike allowed. The trial judge held that the purported contract was for the purchase and sale of real estate, and since the same was not in writing, the contract was inadmissible and the proffered evidence was inadmissible. To this ruling the plaintiff excepted and submitted to a nonsuit and appealed to the Supreme Court, assigning error.

Land, Sowers & Avery for plaintiff, appellant.
Scott & Collier and M. L. Nash for defendant, appellee.

DENNY, J. In our opinion there was error in the ruling of the trial judge. And where a judge intimates an opinion on the law which lies at the foundation of the action, adverse to the plaintiff, or excludes evidence offered by the plaintiff which is material and necessary to make

out his case, he may submit to a nonsuit and appeal. *Nowell v. Basnight,* 185 N.C. 142, 116 S.E. 87; *Chandler v. Mills,* 172 N.C. 366, 90 S.E. 299; *Hayes v. R. R.,* 140 N.C. 131, 52 S.E. 416; *Hickory v. R. R.,* 138 N.C. 311, 50 S.E. 683; *Tiddy v. Harris,* 101 N.C. 589, 8 S.E. 227; *Mobley v. Watts,* 98 N.C. 284, 3 S.E. 677.

This is not an action for specific performance, but one for the recovery of money paid to the defendant, as part of the purchase price of real property, pursuant to the terms of a parol agreement which the plaintiff alleges the defendant breached.

In the case of *Carter v. Carter,* 182 N.C. 186, 108 S.E. 765, the Court said: "We have solemnly adjudged in this Court, more than once, that where there is a parol contract to convey land, the full amount of the purchase money is paid, the vendee enters into possession and the vendor afterwards repudiates the contract by refusing to make a deed for the land, th purchaser may recover the price of the land so paid by him (*Improvement Co. v. Guthrie,* 116 N. C. 381), and further that where the vendor elects so to repudiate his parol contract by refusing to convey and sets up the Statute of Frauds, the purchaser may recover the amount paid by him for the land under his prayer for general relief, although the action be for specific performance."

In *Improvement Co. v. Guthrie,* cited above, it is said: "If A and B contract for the sale of the land by parol and the vendor elects to repudiate the contract, the vendee may recover back the amount he had paid under the contract . . . A parol contract for land is not void, except at the instance of the party who is allowed and does plead the statute, and neither party who repudiates the contract can take any advantage or benefit under it." *Wilkie v. Womble,* 90 N.C. 254; *Barnes v. Brown,* 71 N.C. 507; *Albea v. Griffin,* 22 N.C. 9.

In the last cited case the Court held that the payment of the purchase price, the taking of possession of the premises, and making improvements thereon would not entitle the vendee to specific performance of the parol agreement; and further held that "no action will lie in law or equity for damages because of nonperformance." Even so, the Court said: "We are nevertheless of the opinion that the plaintiff has an equity which entitles him to relief, and that parol evidence is admissible for the purpose of showing that equity."

Therefore, we hold that while the plaintiff is not entitled to establish his parol agreement with the defendant for the purpose of obtaining specific performance thereunder, G.S. 22-2, since the agreement as alleged is denied, *McCall v. Institute,* 189 N.C. 775, 128 S.E. 349; *Arps v. Davenport,* 183 N.C. 72, 110 S.E. 580; *Henry v. Hilliard,* 155 N.C. 372, 71 S.E. 439; *Miller v. Monazite Company,* 152 N.C. 608, 68 S.E. 1; he may do so for the purpose of determining whether he is entitled to re-

cover the amount he has paid the defendant under such agreement. And it is clearly evident this can only be done by oral testimony. *Luton v. Badham,* 127 N.C. 96, 37 S.E. 143; *Pass v. Brooks,* 125 N.C. 129, 34 S.E. 228; *Tucker v. Markland,* 101 N.C. 422, 8 S.E. 169; *Pitt v. Moore,* 99 N.C. 85, 5 S.E. 389; *Wilkie v. Womble, supra; Kivett v. McKeithan,* 90 N.C. 106. Cf. *Grantham v. Grantham,* 205 N.C. 363, 171 S.E. 331; *Grant v. Brown,* 212 N.C. 39, 192 S.E. 870. If, on the other hand, it is determined that the plaintiff has breached the parol agreement as alleged by the defendant, he will not be entitled to recover the amount paid thereunder. *Improvement Co. v. Guthrie, supra.* There is error in the ruling of the court below.

Error.

FURNIE HILL, EMPLOYEE, v. GEORGE DUBOSE, EMPLOYER, AND CONNECTICUT INDEMNITY COMPANY, CARRIER.

(Filed 7 November, 1951.)

1. **Master and Servant § 53b (1)—**

   Compensation for partial permanent disability should be based upon the loss of wage-earning power rather than the amount actually earned by the employee after maximum recovery from the injury, and where it is apparent that the recovery was based upon the amount actually earned, the cause will be remanded. G.S. 97-2 (i), G.S. 97-30.

2. **Master and Servant § 47—**

   The retention of jurisdiction by the Industrial Commission for a period of 300 weeks from the date of the accident for the purpose of showing decreased earning capacity due to permanent partial disability, is error.

APPEAL by defendants from *Stevens, J.,* February Term, 1951, of LENOIR. Remanded.

Claim for compensation under Workmen's Compensation Act.

It was admitted that the claimant, a carpenter, sustained a compensable injury by accident 15 July, 1949, when he fell from the roof of a building on which he was working resulting in fracture of some of the transverse processes in his spine. The defendants, employer and insurance carrier, accepted liability therefor and paid compensation for temporary total disability through 25 November, 1949. Thereafter, upon request of claimant, a hearing was had by the Industrial Commission for the purpose of determining whether he was entitled to additional compensation. After hearing the evidence of claimant and two physicians the Commission found that the claimant had reached the point of maximum recovery from the injury 25 November, 1949, and thereafter ceased to be

totally disabled, but that as result of his injury claimant sustained a permanent impairment of the function of his back to the extent of twenty per cent, and is partially and permanently incapacitated to earn wages which he was receiving at the time of his injury in same or any other employment; "that as result of his own efforts and as proceeds and wages from the work he has performed, the claimant has earned $7 per week from November 25, 1949, to July 18, 1950, the date of second hearing." The Commission awarded additional compensation under G.S. 97-30 at rate of $22.80 per week through 18 July, 1950, and in addition thereto ordered defendants to pay compensation to claimant at rate of sixty per cent of the difference between the wage he was earning before injury and the weekly wage he is able to earn after 18 July, 1950, at any time it is shown claimant is earning less due to his injury, within 300 weeks from date of accident.

The full commission sustained the hearing commissioner's findings and award, and on appeal to the Superior Court the action of the Industrial Commission was in all respects affirmed.

The defendants excepted and appealed to this Court.

Guy Elliott for plaintiff, appellee.
Smith, Sapp, Moore & Smith for defendants, appellants.

DEVIN, C. J. It is apparent from an examination of the findings and award of the Industrial Commission, which were in all respects affirmed by the court below, that the award of compensation now made was based upon a finding as to the amount the claimant had earned since the date on which total permanent disability had ceased, rather than upon his capacity or ability to earn.

The statute, G.S. 97-2 (i), defines disability as meaning "incapacity because of injury to earn the wages the employee was receiving at the time of injury in the same or any other employment." The rule of compensation for partial disability prescribed by G.S. 97-30 is that the employer shall pay "to the injured employee during such disability, a weekly compensation equal to 60 per centum of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter."

In *Dail v. Kellex Corp.*, 233 N.C. 446, 64 S.E. 2d 438, it was said: "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 (233 N.C. 372, 64 S.E. 2d 265). Loss of earning capacity is the criterion." Compensation must be based upon loss of wage-earning power rather than the amount actually re-

ceived. It was intended by the statute to provide compensation only for loss of earning capacity. Hence, the finding that claimant had earned $7 per week for the period from 25 November, 1949, to 18 July, 1950, was not the proper basis for determining the award under the statute.

The appellee concedes that in accord with the decision in *Dail v. Kellex Corp., supra,* the award of the Commission should be modified by eliminating the requirement that the case be held open for 300 weeks.

While in other respects the findings of the Industrial Commission were supported by the evidence, we think in the particulars pointed out there was error in affirming the conclusions and award of the Commission, and accordingly the case is remanded to the end that sufficient findings, and proper conclusions and award thereon may be made by the Industrial Commission as the basis for judgment.

Error and remanded.

STATE v. LUTHER "LUKE" KIMMER AND WILLIAM MATHIS, ALIAS WILL MATHEWS.

(Filed 7 November, 1951.)

Burglary § 10: Larceny § 6—

In a prosecution for breaking and entering and larceny, the admission in evidence of search warrants reciting the theft of articles not recovered and reciting affiants' belief that they were concealed on the premises of defendants, which recitals are not in corroboration of the testimony of the affiants upon the trial, *held* prejudicial.

APPEAL by the defendants from *Phillips, J.,* May Term, 1951, of IREDELL. New trial.

The defendants were indicted for breaking and entering and larceny. There was verdict of guilty, and from judgment imposing sentence the defendants appealed.

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

J. G. Lewis and Claud Hicks for defendants, appellants.

DEVIN, C. J. The evidence considered in the light most favorable for the State was sufficient to carry the case to the jury.

One of the material questions involved was the identification of property found in possession of the defendants as having been stolen from W. H. Renegar, the owner of the house alleged to have been entered. Separate search warrants had been issued for the premises of the two

defendants. The court properly held these were issued in substantial accordance with the statute and the evidence disclosed thereby competent.

The State, however, offered these warrants in evidence, and defendants' objection to their admission was overruled by the court. There was thus submitted to the jury to be considered as evidence the following statement of facts set forth in these warrants:

(1) "Ruby Johnson, Iredell County, on information and belief, being duly sworn, deposes and complains that on or about the 25th day of Dec. 1950, at Iredell County, certain property, to-wit: household and kitchen furniture, about $500.00 in money, including 3 gold coins of $10.00 denomination and other property of the value of approximately $1,000.00 dollars, was feloniously stolen, taken and carried away from the possession of W. H. Renegar; and the said Ruby Johnson, daughter, further deposes that she has reasonable grounds to believe the said property, or a part thereof, to be concealed on the premises of one Will Mathis, situated in Marsh Township, Surry County. And the said Ruby Johnson, on her oath, further deposes that the grounds for her suspicions are as follows: Said Mathis was seen with Kimmer, who has heretofore been apprehended on Renegar premises same time."

(2) "Whereas, W. H. Renegar of said County and State, has this day made affidavit before me, the undersigned, a Justice of the Peace of said County, that certain articles of personal property, to-wit: bed clothing, money, eight hundred pounds of wheat, cooking utensils, etc., were stolen from him on or about the 1st day of February, 1951, and that he has reason to believe that they are in the possession or on the premises of one Luke Kimmer, off Highway 601, in Davie County, N. C."

True, Ruby Johnson subsequently testified as a witness in the trial, but the only property she testified she found on the premises of Will Mathis, which she could identify as having belonged to W. H. Renegar, was four plates. Hence, the statements in the affidavit in the warrant as to the other property stolen, and that Mathis had been seen with Kimmer on Renegar's premises could not have served as corroborative of her testimony as a witness. Stansbury, sec. 51.

For the same reason the affidavit of W. H. Renegar set out in the search warrant for defendant Kimmer's premises that 800 pounds of wheat had been stolen and about which Renegar did not testify as a witness went beyond the permissible scope of corroborative evidence. *Bowman v. Blankenship,* 165 N.C. 519, 81 S.E. 746; *In re Stocks,* 175 N.C. 224, 95 S.E. 360; *State v. Scoggins,* 225 N.C. 71, 33 S.E. 2d 473.

We think there was error in submitting to the jury as evidence the facts set forth in these search warrants, and that there must be a new trial.

New trial.

GRACE BRIGGS v. BEN MEEKS BRIGGS.

(Filed 7 November, 1951.)

1. **Appeal and Error § 40d—**

The findings of fact of the lower court are conclusive on appeal when supported by evidence.

2. **Divorce and Alimony § 12—**

In the absence of proof of any ground for divorce either *a vinculo* or *a mensa,* the court correctly denies motion for alimony *pendente lite.*

3. **Same—**

Upon denial of motion for alimony *pendente lite* for want of proof of a cause for divorce either *a vinculo* or *a mensa,* the court has no authority to dismiss the action as in case of nonsuit, since the cause is not before the court on final hearing on the merits.

APPEAL by plaintiff from *Morris, J.,* June Term, 1951, LENOIR. Modified and affirmed.

Civil action for alimony without divorce and for counsel fees, heard on motion for an allowance *pendente lite.*

Jones, Reed & Griffin for plaintiff appellant.
Whitaker & Jeffress for defendant appellee.

BARNHILL, J. The court below, after hearing the evidence, made full findings of fact. The facts found are supported by the evidence offered and are binding on us. *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351, and cases cited.

On the facts found the court correctly concluded that the plaintiff has failed to make out any cause for divorce, either *a vinculo* or *a mensa.*

The existence of grounds for divorce is a prerequisite to any allowance to the wife under G.S. 50-16. To warrant an allowance *pendente lite* she must allege and prove a cause of action for divorce. *Cameron v. Cameron,* 231 N.C. 123, 56 S.E. 2d 384. In the absence of such proof, the court below properly denied her motion. *Butler v. Butler,* 226 N.C. 594, 39 S.E. 2d 745, and cases cited; *Blanchard v. Blanchard,* 226 N.C. 152, 36 S.E. 2d 919.

But the cause was heard on motion for subsistence and counsel fees *pendente lite.* It was not before the court on final hearing on the merits. Hence the court was without jurisdiction to dismiss the action as in case of nonsuit. To this extent the order entered must be modified. As so modified the judgment is affirmed.

Modified and affirmed.

J. B. SMOAK v. M. D. NEWTON AND JAKE NEWTON.

(Filed 7 November, 1951.)

Appeal and Error § 19—

On appeal from judgment dismissing an appeal for failure to serve statement of case on appeal in apt time, record containing only the judgment of dismissal, notice of the motion, the motion, affidavit filed, and appeal entry, is insufficient, there being nothing in the record to show date of termination of the term at which the original judgment was entered or record from which time for serving case on appeal may be calculated in determining the validity of the judgment of dismissal. Rule of Practice in the Supreme Court 19 (1).

APPEAL by plaintiff from judgment, dated 20 March, 1951, entered in this action by *Phillips, Judge* presiding at March Term, 1951, of Superior Court of RANDOLPH County, allowing motion of defendants to dismiss, and dismissing appeal to Supreme Court taken by plaintiff from a judgment also entered in this action at January Term, 1951, of said Superior Court for that, in accordance with finding of fact made upon hearing of the motion, statement of case on appeal on such appeal had not been served properly and in apt time.

An order, entered by the judge in settling case on appeal from the judgment of 20 March, 1951, rules that such appeal should, in addition to said judgment, consist of notice of the motion, the motion, an affidavit filed, and appeal entry signed 20 March, 1951. And the transcript of record and case on appeal to this Court contains nothing more.

Plaintiff appeals to Supreme Court, assigning error.

Ottway Burton for plaintiff, appellant.
Miller & Moser for defendants, appellees.

WINBORNE, J. Clearly the transcript of record on this appeal fails to meet the requirements of Rules 19 (1) and 20 of the Rules of Practice in the Supreme Court of North Carolina, 221 N.C. 543, at pages 553 and 557. The summons, the pleadings, and the organization of the court, and the judgment at the January Term, 1951, and the appeal entries from judgment then so entered, are all absent. And there is no record showing date of termination of the said January Term, 1951, or other record from which time for serving case on appeal from the judgment of January Term, 1951, may be calculated in considering the validity of the judgment at March Term, 1951, from which this appeal is taken.

Rule 19 (1) expressly requires "that the pleadings on which the case is tried, the issues and the judgment appealed from shall be a part of

the transcript in all cases." And in Rule 20, it is provided that even "memoranda of pleadings will not be received or recognized in the Supreme Court as pleadings, even by consent." And "where the pleadings are omitted from the record, the appeal must be dismissed." See *S. v. Lbr. Co.,* 207 N.C. 47, 175 S.E. 713; see also *Washington County v. Land Co.,* 222 N.C. 637, 24 S.E. 2d 338; *Ericson v. Ericson,* 226 N.C. 474, 38 S.E. 2d 517, where the authorities are assembled.

Whether plaintiff may now be entitled to a writ of *certiorari* as in *Chozen Confections, Inc. v. Johnson,* 220 N.C. 432, 17 S.E. 2d 505, is not here presented.

Appeal dismissed.

PERCY E. WILLIAMS v. FLOYD RAINES AND WIFE, THELMA NOE RAINES.

(Filed 7 November, 1951.)

1. Appeal and Error § 39b—

Assignments of error relating to an issue answered in appellant's favor can afford no ground for new trial.

2. Appeal and Error § 6c (6)—

Exception to misstatement of a contention must be entered in apt time.

APPEAL by plaintiff from *Morris, J.,* May Term, 1951, LENOIR.

Action for damages arising out of a collision of two automobiles at a street intersection.

Issues of negligence, contributory negligence, and damages were submitted to the jury. The jury answered each of the first two issues "yes." From judgment on the verdict plaintiff appealed.

Jones, Reed & Griffin for plaintiff, appellant.
Whitaker & Jeffress for defendants, appellees.

PER CURIAM. All of plaintiff's assignments of error, save one, are bottomed on exceptions to the charge of the court on the first issue. As the verdict on that issue was in favor of plaintiff, any error in the charge of the court in respect thereto is harmless and affords no cause for a new trial.

The lone exception to the charge on the second issue is directed to the statement of a contention. It does not appear that this exception was entered in apt time. In any event, we are unable to perceive that plaintiff was prejudiced thereby.

The jury, in a trial free from error on the second issue, has resolved the question of contributory negligence against the plaintiff. He must abide the result.

No error.

IN THE MATTER OF THE CUSTODY OF FRANCES EARLE BRINSON, JOHNNY EDWARD BRINSON, AND JOYCE ANITA BRINSON.

(No. 393, Fall Term, 1951)

APPEAL by Petitioner (Edna Earl Brinson) from *Frizzelle, J.*, 3 July, 1951, Lenoir Superior Court. From LENOIR County.

The purpose of the petition of *habeas corpus* by a divorced parent being declared to be to relieve her children from alleged restraint when committed by the court to the Junior Order Children's Home, no appeal lies from the order denying petition, and the attempted appeal therefrom is dismissed. *In re Thompson,* 228 N.C. 74; *In re Holley,* 154 N.C. 163.

This 17 October, 1951.

VALENTINE, J., for the Court.

IN THE MATTER OF: JOHN C. PHILLIPS, JR., CLAIMANT, CHARLOTTE, N. C.; WESTERN UNION TELEGRAPH COMPANY, EMPLOYER, CHARLOTTE, N. C.; STATE OF NORTH CAROLINA ON RELATIONSHIP OF THE EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RALEIGH, N. C.

(No. 532, Fall Term, 1951)

APPEAL by Employment Security Commission from *Sink, J.*, June, 1951, Regular Term of Mecklenburg Superior Court. MECKLENBURG County.

Appeal dismissed upon authority of *In re Mitchell,* 220 N.C. 65. This 7 November, 1951.

VALENTINE, J., for the Court.

WACHOVIA BANK & TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF DUNCAN CAMERON WADDELL, JR., DECEASED, v. VAUGHN A. WADDELL, WIDOW; MARY WADDELL JORDAN, WIDOW; KATE WADDELL, UNMARRIED; FRANCIS C. JORDAN; MARY JORDAN, UNMARRIED; JANET JORDAN, UNMARRIED; BETTY JORDAN JACOBS AND HER HUSBAND, R. L. JACOBS; THORNTON JORDAN, A MINOR; RALPH E. LEE, STEPHEN R. ADAMS, THE UNIVERSITY OF NORTH CAROLINA; ALL BODILY HEIRS OF FRANCIS C. JORDAN AND MARY JORDAN NOT NOW IN ESSE; LYNN BARNARD JACOBS, A MINOR; ALL UNKNOWN BODILY HEIRS OF FRANCIS C. JORDAN AND MARY JORDAN, NOW LIVING.

(Filed 21 November, 1951.)

1. Wills § 40—

Upon filing her dissent to her husband's will, the widow becomes *eo instante* vested with title to all property of her deceased husband allowed her by statute as surviving spouse.

2. Executors and Administrators § 15g—

The Superior Court has jurisdiction to approve a settlement with the widow for her year's support in amount less than the maximum calculated under the provisions of G.S. 30-31. G.S. 30-27.

3. Executors and Administrators § 27: Dower § 8e—

Where trusts are affected and controverted questions of law have arisen upon the dissent of the widow from her husband's will, the executor and trustee may petition the Superior Court to approve a settlement with the widow for her dower, and the court has jurisdiction to approve in its sound discretion a settlement with her in an amount less than the value of her dower right, G.S. 28-147, G.S. 30-5, upon its finding that such settlement is to the best interests of the estate and all the beneficiaries.

4. Wills §§ 31, 39, 40: Trusts § 27—

Upon the dissent of the widow, the will should be so construed that the dissent shall have the least effect upon the general scope or plan of distribution as expressed in the instrument, and such dissent will not be allowed to divert the remainder from its course of distribution except in so far as it may reduce the *corpus* of the estate, and the construction of the will to this end does not involve the jurisdiction of the court to modify a trust for a contingency or emergency unforeseen by testator.

5. Wills § 32—

Where there is a will there is a presumption against partial intestacy, and the courts will adopt that construction which will uphold the will in all its parts if consistent with established rules of law and the intention of testator.

6. Wills § 31—

The primary rule in the construction of wills is to ascertain the intention of testator, and all other rules of construction, as distinguished from rules of law governing construction, serve only as an aid and guide to this end.

7. Wills §§ 34e, 40—

Testator left the residue of his estate one-third to his widow and one-third each to two trusts set up by the instrument. The widow dissented from the will. *Held:* After settlement with the widow for her year's allowance and dower, all the residue of the estate fell into the trusts, one-half to each, and the direction of the will that one-third of the residue should be set up as a trust fund for each trust will not be allowed to defeat the intent of testator and render him intestate as to one-third of the residue devised and bequeathed to the widow. G.S. 30-2, G.S. 28-149 (3), G.S. 30-5.

8. Wills § 32½: Dower § 2—

Testator was devised under another instrument a remainder in the event the first taker should die without issue. The first taker died without issue subsequent to the death of testator. *Held:* Testator had a transmittible estate, G.S. 31-40, but whether his widow is entitled to dower therein is not necessary to be decided in this case, since the widow had agreed to a settlement in lieu of dower, and therefore the property passed under the residuary clause of testator's will.

9. Wills § 34g—

Testator has the power to direct that all taxes, including estate and inheritance taxes, be paid before the distribution to the beneficiaries, and conversely to direct that the beneficiaries of certain specific legacies be liable for inheritance taxes.

APPEAL by plaintiff from *Nettles, J.*, at Chambers, 8 September 1951, BUNCOMBE.

Petition by plaintiff for the advice and instruction of the court in respect of certain questions which have arisen in the administration of the estate of its testator and to obtain the approval of a settlement of the dissenting widow's dower and year's allowance claims, here on former appeal, *Trust Co. v. Waddell, ante,* 34.

Plaintiff's testator, Duncan Cameron Waddell, Jr., late of Buncombe County, died testate, leaving a personal estate of the value of more than one and one-quarter million dollars and real property of the approximate value of $300,000. In his will he made certain specific bequests and devises which are not materially involved in this litigation. He then devised to his wife, defendant Vaughn A. Waddell, "(⅓) one-third of all the rest and remainder of my estate, real and personal in kind, absolutely . . ." The remaining two-thirds of the residuary estate was devised to plaintiff in two separate trusts as set out in the statement of facts on the former appeal.

The will contains this provision in respect of estate, inheritance, and other taxes, to wit:

"ITEM THREE: I direct my Executors to pay all taxes on my property owned by me at the time of my death and also all estate and inheritance

taxes levied by the United States, and, or any State so that the beneficiaries hereunder may receive their legacies free of encumbrance or cost to them; except the bequest named in Item Seven, all taxes on which are to be borne by the legatee named therein."

The exception refers to the bequests to defendants Stephen R. Adams and Ralph E. Lee.

The widow duly filed her dissent to the will and made claim for a year's allowance in the sum of $38,000. The interested parties have agreed, subject to the approval of the court, to convey certain real property of the appraised value of $60,500 to the widow in fee in settlement of her claims for dower and year's allowance. Of this amount $22,000 is in settlement of her claim for a year's allowance and $38,500 is in satisfaction of her dower interest in any and all real property owned or possessed by the testator during coverture. One object of the proceeding is to obtain authority to perfect this proposed settlement.

One Mary W. Waddell devised certain property to her daughter Kate with the remainder, in the event her daughter died without issue, to plaintiff's testator and his sister, Mary W. Jordan. The life tenant was still living at the time of the death of plaintiff's testator. A question as to the widow's dower interest in this property is raised.

The court below, after a full hearing, found the facts and entered its order in part as follows:

"A. That, by the will of Mary W. Waddell, there was devised to Duncan Cameron Waddell, Jr., deceased, and defendant Mary Waddell Jordan, each, an undivided one-half interest in the property in Greensboro, North Carolina, known as No. 1110 West Market Street, subject to the life estate of defendant, Kate Waddell, conditioned upon said defendant Kate Waddell dying without issue, and said undivided one-half interest in said property so devised to said Duncan Cameron Waddell, Jr., is property of his estate to be included in the trust estates created by Items Twelve and Thirteen of his said will, but defendant Vaughn A. Waddell has no dower right or interest in said property known as No. 1110 West Market Street, in Greensboro, North Carolina.

"B. That the will of said Duncan Cameron Waddell, Jr., deceased, confers upon plaintiff the right, power and authority to establish the two trusts created by Items Twelve and Thirteen of said will, and to include in and allocate to each of said trusts one-half of all of the real and personal property of the estate of said Duncan Cameron Waddell, Jr., deceased, remaining after (1) payment of the indebtedness of said estate, costs and expenses of administration thereof, and any taxes and other charges payable therefrom, as hereinafter adjudged and decreed, out of the personal property, (2) distribution to defendant Vaughn A. Waddell of her distributive share of the personal property and settlement of her

dower and year's allowance, as hereinafter authorized, and (3) satisfaction of the specific bequests and devises as set forth in said will, other than those to said defendant Vaughn A. Waddell.

"C. That under the provisions of the will of said Duncan Cameron Waddell, Jr., deceased, plaintiff Wachovia Bank and Trust Company, Executor and Trustee, had the right, power and authority to agree that defendant Vaughn A. Waddell should receive and have fee simple title to the two pieces of real estate in the City of Asheville, North Carolina, owned by said Duncan Cameron Waddell, Jr., at the time of his death, known as the Imperial Theatre property and the Church Street property, described as Parcels No. 4 and No. 5 of the Buncombe County property in paragraph 17 of the complaint, in settlement of the allowance for her year's support and of her dower in the real estate of her late husband; that the best interest of the estate of Duncan Cameron Waddell, Jr., and the best interest of all beneficiaries of the trusts created by Items Twelve and Thirteen of the will of said Duncan Cameron Waddell, Jr., and the best interest of the widow, defendant Vaughn A. Waddell, will be materially and substantially promoted by the carrying out of the agreement of settlement of allowance for a year's support and dower of said widow, defendant Vaughn A. Waddell, as set forth in the memorandum dated December 5, 1950, a copy of which is Exhibit "E" to the complaint; that said agreement of settlement of said widow's year's allowance and dower is approved, and, in full and complete settlement of all claims of defendant Vaughn A. Waddell of allowance for a year's support and of all her dower and right to dower in the real estate of her late husband, Duncan Cameron Waddell, Jr., there is transferred and vested in said Vaughn A. Waddell, free and discharged of all and every right, title, claim and interest of plaintiff Wachovia Bank and Trust Company, as Executor and as Trustee under the will of Duncan Cameron Waddell, Jr., deceased, and of defendants Kate Waddell, Mary W. Jordan, Francis C. Jordan, Mary Jordan, Janet Jordan, Betty Jordan Jacobs, R. L. Jacobs, Thornton Jordan, Lynn Barnard Jacobs, the University of North Carolina, and all of the bodily heirs of Francis C. Jordan and Mary Jordan, those that may be born hereafter and those unknown now living, absolute and fee simple title to the following described land and premises situate in Asheville, Buncombe County, North Carolina, to wit:" (Here follows a specific description of the real property to be conveyed to the widow)

D. (This section forecloses and divests said widow "of every and all right, title, claim and interest" in and to all the real estate of the testator not specifically conveyed to her)

E. (This section directs the execution of the deeds to effectuate the agreement)

"L. Plaintiff shall pay all Federal Estate and North Carolina Inheritance taxes, finally determined to be due and owing, out of the personal property of the estate of said Duncan Cameron Waddell, Jr., deceased, before distribution is made by plaintiff to the widow, defendant Vaughn A. Waddell, and the beneficiaries under the will of said Duncan Cameron Waddell, Jr., deceased, and plaintiff shall not be reimbursed or have any right of reimbursement for any of said taxes so paid, except in the manner and to the extent as provided hereinabove in paragraphs I, J and K of this judgment."

There is no exception to any paragraph of the judgment not quoted above and no question in respect to any one of said sections is raised on this appeal.

The plaintiff, under direction of the court below, excepted and appealed.

Francis J. Heazel for plaintiff appellant.

Woodson & Woodson for defendant Vaughn A. Waddell.

J. Y. Jordan, Jr., for defendants Mary W. Jordan, Francis C. Jordan, Mary Jordan, Janet Jordan Jacobs and husband, R. L. Jacobs.

Andrew Joyner, Jr., for defendant Kate Waddell.

Tench C. Coxe, Jr., and Adams & Adams for defendants Ralph E. Lee and Stephen R. Adams.

Kingsland Van Winkle for defendants Thornton Jordan and all the bodily heirs of Francis C. Jordan and Mary Jordan not now in esse.

J. M. Horner, Jr., for defendants Lynn Barnard Jacobs and all unknown bodily heirs of defendants Francis C. Jordan and Mary Jordan.

BARNHILL, J. This is not a case in which the parties seek to have a court of equity approve a family settlement of differences arising in respect of an estate in the course of its administration. Neither is it a cause in which the first takers seek to alter or modify the terms of a trust to the possible disadvantage of the ultimate takers. It is true the trusts created by the will are to some extent adversely affected for the reason the widow takes under the law one-half of the personal estate rather than the one-third she would have received as a beneficiary under the will. But this adverse effect arises out of the fact the widow elected to do what she had a legal right to do, and not out of any contingency or emergency unforeseen by the testator. Hence a number of the decisions cited in the briefs on the original appeal and now relied on by the parties are not in point.

The widow, upon filing her dissent to the will, became, *eo instante,* vested with title to all the property of her deceased husband allowed her by statute as surviving spouse. To the extent of her right to one-half of the personal property belonging to the estate and to an allowance for a

year's support, she became and is a claimant against the estate. As widow she is entitled to a life estate in one-third of the real estate of which her husband was seized during coverture, and the trustee must account to her for the income therefrom to the extent of her interest.

Therefore, this proceeding, in the first instance, is nothing more than a petition for the approval by the court of a settlement of these claims in a manner alleged to be to the best interest of all the parties.

On its appeal here from the order of the court below approving the proposed settlement and instructing the plaintiff in respect to certain matters affecting the administration of the estate, the plaintiff poses these questions for consideration and decision:

1. Did the court below have authority to approve and direct the consummation of the agreement settling the year's allowance and dower claims of the widow and, if so, should its order in that respect be affirmed?

2. Does the plaintiff trustee take the residue of the estate, after satisfaction of the widow's claim to her distributive share of the personal property, her year's allowance, and her dower, for the benefit of the trusts created by the will, or only two-thirds thereof, and if only two-thirds, does the remaining one-third pass as undevised property?

3. Is the widow entitled to dower in the contingent remainder interest of the testator in the property devised in the will of Mary W. Waddell, and, if so, does such property interest pass to the trust estates upon the consummation of the contract with the widow?

4. Did the court below correctly instruct and advise plaintiff with respect to the payment of Federal Estate and North Carolina Inheritance taxes?

1. The settlement. It is asserted that the widow's maximum allowance for a year's support, calculated as provided by law, G.S. 30-31, would approximate $38,000. She has agreed to accept $22,000. The court below found this sum to be reasonable and proper. Its jurisdiction to make the allowance is statutory. G.S. 30-27; *Drewry v. Bank,* 173 N.C. 664, 92 S.E. 593.

The commuted value of the widow's dower interest in the real property of plaintiff's testator is more than $50,000. The settlement contemplates the payment of $38,500 in full satisfaction thereof. The widow has consented to accept the agreed amount, plus payment of her year's allowance, on condition she is paid by the conveyance of the income-producing real property designated and described in the contract and in the judgment of the court below. The presiding judge, after a full hearing and careful consideration of all the facts, has found and concluded that this proposed settlement is to the best interests of the estate of the testator and of all the beneficiaries of the trusts created in the will.

Many reasons might be advanced in support of this conclusion. These we need not now discuss. Suffice it to say that the matter of the approval of the settlement rested in the sound discretion of the court below and no reason is made to appear why its judgment in this respect should not be affirmed. G.S. 28-147; *S. v. Griggs,* 223 N.C. 279, 25 S.E. 2d 862; *Edney v. Matthews,* 218 N.C. 171, 10 S.E. 2d 619; *In re Estate of Poindexter,* 221 N.C. 246, 20 S.E. 2d 49.

". . . the Superior Court in term is by statute constituted a forum for the settlement of controversies over estates (C.S., 135), and the power of the Superior Court to entertain administration suits and for the settlement of estates is well recognized." *S. v. Griggs, supra,* and cases cited.

And in cases of this type, where trusts are affected, the authority of the executor and trustee is involved, and controverted questions of law have arisen, a petition by the executor and trustee for judicial direction is an approved method of procedure for presenting the questions at issue to the judge for consideration and decision. *In re Estate of Poindexter, supra,* and cases cited.

2. Disposition of the residue of the estate. The will contains a plan or scheme for the disposition of the testator's property entirely consistent and harmonious in all its parts. There would be no difficulty in its construction or execution but for the derangement of the plan caused by the dissent of the widow. But it is a settled principle that the will shall be so construed that the dissent of the widow shall affect the devisees and legatees to the least possible degree, and that the general scope or plan of distribution be carried out and effectuated so far as possible. "The dissent may defeat some of the arrangements made by the will, and accelerate the time of enjoyment of some of the legacies and devises, but it does not affect the construction of the will." Pritchard on Wills and Administration, sec. 766; *University v. Borden,* 132 N.C. 476; *Re Povey,* 261 N.W. 98, 99 A.L.R. 1183; 2 Page on Wills, 2d Ed., sec. 1224; 57 A.J. 1054, sec. 1549.

It is therefore generally held that a widow's election to take against the husband's will does not, except as it may reduce the *corpus* of the estate, divert the remainder from its course of distribution. *Spaulding v. Lackey,* 173 N.E. 110, 71 A.L.R. 660; *Bank v. Bank,* 190 A. 215, 111 A.L.R. 711.

Where there is a will there is a presumption against partial intestacy, *Seawell v. Seawell,* 233 N.C. 735; *Van Winkle v. Berger,* 228 N.C. 473, 46 S.E. 2d 305; *Holmes v. York,* 203 N.C. 709, 166 S.E. 889, and the courts in construing a will do not search for a meaning which will nullify it in whole or in part, *Johnson v. Salsbury,* 232 N.C. 432, 61 S.E. 2d 327, but adopt that construction which will uphold the will in all its parts if such course is consistent with established rules of law and the intention

of the testator. *Johnson v. Salsbury, supra; Ferguson v. Ferguson,* 225 N.C. 375, 35 S.E. 2d 231.

"The objective of construction is to effectuate the intent of the testator as expressed in his will, for his intent as so expressed is his will." *Woodard v. Clark, ante,* 215. This is the dominant and controlling rule of testamentary construction. *Richardson v. Cheek,* 212 N.C. 510, 193 S.E. 705. All other accepted canons of construction serve not to restrict or restrain the judicial mind but to aid and guide it in the discovery of the intention of the testator. 57 A.J. 732, sec. 1135.

But let us here interpolate for the sake of exactness that in applying this rule, the distinction between rules of construction and rules of law controlling construction must be kept in mind. While all other rules of construction must yield to the primary "intent" rule, the intent must yield to conflicting rules of law controlling construction such as the rule in *Shelley's case* and the rule against perpetuities. 57 A.J. 729, sec. 1134; *Featherstone v. Pass,* 232 N.C. 349, 60 S.E. 2d 236; *Richardson v. Cheek, supra; Smith v. Moore,* 178 N.C. 370, 100 S.E. 702; *Crisp v. Biggs,* 176 N.C. 1, 96 S.E. 662.

Here the intent of the testator could not be the subject of serious controversy. It is clear that he considered the persons who were to be the objects of his bounty under three classes, to wit: those upon whom he intended to bestow specific bequests, then the widow, and finally the class which was to receive the residuum; and he parceled his estate with this in mind, and its appears that he did not intend that any part of his estate should pass as intestate property. *In re Reynolds' Will,* 138 N.W. 1019.

The bulk of his valuable estate is disposed of in Items 11, 12, and 13 of the will, and it is apparent that his wife and his two sisters were the primary objects of his bounty. The executors are directed first to set apart to his widow one-third of all his net estate (remaining after the delivery of certain relatively unimportant bequests) in kind, absolutely and without limitation. The rest and residue remaining after the deduction of the widow's share is then set apart in trust for the use and benefit of his two sisters.

While it is true he devised to plaintiff in trust "one-third of the rest, residue and remainder" of his property for the use and benefit of those named in Item Twelve of the will and "the remaining one-third" to it in trust for those named in Item Thirteen, the words "one-third of the rest, residue and remainder" and "the remaining one-third" are not controlling, for in ascertaining the intent of a testator greater regard must be given to the dominant purpose of a testator than to the use of any particular words. *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356.

The provision in the will in favor of the widow in legal effect was no more than an offer on the part of the testator to purchase her statutory interest in his estate for the benefit of his estate. As she refused to accept the offer made her in the will and elected to take under the statute, G.S. 30-2, she has her interest under the statute, G.S. 28-149 (3), G.S. 30-5, as if there was no will. That portion of the estate devised to her which she renounced becomes a part of the residuum out of which she is first to have her share as provided by law, and the remainder is to be set apart in trust as provided in the will. *Reid v. Neal,* 182 N.C. 192, 108 S.E. 769; *Featherstone v. Pass, supra; Dunshee v. Dunshee,* 96 N.E. 298; *Moore v. Hospital Ass'n.,* 6 F. 2d 986; Anno. 155 A.L.R. 1426; *Spaulding v. Lackey, supra; Bank v. Bank, supra.*

Thus the widow and plaintiff, as trustee, take all the estate remaining after the satisfaction of specific legacies, whether the widow receives her share under the will as devisee or under the law as surviving spouse. So the testator intended.

3. The Mary W. Waddell property. The interest in the Greensboro real estate devised to testator is a transmittible estate, G.S. 31-40, *Buffaloe v. Blalock,* 232 N.C. 105, 59 S.E. 2d 625, and constitutes a part of the residuum to be set apart in trust.

On this record, whether the widow is entitled to dower therein we need not now decide. If it is not a part of testator's estate to be taken into consideration in ascertaining the value of the widow's dower, it passes to the trustee free of any claim on her part. If it is to be so considered, the widow, under the settlement agreement, relinquishes all claim thereto. In either event, the trustee acquires title thereto unencumbered by any claim of interest therein by the widow.

4. Federal Estate and State inheritance taxes. The testator specifically directed the plaintiff to pay all taxes on his property, including all estate and inheritance taxes levied by the United States or by any State. This he had a right to do. The dissenting widow, who might have some right to protest, has assented. So what boots it whether such taxes, or any part thereof, are, under the law, payable as a debt of the estate or are assessable against the several legacies and devises? The direction as to the payment thereof by the plaintiff contained in the judgment was impelled by the terms of the will.

In providing for the payment of such taxes out of the funds of the estate to the exoneration of the legacies, the bequest to Stephen R. Adams and Ralph E. Lee contained in Item Seven of the will was excepted. These legatees have agreed to reimburse the plaintiff for all taxes paid on account of their bequest, and the court has so directed. This is in accord with the terms of the will.

Thus it appears that the exceptive assignments of error brought forward and debated on this appeal are without substantial merit. Hence, on the record as it comes before us, the judgment entered must be

Affirmed.

ELIZABETH G. WOODARD AND BESSIE W. CAMPBELL v. W. G. MORDECAI, CO-TRUSTEE OF THE ESTATE OF MOSES W. WOODARD, DECEASED; MOSES W. WOODARD, JR.; MOSES W. WOODARD III; MARY WHITE WOODARD McDONALD; AND NANCY ELIZABETH WOODARD.

(Filed 21 November, 1951.)

1. Trial § 55—

Upon trial by the court upon agreement, the court is required to find the facts on all issues of fact joined on the pleadings, to declare his conclusions of law upon the facts found in such manner as to render them distinguishable from the findings of fact, and to enter judgment accordingly. G.S. 1-185.

2. Same—

In a trial by the court under agreement of the parties, the trial court is required to find and state only the ultimate facts and not the evidentiary facts.

3. Trusts § 14a—

When the instrument commands the trustee to perform some positive act the power is mandatory, when the instrument provides that the trustee may either exercise a power or refrain from exercising it, or leaves the time, manner, and extent of its exercise in the discretion of the trustee, the power is discretionary.

4. Same—

The court will always compel the trustee to exercise a mandatory power: but will not undertake to control the exercise of a discretionary power except to prevent abuse of discretion.

5. Same—

A trustee abuses his discretion in exercising or failing to exercise a discretionary power if he acts dishonestly, or if he acts with an improper motive even though not a dishonest one, or if he fails to use his judgment, or if he acts beyond the bounds of a reasonable judgment.

6. Same: Trusts § 19b—

A provision in a will that the trustee might convey any part or all of the share of the *corpus* of a beneficiary to the beneficiary if in the trustee's judgment it is necessary or best for the welfare of the *cestui* and consistent with the welfare of trustor's family and estate, confers a discretionary power.

7. Same: Trial § 55—Judgment held based upon findings of ultimate facts as distinguished from conclusions of law.

In an action to compel a trustee to exercise a discretionary power upon the ground of abuse of discretion in that the trustee acted with the improper motive of prejudice and failed to use his judgment, *held* findings by the court that the trustee had not abused his discretion or acted arbitrarily, that the trustee's conclusion not to exercise the power was consistent with the intentions of trustor and that the exercise of the power was not for the best welfare of the beneficiaries nor the welfare of the family (the basis set out in the instrument for the determination of whether the power should be exercised or not) are findings of ultimate facts as distinguished from legal conclusions, and support the conclusion that the beneficiaries were not entitled to compel the exercise of the power.

8. Evidence § 26½—

Where plaintiffs introduce evidence tending to show they had been harassed by litigation over the trust estate, defendants are entitled to introduce judicial records tending to show that plaintiffs themselves had instituted such litigation in order to rebut plaintiffs' implication.

9. Appeal and Error § 39e—

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

10. Evidence § 43e—

Where the mental state of trustee in refusing to exercise a discretionary power is in issue, a letter written by him to his co-trustee setting forth his motives and reasons for refusing to exercise the power upon the original application of the beneficiaries *is held* competent even though the letter was never mailed, since it is a relevant circumstance tending to show his state of mind at the time in question.

11. Evidence § 18—

Evidence otherwise incompetent may be competent for the purpose of corroborating the sworn testimony of the witness at the trial.

12. Appeal and Error § 39e—

The admission of immaterial evidence in a trial by the court under agreement of the parties will not be held for reversible error when its admission could not have affected the decision of the court.

APPEAL by plaintiffs from *Bone, J.*, at May Term, 1951, of WAKE.

Consolidated civil actions by Elizabeth G. Woodard and Bessie W. Campbell against W. G. Mordecai, as a successor trustee under the will of Moses W. Woodard, and others, to require defendant trustee to exercise a discretionary power granted by the will, and to join his co-trustee, the First-Citizens Bank & Trust Company, in conveying parts of the trust *corpus* to the plaintiffs free from the trust.

The record discloses the following facts:

1. Moses W. Woodard died at his domicile in Wake County, North Carolina, on 27 April, 1915, leaving his wife, Elizabeth G. Woodard, his son, Moses W. Woodard, Jr., and his daughter, Bessie W. Campbell.

2. Moses W. Woodard left a last will, which was forthwith admitted to probate in the Superior Court of Wake County. The portions of this instrument pertinent to this litigation are as follows:

Item Five: I give, devise and bequeath all the rest and residue of my property and estate of whatsoever nature and wheresoever the same may be to Charles H. Belvin and Joseph G. Brown, both of Raleigh, N. C. to be by them held in trust for the use and benefit of my said wife and my said son and my said daughter in the manner following:

The said Trustees if they deem best, shall have the power (without being required to get an order of court for that purpose) to sell, convey and convert into money, any part or all of said trust estate and to receive the proceeds of such sale; to invest the same and also any money belonging to my estate as they deem best and if they see fit, to sell, convey and convert into money any or all of such investments and to reinvest the proceeds of such sale; to again sell, convey and convert into money and reinvest, when, as often, and in such manner as they see fit—such sales to be private or public, for cash or on time, as such trustees deem best—to make, execute and deliver any and all deeds or other paper writings and to do all things requisite and necessary to effectually carry out the trusts herein declared; to receive the income from such trust estate and from all such investments and after paying out from such income the taxes and other charges on such trust estate, repairs, insurance and other expenses connected therewith, and the costs and charges of executing the trust to dispose of such trust estate and the income therefrom as follows:

"A." Until the marriage of my said wife, Elizabeth, or if she does not marry again, then until her death, unmarried, to divide semiannually the net income from said trust estate into as many equal shares as there shall be wife of mine, then alive and unmarried, and son of mine then alive or son of mine dead but with lineal descendants then alive and daughter of mine then alive or daughter of mine dead but with lineal descendants then alive, and to pay such shares of income to such wife, son and daughter or the lineal descendants of such deceased son or daughter—such lineal descendants to stand *per stirpes* in the place of their deceased parents and together take the share which such deceased parent would have taken if alive at that time.

Upon the marriage or death of my said wife her interest in said trust estate shall cease and determine and shall go and belong to my said son and daughter and their lineal descendants in the same manner as is here-

inafter provided for the holding and disposing of the original shares of said son and daughter in said trust estate.

"B." During the natural life of my said daughter, Bessie, to divide semi-annually the net income from said trust estate into as many equal shares as there shall be daughter of mine then alive and wife of mine, then alive and unmarried, and son of mine then alive or son of mine dead but with lineal descendants then alive and to pay such shares of income to such daughter, wife and son or the lineal descendants of such deceased son—such lineal descendants to stand *per stirpes* in the place of their deceased father and take the share which he would have taken if alive at that time.

Upon the death of my said daughter leaving lineal descendants surviving her, said Trustees shall divide the *corpus* of said trust estate into as many equal shares as there shall be such daughter deceased and wife of mine alive, and unmarried, at that time and son of mine then alive or son of mine dead but with lineal descendants then alive and shall pay, deliver and convey absolutely and in fee simple one of said shares *per stirpes,* to such lineal descendants as my said daughter shall have so left her surviving, upon which payment the trust as to that share shall cease and determine.

Upon the death of said Bessie without leaving any lineal descendants surviving her, then her interest in said trust estate shall cease and determine and shall go and belong to my said wife and son and his lineal descendants in the same manner as is herein provided for the holding and disposing of the original shares of my said wife and son in said trust estate.

"C." During the natural life of my said son, Moses, to divide semi-annually the net income from said trust estate into as many equal shares as there shall be son of mine then alive and wife of mine then alive and unmarried and daughter of mine then alive or daughter of mine dead but with lineal descendants then alive and to pay such shares of income to such son, wife and daughter or the lineal descendants of such deceased daughter—such lineal descendants to stand *per stirpes* in the place of their deceased mother and together take the share which such deceased mother would have taken if alive at that time.

Upon the death of my said son leaving lineal descendants surviving him the said Trustee shall divide the *corpus* of such trust estate into as many equal shares as there shall be such deceased son and wife of mine alive and unmarried at that time, and daughter of mine alive or daughter of mine dead but leaving lineal descendants alive at that time and shall pay, deliver and convey absolutely and in fee simple one of said shares *per stirpes* to the lineal descendants which the said Moses shall have so

left him surviving, upon which payment the trust as to that share shall cease and determine.

Upon the death of said Moses without leaving any lineal descendants surviving him, then his interest in said trust estate shall cease and determine and shall go and belong to my said wife and daughter and such daughter's lineal descendants in the same manner as is herein provided for the holding and disposing of the original shares of said wife and daughter in said trust estate.

Item Six: All the property and estate acquired by said Trustees by means of the assets belonging to my estate, whether by reason of increase of values or by change of investment or otherwise, shall be held by said Trustees upon the same trusts as those declared for the holding of the property and estate originally bequeathed and devised to them. No investment shall be made nor shall any investment be changed nor any sale be made, deed or other paper writing, delivered, except by the consent and concurrence of both Trustees.

The said Trustees (if they in their judgment deem it necessary or best for the welfare of the *cestui que trust,* and consistent with the welfare of my family and estate) may from time to time, advance, deliver and convey absolutely and in fee simple, free from the trust, to my said wife if unmarried or to my said daughter after she arrives at the age of 21 years or to my said son after he arrives at the age of 21 years, any part or all of the share of the *corpus* of the trust estate above provided for his or her benefit and thus terminate the trust so far as it affects the property so advanced, delivered and conveyed and the receipt of such *cestui que trust* shall be a complete release and discharge of said Trustees for so doing. But in case of such advancement the amount so advanced shall be counted in estimating the amount of the *corpus* of the estate for division and charged up to the share of the person so receiving the same and deducted from the payment on division to his or her lineal descendants; and in estimating the income for division, interest shall be counted on such advancement at the rate of 3% per annum and be charged up to the share of income of the person so advanced and be deducted from the payment of income to the party so advanced or to his or her lineal descendants.

Item Seven: I hereby nominate, constitute and appoint the said Chas. H. Belvin and Joseph G. Brown, Executors of this my last will and testament, and also Guardians of my said daughter and of my son until their arrival at the age of 21 years and direct that neither of them be required to give any bond, either as Executor or as Trustee or as Guardian.

Said Executors and Trustees for the purpose of settling my estate and for the purpose of making the divisions and settlement of the trust estate

as above directed shall have the power and are hereby authorized as they see fit (without being required to get an order of court for that purpose) to sell at private or public sale, for cash or on time, and to convey any part or portion of said property and estate, and to receive the proceeds of such sale.

Upon the refusal of either the said Belvin or Brown to qualify as Executor or upon the death of either, the other, having qualified, shall have all the rights and powers and be subject to all the duties herein provided for them jointly as Executors.

Upon the refusal of either the said Belvin or Brown to act as Trustees or upon the death of either after acting as Trustee without having appointed a substitute as below provided, the successor of the one so refusing to act or so dying, without appointing such substitute, shall be appointed by the proper court in the manner provided by law and the Trustee so appointed shall have all the rights and powers and be subject to all the duties herein provided for the original Trustee so refusing to act or so dying.

If either the said Belvin or the said Brown shall refuse to act as trustee or if after having acted as Trustee, shall be unwilling or unable to continue to execute the trust and shall desire to be discharged therefrom he may by deed duly executed and registered in Wake County, N. C., declare such desire, and appoint some other person or corporation to act as Trustee in his place and transfer to such person or corporation his interest in said property and estate, whereupon such original Trustee shall be released from the further discharge of the trust and such appointee upon his acceptance of said trust shall have all the rights and powers and be subject to all the duties provided in this Will for the Trustee so making such appointment.

3. The *corpus* of the trust created by the will of Moses W. Woodard has been administered by the original trustees or successor trustees named by the court ever since the will was proven. The First-Citizens Bank & Trust Company, which is hereafter called the corporate trustee, and W. G. Mordecai, who is hereafter designated as the individual trustee, have been serving as successor trustees since 2 May, 1949. The *corpus* of the trust now consists of three store buildings in the City of Raleigh, which are being rented by the trustees and which have yielded an average yearly income of $6,718.30 to each of the beneficiaries named in the will, that is to say, Elizabeth G. Woodard, Bessie W. Campbell, and Moses W. Woodard, Jr., for the past twenty years. As a result of a new lease of one of the buildings, the *corpus* of the trust will yield an annual income of at least $14,000.00 to each of the beneficiaries in the immediate future.

4. Elizabeth G. Woodard, who has not remarried, and Bessie W. Campbell, who has no living issue, live together in a substantial dwelling

owned by the latter at Pinehurst, North Carolina. Moses W. Woodard, Jr., resides in Raleigh, North Carolina, and has three children, namely: Moses W. Woodard III, Mary White Woodard McDonald, and Nancy Elizabeth Woodard.

5. Before commencing this litigation, the plaintiffs, Elizabeth G. Woodard and Bessie W. Campbell, made written demand on the trustees that they convey one-third of the trust *corpus* to each of the plaintiffs free from the trust. The corporate trustee agreed to comply with the demand, but the individual trustee refused to do so.

6. Each of the plaintiffs thereupon brought an action against the individual trustee and the other defendants, praying the court to compel the individual trustee to join the corporate trustee in the demanded conveyances or to remove him from his fiduciary office. Under a subsequent agreement of the parties, these actions were consolidated for trial, judgment, and all other purposes under the title assigned to them on this appeal.

7. The complaints of the plaintiffs allege in detail that it is necessary or at least best for their welfare that the trustees forthwith convey one-third of the trust *corpus* to each of them free of the trust; that such action by the trustees would be consistent with the welfare of the family and estate of the testator; and that in refusing to exercise his discretionary power in their favor the individual trustee abuses his discretion in these respects: (1) He acts with an improper motive, to wit, prejudice; and (2) he fails to use his judgment, *i.e.*, he bases his refusal upon an arbitrary decision or whim rather than upon a consideration of the relevant circumstances.

The answers of the defendants deny the material allegations of the complaints, and aver, in substance, that the individual trustee acted in good faith and with reason in rejecting the demand of the plaintiffs.

8. The parties waived trial by jury, and submitted the issues of fact and law to his Honor, Walter J. Bone, the presiding judge. After hearing the evidence adduced by the plaintiffs and the defendants for the avowed purpose of sustaining their respective allegations, Judge Bone entered a written judgment, containing the statements set forth in the opinion and denying the plaintiffs the relief prayed. The plaintiffs excepted to the judgment and appealed.

Bunn & Arendell, Harris & Poe, and Taylor & Allen for plaintiffs, appellants.

Fuller, Reade, Umstead & Fuller for defendant, W. G. Mordecai, cotrustee, appellee.

Brassfield & Maupin for the defendant, Moses W. Woodard, Jr., appellee.

T. Lacy Williams for the defendants, Moses W. Woodard III, Mary White Woodard McDonald, and Nancy Elizabeth Woodard, appellees.

ERVIN, J. The plaintiffs make these assertions by their assignments of error:

1. That the judge did not observe the provisions of G.S. 1-185, specifying that "upon the trial of an issue of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law separately."

2. That the judge committed prejudicial error in admitting certain testimony tendered by the defendants.

These objections will be considered in their numerical order.

The contention of the plaintiffs that the judge did not comply with G.S. 1-185 is epitomized in their brief in this fashion: "An examination of the judgment fails to disclose any separate finding of facts, or any finding of material facts."

This contention presents these problems: (1) What does G.S. 1-185 require of the judge? (2) What are the material facts in this litigation? The first problem necessitates a construction of the statute; and the second involves a consideration of the rules under which courts require trustees to exercise powers granted by trust instruments.

Where a jury trial is waived by the parties to a civil action, the judge who tries the case is required by G.S. 1-185 to do three things in writing: (1) To find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising upon the facts found; and (3) to enter judgment accordingly. *Dailey v. Insurance Co.,* 208 N.C. 817, 182 S.E. 332; *Shore v. Bank,* 207 N.C. 798, 178 S.E. 572. In addition, he must state his findings of fact and conclusions of law separately. *Foushee v. Pattershall,* 67 N.C. 453. The judge complies with this last requirement if he separates the findings and the conclusions in such a manner as to render them distinguishable, no matter how the separation is effected. 64 C.J., Trial, section 1091.

There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts. *Long v. Love,* 230 N.C. 535, 53 S.E. 2d 661; *Brown v. Hall,* 226 N.C. 732, 40 S.E. 2d 412; *Hawkins v. Moss,* 222 N.C. 95, 21 S.E. 2d 873. G.S. 1-185 requires the trial judge to find and state the ultimate facts only. *Eley v. R. R.,* 165 N.C. 78, 80 S.E. 1064; *Bloss v. Rahilly,* 16 Cal. 2d 170, 104 P. 2d 1049; *McCarty v. Sauer,* 64 Idaho 748, 136 P. 2d 742; *Black v. Gunderson,* 46 S.D. 642, 195 N.W. 653; *Sandall v. Hoskins,* 104 Utah 50, 137 P. 2d

819; *Gerve v. Medford Bridge Co.,* 205 Wis. 68, 236 N.W. 528; 64 C.J., Trial, section 1099.

The powers of a trustee are either mandatory or discretionary. A power is mandatory when it authorizes and commands the trustee to perform some positive act. *Brummett v. Hewes,* 311 Mass. 142, 40 N.E. 2d 251; *In re Carr's Estate,* 176 Misc. 571, 28 N.Y.S. 1215. A power is discretionary when the trustee may either exercise it or refrain from exercising it, *Welch v. Trust Co.,* 226 N.C. 357, 38 S.E. 2d 197; *Bennett v. Norton,* 171 Pa. 221, 32 A. 1112; or when the time, or manner, or extent of its exercise is left to his discretion. *Gosson v. Ladd,* 77 Ala. 223; *City of San Antonio v. Zogheib* (Tex. Civ. App.), 70 S.W. 2d 333.

The court will always compel the trustee to exercise a mandatory power. *Albright v. Albright,* 91 N.C. 220. It is otherwise, however, with respect to a discretionary power. The court will not undertake to control the trustee with respect to the exercise of a discretionary power, except to prevent an abuse by him of his discretion. The trustee abuses his discretion in exercising or failing to exercise a discretionary power if he acts dishonestly, or if he acts with an improper even though not a dishonest motive, or if he fails to use his judgment, or if he acts beyond the bounds of a reasonable judgment. The American Law Institute's Restatement of the Law of Trusts, section 187; *Carter v. Young,* 193 N.C. 678, 137 S.E. 875; 65 C.J., Trusts, section 539.

The will expressly authorizes the successor trustees to exercise all the powers conferred by it upon the original trustees. The power to convey parts of the trust *corpus* to the widow and children of the testator free from the trust is clearly discretionary. The trustees are permitted to make such conveyances, but they are not required to do so. The plaintiffs recognize the discretionary nature of the power. They predicate their causes of action on the theory that the court must compel the individual trustee to join the corporate trustee in conveying parts of the trust *corpus* to them free from the trust to prevent an abuse by the individual trustee of the discretion reposed in him. Properly interpreted, their complaints allege that in refusing to exercise his discretionary power in their favor the individual trustee abuses his discretion in these respects: (1) That he acts with an improper motive, to wit, prejudice; and (2) that he fails to use his judgment, *i.e.,* he bases his refusal upon an arbitrary decision or whim rather than upon a consideration of the relevant circumstances.

When his written decision is read aright, it appears that the trial judge found and stated these things: (1) That the individual trustee has not abused his discretion or acted arbitrarily in respect to the matters mentioned in the complaints, but, on the contrary, has "acted . . . with discretion, reasonableness, and good judgment"; (2) that the conclusion reached by the individual trustee, on his disagreement with the corporate

trustee, *i.e.*, that the trustees ought not to convey one-third of the trust *corpus* to each of the plaintiffs at this time, is "the correct one . . . and is consistent with the intentions of the trustor, Moses W. Woodard"; and (3) "that it is not necessary nor best for the welfare of the plaintiffs nor either of them, nor to their best interest, nor consistent with the welfare of the family and the estate of the trustor, Moses W. Woodard, that a one-third part of the *corpus* of the . . . trust estate be . . . distributed to each of" the plaintiffs.

We are confronted at this point by the question whether these statements of the judge are ultimate facts or legal conclusions. Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. *Christmas v. Cowden,* 44 N.M. 517, 105 P. 2d 484; *Scott v. Cismadi,* 80 Ohio App. 39, 74 S.E. 2d 563. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. 54 C.J., Trial, section 1151. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. *Rhode v. Bartholomew,* 94 Cal. App. 2d 272, 210 P. 2d 768; *Citizens Securities & Investment Co. v. Dennis,* 236 Ill. 307; *Mining Securities Co. v. Wall,* 99 Mont. 596, 45 P. 2d 302; *Christmas v. Cowden, supra; Oregon Home Builders v. Montgomery Inv. Co.,* 94 Or. 349, 184 P. 487. Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law. *Maltz v. Jackoway-Katz Cap. Co.,* 336 Mo. 1000, 82 S.E. 2d 909; *Tesch v. Industrial Commission,* 200 Wis. 616, 229 N.W. 194.

When the statements of the judge are measured by this test, it is manifest that they constitute findings of ultimate facts, *i.e.*, the final facts on which the rights of the parties are to be legally determined. They settle all the material issues of fact raised by the pleadings. In addition, they warrant the readily distinguishable conclusion of law "that the plaintiffs do not have the right to require a division of the *corpus* of the trust estate . . . as requested and demanded by them," and the judgment denying the plaintiffs the relief sought by them. These things being true, the judge complied with all the requirements of G.S. 1-185.

This brings us to the assignments of error based on the admission of testimony presented by the defendants.

On 25 May, 1950, Elizabeth G. Woodard wrote a letter to the trustees, charging, in substance, that her life had been marred and her health injured by "court battling." The plaintiffs introduced this letter in evidence at the trial to support allegations of the widow's complaint that she had been deprived of "strength, pleasure, happiness, and enjoyment . . . by being involved in trials and law suits" with persons serving as

trustees of the estate of her husband, and that a conveyance of one-third of the trust *corpus* to her was necessary to free her from "court struggles" and to restore her peace of mind. This being so, the court rightly received in evidence the judicial record showing that in 1931 the plaintiff, Elizabeth G. Woodard, unsuccessfully applied to the Superior Court of Wake County in a former action for a decree compelling the Raleigh Savings Bank & Trust Company, the then trustee, to transfer a portion of the trust *corpus* to her. The record tended to rebut the implications of the widow's charge that she had been harassed by much vexatious litigation instituted by the trustees. The exception to the admission of the judicial record would be unavailing to plaintiffs, however, even if its contents were incompetent; for virtually the same evidence was elicited by defendants without objection from plaintiffs on the cross-examination of Bessie W. Campbell, who testified at the trial. *Davis v. Davis,* 228 N.C. 48, 44 S.E. 478; *Merchant v. Lassiter,* 224 N.C. 343, 30 S.E. 2d 217.

When he decided not to exercise the discretionary power in favor of the plaintiffs, the individual trustee addressed a letter to Thomas G. Chapman, the trust officer of the corporate trustee, setting forth in detail the motives and reasons for his decision. He did not mail or deliver the letter to Chapman but retained it and identified it at the trial. The judge received the letter in evidence over the exception of the plaintiffs. He did not err in so doing. The allegations of the complaint that the individual trustee acted arbitrarily and with an improper motive when he rejected the demand of the plaintiffs put the state of mind of the individual trustee at that time directly in issue. As a consequence, the letter was competent under the rule that "where the existence of a particular mental state in a particular individual is a relevant fact, his declarations which indicate the existence or nonexistence of such state are admitted as circumstantial evidence, even though the declarant himself may be available as a witness." 31 C.J.S., Evidence, section 255. See, also, in this connection: *In re Carson's Estate,* 184 Cal. 437, 194 P. 5, 17 A.L.R. 239; Wigmore on Evidence (2d Ed.), section 1729; Stansbury: North Carolina Evidence, section 255. The letter was also admissible to corroborate the sworn testimony of the individual trustee at the trial to the same effect. *S. v. Noland,* 204 N.C. 329, 168 S.E. 412; *Insurance Co. v. Gavin,* 187 N.C. 14, 120 S.E. 820.

Chapman, the trust officer of the corporate trustee, was not a witness at the trial. The individual trustee testified that he and Chapman interviewed both of the plaintiffs relative to their demand for parts of the trust *corpus;* that he thereafter suggested to Chapman that they ought to consult Moses W. Woodard, Jr., the other beneficiary, and ascertain his opinion on the subject; and that Chapman thereupon stated that "he couldn't do it" because "it might complicate matters." The plaintiffs

took an exception to the receipt of the extrajudicial statement of Chapman, which appears to be incompetent hearsay. Nevertheless, its receipt was not prejudicial to plaintiffs on the present record. The litigation involved the conduct of the individual trustee, and not that of the corporate trustee or its trust officer. Consequently, the statement of Chapman was immaterial, and did not affect the decision of the able and experienced judge who tried the issues of fact. *Young v. Stewart,* 191 N.C. 297, 131 S.E. 735; *In re Rawlings' Will,* 170 N.C. 58, 86 S.E. 794.

It is noted, in closing, that the judgment is not to be construed to preclude the trustees from exercising the discretionary power in the future if they jointly conclude that its exercise is "necessary or best for the welfare of the *cestui que trust,* and consistent with the welfare of . . . (the) family and estate" of the testator.

For the reasons given, the judgment is

Affirmed.

STATE v. CLYDE BRANNON AND EDGAR GARREN.

(Filed 21 November, 1951.)

1. **Homicide § 25—**

Where the evidence shows an intentional killing with a deadly weapon, nonsuit may not be allowed on the charge of second degree murder notwithstanding defendants' contention, supported by evidence, that they killed deceased in self-defense in arresting him in the discharge of their official duties as law enforcement officers, since the presumption from the intentional killing with a deadly weapon takes the case to the jury with the burden upon defendants to show matters in mitigation or excuse.

2. **Homicide § 30—**

Any error in the submission of the question of guilt of murder in the second degree is rendered harmless by a verdict of manslaughter.

3. **Criminal Law § 53d—**

The failure of the court to charge the jury not to consider testimony to which the court had sustained defendants' objections will not be held for error when the record discloses no objections were made to the eliciting questions, no request to strike the answers interposed, and no request made that the court instruct the jury not to consider the answers.

4. **Criminal Law § 81c (3)—**

The admission of testimony to the effect that deceased was very weak at the time the fatal shot was fired will not be held for prejudicial error when there is competent expert medical testimony tending to show that of necessity deceased was in a weakened condition at that time.

5. **Criminal Law § 78e (2)—**

Misstatement of the contentions of the State or of the defendants must be brought to the court's attention in apt time.

6. **Arrest § 2: Homicide § 27f—**

Exception to the charge for the court's failure to explain the difference between self-defense as applied to ordinary persons and as applied to officers attempting to make a lawful arrest cannot be sustained when the record discloses that the court fully charged the jury as to defendants' right in making a lawful arrest to be the aggressors and to use all reasonable force apparently necessary to overcome any resistance, even to the taking of life, in discharging their duty to arrest deceased.

7. **Criminal Law § 81c (2)—**

Exceptions to the charge will not be sustained when the charge is without prejudicial error upon a contextual construction.

APPEAL by defendants from *Rudisill, J.*, August Term, 1951, of CHEROKEE.

The defendants were tried on a bill of indictment charging them with murder in the first degree of one Hoyt Barton. Upon the call of the case for trial, the solicitor announced in open court that the State would not ask for a verdict of murder in the first degree, but would ask for a verdict of murder in the second degree, or manslaughter, as the evidence might warrant.

The evidence of the State tends to show that about 4:30 or 5:00 p.m., 9 June, 1951, the deceased, Hoyt Barton, and Bill Palmer, were playing a game of pool in Brownie's Pool Room in Murphy, Cherokee County, North Carolina. They had both been drinking. During the course of the game they went into the rest room to take another drink. As they were about to take a drink, Clyde Brannon, Chief of Police of Murphy, came into the rest room, took the bottle of whisky and poured it out. According to the testimony of Bill Palmer who testified for the State, after the officer poured the whisky out, Hoyt Barton returned to the pool table and some words, which the witness did not remember, passed between the officer and Barton, and the first thing he knew the officer was going toward Barton with his blackjack. Barton struck the officer with his fist and knocked him down and the officer said, "Bill, get him." "I walked over to where Hoyt was and took him out of the pool room, and we went up toward the Safety Cab stand. When we got to the corner, about one-half block, and turned out to the cab stand, we noticed Clyde was following us, and Hoyt turned facing him and backed over to the cab stand. I said to Clyde, 'Let Hoyt get in the cab and go home, and if you got anything against him, take it out some other time,' and Clyde said, 'No, I am going to kill the s.o.b. or put him in jail.' Hoyt was standing with the cue stick in his hand, sliding his arm around the cue stick and

twisting his arm. I heard Hoyt say, 'Clyde, when you kill me you will kill five little kids,' and about that time Clyde raised his gun a little and shot, and then Hoyt came toward him with the cue stick and struck him with the cue stick, and then Ed Garren (a special police officer not on duty at the time) came up and was drawing to hit him with the blackjack and Hoyt tried to tear loose from him and then Brannon shot again, and then Hoyt hit him with the cue stick again, and . . . Ed Garren and Clyde and Hoyt all got together again and Clyde and Hoyt had their arms around each other and the gun fired again, and after the gun was fired Ed gave Hoyt a shove and Hoyt went down . . . and Ed Garren went up and got the pistol and went away a few steps . . . and turned around facing Hoyt and Hoyt was 12 or 15 feet away from him, and then Ed Garren fired and then Hoyt took a side step and went down on the pavement. Brannon was about 10 or 12 feet from Hoyt when he fired the first shot . . . I had not heard anything said about arresting Hoyt." On cross-examination, this witness testified, "I knew it was unlawful to take nontax-paid liquor. I knew that Hoyt and me had been caught in the violation of the law."

The testimony of this witness as to what occurred after Barton and Palmer left the pool room, was corroborated by Ed Dockery and R. V. Dockery, who testified for the State, each one testifying that the defendant Brannon shot Barton before Barton hit him with the cue stick. The State's evidence further tends to show that the defendant officers said nothing to the deceased about arresting him except the statement made in his presence by the defendant Brannon to Bill Palmer that he intended to kill him or take him to jail. The evidence also tends to show that Barton had dropped the cue stick and "was sort of slumped when he was shot by Garren."

After the shooting the deceased was taken to a hospital and died four or five days later from the results of the multiple gunshot wounds inflicted on him by the defendants.

The evidence of the defendants is in sharp conflict with that of the State. The defendant Brannon testified: That when he walked in the pool room and saw Palmer and Barton go into the rest room, he walked back there and saw Barton hand Palmer a bottle. He said, "Boys, I'll take that," and Barton said, "G— d— you, you can't do that." He took the liquor out of Bill Palmer's hand and poured it out. He then said, "Hoyt, go home," and he said, "I am not going." When he would not go home, he said, "Hoyt, you are under arrest," then they scuffled around over the floor. He had known the deceased for fifteen years; that he judged him to be over six feet tall; weight around 190 to 200 pounds; that he was about 35 years of age, and that he knew he had the reputation of being a dangerous and violent man when drunk. That Barton grabbed

him and he called for help. "He hit me three or four times. My weight is 158 pounds. I am 5 feet 7 inches tall, and am 45 years of age . . . I got loose from him and he hit me again then he knocked me down and I got up and ran around the table to keep him from getting me any more. Then he got a cue stick and I told the fellows there in the pool room, 'If not any of you fellows are going to help me, go outside and get help for me.' . . . I told Bill Palmer to help me, and Bill got a-hold of him and stopped him . . . I deputized Bill Palmer to help me . . . I got outside and met Ed Garren . . . who was an extra policeman, and I deputized him to help me. I gave Garren my blackjack, and I told Hoyt, 'You are under arrest, you have to go with me,' and kept telling him to drop the cue stick and go with me like a man, and got up there, and Bill said he would take him home. I said, 'Bill, don't interfere any more. I am going to take him.' Then Hoyt said, 'Then shoot me, G— d— you.' "

This witness denied saying he was going to take Barton to jail or kill him, but testified that as the deceased was in the act of hitting him with the cue stick he shot at his right arm; that the deceased hit him several times with the cue stick and he shot at his left arm. He further testified he was unconscious when the third shot was fired and does not remember anything about it.

The defendant Garren testified: "I didn't see what happened to Brannon and Barton in the pool room. I saw Barton get shot the first time. I don't know where it hit him. I saw him shot the second time . . . I shot at his leg. He had been shot at three times when I shot. I didn't know whether he had been hit or not. He talked to me before I shot him. I backed off three or four steps. I think he had the cue stick in his hand when I shot."

The State offered a number of witnesses who testified that the deceased did not have the general reputation of being a dangerous and violent man.

The jury returned a verdict of guilty of manslaughter.

From the judgment entered, the defendants appeal, and assign error.

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

C. E. Hyde and O. L. Anderson for appellants.

DENNY, J. The failure of the court below to sustain the defendants' motion for judgment as of nonsuit, and their motion for a directed verdict of acquittal as to the charge of murder in the second degree, is assigned as error.

The ruling of the court below on these motions was proper and will be upheld. It is true the defendants were law enforcement officers and are contending that they killed the deceased in self-defense while in the

discharge of their official duties. Nevertheless, this does not change the general rule that where the evidence shows an intentional killing with a deadly weapon, the law implies malice, and the State cannot be non-suited. As stated in *S. v. Utley,* 223 N.C. 39, 25 S.E. 2d 195, "And when this implication is raised by an admission or proof of the fact of an intentional killing, the burden is on the defendant to show to the satisfaction of the jury facts and circumstances sufficient to reduce the homicide to manslaughter or to excuse it." *S. v. Vaden,* 226 N.C. 138, 36 S.E. 2d 913; *S. v. Debnam,* 222 N.C. 266, 22 S.E. 2d 562; *S. v. Mosley,* 213 N.C. 304, 195 S.E. 830; *S. v. Terrell,* 212 N.C. 145, 193 S.E. 161; *S. v. Keaton,* 206 N.C. 682, 175 S.E. 296; *S. v. Johnson,* 184 N.C. 637, 113 S.E. 617.

Furthermore, submission to the jury of the question of the guilt of the defendants of murder in the second degree was harmless since the jury returned a verdict of manslaughter. *S. v. Artis,* 233 N.C. 348, 64 S.E. 2d 183; *S. v. Beachum,* 220 N.C. 531, 17 S.E. 2d 674; *S. v. Blackwell,* 162 N.C. 672, 78 S.E. 316.

The defendants assign as error the failure of the court to instruct the jury not to consider statements made by the witnesses R. V. Dockery and Ed Dockery to the effect that "Hoyt (the deceased) got so weak" just before the defendant Garren fired the last shot. The court sustained the objections to the statements even though the defendants interposed no objections to the preceding questions.

Since no objections were made to the questions which preceded the statements and no request to strike the answers were interposed, and no request was made to the court to instruct the jury not to consider them, these exceptions were waived. *S. v. Holland,* 216 N.C. 610, 6 S.E. 2d 217; *S. v. Gooding,* 196 N.C. 710, 146 S.E. 806; *S. v. Green,* 152 N.C. 835, 68 S.E. 16. Moreover, we consider the statements harmless in view of the medical and other testimony which was before the jury. Barton had been shot three times by Brannon before he was shot by Garren, and if Garren's own testimony is to be believed, he fired the fourth shot which entered the left leg of the deceased. This shot, according to the medical testimony, entered the left leg near the groin and came out through the thigh. Prior thereto, one shot had entered the right forearm of the deceased and came out about an inch and a half below his elbow, and another one entered the back of the left arm and came out the front above the elbow. Still another shot entered his right chest; this bullet ranged upward and punctured the upper right part of his lung and fractured his windpipe.

The appellants have preserved and brought forward thirteen exceptions to contentions of the State, or the defendants, as given to the jury by the court in its charge.

It is well settled that any misstatement of the evidence by the trial judge in reciting the contentions of the State, or a defendant, should be brought to his attention in apt time in order to afford him an opportunity for correction. *S. v. Shackleford,* 232 N.C. 299, 59 S.E. 2d 825; *S. v. Warren,* 227 N.C. 380, 42 S.E. 2d 350; *S. v. Biggerstaff,* 226 N.C. 603, 39 S.E. 2d 619; *S. v. Smith,* 221 N.C. 400, 20 S.E. 2d 360.

The defendants complain and assign as error the failure of the court to properly define and apply the law to the facts and explain the difference between self-defense as applied to ordinary persons and as applied to officers attempting to make a lawful arrest.

Pertinent parts of the charge complained of with respect to the rights and duties of officers while making an arrest, are as follows: "If you find from the evidence that the defendant Brannon apprehended the deceased, Hoyt Barton, in a violation of the prohibition law, I charge you that it was the duty of the officers to place him under arrest . . . The officers owed the deceased no duty to allow him to go home nor were they required or under any duty to put off the arrest to a more favorable time. . . .

"The court further charges you that where an officer has legal authority to arrest, and while using proper means, if resisted, he may repel force with force and need not give back an inch; but he may not use excessive force. . . . When an offender resists arrest the officer may use sufficient force to overcome resistance, and if the resistance is with a deadly or dangerous weapon, and I charge you that the cue stick introduced in evidence here is a deadly weapon, the officer may resort to such force as necessary to avoid serious injury and accomplish the arrest. He is never required under such circumstances to afford the resisting offender the opportunities of a fair and equal struggle, but may avail himself of any advantages that arise in the conflict.

"It is the law of this State, and I charge you that forcible resistance to lawful arrest will not be sanctioned. As against those who defy its decrees and threaten violence to its officers, the law commands that its mandates be executed, peaceably, if they can, forcibly if they must. An officer making an arrest, either in case of felony or misdemeanor, may meet force with force, sufficient to overcome it, even to the taking of life if necessary . . . He is rightfully the aggressor, and he may use such force as is necessary to overcome any resistance. . . .

". . . Where officers, engaged in making arrests, are acting in good faith, and force is required to be used, their conduct should not be weighed in golden scales. I therefore charge you, gentlemen of the jury, that if you should find from the evidence in this case that the defendants used no more force than appeared to them to be necessary at that time and under the circumstances then confronting them, the homicide would be justifiable and it would be your duty to return a verdict of not guilty.

"I charge you that it is the law in this State that duly summoned assistants or persons deputized by an officer attempting to make an arrest are under the same protection of the law which is afforded the officer attempting such arrest. Therefore, if you find from the evidence that the defendant Garren was duly summoned or deputized by the officer Brannon to assist in making or attempting to make an arrest of the deceased Hoyt Barton, the law affords the defendant Garren the same protection as it affords the defendant Brannon.

"If you find from the evidence that Brannon, the police officer, while attempting to arrest the deceased for a violation of the prohibition law of the State, in the presence of the officer, was withstood and resisted by the deceased, and in resisting assaulted the officer with a cue stick . . . making it appear to the officer it was necessary to shoot the deceased in order to subdue him and place him under arrest, the action of the officers was fully justified.

"The court further charges you that an authorized officer of the law in arresting an offender may use force, the degree of which is largely within his own judgment, as is necessary to accomplish his purpose, and when withstood and his authority and purpose made known, he may use the force necessary to overcome resistance, to the extent of taking human life if that be required for the proper and efficient performance of his duty, without criminal liability, unless the force has been excessively and maliciously used to such a degree as amounts to a wanton abuse of authority; and this applies whether the offense charged be a felony or misdemeanor."

We do not think this assignment of error is well taken. It is not contended by the appellants that the court's charge on the law ordinarily applicable to the right of self-defense is erroneous; and the charge with respect to the rights and duties of an officer while making an arrest was in substantial accord with our decisions on the subject.

Stacy, C. J., in speaking for the Court in *Holloway v. Moser,* 193 N.C. 185, said: "An officer, in making an arrest or preventing an escape, either in case of felony or misdemeanor, may meet force with force, sufficient to overcome it, even to the taking of life, if necessary. *S. v. Dunning,* 177 N.C. 559. And he is not required, under such circumstances, to afford the accused equal opportunities with him in the struggle. He is rightfully the aggressor, and he may use such force as necessary to overcome any resistance . . . If the offender put the life of the officer in jeopardy, the latter may *se defendendo* slay him; but he must be careful not to use any greater force than is reasonably and apparently necessary under the circumstances, for necessity is the ground upon which the law permits the taking of life in such cases." *S. v. Miller,* 197 N.C. 445, 149 S.E. 590; *S. v. Fain,* 229 N.C. 644, 50 S.E. 2d 904.

Moreover, the defendants do not except to any specific portion of the charge on this phase of the case. And it would seem that if any portion of the charge complained of, in this respect, is subject to criticism, it is because it was more favorable to the defendants than our decisions require.

We have carefully examined the remaining assignments of error to the court's charge, and when it is considered contextually, as it must be, it is, in our opinion, without prejudicial error. *In re Will of West,* 227 N.C. 204, 41 S.E. 2d 838; *S. v. French,* 225 N.C. 276, 34 S.E. 2d 157; *S. v. Davis,* 225 N.C. 117, 33 S.E. 2d 623; *S. v. Manning,* 221 N.C. 70, 18 S.E. 2d 821.

There are many other exceptions and assignments of error on this record which we have not discussed, but after a careful examination and consideration of them, none of them, in our opinion, is sufficient to disturb the verdict below.

A careful review of the entire record leads us to the conclusion that the real issue in the trial below was whether or not the defendants used excessive force in their attempt to subdue and arrest the deceased. The jury resolved the issue against the defendants in a trial free from error in law. The verdict of the jury will be upheld.

No error.

RAYMOND POWELL v. MABEL LLOYD.

(Filed 21 November, 1951.)

1. Trial § 22a—

On motion to nonsuit, evidence supporting plaintiff's claim must be considered in the light most favorable to him, giving him the benefit of every reasonable inference and intendment.

2. Automobiles § 18h (2)—

Evidence tending to show that defendant, driving at nighttime without tail lights in a drizzle of rain and in heavy fog, suddenly stopped her truck without giving warning by hand signal or brake lights, causing a rear-end collision by plaintiff's following vehicle, *is held* sufficient to be submitted to the jury upon the issue of negligence. G.S. 20-129, G.S. 20-154.

3. Negligence § 17—

The burden of proving contributory negligence rests upon defendant.

4. Negligence § 19c—

Nonsuit on the ground of contributory negligence cannot be granted unless plaintiff's own evidence, taken in the light most favorable to him, establishes contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom.

5. Automobiles § 18h (3)—Plaintiff's evidence held not to show contributory negligence as a matter of law.

Plaintiff's evidence tended to show that he was riding his motorcycle following defendant's truck at nighttime in rain and fog along a highway under repair, with barricades at long intervals in their lane of traffic, that lights from vehicles approaching from the opposite direction interfered with plaintiff's vision, that as plaintiff got within thirty feet of the truck defendant suddenly stopped her truck 175 feet before reaching a barricade, without giving warning by hand signal or brake lights, that in the emergency thus created plaintiff, traveling fifteen or twenty miles per hour, applied his brakes as hard as prudent on the wet pavement, attempted to go around the truck to his right to avoid collision with oncoming traffic to his left, and that his front wheel cleared the truck on the right but that the back portion of the motorcycle struck the right side of defendant's rear bumper, resulting in injury to plaintiff and damage to his motorcycle. *Held:* Plaintiff's evidence does not disclose contributory negligence as a matter of law, and nonsuit was improvidently granted.

6. Negligence § 2—

Where sudden emergency is created by the negligence of defendant, plaintiff is not required to choose the wisest conduct, but only to choose such conduct as a person of ordinary care and prudence, similarly situated, would have chosen.

7. Automobiles §§ 12a, 18h (3)—

Plaintiff may not be charged with contributory negligence as a matter of law merely because of failure to stop when the lights of oncoming traffic partially blind him and interfere with his vision of the road ahead.

BARNHILL, J., dissenting.

WINBORNE and DENNY, JJ., concur in dissent.

APPEAL by plaintiff from *Gwyn, J.*, June Term, 1951, BURKE.

Civil action to recover for personal injury and property damage resulting from a collision between plaintiff's motorcycle and defendant's truck.

Plaintiff's evidence tends to show that on 7 October, 1949, in a rear-end collision between the motorcycle of plaintiff and the pickup truck of defendant, plaintiff sustained a compound fracture of his leg resulting in serious permanent injury. His motorcycle caught fire and was practically destroyed. The collision happened between Morganton and Valdese in a curve on Highway 70, which highway is 18 feet hard surface with 3 feet shoulders. The road was under repair. Several barricades were across the right-hand portion some distance to the east and to the west of the point of collision. The barricade nearest the point of collision had been placed there after plaintiff had passed that point about noon going to Morganton. Plaintiff and defendant were both traveling in an easterly direction toward Valdese, plaintiff behind the defendant.

It had been raining and at the time was dark, foggy and drizzling rain. Plaintiff's vision was impaired by approaching cars, the lights of which were "shining high" making it difficult for him to see the road ahead. His motorcycle was in good condition, his lights and brakes in good working order, and he was driving with his lights dimmed.

At a distance of 175 feet before reaching the barricade ahead, defendant stopped her truck suddenly directly in front of plaintiff without giving either hand or mechanical signal or otherwise indicating her intention to stop. She had no tail light burning and no brake light in operation. Plaintiff applied his brakes and turned to the right in an effort to miss the truck, but some part of the rear bumper of the truck caught his motorcycle, crushing his leg. His motorcycle stopped with the rear wheel on the hard surface and the front wheel in the edge of the ditch. Plaintiff could not cut to the left because of approaching traffic. On the next day in the sheriff's office the defendant admitted to Patrolman O'Kelly and to plaintiff's father that "the wreck was her fault; that she had no tail lights and that she would take care of it and pay the charges."

Plaintiff testified: "I was traveling 15 to 20 miles per hour. . . . When I started around, getting into the curve, I was about 50 feet from the truck, and I got half way around the curve. . . . I had got up to within 30 feet of her before I thought she would stop. . . . She stopped right suddenly. . . . I did not notice anything stopped until I got close to it and I did not have time to swerve around and I tried to cut around, and I had my brakes on, and not going over 15 miles when going around that side and the front wheel got by and the rear, something caught in the left side bumper and my leg caught and crushed between it and the bumper. I nearly got around her on her right side. We were both going in the same direction. The reason I did not turn out on the left side was a bunch of cars coming meeting me and I was liable to run straight into those cars; the cars were coming with their lights shining up high and that made it hard for me to see in front. . . . I could not see well because of the approaching lights shining up. . . . My motorcycle is made so I can dim my lights and I had them on dim. I do not know whether the lights approaching me were on dim or not, but they were shining up high. . . . She had no tail lights and gave no hand signal. . . . The lights and brakes on my motorcycle were in good shape and the brakes were working."

At the close of plaintiff's evidence, a nonsuit was predicated upon the contributory negligence of the plaintiff. From this ruling the plaintiff appealed, assigning errors.

Mull, Patton & Craven for plaintiff, appellant.
Horton & Carter for defendant, appellee.

VALENTINE, J. The question on this appeal is the correctness of the ruling below allowing the defendant's motion for judgment of nonsuit. Defendant offered no evidence, but plaintiff's evidence made out a case of actionable negligence against her. Therefore, if the judgment of the court below is sustained, it must be upon the basis that plaintiff's own evidence proved as a matter of law that he was guilty of contributory negligence. Upon a motion for nonsuit the plaintiff is always entitled to have the evidence which tends to support his position considered in the light most favorable to him. He is entitled to the benefit of every inference and intendment which reasonable minds can logically draw from his evidence. *Nash v. Royster,* 189 N.C. 408, 127 S.E. 356.

Unquestionably, there was abundant evidence tending to show negligence on the part of defendant. She drove her truck on a wet slippery highway in a drizzle of rain and in a heavy fog without tail lights or brake lights while meeting heavy traffic with glaring lights. She stopped her truck suddenly and without warning in the path of the plaintiff. The evidence tended to show not only a failure of defendant to observe the rules of the prudent man under the circumstances, but also showed a violation of statutes regulating the operation of motor vehicles on the highways. G.S. 20-129; G.S. 20-154. Evidence of such conduct on the part of defendant was sufficient to raise a jury question upon defendant's negligence. *Joyner v. Dail,* 210 N.C. 663, 188 S.E. 209; *Tarrant v. Bottling Co.,* 221 N.C. 390, 20 S.E. 2d 565; *Conley v. Pearce-Young-Angel Co.,* 224 N.C. 211, 29 S.E. 2d 740.

The burden of proving contributory negligence rests upon the defendant. By her motion for nonsuit, defendant contends that from plaintiff's evidence there was sufficient showing of contributory negligence to preclude his recovery. This calls for the application of the rule that judgment of nonsuit on the ground of contributory negligence should not be granted unless the evidence of plaintiff, taken in the light most favorable to him, establishes such negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. *Dawson v. Transportation Co.,* 230 N.C. 36, 51 S.E. 2d 921; *Winfield v. Smith,* 230 N.C. 392, 53 S.E. 2d 251; *Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209; *Hampton v. Hawkins,* 219 N.C. 205, 13 S.E. 2d 227; *Hobbs v. Drewer,* 226 N.C. 146, 37 S.E. 2d 121; *Cole v. Koonce,* 214 N.C. 188, 198 S.E. 637; *Manheim v. Taxi Corp.,* 214 N.C. 689, 200 S.E. 382.

With respect to a nighttime collision, this Court has said: "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. . . . 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." *Chaffin v. Brame,* 233 N.C. 377, and cases there cited.

In examining the evidence in the instant case in the light of the applicable principles of law, we have this factual situation: On the evening of 7 October, 1949, the defendant was operating a pickup truck in an easterly direction along Highway 70 around a curve between Morganton and Valdese. It was after dark in the evening, had been raining and at the time was drizzling rain and very foggy. The hard surface highway was slick. The road was undergoing repairs and some barricades had been placed along the southern half of the highway, but there were no barricades for a considerable distance in front and behind defendant's truck. Defendant had no tail lights burning and no brake light in operation. Plaintiff was riding his motorcycle in the same direction behind defendant's truck. At the point of collision, a number of automobiles with "lights shining high" were meeting plaintiff and defendant. The lights of the oncoming cars did not completely blind plaintiff, but interfered with his vision so that he could not see the road ahead clearly. When plaintiff got within 30 feet of defendant, she suddenly and without warning of any kind stopped her truck on the highway directly in front of plaintiff, a distance of 175 feet before she reached the barricade ahead. Plaintiff applied his brakes, which were in good condition, and turned to the right in an effort to miss defendant's truck. He nearly got around the truck, but the back portion of his motorcycle caught the right end of the rear bumper of defendant's truck in such a way as to crush and break his leg, thereby seriously and permanently injuring him. His motorcycle came to rest with the front wheel in the edge of the ditch and the rear wheel still on the hard surface portion of the highway. Plaintiff could not turn to the left because of defendant's position on the highway and the presence of oncoming traffic. He dimmed his lights in recognition of the rights of approaching motorists. There was no evidence that plaintiff drove his motorcycle at any time at a rate of speed greater than 15 or 20 miles per hour. The hard surface portion of the highway was 18 feet with 3 feet shoulders on each side. Plaintiff applied

his brakes, but a complete application of the brakes upon a wet road may have produced more disastrous results. Defendant admitted full responsibility without attributing any negligence to the plaintiff.

In these circumstances requiring instant action, the plaintiff according to his testimony did not have sufficient time to meditate and deliberate on the course of action necessary for best results, and in judging his conduct consideration must be given to the sudden emergency with which he was confronted. He should not be held to the same deliberations or circumspection as are required in ordinary conditions. *Hinton v. R. R.*, 172 N.C. 587, 90 S.E. 756. "The standard of conduct is that of the prudent man under like circumstances. According to plaintiff's testimony the emergency was created by the negligent conduct of the defendants. Under these circumstances the rule is stated in *Ingle v. Cassady*, 208 N.C. 497, 181 S.E. 562, as follows: 'One who is required to act in emergency is not held by the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made.'" *Winfield v. Smith, supra; Butner v. Spease*, 217 N.C. 82, 6 S.E. 2d 808; *Beck v. Hooks*, 218 N.C. 105, 10 S.E. 2d 608; *Sparks v. Willis*, 228 N.C. 25, 44 S.E. 2d 343; *Wall v. Bain*, 222 N.C. 375, 23 S.E. 2d 330.

The plaintiff cannot be charged with contributory negligence as a matter of law merely because he did not stop when the high shining lights of oncoming traffic partially blinded him and interfered with his vision of the road ahead. This principle has been fully recognized and applied in this jurisdiction. *Cummins v. Fruit Co.*, 225 N.C. 625, 36 S.E. 2d 11; *Leonard v. Transfer Co.*, 218 N.C. 667, 12 S.E. 2d 729; *Cole v. Koonce, supra; Williams v. Express Lines*, 198 N.C. 193, 151 S.E. 197; *Clarke v. Martin*, 215 N.C. 405, 2 S.E. 2d 10. Whether the plaintiff could have avoided the collision and its resulting injury or whether his conduct was different from that of any reasonably prudent man in the same or similar circumstances are questions about which reasonable minds may honestly differ. We cannot say as a matter of law that the single inference of contributory negligence and no other may be drawn from plaintiff's evidence.

Therefore, the judgment of the court below is

Reversed.

BARNHILL, J., dissenting: The statement of facts contained in the majority opinion presents a general picture of the circumstances surrounding the collision which is the basis of this action. Yet, in my opinion, some of plaintiff's testimony is, under the circumstances of this case, given undue weight, while portions thereof are not accorded their proper significance. On the question of nonsuit, the statute, G.S. 1-183,

requires us to consider all the testimony of plaintiff in the light most favorable to him. This does not authorize us to minimize or ignore uncontradicted, unequivocal, positive facts to which plaintiff himself testified. *Atkins v. Transportation Co.,* 224 N.C. 688.

Plaintiff and defendant were traveling eastward on Highway 70, going from Morganton toward Valdese, in a curve, and the accident happened about the center of the curve. The south side of the road—the plaintiff's and defendant's right-hand side—was under repair, and fifteen or twenty barricades were placed along the road to prevent travel on that side. This, in effect, converted the road into a one-lane highway, vehicles going east being required, as they met oncoming traffic, to turn to the right, decrease speed or stop if at or near a barricade, and permit the west-bound vehicles to pass in safety. This condition was known to the plaintiff.

Non constat defendant's truck had no tail light, plaintiff had seen and knew the truck was traveling ahead. He saw it when he was 50, 75, or 100 feet to the rear and it was within his view as they proceeded along the highway. The truck stopped suddenly. The driver gave no hand signal of her intent to stop. No brake light came on as she applied her brakes. These are facts which could not be within her knowledge unless he could see the truck at the time. That he saw it is implicit in his testimony, or else all that he said in that respect was without foundation in fact.

Hence, this is not a case of ordinary travel, where the motorist to the rear has no cause to anticipate that the forward vehicle will stop, but may assume that it will continue on its way. Here plaintiff was on constant notice that defendant's driver might be compelled to stop at any moment, and the nearness of the oncoming traffic gave him positive warning *that moment was at hand.* The notice thus accorded plaintiff was as positive and direct as any hand signal or brake light could have been.

The absence of a tail light has no material bearing on this case. It is required so as to give notice to vehicles approaching from the rear. As plaintiff had already seen the truck and knew of its presence, no further notice was essential, and the observed absence of such light "put him on notice that he could not rely upon those lights." *Austin v. Overton,* 222 N.C. 89. Likewise, the statement of the driver, "It is my fault," has no particular significance in respect to the question of contributory negligence. At most it only concedes the truck driver's own negligence. *Austin v. Overton, supra.*

If there was any sudden emergency, it was created, in part at least, by plaintiff in driving so close to the truck, with full knowledge the truck would be compelled to stop on account of the oncoming traffic, that he could not stop or even attempt to stop without creating a dangerous

situation. Being a party to the creation of the emergency, he cannot invoke the sudden emergency doctrine in exculpation of his own conduct.

The rule of sudden emergency cannot be invoked by one who has brought that emergency upon himself by his own wrong or who has not used due care to avoid it. 1 Blashfield, pt. 2, p. 547, sec. 669, and numerous cases cited in notes. See also 38 A.J. 876; *Bentson v. Brown,* 203 N.W. 380, 38 A.L.R. 1417; Anno. 37 L.R.A., N.S. 54.

Plaintiff was gradually gaining on the truck. He was 75 or 100 feet behind when he first saw it and was within 30 feet when he saw it stop suddenly in the middle of the road. At that time he was so close to the truck that he knew, not only that he could not stop but also, that it was dangerous to attempt to stop by the full application of his brakes. "I knew if I tried to stop I would slide on."

Under these circumstances as disclosed by this record, it would seem to me that the conclusion plaintiff, by his own negligent conduct, materially contributed to the creation of the emergent situation about which he complains is inescapable.

So the case comes to this. The plaintiff was rounding a curve on a one-lane road, traveling to the rear of a truck he saw and knew was ahead. He was aware that vehicles approaching from the opposite direction would force the truck to turn to the right, stop, and yield the right of way, and that he would have to do likewise. He was aware of the wet, slippery condition of the road, and he saw the oncoming traffic which was so close the lights affected his capacity to see. He knew that this indicated the truck would likely be compelled to stop. Yet he continued to narrow the distance between him and the truck to such an extent that when it did stop, he was so close it was impossible for him to avoid the collision. If this does not indicate that he drove head-on into a dangerous situation and failed to exercise due care for his own safety, I find it difficult to perceive how the operator of a vehicle could be held guilty of negligence as a matter of law when he plows into a vehicle he knows is just ahead.

A motorist is held to the duty of seeing what he ought to have seen. *Wall v. Bain,* 222 N.C. 375; *Cox v. Lee,* 230 N.C. 155. *A fortiori* he is charged with the duty to regard and pay due attention to the conditions he actually knows and observes and which materially affect his duty to exercise due care under the circumstances then existing. Therefore, the case comes squarely within the first line of decisions cited in *Tyson v. Ford,* 228 N.C. 778.

Chaffin v. Brame, 233 N.C. 377, relied on in the majority opinion is clearly distinguishable. In that case the circumstances were such that the plaintiff did not know of the presence of defendant's parked truck

until the very moment of the collision. *Barlow v. Bus Lines,* 229 N.C. 382, is similarly distinguishable.

There is a presumption in favor of the judgment entered, and the burden rests upon the appellant to show error. This, in my opinion, he has failed to do. I therefore vote to affirm.

WINBORNE and DENNY, JJ., concur in dissent.

STATE OF NORTH CAROLINA ON RELATION OF THE UTILITIES COMMISSION v. CITY COACH COMPANY, INC.

(Filed 21 November, 1951.)

1. Utilities Commission § 3: Carriers § 5—

Chap. 1132, Session Laws of 1949, has no application in determining the validity of an order of the Utilities Commission entered 30 July, 1947.

2. Same—

Under the provisions of Chap. 440, Session Laws of 1933, amending Chap. 136, Session Laws of 1927 (G.S. 62-105(f)), the Utilities Commission has jurisdiction upon a showing of public convenience and necessity therefor to grant to a city bus carrier authority to operate over a public highway for a distance of .7 of a mile outside the city, without finding that the operations of an inter-urban bus company under franchise along said highway were not providing sufficient service, or that thirty days notice had been given it and it had failed to provide the service required by the Commission.

3. Same—

What constitues public convenience and necessity is primarily an administrative question and involves determination, among other things, of whether there is a substantial public need for the service, whether existing carriers meet this need, and whether it would impair the operation of existing carriers contrary to the public interest.

4. Utilities Commission § 5—

An order of the Utilities Commission is *prima facie* just and reasonable. G.S. 62-26.10.

BARNHILL, J., concurring.

APPEAL by Utilities Commission from *Sink, J.,* March Term, 1951, of GASTON. Reversed.

The case involves the validity of an order of the Utilities Commission granting franchise certificate to the Gastonia Transit Company to operate motorbuses on Highway #7 for seven-tenths of a mile beyond the

corporate limits of the City of Gastonia over route now served by the City Coach Company. The City Coach Company appeared in opposition.

In 1942 the Gastonia Transit Company (hereinafter called the Transit Company) was granted franchise by the City of Gastonia to operate bus transportation service over the city streets. In 1945 the City approved the Transit Company's application for authority to extend its operation to a point on Highway #7 seven-tenths of a mile beyond the city limits. Thereupon the City Coach Company (hereinafter referred to as the Coach Company), an inter-urban motor-carrier of passengers which also operated buses on certain streets of the city and thence out along Highway #7, instituted action to restrain the operation of the Transit Company beyond the city limits. This action reached this Court by appeal and was heard at Spring Term, 1947, and the decision is reported in 227 N.C. 391, 42 S.E. 2d 398. It was held in that case that only the Utilities Commission had power to grant franchises for operation of motorbuses over the public highways, and that one desiring to engage in that business must first apply to and obtain the Commission's franchise certificate authorizing such operation.

On 15 April, 1947, the Transit Company filed its application for franchise certificate for operation over Highway #7 from Gastonia city limits to intersection of Lower Dallas Road, the distance being seven-tenths of a mile, to which the Coach Company filed protest on the ground that the Coach Company was already operating over this route under franchise certificate issued by the Utilities Commission in 1946.

After hearing all the evidence the Utilities Commission found that there was need for the services of both the Coach Company and the Transit Company, both rendering good service, and "that public convenience and necessity for the operation of the Gastonia Transit Company has been clearly shown." It was thereupon ordered that franchise certificate issue to the Transit Company authorizing it to engage in the transportation of passengers by bus over certain streets and thence from city limits *via* Highway #7 to the intersection of the Lower Dallas Road. The Coach Company excepted to this order. Its exceptions were overruled, and it appealed to the Superior Court of Gaston County.

In the Superior Court the Transit Company and Utilities Commission moved to dismiss the Coach Company's appeal. On the hearing Judge Sink overruled the motion to dismiss the appeal, and on the merits held that the order of the Commission was void for failure to comply with the provisions of the statute, G.S. 62-105 (f), in that it was not shown that the existing operations were not providing sufficient service or that after 30 days' notice the Coach Company had failed to provide the service required by the Commission.

The Utilities Commission excepted and appealed.

Attorney-General McMullan and Assistant Attorney-General Paylor for the North Carolina Utilities Commission, appellant.

Banks Arendell for Gastonia Transit Company, Inc., appellant.

Basil L. Whitener for City Coach Company, appellee.

DEVIN, C. J. The appeal in this case presents the question of the validity of an order of the Utilities Commission granting franchise certificate to the Gastonia Transit Company to operate buses over seven-tenths of a mile of the route now served by the City Coach Company.

The court below held that the order was void for the reason that the Utilities Commission had granted the Transit Company's application for transportation service which would duplicate in part a previously authorized similar class of service without having found that the existing operation was not providing sufficient service to reasonably meet the public convenience and necessity as required by statute.

Undoubtedly the ruling appealed from would find support in the present statute, Chapter 1132, Session Laws of 1949, now codified as G.S. 62-121.52 (7), but this proceeding was instituted before the Utilities Commission in 1947, and the order of the Commission now under consideration was entered 30 July, 1947. Thereafter it was pending on appeal from the Commission in the Superior Court of Gaston County until heard in March, 1951. It is provided in the Bus Act of 1949 (sec. 40 of Chap. 1132) that "this Act shall not apply to any proceeding which has been heard and is awaiting a decision of the Commission or in which the Commission has entered its decision or order prior to its effective date (Oct. 1, 1949)." So that the validity of the order of the Commission entered in 1947 must be judged by the controlling statute then in force. Chapter 136, Session Laws of 1927, amending and re-enacting previous statutes relating to buses provided that "the Commission *shall* refuse any application for passenger franchise over a route where there has already been established one or more passenger lines, unless it is shown to the satisfaction of the Commission that the existing operations are not providing sufficient service to reasonably meet the public convenience and necessity. . . ." But by Chap. 440, Session Laws of 1933, the 1927 statute was amended to read as follows: "The Commission *may* refuse to grant any application for a franchise certificate where the granting of such application would duplicate, in whole or in part, a previously authorized similar class of service, unless it is shown to the satisfaction of the Commission that the existing operations are not providing sufficient service to reasonably meet the public convenience and necessity. . . ." This statute was codified as 62-105 (f).

An examination of the wording of the statute in force when the order of the Utilities Commission was entered leads to the conclusion that the

General Assembly had at that time authorized the Utilities Commission in its discretion, in carrying out the purposes of the Bus Act, for the public benefit, to grant or refuse application for a franchise certificate to operate passenger buses over a designated route, though it might duplicate in part an authorized similar class of service. But the authority to the Commission to exercise its discretion was qualified by the implied direction in the next clause that if it be shown to the satisfaction of the Commission that the previously authorized operator was not rendering adequate service, or failed after notice to provide the required service, then it would be the duty of the Commission to grant to the properly qualified applicant franchise to operate. The authority to grant a franchise certificate for the operation of passenger buses on the highway must in any event be predicated upon a showing of public convenience and necessity therefor.

This conclusion seems to be supported by the decision of this Court in *Utilities Commission v. Trucking Co.,* 223 N.C. 687, 28 S.E. 2d 201, where it was said, *Chief Justice Stacy* speaking for the Court: "Nor is it to be overlooked that in 1933, the Commission was given authority to grant or refuse any application for a franchise certificate where the granting of such application would duplicate, in whole or in part, a previously authorized similar class of service, unless it is shown to the satisfaction of the Commission that the existing operators are not providing sufficient service reasonably to meet the public convenience and necessity." And in a concurring opinion in that case by *Justice Barnhill* it was said: "Under the express language of the motor bus law the power of the Commission to grant franchises to a passenger or freight carrying corporation involves the exercise of discretion and judgment. . . . The term . . . 'may refuse to grant' clearly import the exercise of discretion and judgment. We have consistently held that the courts will not review or reverse the exercise of discretionary power by an administrative agency except upon showing of capricious, unreasonable, or arbitrary action, or disregard of law." *Justice Barnhill's* concurring opinion in this case was subsequently adopted by the Court in *Utilities Comm. v. McLean,* 227 N.C. 679, 44 S.E. 2d 210.

And in *Utilities Commission v. Coach Co.,* 224 N.C. 390, 30 S.E. 2d 328, *Justice Denny* writing the opinion of the Court, after quoting G.S. 62-105 (f), used this language in interpretation thereof: "Under the provisions of the foregoing statute, the Commission may in its discretion grant a franchise which would duplicate in whole or in part a previously authorized similar claim of service, and when it is shown to the satisfaction of the Commission that existing operations are not providing sufficient service to reasonably meet the public convenience and necessity, and the existing operators, after thirty days' notice, fail to provide the

service required by the Commission, it would be its duty to do so. The language is that the Commission may refuse to grant the additional franchises unless it is shown to the satisfaction of the Commission that certain facts exist as set forth in the statute."

Hence, it would seem logically to follow that where the Commission under the statute in force in 1947 has found upon sufficient evidence "that numerous people use the service of the Gastonia Transit Company in going to and from work to places in and bordering Gastonia which are not served by the City Coach Company, and that public convenience and necessity for the operation of the Gastonia Transit Company has been clearly shown," and the Commission has upon such finding issued franchise certificate to the Transit Company, its order should not be vacated, notwithstanding there was no finding of inadequate service by the Coach Company.

What constitutes public convenience and necessity is primarily an administrative question and involves determination, among other things, of whether there is a substantial public need for the service, whether existing carriers meet this need, and whether it would impair the operations of existing carriers contrary to the public intent. *Utilities Comm. v. Trucking Co., supra.* And the determination of the Utilities Commission is declared by statute to be *prima facie* just and reasonable. G.S. 62-26.10; *Utilities Comm. v. Coach Co., supra.*

The ruling of the court below on the motion to dismiss the appeal from the Utilities Commission to the Superior Court seems to be in accord with the facts and the rules governing appeals from the Commission.

No procedural question is raised or decided on this appeal, but we note the statute G.S. 62-26.7 prescribes that when an appeal shall be taken from an order of the Utilities Commission the case shall be entered on the docket of the Superior Court as "State of North Carolina on relation of the Utilities Commission" as party plaintiff, and it is further provided by G.S. 62-26.12, "Any party may appeal to the Supreme Court under the same rules and regulations as are prescribed by law for appeals." Where the Utilities Commission as an administrative agency of the State establishes rates and regulations for those engaged in public service, or exercises similar functions, it properly should appear as a party to enforce its orders in the public interest, but when the Utilities Commission sits as a court of record to determine the rights of rival claimants to a valuable franchise, it is somewhat anomalous to find it appearing in this Court to uphold its order from which one or the other party had appealed. However, this procedure seems to have been authorized by the General Assembly in the statutes noted. Compare G.S. 1-271.

For the reasons herein stated we conclude that the court below was in error in holding the order of the Utilities Commission appealed from was

invalid. On the record and under the statutes in force at the time the order was entered the Utilities Commission was entitled to have its order affirmed. The cause should be remanded to the Utilities Commission for such further regulations as may be necessary in adjusting the rights of the parties to this proceeding, in the public interest.

Reversed.

BARNHILL, J., concurring: While I am in accord with the majority decision on the merits of this controversy, I wish to make it crystal clear that, in my opinion, the Utilities Commission had no right to appeal to this Court from the ruling of the court below.

While the rights of the respective parties are fixed by Ch. 134, P.L. 1933, now General Statutes Ch. 62, Art. 4, the right of appeal from the judgment entered, being procedural in nature, is controlled by the provisions of Ch. 989, Session Laws of 1949 (G.S. 62-26.6 *et seq.*), which was adopted prior to the hearing in the Superior Court.

Briefly stated, the pertinent provisions of that Act are these: (1) the party adversely affected by a decision of the Utilities Commission may petition for a rehearing and "if the decision (on the petition to rehear) fails to grant the full relief prayed for in the petition, or . . . after a decision becomes final by reason of the failure of the Commission to act," the petitioner may appeal within the time and under the conditions specified in the Act, G.S. 62-26.6; (2) upon such appeal the cause shall be entitled "State of North Carolina on relation of the Utilities Commission against" the appellant, to be designated by name in the caption, G.S. 62-26.7; (3) on the appeal "the complainant in the original complaint before the Commission shall be a party to the record and each of the parties to the proceeding before the Commission shall have a right to appear and participate in said appeal," G.S. 62-26.8; (4) any party may appeal to the Supreme Court from the judgment of the Superior Court "*under the same rules and regulations as are prescribed by law* for appeals, except that the Utilities Commission, if it shall appeal, shall not be required" to give appeal bond, G.S. 62-26.12. (Italics supplied.)

Thus, in providing for appeals in cases originating before the Utilities Commission, the only references to the Commission are the one requiring its name to appear in the caption and the one exempting it from the requirement that the appellant give an appeal bond. G.S. 1-270, 1-285. Even if we concede that these provisions are sufficient to permit it to appeal in proper instances, the right of appeal in Utilities Commission cases is subject to existing statutory rules regulating appeals generally, and the only parties who are permitted to appeal to this Court are the parties "aggrieved" by the judgment entered in the Superior Court. G.S. 1-271.

The party aggrieved, within the meaning of this provision, is the one whose rights have been directly and injuriously affected by the judgment entered in the Superior Court. *Freeman v. Thompson,* 216 N.C. 484; McIntosh P. & P. 767-8.

Under no view of this case could it be said that the Commission is a "party aggrieved" by the judgment from which it appeals. The reversal of its ruling may have inflicted some slight injury to its pride of opinion. Even if such was the case, this is the full extent to which it is affected.

The provisions for appeal in cases originating before the Utilities Commission leave much to be desired. The requirement that the original complainant—here the Gastonia Transit Company—shall be made a party to the action was not followed. Perhaps this was for the reason the statute is so indefinite in this respect. In any event, it would seem that the parties acted under the apprehension that it was necessary for the Commission to appeal in order to give the Transit Company an opportunity to be heard in this Court. Under such circumstances, particularly where there is merit in the appeal, we should not dismiss *ex mero motu.*

Let me presume to suggest that the requirement of the statute in respect to the parties to the action on appeal may be observed by naming both parties defendants and designating one "petitioner" and the other "respondent," in this manner: "State of North Carolina *ex rel.* Utilities Commission *v.* City Coach Company, petitioner, and Gastonia Transit Company, respondent." Since only the party whose petition for rehearing has been denied in whole or in part is granted the right to appeal to the Superior Court, the party designated as petitioner would, in every case, be the appellant.

IN THE MATTER OF THE WILL OF ANNIS S. KEMP.

(Filed 21 November, 1951.)

1. Wills § 21c—

To constitute undue influence which will vitiate a will it is necessary that the mind of testator be overpowered by the influence of another amounting to restraint akin to coercion, so that the instrument does not express the intent of the maker but rather that of the person exerting the influence.

2. Wills § 23c—

Testatrix lived with her brother until his death, and was the beneficiary of his will. Her will was executed some thirteen days after his death and testatrix lived more than three years after its execution without intimation that its terms were not in accord with her wishes. The only

evidence of undue influence was testimony of her statements that she and her brother had discussed their affairs and decided that they were going to leave their property for the benefit of orphan children of the county. *Held:* There was no sufficient evidence of undue influence on the part of testatrix' brother to require the submission of the issue to the jury.

3. Wills § 25—

A charge placing the burden upon propounders to show conjunctively the absence of each of the essential elements of testamentary capacity must be held for error, since it suffices if they negative any one of such essential elements.

4. Same: Appeal and Error § 39f—

Error in placing the burden upon caveators to show conjunctively the absence of each of the essential elements of testamentary capacity *held* not cured by contextual construction with another portion of the charge correctly defining testamentary capacity, since upon this record the erroneous instruction was repeated in the last part of the charge and caveators had undertaken to show that testatrix was lacking in single, specific elements of mental capacity to make a will.

APPEAL by caveators from *Bennett, Special Judge,* and a jury, at July Term, 1951, of RANDOLPH.

Issue of *devisavit vel non* decided in favor of propounder on the question of testamentary capacity of the testatrix, Annis S. Kemp.

The testatrix was unmarried. She lived most of her adult life with her brother, David J. Kemp, at the "old Kemp Home" on Highway No. 902 about four miles from Asheboro. David had been married, but lost his wife in childbirth. The child did not survive. Thereafter the testatrix and David lived together until his death. He died 8 December, 1945, leaving a will by which substantially all of his property was given to the testatrix. It is also in evidence that she received from him during his lifetime personal property of substantial value. The challenged will was made by Annis S. Kemp 21 December, 1945, thirteen days after the death of her brother David. By the terms of the will all of her property is devised and bequeathed "to the Trustees of Randolph County Hospital, Asheboro, N. C. for the use, benefit, and treatment of orphan children under twenty-one years of age" . . . The will contains this further recital: "it being my desire and purpose in making this will to carry out the wishes of my deceased brother, D. J. Kemp, to give our property to the use and benefit of the unfortunate orphan children of Randolph County who need medical care and hospital treatment."

Soon after making the will on 21 December, 1945, the testatrix acquired and moved to a house in Asheboro, where she resided until shortly before her death. She died in the Randolph County Hospital 8 January, 1949, at the age of sixty-nine, leaving a gross estate in lands, mortgage notes, and other property, valued at about $40,000. She was survived by

a brother, age seventy-four, and a number of descendants of deceased sisters, among whom are the caveators.

The evidence bearing on the issue of mental capacity is sharply in conflict. The caveators offered evidence tending to show that the testatrix suffered a stroke of facial paralysis sometime prior to the death of her brother David; and that she suffered and died from carcinoma, that is, cancer in the late stage; that she was feeble and weak in body and mind; that she did not know what property she owned, particularly the nature and extent of the property received from her brother and his estate; that she suffered with delusions that she was extremely poor and unable to buy the bare necessities of life; that without cause she lost her esteem for her close relatives and became suspicious of some of them; that she had no definite or fixed idea of how she wanted to dispose of her property; that she did not know she had executed a will; that often she made varying statements as to how and to whom she intended to leave her property.

The propounder, on the other hand, offered evidence tending to show that the testatrix was an alert, intelligent woman; that her paralysis affected only the muscles of her face and not her mental faculties, and soon cleared; that while she died of cancer, she was entirely "clear-minded" until a few days before her death; that she attended to her household duties, bought her own groceries, knew how to conduct her business affairs, made loans of money on mortgages, appraised the real estate offered as security, turned down questionable applications, and closed only sound loans, collected her notes and rents, attended to the settlement of her brother's estate with care and precision, and looked after herself and her property with frugal care and discriminating judgment; that she knew what property she owned and what she wanted to do with it; that she knew and recognized and had due regard for her close relatives, but simply chose to leave none of her property to them.

The jury returned the following verdict:

"1. Was the paper writing dated December 21, 1945, and offered for probate as the last will and testament of Annis S. Kemp, executed according to law? Answer: YES.

"2. Did Annis S. Kemp, at the time of the execution of said paper writing, lack sufficient mental capacity to make a will? Answer: No.

"3. Is said paper writing, dated December 21, 1945, as propounded, and each and every part thereof, the last will and testament of Annis S. Kemp, deceased? Answer: YES."

The caveators tendered an issue of undue influence, but the court refused to submit it.

From judgment upon the verdict, the caveators appealed, assigning numerous errors.

Ottway Burton and Larry T. Hammond for caveators, appellants.
H. R. Anderson and H. M. Robbins for propounder, appellee.

JOHNSON, J. The trial court properly refused to submit the issue of undue influence. Here, the caveators contend it was shown by the evidence that the testatrix in making the will was unduly influenced by her brother David J. Kemp, who died 13 days before the will was made. It is not suggested that any one except David unduly influenced the testatrix. The caveators rest this exception solely on the theory of the posthumous continuation of undue influence allegedly exerted by the brother during his lifetime. In effect, the caveators contend that the hand from the grave reached up and wrote the will.

Conceding, but not deciding, that there is no sound reason why upon proof of the exertion of undue influence it may not be shown to have continued to operate in a controlling manner on the mind of the victim after the death of the person alleged to have exercised it (*Penniston v. Kerrigan,* 159 Ga. 345, 125 S.E. 795; *Trust Co. of Ga. v. Ivey,* 178 Ga. 629, 173 S.E. 648; 13 N. C. Law Rev. 268. But compare *Henderson v. Jackson,* 138 Iowa 326, 111 N.W. 821), even so, on this record there is no showing of undue influence on the part of the deceased brother David J. Kemp.

To constitute undue influence, within the meaning of the law, as stated by *Stacy, C. J.,* in *In re Will of Turnage,* 208 N.C. 130, 179 S.E. 332, "there must be something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an expression of the wishes of the maker, but rather the expression of the will of another. 'It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made.'

"In short, undue influence, which justifies the setting aside of a will, is a fraudulent influence, or such an overpowering influence as amounts to a legal wrong. . . . It is close akin to coercion produced by importunity, or by a silent, resistless power, exercised by the strong over the weak, which could not be resisted, so that the end reached is tantamount to the effect produced by the use of fear or force. To constitute such undue influence, it is not necessary that there should exist moral turpitude, but whatever destroys free agency and constrains the person, whose act is brought in judgment, to do what is against his or her will, and what he or she otherwise would not have done, is a fraudulent influence in the eye of the law. . . ." (208 N.C., pp. 131 and 132). See also: *In re Ball's Will,* 225 N.C. 91, 33 S.E. 2d 619; *In re Evans' Will,* 223 N.C. 206, 25 S.E. 2d 556; *In re Harris' Will,* 218 N.C. 459, 11 S.E. 2d 310;

In re Turnage's Will, 208 N.C. 130, 179 S.E. 332; *In re Hurdle's Will*, 190 N.C. 221, 129 S.E. 589.

There is no evidence that David J. Kemp during his lifetime said or did anything to the testatrix which might be construed as amounting to an overpowering influence or as tending in any way to coerce her actions or destroy her free will. In fact, aside from the recitals in the will, the only evidence in the record that she ever discussed with her brother David the making of a will is the testimony of the attorney who drew the will. He said she told him "she and her brother had often discussed their affairs and that they had decided that they were going to give their property to the orphan children of the county, and they thought that the Randolph Hospital could better administer it, and that she wanted to carry out her wishes and the wishes of her brother." Besides, the record indicates that the testatrix lived more than three years after the will was made. Yet there is no evidence that she ever intimated any discontent with the will or suggested that its terms were not in accord with her wishes.

It follows, therefore, that the assignment of error based on the refusal of the court to submit the issue of undue influence may not be sustained.

However, there appears to be substantial merit in the caveators' exceptive assignments to the charge of the trial court as to the burden of proof on the issue of mental capacity. In fixing the burden of proof on this issue the court instructed the jury as follows:

"In connection with the second issue, the burden of proof thereon rests upon the caveators to satisfy the jury by the greater weight of the evidence that at the time the said Annis S. Kemp signed and executed said paper writing that she was incapable by reason of her mental incapacity to know and comprehend the nature, character and extent of her property, who were the natural objects of her bounty, how she was disposing of her property, and the effect of such disposition upon her estate."

It thus appears that the court placed on the caveators the burden of showing that the testatrix was lacking in all of the essential elements of testamentary capacity; whereas, to establish testamentary incapacity, it suffices to negative only one of the essential elements of testamentary capacity.

True, the court thereafter instructed the jury that a person has capacity to make a will when he possesses "mind sufficient (1) to understand without prompting the business about which he is engaged when his will is executed; (2) the kind and extent of the property to be willed; (3) the persons who are the natural objects of his bounty; and (4) the manner in which he desires the disposition of his property to take effect, and the effect which the disposition of the property would have upon his estate."

This would seem to be a satisfactory statement of the essential elements of testamentary capacity (*In re Rawlings' Will*, 170 N.C. 58, 86 S.E.

794; *Bost v. Bost,* 87 N.C. 479; *In re Will of Tatum,* 233 N.C. 723, 65 S.E. 2d 351; *In re Will of York,* 231 N.C. 70, 55 S.E. 2d 791; 57 Am. Jur., Wills, Sec. 64), and if nothing further to the contrary appeared, it might be assumed that upon a contextual interpretation of the foregoing portions of the charge, the error in fixing the burden of proof in the conjunctive rather than in the disjunctive might be treated as harmless. However, it is observed that the erroneous instruction was twice repeated, with the court in its final summation telling the jury in effect that the burden was on the caveators to show that the testatrix was lacking in all of the essential elements of testamentary capacity, this last instruction being as follows:

"If the caveators have satisfied you from the evidence and by its greater weight that on the date of the execution of the purported will of Annis S. Kemp that she lacked or did not have sufficient mental capacity to know the nature and extent of her property, its value, who were the natural objects of her bounty, and the force and effect of the disposition of her property by will, in that event you would answer the issue YES. If the caveators have failed to so satisfy you, the burden resting upon them, then you would answer the issue No."

Thus, upon consideration of the whole charge, it would seem that the caveators were unduly burdened in overcoming the presumption of testamentary capacity.

We have not overlooked the decision in *In re Will of Efird,* 195 N.C. 76, 141 S.E. 460, in which similar inexact instructions as to the burden of proof were held not sufficiently prejudicial to warrant a new trial. But the *Efird case* is distinguishable. Upon a contextual construction of the charge in that case, in the light of the theory of the trial, it is apparent that the jury easily understood that the paper writing was not a valid will if any or either of the enumerated elements of testamentary capacity was lacking. Here, a study of the entire charge engenders the impression that the jury likely acted upon the belief that testamentary capacity may subsist even in the absence of one or more of the essential elements thereof. That harm came to the caveators from this appears all the more likely in view of the fact that in the trial of the case,—particularly in cross-examining the propounder's witnesses,—the caveators undertook to show that the testatrix was lacking in single, specific elements of testamentary capacity.

A careful study of the record impels the conclusion that the caveators are entitled to a new trial.

Since the questions raised by the caveators' other exceptive assignments of error may not arise on the retrial, we refrain from discussing them.

New trial.

R. M. MAULDIN, MRS. EMILY H. BELLOWS, J. G. CHRISTIAN, JR., JAMES H. GLENN, JOHN P. HOBSON, HERBERT SPAUGH AND F. O. ROBERTS, MEMBERS OF THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF CHARLOTTE, AND THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF CHARLOTTE v. S. Y. McADEN, J. CALDWELL McDONALD, SANDY G. PORTER, J. CARL McEWEN AND E. A. BEATY, MEMBERS OF THE BOARD OF COUNTY COMMISSIONERS OF MECKLENBURG COUNTY.

(Filed 21 November, 1951.)

Schools § 10h—School authorities have limited discretion to reallocate funds in accord with general purposes stated in bond order and notice.

Where the bond order and notice of election for school bonds list the erection of a senior high school in a section of the city, the plans for which include a physical educational plant for use of the pupils of that school and also the pupils of a junior high school in the vicinity, *held* the Board of County Commissioners upon proper findings has the discretionary power to authorize the diversion of a portion of the funds for the erection of a physical educational plant at the junior high school so that each school would have a physical educational plant suitable for its own pupils, the reallocation of the funds being in accord with the general purposes stated in the bond resolution and notice. G.S. 153-107.

APPEAL by defendants from *Bobbitt, J.*, in Chambers, 6 October, 1951, MECKLENBURG. Affirmed.

The plaintiffs constituting the Board of School Commissioners of the City of Charlotte instituted this action under the Declaratory Judgment Act to determine the right of the parties to allocate and use a portion of the funds derived from Mecklenburg County School Building Bonds for the erection of a physical education building on the grounds of West Charlotte Junior-Senior High School.

By consent of all parties on the facts admitted in the pleadings Judge Bobbitt rendered the following judgment:

"This action involves use and application of the proceeds of an issue of $5,325,000 Mecklenburg County School Building Bonds authorized by a bond order finally adopted on August 21, 1950, and thereafter approved by a vote of the people at an election held on September 30, 1950. The validity of the bonds is not in question. Of the total proceeds of the said bonds, $3,555,000 was allocated for use within the Charlotte City administrative unit and the balance for use by the Board of Education of Mecklenburg County without the said city. The bond order authorizing the bonds and the notice of election thereon held pursuant thereto listed eleven proposed school improvements or projects within the City of Charlotte, among which was the erection and equipment of a senior high school for negroes in the northwest section of the City of Charlotte

in the Double Oaks area. Neither the bond order nor the notice of election mentioned or made any provision for any additions to the present West Charlotte Junior-Senior High School for negroes, which is located in the northwest section of the City of Charlotte, approximately one-quarter of a mile from the site acquired for the erection of the senior high school for negroes in the Double Oaks area. The precise question involved is whether the Board of Commissioners of Mecklenburg County has the right to permit the City School Board to use $200,000.00 of the proceeds of the said bonds in the erection and equipment of a physical education building at the site or on the campus of the said West Charlotte Junior-Senior High School. The determinative facts appearing of record are as follows:

"1. Subsequent to the authorization of the said bonds, the School Commissioners of the City of Charlotte allocated $1,109,000.00 of the City's share of the bond proceeds for the building and erection of the proposed senior high school for negroes in the Double Oaks area in the northwest section of said city, including the erection and equipment of a physical education building designed so as to be large enough to accommodate and furnish physical education facilities to the pupils at both the said new senior high school for negroes and the old West Charlotte Junior-Senior High School, which upon completion of the new senior high school would be converted to a Junior High School. After having made such original or tentative allocation of $1,109,000.00 for the new senior high school, the School Commissioners of the City of Charlotte have duly adopted a resolution finding and determining that it would be for the best interests of the educational program in the City of Charlotte and of the colored patrons in the northwest section of the said City that the proposed physical education building at the new senior high school be reduced to such a size as to accommodate only the pupils at the senior high school and that a physical education building be erected on the campus or at the site of the old West Charlotte Junior-Senior High School of sufficient size to accommodate pupils at that school; and to that end that $200,000.00 should be deducted from the allocation made for the new senior high school and that amount used for the erection and equipment of a physical education building at the old West Charlotte Junior-Senior High School for negroes. This action of the School Commissioners of the City of Charlotte was based on their findings and determinations that it would best serve the educational requirements of the area in question to avoid having to take the pupils from the Junior High School one-quarter of a mile to the Senior High School for physical education, and further that it was to the best interests of all of the pupils involved that the pupils at the two schools of different ages should be separately instructed in physical education. There being no allegation, suggestion or presumption to

the contrary, the Court finds that the findings and determinations of the School Commissioners of the City of Charlotte as hereinbefore set forth and as fully set forth in the resolution adopted by the School Commissioners of the City of Charlotte, a copy of which is attached to the complaint, marked Exhibit B, were made by the said School Commissioners in their administrative discretion and without being influenced by improper motives but in good faith and without misconduct on their part.

"2. In their aforesaid resolution which was duly presented to the Board of Commissioners of Mecklenburg County, the School Commissioners of the City of Charlotte requested the Board of Commissioners of Mecklenburg County to allow and permit them to use and apply $200,000.00 of the City's portion of the bond issue in question in the erection and equipment of a physical education building at the site or on the campus of the present West Charlotte Junior-Senior High School for negroes. The Board of Commissioners of Mecklenburg County adopted a resolution, a copy of which is attached to the complaint and marked Exhibit C, upon consideration of the said resolution found and determined that the facts therein set forth as found by the City School Board were correct and true, but further found that neither in the original bond order nor in the notice of election held pursuant thereto was any mention made of any building or improvements at the site or upon the campus of said West Charlotte Junior-Senior High School, by reason of which fact and having taken legal advice, the Board of Commissioners of Mecklenburg County were of the opinion that they were without legal right to accede to the request of the School Commissioners of the City of Charlotte and refused to permit the reallocation of the said funds as requested, basing its refusal purely upon the fact that it had no legal right so to do.

"3. The Court finds as an inference of fact from the record that the erection and equipment of a physical education building on the campus or at the site of the present West Charlotte Junior-Senior High School will serve the interests of the patrons of the junior and senior high schools for negroes in the northwest section of the City of Charlotte and is within the general purposes and purview of the bond order pursuant to which the bonds are to be issued.

CONCLUSIONS OF LAW.

"Taking as true the allegations and admissions of the complaint and answer in this cause, the Court is of opinion that the Board of Commissioners of Mecklenburg County has the legal right to allow and permit the School Commissioners of the City of Charlotte to use and expend $200,000.00 of the City's share of said bond fund in the erection and equipment of a physical education building at the site or on the campus

of the present Junior-Senior High School for negroes, which upon completion of the new senior high school will be converted into a Junior High School.

"Wherefore, such being the opinion of the Court, it is adjudged and decreed that the defendants, constituting the Board of Commissioners for Mecklenburg County, be, and they hereby are, directed, authorized and empowered to authorize and permit the School Commissioners of the City of Charlotte to use and expend up to the sum of $200,000.00 of the City's share of the proceeds of the bonds in question, heretofore tentatively allocated to the senior high school for negroes in the Double Oaks area, in building and equipping a physical education building at the site or on the campus of said present West Charlotte Junior-Senior High School for negroes, if upon investigation the Board of Commissioners for Mecklenburg County shall find and determine that the proposed expenditure is not excessive, is necessary to maintain the constitutional six months school term in the City of Charlotte, that funds are not otherwise available for said undertaking and that such course will best subserve and promote the educational program of the Junior and Senior negro students in the northwest section of the City of Charlotte."

To the foregoing judgment the defendants noted exception and appealed.

Brock Barkley for plaintiffs, appellees.
Taliaferro, Clarkson & Grier for defendants, appellants.

DEVIN, C. J. The defendants, who constitute the Board of County Commissioners of Mecklenburg County, having some doubt as to their legal power to authorize the reallocation of the funds as requested by the Board of School Commissioners, bring the case here for review.

The underlying facts fully set out in the judgment of Judge Bobbitt are sufficient, we think, to justify the reallocation of $200,000.00 of the funds derived from the sale of County School Building Bonds for the erection of physical education building on the grounds of the present West Charlotte Junior-Senior High School. The reasons for the reallocation are stated in the resolution of the Plaintiff Board and are convincing. We regard the departure from the original proposals and allocations contained in the Bond Resolution and advertisement as immaterial and not of the substance.

This view is supported by the decision of this Court in *Feezor v. Siceloff,* 232 N.C. 563, 61 S.E. 2d 714, where it was said, *Justice Denny* speaking for the Court, "The question before us does not involve any change of purpose for which the school bonds were issued, but only a change in the manner and method of accomplishing that purpose." The

judgment below is also in line with what was said by this Court in *Atkins v. McAden,* 229 N.C. 752, 51 S.E. 2d 484: "But G.S. 153-107, in our opinion, does not place a limitation upon the legal right to transfer or allocate funds from one project to another included within the general purpose for which bonds were issued."

In the case at bar the general purpose was the erection of a senior high school for negro children in Double Oaks area. This would include a physical education building. The erection of the senior high school building would permit the present Junior-Senior High School building in the same locality to become the Junior High School, and the erection of a portion of the physical education facilities on the grounds of the Junior High School for the reasons set out would seem to be not out of line with the general purposes of the bond issue. On the contrary, the reallocation of funds as proposed would be in accord with the general purposes stated in the bond resolution and notice.

In *Waldrop v. Hodges,* 230 N.C. 370, 53 S.E. 2d 263, where bonds had been issued for the purpose of erecting new school buildings and purchasing sites therefor in the district, it was proposed to use 70% of the bond proceeds for the purpose of enlarging elementary school buildings and to hold 30% to be used in connection with a contemplated future bond issue for the erection of a new high school building. It was held this would constitute an unauthorized diversion from the purpose for which the bonds were voted. It was said in the opinion written for the Court by *Justice Barnhill,* that "While the defendants have a limited authority, under certain conditions, to transfer or allocate funds from one project to another, included within the general purpose for which bonds are authorized, the transfer must be to a project included in the general purpose as stated in the bond resolution and notice of election."

In the last case on this subject considered by this Court, *Gore v. Columbus County,* 232 N.C. 636, 61 S.E. 2d 890, the same principle was applied to the facts of that case. There the bond issue was for erecting, remodeling and enlarging school buildings and in the bond statement and in pre-election notice certain improvements in the school buildings of two named districts were specified. Later, on the basis of a survey it was proposed to use the funds allocated to these schools for the erection of a single high school building to serve both districts in lieu of remodeling and enlarging the existing buildings. It was held the facts found were insufficient to justify reallocation of bond funds for that purpose, unless it should be found that by reason of changed conditions the original projects were no longer needed, and that the proposed building would eliminate the necessity for the improvements originally contemplated.

It is true in our case the diversion of a portion of the funds is to a school not specifically mentioned in the bond order, but it is in the same

locality and the funds are to be deducted from those originally allocated to the Senior High School and are to be used to serve the same purpose for the same patrons in a manner thought to be advantageous. The school authorities are not without limited discretion in the matter, and we think its exercise in this instance for the reasons set out in the judgment may not be successfully attacked.

It is not suggested that the voters of this area have been dealt with unfairly, or that any improper motive is being served. Provision is made in the judgment that the authorization of the reallocation requested be based upon proper findings, in accord with the decision of this Court in *Gore v. Columbus County, supra.*

We conclude that the judgment empowering the Board of County Commissioners, upon proper findings by the Board, to permit the expenditure of $200,000 of the proceeds of the school building bonds referred to, for the purposes set out in the resolution of the Board of School Commissioners of the City of Charlotte, should be affirmed, and it is so ordered.

Judgment affirmed.

JUNE PLEMMONS AND HUSBAND, JAMES PLEMMONS, v. MATILDA CUTSHALL AND HUSBAND, E. L. CUTSHALL; SHERMAN TWEED AND WIFE, BELLE TWEED; CHAPEL TWEED AND WIFE, MRS. CHAPEL TWEED; ALL THE UNKNOWN HEIRS OF ABNER TWEED, DECEASED; ANN GILBERT, DECEASED; LULA MORGAN HEIRS, DECEASED; HESTER STANTON, DECEASED; MAGNOLIA FARMER, DECEASED; JOSHUA TWEED, DECEASED. LUTHER TWEED, AND ALL OTHER HEIRS KNOWN AND UNKNOWN, WHO ARE NECESSARY PARTIES HERETO.

(Filed 21 November, 1951.)

1. Boundaries § 11—

Where in a processioning proceeding each side admits that the other owns adjoining land, and respondents further aver adverse possession of the land owned by them, *held* no issue of title is raised, the sole issue being as to the true location of the dividing line between the lands of the respective parties.

2. Boundaries § 9—

The burden of proof on the issue as to the true location of the dividing line is upon petitioners.

3. Boundaries § 6—

In a processioning proceeding, what constitutes the true dividing line is a question of law for the court, its location is a question of fact for the jury under correct instructions based upon competent evidence.

4. **Boundaries § 5a: Frauds, Statute of, § 9—**
Description of land in a deed must be certain in itself or capable of being reduced to certainty by matters *aliunde* pointed out in the deed itself.

5. **Boundaries § 5h—**
A deed describing the land by reference to corners and lines of the adjacent lands is sufficient to admit proof of such adjacent corners and lines, the call for another's line being considered one to a natural boundary, and the best evidence thereof being the record of a deed covering such corners or lines followed by the fitting of the description to the land in accordance with appropriate rules.

6. **Boundaries § 8c—**
Ordinarily a line should be run in its regular order from a known beginning, and it is only when a corner cannot be ascertained by running forward and may be fixed with certainty by running reversely that the call may be reversed.

7. **Boundaries § 10—**
A processioning proceeding may not be dismissed as in case of nonsuit, but peremptory instructions may be requested in appropriate cases.

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

APPEAL by respondents from *Bennett, Special Judge,* at June Civil Term, 1951, of MADISON.

Procession proceeding to establish the true dividing lines between the lands of petitioners and of respondents.

Petitioners allege in their petition (2) that they are the owners in fee and are in possession of a tract of land situate, lying and being on waters of Shelton Laurel in No. 2 Township in Madison County, described as follows:

"BEGINNING on a Spanish Oak Stump, the Joshua Tweed corner, and running a southwest direction with the Joshua Tweed line to a hemlock and oak in said line (being the southeast corner of the Joshua Tweed 50-acre Mill tract), then a northerly direction with the east line of the Joshua Tweed Mill tract to a stake the northeast corner of said mill tract, thence to the top of Big Hill Ridge with the Mack tract line to a black oak, thence down Big Hill Ridge with Gilliad Tweed's line to a white oak stump—Gilliad Tweed's corner—thence continuing with Gilliad Tweed's line to a Woodward Hensley's line, then up and with the meanders of a ridge to Lowery Cutshall's line then with Lowery Cutshall's line to the BEGINNING. Containing thirty acres more or less.

"(3) That the respondents are the owners, or claim some interests in lands adjoining the lands described in the next preceding paragraph, and the boundary lines between the lands of the petitioners and the respond-

ents are in dispute, and the same cannot be settled by compromise or agreement.

"(4) That the lines that are in dispute are described in petitioners' boundary as follows: 'BEGINNING on a Spanish oak stump, the Joshua Tweed corner, and running a southwest direction with the Joshua Tweed line to a hemlock and oak in said line, (being the southeast corner of the Joshua Tweed 50-acre Mill tract), and then a northerly direction with the east line of the Joshua Tweed Mill tract to a stake, the northeast corner of said Mill tract, thence to the top of the Big Hill Ridge with the Mack tract line, to a black oak.' "

On the other hand, the record on this appeal contains four separate answers, (1) by the original respondents, (2) by the original respondents and Chapel Tweed and numerous others, allegedly having been made parties hereto by order of court, (3) by Atman Cutshall, *et al.*, allegedly having been made parties hereto by order of court, and (4) Mrs. Linda Fox, *et al.*, who describe themselves as heirs at law of Joshua Tweed. In all of these answers the respondents admit that the petitioners own land adjoining the lands of respondents. And while in the second and third answers as above recited, it is averred that the allegations of the petition as to ownership of land as therein described, and of the disputed line are denied,—the denials are followed immediately by admission that "petitioners have a title to some land adjoining the lands of respondents," and that "the petitioners and respondents are owners of lands adjoining each other." But respondents deny that there is any dispute as to their boundary lines. They further aver that they are the owners of (1) the 400 acres Joshua Tweed land, the corner and line of which are first referred to in the description of petitioners' land as set out in the petition, (2) the Joshua Tweed 50-acre Mill tract, corners and line of which are next referred to in said description, and (3) the Mack tract, next referred to in said description. Specific descriptions of these tracts are set out. And respondents say that the lines and boundaries thereof are known and visible; that they have had adverse possession of the land for more than seven years, and twenty years, the statutes as to which they plead in bar of petitioners' right to recover.

The cause was transferred to the civil issue docket for trial, and tried in Superior Court.

Upon the trial in Superior Court, summarily stated, the petitioners offered in evidence the record of the deed to *feme* petitioner for the land described as in the petition, and undertook to locate same by oral testimony in respect to calls in the descriptions of the respondents' lands, without first introducing in evidence the records of the deeds in which such descriptions appear. Respondents objected to much of it, and here challenge the ruling of the court in admitting it.

Petitioners offered testimony as to possession by them and those under whom they claim title, of the lands they allege they own as set out in the petition.

Motions for judgment as of nonsuit were made by respondents when petitioners first rested. Overrued. Exception.

And respondents reserving exception to denial of motion for nonsuit, offered in evidence the records of deeds under which they assert ownership of the three tracts they aver in their answers they own, and offered testimony tending to locate same as they contend the true location to be.

Motions of respondents for judgment as of nonsuit at close of all the evidence were denied, and they excepted.

Respondents tendered seven issues, the first three of which are these:

"(1) Are the plaintiffs the owners of the tract embraced on the map by the blue lines between 3, 4, 5, 6 and 3?

"(2) What is the true dividing line between the lands of the plaintiffs and the defendants Atman Cutshall and McClellan Cutshall?

"(3) What is the true dividing line between the plaintiffs and the defendants?"

The next four related to adverse possession by defendant E. A. Tweed heirs,—for seven years, and for twenty years as to each of two portions of land shown on the map.

The record shows that the first three were "granted" and the last four "denied." Exception #1.

But the record shows that the court submitted these issues, which the jury answered as shown:

"1. What is the true dividing line between plaintiffs and the Tweed heirs?

"Answer: 2, 3, 4 and 5.

"2. Have the Tweed heirs been in the adverse possession of the diamond-shaped tract as shown on the map for seven years under color of title, as alleged in the Answer?

"Answer: No.

"3. Have the Tweed heirs been in the adverse possession of the diamond-shaped tract as shown on the map for twenty years as alleged in the Answer?

"Answer: No.

"4. What is the true dividing line between plaintiffs and defendants Atman Cutshall, McClellan Cutshall and Mamie Banks?

"Answer: 1-2.

"5. Have the defendants, Tweed heirs, been in the adverse possession of the property embraced in the lines A, B, C and L for seven years under color of title, as alleged in the Answers?

"Answer: No.

"6. Have the defendants, Tweed heirs, been in the adverse possession of the property embraced in the lines A, B, C and L for twenty years, as alleged in the Answers?

"Answer: No."

Exception #2.

From judgment in accordance with the verdict, the respondents appeal to Supreme Court and assign error.

George M. Pritchard and Calvin R. Edney for petitioners, appellees.

Carl R. Stuart for respondents, appellants.

WINBORNE, J. It is apparent from the record and statement of case on this appeal that in the trial court there was a misconception on all hands as to the issues raised by the pleadings.

A reading of the petition reveals the express purpose of the proceeding to be the establishment of boundary lines between lands of petitioners and lands of respondents. Chapter 38 of General Statutes of North Carolina. Petitioners allege that they are the owners of a tract of land whose boundaries are the boundaries of lands they allege are owned by respondents.

Also a perusal of the answers shows that respondents admit that petitioners own land adjoining the land they, the respondents, expressly aver they own, and of which they have had adverse possession for more than seven years under color of title,—yea, more than twenty years under known and visible lines and boundaries.

Thus no issue of title is raised,—either as to the lands of petitioners, or as to the lands of respondents. So, after all the underbrush is cleared away, the pleadings raise only the issue as to "What is the true dividing line between the lands of petitioners and the lands of respondents?" See *Greer v. Hayes,* 216 N.C. 396, 5 S.E. 2d 169; *Cornelison v. Hammond,* 225 N.C. 535, 35 S.E. 2d 633.

Hence there was error in submitting other issues.

The burden of proof on the issue as to the true location of the dividing line is upon the petitioners. This is accordant with the well settled rule enunciated in decisions of this Court, among which are these: *Hill v. Dalton,* 140 N.C. 9, 52 S.E. 273; *Woody v. Fountain,* 143 N.C. 66, 55 S.E. 425; *Garris v. Harrington,* 167 N.C. 86, 83 S.E. 253; *Carr v. Bizzell,* 192 N.C. 212, 134 S.E. 462; *Greer v. Hayes, supra; Hill v. Young,* 217 N.C. 114, 6 S.E. 2d 830.

Also it is settled law in this State that, in a proceeding to establish a boundary line, which is in dispute, what constitutes the dividing line is a question of law for the court, but a controversy as to where the line is must be settled by the jury under correct instructions based upon compe-

tent evidence. See *Clegg v. Canady,* 217 N.C. 433, 8 S.E. 2d 246; *Huffman v. Pearson,* 222 N.C. 193, 22 S.E. 2d 440, and cases cited. See also *Brown v. Hodges,* 232 N.C. 537, 61 S.E. 2d 603.

Moreover, it is noted that respondents in the case in hand aver in the original answer that the description set forth in the petition is too indefinite to describe the petitioners' land with any certainty. As to this averment, the decisions of this Court generally recognize the principle that a deed conveying land within the meaning of the statute of frauds must contain a description of the land, the subject matter of the deed, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the deed refers. The office of description is to furnish, and is sufficient when it does furnish, means of identifying the land intended to be conveyed. The deed itself must point to the source from which evidence *aliunde* to make the description complete is to be sought. See *Self Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889, and cases cited.

Testing the description of petitioners' land by this principle, it appears to be sufficient to admit of such proof.

So, in the light of these principles, petitioners in present case have the burden of locating the lines and corners called for in the description of their land. And since the beginning is designated as "a Spanish oak stump, the Joshua Tweed corner," and the first call runs "a southwest direction with the Joshua Tweed line to a hemlock and oak in said line," it is incumbent upon petitioners to locate this corner and the line of the Joshua Tweed tract,—the call for another's line being considered a natural boundary. See *Clegg v. Canady, supra.* In locating such corner and line, the best evidence of the calls in the description of this tract is the record of a deed covering it. *Woodbury v. Evans,* 122 N.C. 779, 30 S.E. 2. Then the description therein may be fitted to the land in accordance with appropriate rules. See *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673, and cases cited.

In the *Locklear case* it is said that the general rule is that in order to locate a boundary of land, the lines should be run 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.

In like manner the burden is upon the petitioners to locate the corners and line of the 50-acre Mill tract, and the line of the Mack tract—called for in the description of their land.

When these three tracts are so properly located, the lines called for will constitute the true dividing line between the lands of petitioners and of respondents.

Thus it is clear, and we hold, that the course pursued by petitioners as appears in statement of facts hereinabove, in undertaking to develop their case on the trial below, is violative of pertinent rules of evidence, and prejudicial to respondents.

As to exceptions to refusal of the trial court to allow motions, aptly made, for judgment as of nonsuit: Where, in a processioning proceeding, the only real controversy is as to the location of the dividing line between the lands of the petitioners and of the respondents the cause should not be dismissed as in case of nonsuit.

See *Cornelison v. Hammond, supra,* where the subject has been fully discussed and applied in opinion by *Barnhill, J.* See also *Brown v. Hodges,* 230 N.C. 746, 55 S.E. 2d 498. In lieu of such motion, request for peremptory instruction may be appropriate in a proper case.

Finally, since there must be a new trial for error pointed out, the other exceptions are not expressly treated.

New trial.

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

MARY LEONA JONES v. OTIS ELEVATOR COMPANY, A CORPORATION.

(Filed 21 November, 1951.)

1. **Contracts § 19: Negligence § 1—**

In order for a person injured in a fall down an elevator shaft to recover against the company under contractual duty to the owner of the building to keep the safety devices on the elevator in reasonably safe condition and in proper repair, the injured person must show a negligent breach of the legal duty arising out of the contract and that such breach of duty was the proximate cause or one of the proximate causes of the injury.

2. **Courts § 15—**

The laws of the state in which plaintiff's injury occurred governs the substantive rights of the parties in an action for negligence.

3. **Negligence § 3½—**

The doctrine of *res ipsa loquitur* does not apply in the State of Virginia to a case of an unexplained accident which may be attributable to one of several causes, some of which are not under the control of the defendant.

4. **Negligence § 19b (2)—Res ipsa loquitur held not applicable in this action to recover for fall down elevator shaft.**

Plaintiff was injured in a fall down an elevator shaft in a building in the State of Virginia. Plaintiff sued the company which was under con-

tinuing contractual obligation to the building owner to keep the elevator in repair. Plaintiff's evidence affirmatively showed that defendant was not liable for the alleged poor lighting, and while plaintiff's evidence tended to show that the elevator cage was not at the floor where plaintiff entered the shaft through the open door, plaintiff's evidence failed to show that at the time it was impossible to open the door when the elevator cage was not at that floor. *Held:* Since the evidence does not show that the safety device preventing the opening of a door at a floor unless the elevator cage was at such floor, was not working at that time, the doctrine of *res ipsa loquitur* does not apply under the laws of the State of Virginia and nonsuit was proper.

APPEAL by plaintiff from *Stevens, J.*, February Term, 1951, of LENOIR.

This case was heard on demurrer at the Fall Term, 1949, and reported in 231 N.C. 285, 56 S.E. 2d 684. An examination of that opinion may give a more complete understanding of the facts herein stated.

The plaintiff, Mary Leona Jones, now Mrs. Holland, Doris Fulghum, now Mrs. Hoffman, and Doris Blackman, now Mrs. Epps, all of whom will be referred to hereinafter by their respective married names, were student nurses in training at Goldsboro Hospital, Goldsboro, North Carolina, in December, 1947. They were sent by the Goldsboro Hospital, 1 January, 1948, to the Medical College of Virginia, Hospital Division, Richmond, Virginia, as affiliate nurses where they were to take special training for a period of three months.

When these student nurses arrived at the hospital in Richmond, they reported to the house mother, a Mrs. Rhodes. Mrs. Rhodes took them to the quarters they were to occupy on the third floor of a building known as Memorial Hall where fourteen nurses were quartered. She instructed them how to use the elevator in the building which had three floors and a basement. The elevator served all four floors.

According to the evidence, the elevator was not a modern, automatic, pushbutton type. If you were in the basement of the building and wanted the elevator, you had to go to the floor where it was located and bring it down or holler to someone to do so. There were no signals or indicators to show where it was at any particular time. It was an "old-timey" elevator and had to be operated by manipulating a lever on the inside of the cage. The cage or carriage was not equipped with a door. Entrance to the elevator on each floor was obtained by sliding open a large wooden panel door.

According to the defendant's answer, a portion of which was introduced in evidence by the plaintiff, "It was a conventional type electrically-operated elevator, equipped with various safety devices, including electro-mechanical bar locks on the shaftway doors, which said locks can only be opened from the inside of the elevator shaft; that on each floor of said building there are shaftway doors which are in two sections, one station-

ary and one movable and that when any of said doors are open, the electric contact is broken and the elevator carriage or cage cannot be moved, except by using the switch on the control panel in the machine room located in the basement of said building. That said machine room was kept closed and locked except when opened by an authorized representative of the defendant."

The evidence further tends to show that the student nurses used the elevator whenever it was available. This plaintiff, and the other witnesses who used it prior to this occasion, testified they had always found the elevator cage at the floor where the door to the shaftway was open; that the hall where the elevator shaft is located, just off the main hall, was equipped with sufficient lights when burning. On the occasion complained of the light was only sufficient to see the elevator dimly. There was a light on the facing of the elevator door which could have been turned on. There was a sign on the facing of the elevator entrance on the third floor which read: "Use this elevator at your own risk." The plaintiff was familiar with the elevator; she and Mrs. Hoffman and Mrs. Epps used it three or four times a day.

As one approached the elevator, the light inside the car could be turned on before entering it, but the nurses, including the plaintiff, usually stepped into it in the dark and cut on the light after entering.

Mrs. Epps testified there was a wire screen in both of the upper panels of the door to the elevator on the third floor. "It did have a hole in it . . . I noticed that the first day I was there. There was no change in that condition between that time and the time of the accident . . . I didn't put my hand in there and open the door. I was tall enough, but I didn't. Miss Jones (Mrs. Holland) is about the same height I am." This witness further testified, "We didn't like to walk and we wanted to use the elevator as often as we could. Everybody turned the lights out so nobody else would see the elevator was up there and use it. We turned the lights out so people couldn't see the elevator was there and then when we came to use the elevator we stepped right in without putting a light on. You couldn't get the elevator unless you were on the floor the elevator was at. I don't know whether, if the door was closed, you couldn't get it on that floor and couldn't open the door except from the outside unless you put your hand in that screen and opened that door. When we got in the elevator and came to our floor, or any floor, we would leave it there, and if we left the door open the elevator had to stay there so . . . you could go back down in it so nobody else could get it unless they came for it. If you didn't turn out the lights people could see the carriage was there." On the night of 28 March, 1948, about 7:00 o'clock, the plaintiff and Mrs. Epps walked up the stairway in Memorial Hall and went to the room occupied by Mrs. Holland and Mrs. Hoffman. Mrs. Hoffman was

in the room. After a few minutes the three of them started to leave the building. They started to walk down when Mrs. Holland, who was nearest the elevator, said: "Girls, the elevator is here. Let's ride down." They turned to go to the elevator. The door was partly open and Mrs. Holland pushed it the rest of the way open, stepped in and fell to the basement. She was seriously and permanently injured. At the time of the trial below she had no recollection of the conditions as they existed at the time she fell.

The plaintiff introduced that portion of the defendant's answer which admitted the defendant had been under contract with the Medical College of Virginia since 26 June, 1945, to maintain and regularly inspect the elevator involved herein, and that portion which described its type and equipment, the pertinent parts of which have been included in the statement of the case.

The defendant moved for judgment of nonsuit at the close of the plaintiff's evidence and the motion was allowed. From the judgment entered, the plaintiff appeals and assigns error.

Jones, Reed & Griffin for plaintiff, appellant.
Whitaker & Jeffress for defendant, appellee.

DENNY, J. This is not an ordinary tort action. The liability of the defendant, if any, must flow from the negligent breach of its contract with the Medical College of Virginia. This was pointed out in the former opinion referred to herein (231 N.C. 285, 56 S.E. 2d 684). See also 12 Am. Jur. 820, *et seq.;* 38 Am. Jur. 664, 45 C.J. 650; *Standard Oil Co. v. Wakefield,* 102 Va. 824, 47 S.E. 830, 66 L.R.A. 792; *American Oil Co. v. Nicholas,* 156 Va. 1, 157 S.E. 754.

It is admitted that at the time of plaintiff's injury the defendant was under contract with the Medical College of Virginia to maintain some twenty elevators in buildings owned or controlled by the Medical College of Virginia, including the one in Memorial Hall. The defendant, however, under the terms of its contract, which is attached to and made a part of the plaintiff's complaint, expressly excluded therefrom the repair and maintenance of hoistway enclosures and hoistway doors, and door hangers on the passenger elevator in Memorial Hall.

The plaintiff alleges in her complaint, among other things, (1) that the defendant unlawfully, wrongfully, and negligently, failed to maintain lights on each floor of Memorial Hall at the point where the elevator well was located, and particularly on the third floor of the building; and (2) that the defendant unlawfully, and wrongfully violated its contract with the Medical College of Virginia in that it failed to maintain the elevator and the door closures and the electric interlocks attached thereto

in proper repair so as to prevent one from opening the door to the elevator well when the cage or carriage was not at that floor.

We find nothing in the contract between the defendant and the Medical College of Virginia that required or permitted the defendant to have any control or supervision over the hallways of Memorial Hall, or the lighting facilities therein. And the plaintiff offered no evidence in support of her allegations in this respect. Moreover, there was evidence in the trial below to the effect that ample facilities had been provided for adequate light, but that the plaintiff and Mrs. Hoffman and Mrs. Epps made it a practice to turn out the light near the elevator entrance and the light in the elevator in order that no other person on the hall would observe its presence. Mrs. Epps testified, "We turned the lights out so people couldn't see the elevator was there and when we came to use the elevator we stepped right in without putting a light on."

As we construe the allegations of the complaint in the light of the status existing between the plaintiff and defendant, the defendant was not guilty of actionable negligence unless it negligently breached the legal duty arising out of its contract relation with the Medical College of Virginia to exercise care to keep the safety devices on the elevator in a reasonably safe condition and in proper repair, and such negligent breach of duty was the proximate cause, or one of the proximate causes, of plaintiff's injury.

The plaintiff is relying on the doctrine of *res ipsa loquitur,* citing *Haag v. Harris,* 4 Cal. 2d 108, 48 Pac. 2d 1; *Gustavson v. Thomas,* 227 App. Div. 303, 237 N.Y.S. 479; *Class v. Y.W.C.A.,* 47 Ohio App. 128, 191 N.E. 102; *Cramer v. Mergard,* 56 Ohio App. 493, 11 N.E. 2d 108; *Moohr v. Victoria Inv. Co.,* 144 Wash. 387, 258 Pac. 43. These cases, however, involved automatic elevators and are not controlling upon a factual situation such as that before us.

The plaintiff sustained her injuries in the State of Virginia and the substantive rights of the parties are governed by the law of that State. *Charnock v. Taylor,* 223 N.C. 360, 26 S.E. 2d 911, 148 A.L.R. 1126.

In the case of *Peters v. Lynchburg Light & Traction Co.,* 108 Va. 333, 61 S.E. 745, 22 L.R.A. (N.S.) 1188, in applying the doctrine of *res ipsa loquitur,* the Court stated: "The doctrine rests upon the assumption that the thing which causes the injury is under the exclusive management of the defendant, and the evidence of the true cause of the accident is accessible to the defendant and inaccessible to the person injured. *Ross v. Double Shoals Cotton Mills,* 140 N.C. 115, 52 S.E. 121, 1 L.R.A. (N.S.) 298."

In *City of Richmond v. Hood Rubber Products Co.,* 168 Va. 11, 190 S.E. 95, in considering the question of *res ipsa loquitur,* the Court said: "In Virginia the doctrine, if not entirely abolished, has been limited and

restricted to a very material extent. See *Chesapeake & O. Ry. v. Tanner,* 165 Va. 406, 182 S.E. 239, and *Virginia Electric & Power Co. v. Lowry,* 166 Va. 207, 184 S.E. 177."

It was held in *Arnold v. Wood,* 173 Va. 18, 3 S.E. 2d 374, that the doctrine of *res ipsa loquitur* "does not apply in the case of an unexplained accident which may have been attributable to one of several causes, for some of which the defendant is not responsible." *Seven-Up Bottling Co. v. Gretes,* 182 Va. 138, 27 S.E. 2d 925.

The plaintiff alleges her injuries were proximately caused by poor lighting and the failure of the defendant to keep the elevator in proper repair. As heretofore pointed out, this defendant was not responsible for the poor lighting which existed at the time of her injury. And there is no evidence tending to show any of the safety devices on this elevator were out of order other than the fact that the elevator was in the basement of the building and the hoistway door on the third floor was partly open. But the plaintiff's evidence does tend to show that it was possible to open the hoistway door on the third floor from the outside whether the elevator was at that floor or not. This is sufficient to defeat the application of the doctrine of *res ipsa loquitur.*

We deem it unnecessary to consider the question of contributory negligence on the part of the plaintiff, since in our opinion no negligent breach of the contract between the defendant and the Medical College of Virginia has been established.

The judgment of the court below is
Affirmed.

EAST SIDE BUILDERS, INC., A NORTH CAROLINA CORPORATION; JEAN C. HOWE, TIPPIE T. GALUMBECK, REUBEN GRAND AND WIFE, ROSE GRAND, LEONARD FINK, W. RANDALL HARRIS AND WIFE, INEZ K. HARRIS, AND ETHEL S. McSWAIN, FOR THEMSELVES AND ALL OTHER LANDOWNERS WITHIN LAKE VIEW PARK DEVELOPMENT WHO MAY COME IN AND MAKE THEMSELVES PARTIES PLAINTIFF, v. WESLEY W. BROWN AND WIFE, ERMA C. BROWN.

(Filed 21 November, 1951.)

1. Equity § 3—

Ordinarily, laches will not bar relief when the delay has not worked an injury to the prejudice or disadvantage of those adversely interested.

2. Same: Deeds § 16b—

The lapse of some nine or ten years before instituting suit to compel defendant to comply with restrictive covenants by reconverting his house from a two-family to a one-family dwelling, *held* not barred by laches, since defendant was in no way prejudiced by the delay.

3. Deeds § 16b—

Plaintiff's evidence that a single block in a subdivision was developed as a unit and all lots therein conveyed by deeds containing restrictive covenants pursuant to a general scheme of development, is sufficient to withstand nonsuit in a suit to restrain defendant from violating one of the restrictive covenants.

4. Same—

Where plaintiff's evidence in his suit to restrain violation of restrictive covenants tends to show that the particular block in the subdivision in question was developed as a unit in accordance with a general scheme, the fact that numerous lots in other blocks of the subdivision were sold without restrictive covenants does not entitle defendant to nonsuit when it does not appear that a key map of the entire development had ever been placed on record or that any lots in the subdivision had been sold in reference thereto.

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

APPEAL by plaintiffs from *Rudisill, J.,* May Term, 1951, of BUNCOMBE.

This is an action by East Side Builders, Inc., and others, on behalf of themselves and all other parties owning lots in Lake View Park, in the City of Asheville, who may come in and be made parties plaintiff, against Wesley W. Brown and his wife, Erma C. Brown.

The plaintiffs allege that they are owners of lots and homes in Block B of Lake View Park, a restricted residential subdivision as appears on a plat thereof duly recorded in the office of the Register of Deeds for Buncombe County, North Carolina, in Plat Book 4, at page 40.

It is further alleged that prior to 28 April, 1924, Lake View Park, Inc., a North Carolina corporation, owned a large boundary of land situate in Beaverdam Ward, Asheville Township, Buncombe County, and established the same as "an exclusive, restricted residential district or boundary, for the use, security and comfort of those who may purchase homesites therein," and that "in order to assure homesite owners within Block B that such homesites within said block would ever remain an exclusive restricted residential district, included in the deed from Lake View Park, Inc., to a predecessor in title to the defendants Wesley W. Brown and wife Erma C. Brown, and in all other deeds to homesite owners within said Block B, its general plan of development . . ."

Among other covenants contained in deeds to lots in Block B, according to the allegations of the complaint, the grantees for themselves and their heirs, executors, administrators, assigns, and successors in title to said land conveyed, by acceptance of the deed, "doth covenant to and with the said party of the first part, its successors and assigns as follows: 'That they will not erect or suffer to be erected on the land above described any . . . house or building to be used as an apartment house,

tenement house, boarding house, two-family dwelling house, . . . or at any time use or suffer to be used any building or buildings erected thereon for any such purpose . . .' "

It is alleged in the complaint that the defendant, Wesley W. Brown, in accordance with his application for a building permit, erected a one-family residence on Lot 27, in Block B, and that the construction thereof was completed either in the latter part of the year 1940 or the early part of the year 1941, and with full knowledge of his covenant "with plaintiffs and other property owners in Lake View Park Development, and with full knowledge of his application for a building permit," for a one-family residence, the defendant, Wesley W. Brown, shortly after the completion of said residence altered its construction and converted it into a two-family residence; that the defendants have occupied one dwelling unit thereof and have rented the other unit to a second family since the year 1941.

It is also alleged by plaintiffs that a duly authorized restrictions committee of Lake View Park development visited the defendant, Wesley W. Brown, in the fall of the year 1941, and requested him to reconvert his building on Lot 27 of Block B, "into a one-family residence and comply with the restrictions set forth in the general plan of development of Lake View Park . . . but the said defendant, Wesley W. Brown, refused to accede to such request."

The plaintiffs for themselves and all other landowners within Block B of said Lake View Park, and all other landowners within Lake View Park development who may come in and make themselves parties plaintiff, pray the court that the defendants be perpetually enjoined from violating the restrictions set forth in the general plan of development of Lake View Park, and particularly those restrictions applying to Block B therein, by a mandatory injunction directing the defendants to reconvert their building into a one-family dwelling house.

The plaintiffs offered the testimony of Fred L. Sale: That he is a lawyer and has lived in Lake View Park since 1926; that he was secretary of Lake View Park, Inc., from the time it was organized in 1922 until it went out of business in 1930; that the corporation owned approximately 800 acres of land; that the property was laid off into blocks and the blocks into lots. Block B contains 12 lots and each block constituted a separate development, and "I have no idea how many lots were subdivided and sold by Lake View Park at or about the time that this block was divided and lots sold in it. There were probably four blocks in there, A, B, C, D. There were four blocks on that side of the lake, if I recall correctly, that were developed at approximately the same time." The corporation constructed streets, laid sewers and water lines, caused telephone lines to be placed around lot lines, laid off parkways, planted

shrubbery and grassed parkways. The corporation used a form deed and it had restrictions applicable to the individual blocks. There was no difference other than we reserved the right to make reservations and stipulations at variance in the different lots, but there was a general scheme of development, "Insofar as developing it as a residential district, the general scheme was applicable to all the blocks . . . In the general scheme there are a thousand lots, and all were laid out for the same purpose and to be utilized for the same purpose. Block B was no different in that respect from Block C, or a block a mile away from it. . . . I think that there were about 360 lots that we had developed, that had not been sold at the time the mortgage company foreclosed and put Lake View Park out of business. The real estate subdivision known as Lake View Park was practically out of business around 1930. I think it was 1933 that the foreclosure took place. The property itself had a large and substantial mortgage over all unsold property. Due to bank failures and troubles that every one experienced here at that time the mortgage was foreclosed on all the unsold lots, as well as on the undeveloped property. There were a great many lots that we purchased and mortgages came back on, and they were foreclosed by the general mortgage holders. When the mortgage was foreclosed, they took over the mortgages on lots that had been sold and not paid for along with the foreclosure. I can't imagine how many lots were hypothecated and went under the mortgage too. The original developers of the property, which was the company I was connected with, went completely out of the picture after the depression years; and after that time any lots that were sold were sold by someone else. I don't know just what all of those deeds may have contained, and I don't know as to whether restrictions were placed in all of them."

Ample evidence was offered to support the allegations to the effect that the defendants converted their residence into a two-family dwelling and rented one unit thereof as alleged.

At the close of the plaintiffs' evidence, defendants made a motion for judgment as of nonsuit on the grounds that plaintiffs had not proven facts sufficient to substantiate their alleged cause of action, and further that plaintiffs and their predecessors in interest, by reason of their laches in seeking relief against any alleged violation of said restrictions by the defendants, are now barred from demanding such relief.

"The court, after hearing argument of counsel for both plaintiffs and defendants on said motion, is of the opinion and so holds (in its legal discretion) that the evidence in this case shows that the violation of said restrictions, if any, by the defendants occurred during the year 1940 or 1941, and had been continuous since that time, and that no complaint, objection or effort to secure injunctive or other relief has ever been made by the plaintiffs, or their predecessors in interest, prior to the filing of

the instant action on the 12th day of September, 1950, and that the laches and acquiescence of the plaintiffs, and their predecessors in interest, for this period of time, is such as to defeat the application that they made in this action for a perpetual mandatory injunction and restraining order.

"And the court for the reasons above stated, among others, thereupon allows the motion of the defendants for a judgment as of nonsuit."

Judgment dismissing the action was accordingly entered, and the plaintiffs appeal, assigning error.

John Y. Jordan, Jr., and Bernard & Parker for plaintiffs, appellants.

Kester Walton of Harkins, Van Winkle, Walton & Buck for defendants, appellees.

DENNY, J. The defendants contend the judgment as of nonsuit should be upheld on two grounds: (1) Laches on the part of the plaintiffs; and (2) the failure of plaintiffs to prove facts sufficient to substantiate their alleged cause of action.

(1) The weight of authority is to the effect that delay in asserting a right will not bar relief where it has not worked an injury to the prejudice or disadvantage of those adversely interested. 30 C.J.S., section 116, page 531, *et seq.* "Laches is such delay in enforcing one's rights as works disadvantage to another. . . . To constitute laches a change in conditions must have occurred that would render it inequitable to enforce the claim." 30 C.J.S., section 112, page 520, *et seq.* *Stell v. Trust Co.*, 223 N.C. 550, 27 S.E. 2d 524; *Clark v. Henrietta Mills,* 219 N.C. 1, 12 S.E. 2d 682; *Teachey v. Gurley,* 214 N.C. 288, 199 S.E. 83. There is no evidence to the effect that the defendants have been prejudiced or adversely affected in any manner by the delay in instituting this action. Therefore, the defendants were not entitled to a judgment as of nonsuit on the ground of laches. In such cases, the statute of limitations will control, not laches. *Clark v. Henrietta Mills, supra; Teachey v. Gurley, supra.*

(2) We think the plaintiffs offered sufficient evidence in support of the allegations in the complaint to withstand a motion for judgment as of nonsuit. There is evidence which tends to show that Block B is a separate division and if such fact is duly found, it would be sufficient to entitle the plaintiffs to have the violation of any restrictive covenant in the defendants' deed enjoined, unless the violation is barred by the statute of limitations or laches. See *Stephens Co. v. Homes Co.,* 181 N.C. 335, 107 S.E. 233, where it was held that the respective subdivisional plats "was designed to be a separate, distinct, and integral subdivision. . . . It follows, of course, when one of these subdivisional plats has been recorded, and lots sold with reference thereto, the principles of

estoppel and dedication then apply to the particular subdivision covered thereby." *Homes Co. v. Falls,* 184 N.C. 426, 115 S.E. 184; *Johnston v. Garrett,* 190 N.C. 835, 130 S.E. 835; *McLeskey v. Heinlein,* 200 N.C. 290, 156 S.E. 489; *Higdon v. Jaffa,* 231 N.C. 242, 56 S.E. 2d 661; *Sedberry v. Parsons,* 232 N.C. 707, 62 S.E. 2d 88.

On the other hand, there is evidence that tends to show that there was a general scheme applicable to the entire development of 1,000 lots, and that several hundred of these lots may have been sold without restrictions. Even so, it does not appear in the record on appeal that a general or key map of the entire development has ever been placed on record or that any lots have been sold by reference thereto, as was the case in *Davis v. Robinson,* 189 N.C. 589, 127 S.E. 697; *Humphrey v. Beall,* 215 N.C. 15, 200 S.E. 918; *Phillips v. Wearn,* 226 N.C. 290, 37 S.E. 2d 895.

In order that our citizens may construct their homes in areas that will be secure from the encroachment of business and commercial establishments, they have resorted to the use of restrictive covenants. And the use of such covenants is an inducement to purchase lots in restricted areas and to spend large sums in the construction of homes therein. As said by *Brogden, J.,* in *Starkey v. Gardner,* 194 N.C. 74, 138 S.E. 408, "This security and freedom ought not to be destroyed by slight departures from the original plan, guaranteed and safeguarded by restrictive covenants in the deeds under which the property is held. Nor should a property owner be held to have waived his rights and to have abandoned the protection conferred upon him by such covenants, by reason of disconnected and immaterial violations of the restrictions in the conveyances."

The judgment of nonsuit entered below is reversed and the cause remanded for further proceedings in accord with the applicable principles of law and equity.

Reversed and remanded.

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

BARNEY D. JOHNSON v. MRS. VICTOR E. BELL.

(Filed 21 November, 1951.)

1. Automobiles § 8i—

It is unlawful for a motorist to fail to stop in obedience to a highway sign before entering upon an intersection with a through street, and while such failure does not constitute negligence or contributory negligence *per se,* it is evidence to be considered with other evidence in the case upon the issue of negligence or contributory negligence, as the case may be. G.S. 20-158 (a).

2. Automobiles § 18h (2)—

Whether defendant was guilty of negligence in failing to bring her vehicle to a stop in obedience to a highway sign before entering an intersection with a through street *held* for the jury upon the evidence in this action to recover for a collision at the intersection occurring between plaintiff's car, driven along the through street, and defendant's vehicle.

3. Highways § 6: Municipal Corporations § 25b—

Allegation and evidence to the effect that there was a sign erected along a street requiring a motorist to stop before entering upon an intersection with another street is sufficient to raise the inference that such sign was erected pursuant to competent authority notwithstanding the absence of allegation that it was so erected.

4. Automobiles § 8i—

The operator of an automobile along a through street who has knowledge that signs had been erected along the intersecting street requiring motorists thereon to stop before entering the intersection, is entitled to assume, and to act upon the assumption, even to the last moment, that the operator of a vehicle on the servient street will stop in obedience to the sign before entering the intersection.

5. Automobiles § 18h (3)—

Whether plaintiff, driving his car along a through street at a reasonable and prudent speed, acted as a reasonable and prudent person would have acted under similar circumstances in attempting to traverse the intersection without slackening speed notwithstanding that he saw a vehicle approaching from his left toward the intersection along the servient street, *held* a question for the jury under the evidence in this case.

APPEAL by defendant from *Bone, J.*, at April Civil Term, 1951, of WAKE.

Civil action to recover for property damage in an automobile collision allegedly resulting from actionable negligence of defendant.

These facts appear to be uncontroverted: On 17 July, 1950, about the hour of 11:45 a.m., a collision occurred at the intersection of Clark Avenue and Woodburn Road in the city of Raleigh, N. C., between plaintiff's automobile, a sedan, operated by him, traveling in an easterly direction along and upon Clark Avenue, and the automobile of defendant's husband, a sedan, operated by her in a southerly direction along and upon Woodburn Road.

Clark Avenue runs from west to east and Woodburn Road from north to south. The intersection between the two is east of the intersection of Clark Avenue and Oberlin Road, at which there is a stop light. At the time of the collision there was no obstruction on the northwest corner of the intersection of Clark Avenue and Woodburn Road to prevent a person traveling in an automobile east along Clark Avenue toward this intersection seeing an automobile moving south along Woodburn Road, or to

prevent a person traveling in an automobile south along Woodburn Road toward the intersection seeing an automobile moving east along Clark Avenue toward the intersection.

Plaintiff alleges in his complaint, briefly stated, that as he approached the intersection of Clark Avenue and Woodburn Road, he was operating his automobile in a careful, lawful and prudent manner upon his proper side of the street; that, at this intersection, Woodburn Road is designated as a "Stop street with a sign erected"; that the collision between his, plaintiff's, automobile, and that operated by defendant was proximately caused by the negligence of defendant in that, as she approached the intersection she was driving the automobile, operated by her, recklessly and at a high, dangerous, and unlawful rate of speed, and, without looking to her right, failed to stop at the stop sign erected at said intersection, and to yield the right of way to plaintiff who was operating his automobile on a through street, and, without keeping proper lookout, and without giving any signal, drove into the intersection, all in violation of the laws of the State of North Carolina, and ordinances of the city of Raleigh, N. C., and that as sole proximate cause of negligence of defendant his automobile was damaged to his injury in specified sum,—for which he prays judgment.

On the other hand, defendant, in answer filed, admits that she did not come to a complete stop at the intersection, but denies in material aspect all other allegations set forth in the complaint. And, as a further answer and defense to plaintiff's alleged cause of action, defendant avers: That at the time of the collision the automobile driven by her was being operated in a careful and prudent manner, and whatever damage plaintiff may have suffered was not the result of any negligence on her part. But that if it should appear that plaintiff's automobile was damaged as alleged in the complaint, such damage was the direct and proximate result of plaintiff's own negligent and careless manner of driving his automobile over, along and upon Clark Avenue, in that: (a) He failed to have same equipped with proper brakes, or failed to properly use the brakes and failed to keep a proper lookout; (b) he was operating his automobile at a high, reckless and dangerous rate of speed, which was improper under the conditions then and there existing; (c) he failed and neglected to yield the right of way to defendant, who, "long before the approach of the automobile of plaintiff, entered the intersection"; (d) he was operating his automobile recklessly; and (e) he failed to turn same to the side, by which he could have avoided the collision,—all of which is pleaded in bar of any recovery by plaintiff in this action.

Upon trial in Superior Court, plaintiff, as witness for himself, testified in pertinent part: ". . . As I approached Woodburn Road, about 75 feet before I got to the intersection, I saw Mrs. Bell's car coming . . . about

the same distance . . . I would say she was going around 25 miles per hour when I first saw her . . . I knew . . . Woodburn was a stop street. After I traveled a short distance further, I saw she wasn't going to stop. I was positive she would stop. . . . I could not tell that she slowed down at all. Woodburn Road is 30 feet wide. I was around 10 feet from the southwest curb line of Clark Avenue at the time the accident occurred. That stop sign is a large yellow one . . . I was 40 feet from the intersection when I first observed that she was not going to stop. I put on my brakes as quickly as possible. My wheels skidded . . . around 30 feet . . . before the impact. The center of my car struck the rear wheel and fender of hers . . . I did not hear any horn or signal . . . I had conversation with Mrs. Bell at the scene of the accident. She said she didn't see me until she got there . . ."

Then on cross-examination plaintiff continued: ". . . I . . . came to a stop at Clark and Oberlin and started off from there . . . down hill all the way . . . I didn't slow down much . . . When I saw she wasn't going to stop, I did . . ."

Then to the question, "And by that time you were within 40 feet of her?" plaintiff answered, "That's right," and continued, "When I got there just going into the intersection she had come over the center and when I hit her I had just stuck my car into Woodburn Road. She was about 5 or 10 feet in Clark Avenue—the nose of her car was about to the sidewalk of Clark Avenue. The sidewalk is right at the line of the drive. Her car hadn't gone up Woodburn, it was right close to it. The street isn't but 40 feet wide. She had gone 30 or 35 feet through the intersection . . . I was going down the right-hand side of Clark Avenue . . . around 10 feet from the curb . . . in the driving lane . . . I was on a through street . . ."

Defendant, reserving exception to the action of the court in overruling her motion for judgment as of nonsuit entered when plaintiff first rested his case, as a witness for herself, testified in pertinent part: ". . . When I approached the line of Clark Avenue I saw Mr. Johnson's car coming. It was the only car in sight. It was about half way up the block. At that time I was right at the corner of Clark Avenue. I just started on across. He was so far up the street I didn't see any reason not to . . . So I went on into the intersection. I had practically gotten across the whole intersection except for the back wheels and fender. The front of my car was practically out of Clark Avenue and he hit the right rear corner of my car and spun my car around. I did not come to a dead standstill at the time I approached the line of Clark Avenue. I slowed up enough to start up again without changing gears . . . it is a long block . . ."

Then on cross-examination defendant continued: ". . . To my right at the intersection . . . there was not a thing to obscure my vision. I didn't notice the stop sign there . . . I saw the stop sign a couple of days later when I went back over there . . . I should say Mr. Johnson was going rather fast if he skidded that many feet. He skidded, hit me, and kept on skidding. I don't know just how many miles an hour he was going . . . I evidently did not estimate his speed correctly. He was half a block up the street when I saw him. I don't know how many feet that is, but that is a right long block on Clark Avenue . . . I did not see I was going to get hit. I never did expect to get hit at all . . ."

Defendant renewed her motion for judgment as of nonsuit at close of all the evidence. Motion was overruled, and she excepted.

The case was submitted to the jury on three issues, (1) as to negligence of defendant; (2) as to contributory negligence of plaintiff; and (3) as to damages. The jury answered the first issue "Yes," the second "No," and the third "$600.00."

From judgment for plaintiff in accordance with the verdict, defendant appeals to Supreme Court and assigns error.

Broughton, Teague & Johnson for plaintiff, appellee.
Clem B. Holding for defendant, appellant.

WINBORNE, J. Did the trial court err in overruling motions of defendant, aptly made, for judgment as in case of nonsuit? In the light of the provisions of G.S. 20-158 applied to the allegations of the complaint, and the evidence offered by plaintiff which tends to show that Clark Avenue is a through or dominant street, and Woodburn Road is subservient thereto, it would seem that the case was one for the jury. See *Anderson v. Office Supplies, ante,* 142.

The statute, G.S. 20-158, prescribes that (a) The State Highway and Public Works Commission, with reference to State highways, and local authorities, with reference to highways under their jurisdiction, are authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to full stop before entering or crossing such designated highway, and that wherever any such signs have been so erected, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto. And the same section of the statute declares that "No failure so to stop, however, shall be considered contributory negligence *per se* in any action at law for injury to person or property; but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff in such action was guilty of contributory negligence." See *Sebastian v. Motor Lines,* 213 N.C. 770,

197 S.E. 539; *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239; *Hill v. Lopez,* 228 N.C. 433, 45 S.E. 2d 539; *Nichols v. Goldston,* 228 N.C. 514, 46 S.E. 2d 320; *Lee v. Chemical Corp.,* 229 N.C. 447, 50 S.E. 2d 181.

In *Sebastian v. Motor Lines, supra,* regarding the statute, it is held "as a necessary corollary or as the rationale of the statute, that where the party charged is a defendant in any such action the failure so to stop is not to be considered negligence *per se,* but only evidence thereof to be considered with other facts in the case in determining whether the defendant in such action is guilty of negligence." In like manner and for the same reason, the principle may be extended to anyone who violates the statute. See *Reeves v. Staley, supra. Hill v. Lopez, supra.*

Applying these principles to the evidence in the case in hand, if Clark Avenue be a through street, and Woodburn Road a subservient street, with stop sign at its entrance into the intersection with Clark Avenue, it would have been unlawful for defendant to fail to stop, in obedience to the stop sign, before attempting to enter such intersection, and her failure so to do is evidence of negligence to be considered with other facts in the case in determining whether she was guilty of negligence. When so considered, the evidence shown on the record is of such character as to make a case for the jury.

True, there is no allegation that the stop sign was erected by the local officials, yet the allegations of the complaint are sufficient to admit of such inference, and the evidence tends to support the allegation. See *Anderson v. Office Supplies, ante,* 142.

Moreover, there is allegation, and evidence tending to show that plaintiff knew that Clark Avenue on which he was traveling was a through highway, and that there was a stop sign on Woodburn Road. If such be the case, plaintiff was under no duty to anticipate that defendant, in approaching the intersection—his automobile being in plain view,—would fail to stop as required by the statute, and in the absence of anything which gave or should give notice to the contrary, he was entitled to assume and to act on the assumption, even to the last moment, that defendant would not only exercise ordinary care for her own safety, but would act in obedience to the statute, and stop before entering the dominant street. The evidence points to the emergency caused by the failure of defendant to stop. *Reeves v. Staley, supra.*

Whether under such circumstances plaintiff acted as a reasonably prudent person would have acted under similar circumstances, is properly a jury question.

Hence in the judgment below we find

No error.

CITY OF RALEIGH v. A. J. EDWARDS AND WIFE, MAMIE H. EDWARDS (DEFENDANTS), AND W. HAROLD BARBEE AND WIFE, VIRGINIA M. BARBEE (INTERVENING DEFENDANTS).

(Filed 21 November, 1951.)

1. **Appeal and Error § 2—**

An appeal does not lie to the Supreme Court from an interlocutory order of the Superior Court unless such interlocutory order deprives the appellant of a substantial right which he might lose if the order is not reviewed before final judgment. G.S. 1-277.

2. **Eminent Domain § 18b: Parties § 7—**

The court is not required to determine the validity of a claim of interest in lands sought to be condemned before permitting claimant to intervene for the purpose of asserting his claim. G.S. 40-12.

3. **Appeal and Error § 2—**

Petitioner is not entitled to appeal from an order permitting a party claiming an interest in the lands sought to be condemned to intervene in the proceeding, since petitioner can fully protect whatever legal rights it may have by preserving exception to the order allowing intervention, G.S. 1-278, and by appealing from any adverse judgment upon the merits.

4. **Judgments § 30: Appeal and Error § 2—**

Upon the allowance of a motion for leave to intervene, provisions in the order undertaking to specify in advance what interveners' pleadings should allege and what legal positions they should take, are *obiter dicta* and without binding force since such matters are not before the court, and therefore such provisions do not impair any substantial right of interveners and are not appealable.

APPEALS by petitioner, City of Raleigh, and interveners, W. Harold Barbee and wife, Virginia M. Barbee, from *Sharp, Special Judge,* at September Term, 1951, of WAKE.

Motion for leave to intervene in a condemnation proceeding.

The petitioner, the City of Raleigh, a municipality, brought this proceeding against the original respondents, A. J. Edwards and Mamie H. Edwards, to condemn certain lots situated within the corporate limits of the city for the site of a proposed elevated tank to be devoted to the storage of water for the use of the city and its inhabitants.

W. Harold Barbee and his wife, Virginia M. Barbee, who are herein called the interveners, forthwith filed a verified motion before the clerk of the Superior Court seeking leave to intervene in the proceeding as omitted claimants of an interest in the lots sought to be condemned. They alleged, in substance, that such lots and neighboring lots owned by them are located in a subdivision in which all property is restricted to residential uses under a general plan of development; that the building

restriction thus imposed on the lots sought to be condemned confers on them, as owners of neighboring lots in the subdivision, a property right in the nature of an easement in the lots sought to be condemned; that the condemnation of the lots and the erection of the proposed storage tank thereon will absolutely destroy such property right; and that in consequence they ought to be made parties to the proceeding so that they may protect their property right.

The petitioner opposed the motion of the interveners in an affidavit which stated that "it is expressly denied that they have any interest in the property . . . sought to be condemned in this proceeding."

The clerk of the Superior Court granted the motion, and the petitioner appealed to the judge, who entered this order:

"It is . . . ordered that W. Harold Barbee and wife be permitted to intervene and they are hereby made parties to this proceeding for the purpose of determining the value of their interest, if any, in the property of A. J. Edwards and wife by virtue of the restrictive covenants referred to and for that purpose only. The court further holds that any action by the interveners against the petitioner upon allegations of nuisance cannot be determined in this proceeding. The interveners are allowed 10 days . . . to file an answer to the petition, and the petitioner is allowed 10 days thereafter to set up by reply any defense it may have to the allegations of the interveners' answer."

The petitioner and the interveners excepted to the order of the judge, and appealed to the Supreme Court without filing the specified pleadings. The petitioner alleges in its assignment of error that the judge erred in permitting W. Harold Barbee and Virginia M. Barbee to intervene at all. The interveners assert, however, that the leave to intervene was proper, but that the judge erred in undertaking to specify in advance what their pleadings should allege and what legal positions they should take at subsequent stages of the proceeding.

Paul F. Smith and Henry H. Sink for petitioner, appellant and appellee.

Ruark & Ruark and Joseph C. Moore, Jr., for interveners, appellants and appellees.

ERVIN, J. This question arises at the threshold of plaintiff's appeal: Is an interlocutory order granting a motion to intervene in a condemnation proceeding appealable?

Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment. To this end, the statute defining the right of appeal prescribes, in substance,

that an appeal does not lie to the Supreme Court from an interlocutory order of the Superior Court, unless such interlocutory order deprives the appellant of a substantial right which he might lose if the order is not reviewed before final judgment. G.S. 1-277; *Veazey v. City of Durham*, 231 N.C. 357, 57 S.E. 2d 377; *Emry v. Parker*, 111 N.C. 261, 16 S.E. 236.

In permitting intervention in this cause, the court acted under the statutes regulating the procedure in condemnation proceedings. These statutes plainly imply that all persons "who own or have, or claim to own or have, estates or interests in the . . . real estate" sought to be taken for public use are to be made parties to the proceeding for its condemnation. G.S. 40-12; *Hill v. Mining Co.*, 113 N.C. 259, 18 S.E. 171. They do not provide, however, that the court is to try and determine the validity of a claim of ownership advanced by an omitted claimant before it permits him to intervene in the proceeding for the purpose of asserting his claim.

The interlocutory order authorizing intervention in this cause has decided nothing whatever against the petitioner. It merely grants leave to the interveners to become parties to this proceeding so that they may assert that they own an interest in the land sought to be condemned and are entitled to relief accordingly. It clearly contemplates that the validity of the claim of the interveners will be determined in a subsequent trial on the merits conforming to appropriate and established procedure in the event the pleadings of the parties raise issues of law or fact relating to the claim. Inasmuch as no pleadings bearing on the claim have been filed up to the present moment, no such issues have yet arisen.

We must assume that the Superior Court will adjudge the claim of the interveners to be invalid in case it appears at a trial on the merits that the claim is without basis either in law or in fact. There is certainly nothing in the record which indicates that the petitioner cannot fully protect whatever legal rights it may have by an appeal to the Supreme Court from an adverse decision of the Superior Court awarding the interveners relief on the merits.

These things being true, the interlocutory order allowing intervention does not deprive the petitioner of a substantial right which it may lose if the order is not reviewed before final judgment. In consequence, the plaintiff's appeal is fragmentary and premature.

This conclusion has explicit support in well considered decisions recognizing and enforcing the specific rule that an order granting a motion to intervene is not appealable. *Gammon v. Johnson*, 126 N.C. 64, 35 S.E. 185; *Bennett v. Shelton*, 117 N.C. 103, 23 S.E. 95. Moreover, it finds implicit sanction in the cases applying the general rule that ordinarily no appeal lies from an order granting a motion for the joinder of addi-

tional parties. *Colbert v. Collins,* 227 N.C. 395, 42 S.E. 2d 349; *Insurance Co. v. Motor Lines, Inc.,* 225 N.C. 588, 35 S.E. 2d 879; *Morgan v. Turnage Co.,* 213 N.C. 425, 196 S.E. 307; *Wilmington v. Board of Education,* 210 N.C. 197, 185 S.E. 767; *Barbee v. Cannady,* 191 N.C. 529, 132 S.E. 572; *Joyner v. Fiber Co.,* 178 N.C. 634, 101 S.E. 373; *Armfield Co. v. Saleeby,* 178 N.C. 298, 100 S.E. 611; *Etchison v. McGuire,* 147 N.C. 388, 61 S.E. 196; *Bernard v. Shemwell,* 139 N.C. 446, 52 S.E. 64; *Sprague v. Bond,* 111 N.C. 425, 16 S.E. 412; *Emry v. Parker, supra; Sneeden v. Harris,* 107 N.C. 311, 12 S.E. 205; *Lane v. Richardson,* 101 N.C. 181, 7 S.E. 710; *White v. Utley,* 94 N.C. 511.

The petitioner may preserve its exception to the order allowing intervention, and ask the Supreme Court to consider such exception in case it appeals from a final judgment of the Superior Court awarding the interveners relief on the merits. G.S. 1-278; *Bennett v. Shelton, supra; Emry v. Parker, supra.*

This brings us to the appeal of the interveners from the provisions of the order in which the court undertook to specify in advance what their pleadings should allege and what legal positions they should take at subsequent stages of the proceeding. As these matters were not before the court for decision at the time it granted leave to intervene, these provisions constitute *obiter dicta,* and are without binding force. For this reason, they do not impair any substantial right of the interveners, or warrant their appeal.

Appeal of petitioner dismissed.

Appeal of interveners dismissed.

STATE v. GENEAL WASHINGTON.

(Filed 21 November, 1951.)

1. Criminal Law § 53d—

G.S. 1-180 requires the presiding judge to declare and explain the law as it relates to the different aspects of the evidence on each side of the case, so as to bring into focus the relations between the different phases of the evidence and the applicable principles of law.

2. Homicide § 27f—Evidence held to require charge on defendant's right of self-defense where murderous assault is made upon her.

Where all the evidence tends to show that defendant was not the aggressor and defendant's evidence is to the effect that after assaulting her first with his fists and then with a large stick, her assailant announced his intention to take her out of sight of bystanders and kill her, and was in the act of attempting to drag her away when she stabbed him in a fatal

spot with a knife because she "knowed what would happen" or that he would carry out his threat, *held* to require an instruction on the right of a person subjected to a murderous assault to stand his ground and kill if necessary in self-defense, and an instruction to the effect that a person who brings on the difficulty must quit the fight and retreat to the wall in order to claim self-defense is erroneous as partially inapplicable, incomplete and misleading.

APPEAL by defendant from *Clement, J.*, and a jury, at 13 August, 1951, Extra Criminal Term, of MECKLENBURG.

Criminal prosecution tried upon a bill of indictment charging the defendant with the murder of her husband, Booker T. Washington.

When the case was called for trial, the solicitor announced 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.

The evidence of the State reveals that on the morning of 28 July, 1951, two police officers of the City of Charlotte found the deceased in the street in a dying condition with stab wounds about his body. He was taken immediately to the hospital, but a few minutes after arrival died "from massive hemorrhage into the chest cavity as a result of a knife wound." Other wounds on his body were not of fatal character.

Officer McCoy testified that after sending the deceased to the hospital he went to the home of the defendant, about half a block away. She was changing her clothes. She admitted killing her husband with a deadly weapon, but claimed self-defense. She said she stabbed him "with a dagger-type knife about seven or eight inches long, . . . that they had had a fight over a small amount of money just prior to the stabbing . . . said they had got in the street and that he was beating her with his fists, that he had knocked her down an embankment about eight feet and was beating her with a board and with his fists. And she said they came back up onto the sidewalk and he was fighting her and she stabbed him in the chest with the knife. She said they fought all the way up the bank." Officer McCoy further testified that he saw "some boards—little slats . . . lying at the bottom of the hole (embankment) . . . They were . . . about two feet long and about the width of your four fingers." He said he saw no injuries on the defendant, but saw blood on her dress.

The defendant testified that she and the deceased had been married five years; that they had three children, ages three years, two years, and eight months, and that she was five months pregnant with his fourth child; that he had the reputation of being a violent and dangerous man; that he had committed assaults on her throughout their married life. She said he had inflicted extensive knife wounds on her on several occasions and that they separated 14 March, 1951, after he assaulted her with

a shovel and drove her from home, and that they had lived separate and apart since that time; that on Friday evening, 27 July, 1951, at about 10:00 o'clock (the night before the homicide), she met deceased at a grocery store where he bought some groceries for her and the babies and gave her for the family $20.00 out of $43.00 he then had; that at his request she met him about an hour later on the street. He was drinking and cursing, so she went home. Soon thereafter he came to her home (where she was staying with her mother). They talked a while and he left, but came back a few hours later and demanded a return of some of the $20.00 he had given her earlier that night. She did not go out of the house. He stayed around, cursing and abusing her from outside. And in an altercation with defendant's sister he was cut in the face with a knife. Police officers took him to a hospital where he was sewed up. On the way to the hospital he told the officers he was going to kill his wife "if it took 500 years to serve for it." Officer Spencer said he was sober, but appeared to be angry. After being released by the officers, the deceased again went back to the defendant's home,—about 5:00 o'clock in the early morning. This time he gained entrance to the house, assaulted her and tried to drag her outside, but failed and left. Then, about 9:30 a.m. he reappeared and asked for 65c for breakfast. As she handed it to him at the front door, he pulled her out by the wrist, dragged her off the porch, down the street, knocked her over an embankment, jumped down on top of her and beat her with his fists; that then for the first time she "just nicked him with her nephew's Boy Scout knife," which she had picked up in the house when she took the 65c to the door to give her husband. She said she did not try to inflict serious injury, but was merely trying to cause him to stop beating her; that he then picked up a large stick and struck her several times with it, after which he dragged her up the embankment while continuing to beat her; that he told her "I'm going to take you where nobody will get me (a number of persons were standing around) because I'm going to kill you"; that he kept beating her and dragged her away and she stabbed him in the chest to get loose because, as she put it, "he told me what he was going to do to me and I knowed what would happen." After stabbing him she turned and went home and he ran down the street and fell.

The defendant's narrative of the assault was corroborated in the main by the testimony of several eyewitnesses.

Verdict: Guilty of manslaughter.

Judgment: Imprisonment in the Woman's Division of the State Prison at Raleigh for a term of four years.

The defendant appealed, assigning errors.

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

Richard M. Welling for defendant, appellant.

JOHNSON, J. All the evidence offered at the trial below shows that the deceased, and not the defendant, was the aggressor. The defendant's evidence indicates that she was entirely free from fault and never fought willingly and unlawfully. Her evidence further shows that the deceased made a violent attack upon her. First he assaulted her with his fists, knocking her down an embankment; and then struck her several blows with a large stick. Following this, while attempting to drag her away from the people who were standing by, he declared it was his purpose to take her out of sight and kill her. She begged the deceased to stop beating her, and it was only after he announced his intention to take her elsewhere and kill her that she stabbed him in a vital spot.

It thus appears that the defendant's evidence, if believed, showed she was defending against a murderous, as distinguished from an ordinary nonfelonious, assault.

The defendant contends, and our examination of the record discloses, that the trial court failed to instruct the jury as to the law applicable to this phase of the defendant's evidence in compliance with the mandatory requirements of G.S. 1-180, as rewritten by Chapter 107, Session Laws of 1949. This statute requires the presiding judge to declare and explain the law as it relates to the different aspects of the evidence on each side of the case, so as to bring into focus the relations between the different phases of the evidence and the applicable principles of law. *S. v. Fain,* 229 N.C. 644, 50 S.E. 2d 904; *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484; *S. v. Bryant,* 213 N.C. 752, 197 S.E. 530.

In *S. v. Hough,* 138 N.C. 663, p. 667, 50 S.E. 709, *Brown, J.,* said: "There is a distinction made by the text-writers on criminal law, which seems to be reasonable and supported by authority, between assaults with felonious intent and assaults without felonious intent. 'In the latter, the person assaulted may not stand his ground and kill his adversary if there is any way of escape open to him, though he is allowed to repel force with force and give blow for blow. In the former class, where the attack is made with murderous intent, the person attacked is under no obligation to fly, but may stand his ground and kill his adversary if need be.' 2 Bishop's Criminal Law, sec. 6333, and cases cited. It is said in 1 East, Pleas of the Crown, 271: 'A man may repel force by force in defense of his person, habitation or property against one who manifestly intends or endeavors by violence to commit a felony, such as murder, rape, burglary, robbery and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he

has secured himself from all danger, and if he kill him in so doing it is called justifiable self-defense.' The American doctrine is to the same effect. See *S. v. Dixon,* 75 N.C. 275."

In *S. v. Blevins,* 138 N.C. 668, p. 670, 50 S.E. 763, with *Hoke, J.,* speaking for the Court, it is stated: ". . . that where a man is without fault, and a murderous assault is made upon him—an assault with intent to kill—he is not required to retreat but may stand his ground, and if he kill his assailant and it is necessary to do so in order to save his own life or protect his person from great bodily harm, it is excusable homicide and will be so held; . . . this necessity, real or apparent, to be determined by the jury on the facts as they reasonably appeared to him." See also *S. v. Thornton,* 211 N.C. 413, 190 S.E. 758; *S. v. Bost,* 192 N.C. 1, 133 S.E. 176; *S. v. Dixon,* 75 N.C. 275; *S. v. Harris,* 46 N.C. 190.

The failure of the trial court to instruct the jury in accordance with this settled principle of law, under which are fixed the rights of a person upon whom a murderous assault is made, undoubtedly weighed heavily against the defendant. That this is so seems all the more likely in view of the following instruction given the jury by the trial court, to which the defendant excepted:

"Now, gentlemen, where a person brings on a difficulty and is responsible for the fight, if his assailant presses him harder than he anticipated, then before such person could claim that he or she was fighting in self-defense, the law provides that the person must quit the fight, retreat to the wall, quit the combat, and go away, if he can do so in safety, before he or she can claim self-defense. If their back is already to the wall, even though they bring on the difficulty, if they cannot retreat without subjecting themselves to the hazard and danger of great bodily harm or death, then they can still stand their ground and deliver blow for blow and may claim self-defense."

This instruction is correct as a general statement of one phase of the law of self-defense. However, since the record here discloses no evidence tending to show that the defendant brought on the difficulty or was the aggressor, it necessarily follows that the instruction as it relates to the evidence in this case was partially inapplicable, incomplete and misleading. *S. v. Lee,* 193 N.C. 321, 136 S.E. 877; *S. v. Waldroop,* 193 N.C. 12, 135 S.E. 165.

For the reasons given, it would seem that the defendant is entitled to another trial, and it is so ordered. This being so, it is not necessary to review the remaining assignments of error.

New trial.

MRS. RACHEL VIRGINIA WILLIAMS, BY HER NEXT FRIEND, C. W. WILLIAMS, v. UNION COUNTY HOSPITAL ASSOCIATION, INC., D/B/A ELLEN FITZGERALD HOSPITAL.

(Filed 21 November, 1951.)

1. Pleadings §§ 15, 31—

The sufficiency of new matter alleged in the answer to constitute a defense may be tested either by demurrer, G.S. 1-141, or by motion to strike, G.S. 1-126.

2. Hospitals § 6—

A charitable hospital is not liable for injuries to a patient caused by the negligence of its employees but may be held liable for its negligence in failing to use due care in the selection of its employees.

3. Same: Pleadings § 31—

Where, in a suit against a hospital for injury to a patient, there are allegations of negligence on the part of the employees of the hospital, *held* defendant's answer alleging that it is a nonprofit corporation operated as an eleemosynary or charitable institution states a germane defense, and plaintiff's demurrer to such defense is properly overruled.

APPEAL by plaintiff from *Bennett, Special Judge*, April Extra Civil Term, 1951, MECKLENBURG. Affirmed.

Civil action to recover compensation for personal injuries sustained by plaintiff while a patient in defendant's hospital, heard on demurrer to defendant's further defense set out in its answer.

Briefly stated, plaintiff alleges that on 24 May 1949 she was aged, feeble, in ill health, and physically unable to take care of herself; that she was admitted to defendant's hospital as a patient; that her condition was so obvious that defendant knew, or should have known, that it was necessary to place guard rails or other protective devices around her bed to keep her from falling; that this is the usual custom in such cases; that defendant negligently failed to provide plaintiff with any such protection; that as a result she fell from the bed and received serious and permanent injuries to her hip. She alleges other acts of negligence of defendant through its agents and employees.

In its answer defendant alleges that it is a nonstock, nonprofit corporation operated as an eleemosynary or charitable institution.

The plaintiff demurred to said further defense for that the facts alleged do not constitute a valid defense or render the defendant immune from liability for its own negligence. The demurrer was overruled and plaintiff appealed.

Covington & Lobdell for plaintiff appellant.

J. Laurence Jones and Jno. H. Small for defendant appellee.

BARNHILL, J. When new matter is alleged in an answer by way of an affirmative defense, the sufficiency of the plea as a defense to plaintiff's cause of action may be tested either by demurrer or by motion to strike. Both remedies are available to plaintiff. Each is an appropriate method of testing the sufficiency of the plea as a defense to plaintiff's cause of action.

"The plaintiff may in all cases demur to an answer containing new matter, where, upon its face, it does not constitute a . . . defense; and he may demur to one or more such defenses . . . and reply to the residue." G.S. 1-141; *Williams v. Thompson,* 227 N.C. 166, 41 S.E. 2d 359; *Insurance Co. v. McCraw,* 215 N.C. 105, 1 S.E. 2d 369.

As new matter which has no substantial relation to the controversy and presents no defense to the action is irrelevant and immaterial, the plaintiff may, instead, elect to move to strike as provided by statute. G.S. 1-126, G.S. 1-153; *Patterson v. R. R.,* 214 N.C. 38, 198 S.E. 364; *Brown v. Hall,* 226 N.C. 732, 40 S.E. 2d 412.

Decisions in the various jurisdictions on the question of liability of an eleemosynary or charitable corporation for the results of its negligence and the negligence of its employees evidence much contrariety of opinion. 10 A.J. 687, sec. 140, *et seq.; Herndon v. Massey,* 217 N.C. 610, 8 S.E. 2d 914. Even so, the doctrine of liability of such corporations as adopted and applied in this jurisdiction is settled by a uniform line of decisions. *Barden v. R. R.,* 152 N.C. 318, 67 S.E. 971, 49 L.R.A. N.S. 801; *Hoke v. Glenn,* 167 N.C. 594, 83 S.E. 807; *Johnson v. Hospital,* 196 N.C. 610, 146 S.E. 573; *Cowans v. Hospitals,* 197 N.C. 41, 147 S.E. 672; *Herndon v. Massey, supra; Smith v. Duke University,* 219 N.C. 628, 14 S.E. 2d 643; Anno. 109 A.L.R. 1199.

After discussing the conflicting viewpoints expressed by other Courts, *Allen, J.,* speaking for the Court in *Hoke v. Glenn, supra,* says:

"We prefer to adopt the middle course, which exempts (charitable corporations) from liability for the negligence of employees and requires the exercise of ordinary care in selecting them, as more consonant with authority and with the purposes for which such institutions are established. . . .

"In the application of this principle the distinction between the negligent act of the employee and the negligence of the corporate body, in selecting employees must be kept steadily in view, as it is only the latter which creates liability."

And in *Johnson v. Hospital, supra, Brogden, J.,* speaking to the subject, says:

"The boundary line between the liability of hospitals operated upon the basis of charity and not for the purpose of profit or gain, and those operated for such latter purpose is clearly marked. 'The principle seems

to be generally recognized that a private charitable institution, which has exercised due care in the selection of its employees, cannot be held liable for injuries resulting from their negligence, and the rule is not affected by the fact that some patients or beneficiaries of the institution contribute towards the expense of their care, where the amounts so received are not devoted to private gain, but more effectually to carry out the purposes of charity.' "

It follows that in the light of some of the allegations of negligence contained in the complaint, the new matter alleged in the answer is germane and material. To what extent the doctrine is to be applied must depend upon the evidence offered at the trial.

While the doctrine followed in this jurisdiction clearly exempts an eleemosynary hospital from liability for the negligence of its servants, who have been selected with due care, in the care and treatment of those who have accepted the benefits of the charity, so far this Court has not applied the doctrine as against one who is not a recipient of the charity but who, instead, pays full compensation for the services rendered. As to such patient, is the plea available to the defendant? While some of the cases cited contain dicta bearing on the question, as yet there is no authoritative decision in this jurisdiction. See 10 A.J. 691, sec. 144, and p. 700, sec. 151; Anno. 14 A.L.R. 572, and 33 A.L.R. 1369. The demurrer does not necessarily raise the question. Hence decision thereof is reserved.

The judgment of the court below overruling the demurrer is
Affirmed.

WILLIE BELLE DEATON v. E. J. DEATON.

(Filed 21 November, 1951.)

1. **Pleadings § 19c—**

   Where a complaint alleges several causes of action, a general demurrer must be overruled if any one of the causes of action is sufficiently stated.

2. **Divorce and Alimony § 5c—**

   Where, in an action for alimony without divorce, G.S. 50-16, several causes of action for divorce *a mensa* are alleged, G.S. 50-7, a general demurrer to the complaint must be overruled if any one of the causes is sufficiently stated.

3. **Trial § 21—**

   Where several causes of action are alleged, a general motion to nonsuit does not present the sufficiency of the evidence as to any particular cause, and must be overruled if the evidence is sufficient as to any one of the causes.

4. Trial § 22a—

On motion to nonsuit, plaintiff's evidence will be taken as true and considered in the light most favorable to her, giving her every reasonable inference and intendment therefrom.

5. Trial § 23a—

If there is more than a scintilla of evidence in support of any one of the several causes of action alleged, a general motion to nonsuit is properly denied.

6. Divorce § 8c—

Where, in an action for alimony without divorce, G.S. 50-16, there is more than a scintilla of evidence to support any one of several causes of action for divorce *a mensa* alleged, defendant's general motion to nonsuit is properly overruled, since plaintiff is entitled to relief if she establishes any one of the causes and such motion does not present the sufficiency of the evidence as to any particular cause.

7. Trial § 49—

Objection that there was no sufficient evidence to support a verdict cannot be taken for the first time after the verdict has been returned, and motion to set aside the verdict for insufficiency of the evidence as a matter of law is properly denied.

8. Appeal and Error § 6c (2)—

An exception to the signing of the judgment is without merit when the record supports the judgment.

APPEAL by defendant from *Phillips, J.*, June Term, 1951, CABARRUS.

This is an action for alimony and subsistence without divorce and for counsel fees under G.S. 50-16.

Plaintiff alleges several causes of action against the defendant: (1) that he offered such indignities to her person as to render her condition in life intolerable and her life burdensome; (2) that he abandoned her; (3) that he offered cruel and barbarous treatment, endangering her life; (4) that he separated himself from her without providing her with the necessary subsistence according to his means and condition in life; (5) that he maliciously turned her out of doors; (6) that he had become an habitual drunkard; and (7) that he had committed adultery.

The defendant, answering, admits the marriage, but denies all allegations embraced in plaintiff's several causes of action.

Upon the reading of the pleadings, defendant demurred *ore tenus* to the complaint asserting that it fails to state facts sufficient to constitute a cause of action and that the allegations are generalities. His motion was denied and defendant excepted.

Thereupon, the plaintiff offered evidence tending to establish some, if not all, of the grounds for divorce alleged by her, and the defendant

offered evidence in rebuttal. As the exceptions relied on by defendant do not require decision as to the sufficiency of the evidence to support the verdict on the issues of habitual drunkenness and adultery, we need not now review the testimony in detail.

Defendant's motion to dismiss as in case of nonsuit was overruled and defendant duly excepted.

Issues upon each of plaintiff's causes of action were submitted to the jury. The jury answered "yes" to the issue of marriage and further found upon issues 7 and 8 that defendant had become an habitual drunkard and that he had committed adultery as alleged in the complaint.

Defendant's motions to set aside the verdict and for a new trial were denied and exceptions noted. From judgment upon the verdict, defendant appealed, assigning errors.

Bernard W. Cruse and R. Furman James for plaintiff, appellee.
E. Johnston Irvin and C. M. Llewellyn for defendant, appellant.

VALENTINE, J. The questions upon this appeal revolve around defendant's demurrer *ore tenus* to the complaint, his motion to dismiss as of nonsuit at the close of all the evidence, and his motion to set aside the verdict.

The demurrer was general in terms. It is not directed to any one or more of the several causes for divorce alleged in the complaint but to the complaint as a whole. *Mills Co. v. Shaw, Comr. of Revenue,* 233 N.C. 71.

It is a well established rule in this jurisdiction that a complaint is sufficient to withstand a demurrer if it in any part or to any extent presents a cause of action, or if sufficient facts in support of a cause of action can be fairly gathered therefrom. *Hoke v. Glenn,* 167 N.C. 594, 83 S.E. 807; *Mills Co. v. Shaw, Comr. of Revenue, supra; Brewer v. Wynne,* 154 N.C. 467, 70 S.E. 947. It is also held that a complaint which alleges two or more causes of action is good against a demurrer, if only one cause of action is sufficiently stated. *Meyer v. Fenner,* 196 N.C. 476, 146 S.E. 82; *Best v. Best,* 228 N.C. 9, 44 S.E. 2d 214.

It is not necessary for the plaintiff to establish all of the grounds for divorce *a mensa et thoro* alleged in her complaint in order to sustain her action. It is sufficient if she establishes the defendant's guilt of any of the acts that would constitute a cause of action for divorce from bed and board as enumerated in G.S. 50-7. *Albritton v. Albritton,* 210 N.C. 111, 185 S.E. 762; *Hagedorn v. Hagedorn,* 211 N.C. 175, 189 S.E. 507; *Brooks v. Brooks,* 226 N.C. 280, 37 S.E. 2d 909. It, therefore, appears that defendant's demurrer was properly overruled.

The defendant entered a general demurrer to the evidence. His exception to the ruling of the court thereon does not present for decision the

question of whether there was sufficient evidence to support the alleged causes of action to which issues 7 and 8 are directed. If he desired to challenge the sufficiency of the evidence to be submitted to the jury on either or both of these issues, he should have directed his motion to those particular causes. *S. v. Benson, ante,* 263.

Defendant's motion for judgment as of nonsuit at the close of all the evidence was a general motion and referred to no particular cause of action set forth in the complaint. As against this motion, which is substantially a demurrer to the evidence, plaintiff is entitled to have her evidence examined in the light most favorable to her, and is entitled to every reasonable inference and intendment to be drawn therefrom. Such a motion admits as true that which her evidence tends to prove with respect to each cause of action alleged in the complaint. *Maddox v. Brown,* 232 N.C. 244, 59 S.E. 2d 791; *Graham v. Gas Co.,* 231 N.C. 680, 58 S.E. 2d 757. If the plaintiff offers in support of her contention more than a scintilla of evidence, the matter then becomes a jury question. *Gates v. Max,* 125 N.C. 139, 34 S.E. 266; *Cable v. R. R.,* 122 N.C. 892, 29 S.E. 377; *Cox v. R. R.,* 123 N.C. 604, 31 S.E. 848.

Measuring the plaintiff's evidence by the rules of interpretation laid down by this Court, her evidence was sufficient to withstand defendant's motion for judgment as of nonsuit. If the defendant had in apt time made a motion to nonsuit the plaintiff with respect to the causes of action in which she alleged that he had become an habitual drunkard and had committed adultery, the results may have been entirely different. Instead, his motion to nonsuit was directed toward the entire evidence, some parts of which were abundantly sufficient to take the case to the jury and, therefore, sufficient to repel a motion for nonsuit. The defendant could have prayed for instructions as to issues arising upon these two causes of action and a refusal of such prayer may have presented this matter in a different light. *Lea v. Bridgeman,* 228 N.C. 565, 46 S.E. 2d 555.

The motion to set aside the verdict presents no question for decision. While the defendant seeks to use this and the other exceptions relied upon as a basis for his argument that there was no evidence to support the verdict on the issues answered against him, this exception comes too late. It has been held in this jurisdiction "with marked uniformity that an objection that there was no evidence or no sufficient evidence to support a verdict cannot be taken for the first time after the verdict has been returned." *Mincey v. Construction Co.,* 191 N.C. 548, 132 S.E. 462; *Moon v. Milling Co.,* 176 N.C. 407, 97 S.E. 213; *Wilkerson v. Pass,* 176 N.C. 698, 97 S.E. 466; *Lea v. Bridgeman, supra.*

Defendant's exception to the signing of the judgment is without merit. *Smith v. Smith,* 226 N.C. 506, 39 S.E. 2d 391; *Rader v. Coach Co.,* 225

N.C. 537, 35 S.E. 2d 609; *Query v. Insurance Co.*, 218 N.C. 386, 11 S.E. 2d 139.

It follows that the defendant's exceptive assignments of error relied on in this Court fail to point out any cause for disturbing the verdict rendered. Therefore, the judgment thereon must be affirmed. In the trial below we find

No error.

MRS. NOVA B. FOWLER v. ATLANTIC COMPANY, INC., TRADING LOCALLY AS THE IREDELL ICE & FUEL COMPANY, INC.

(Filed 21 November, 1951.)

1. Automobiles §§ 8i, 18h (2)—

Plaintiff's evidence to the effect that defendant's driver turned left at an intersection without giving the statutory signal, and struck plaintiff's car, which was approaching from the opposite direction, after it had been brought to a standstill but was about six feet inside the intersection, *held* for the jury on the issue of negligence.

2. Automobiles § 8i—

Where two vehicles are traveling in opposite directions along the same street and meet as one of them attempts to make a left turn at an intersection, the rules relating to the entering upon the intersection from a side street are not applicable, G.S. 20-155 (a), but the applicable statutes are G.S. 20-155 (b) and G.S. 20-154.

3. Same: Automobiles § 18h (3)—

The collision in suit occurred when defendant's vehicle, first entering the intersection, attempted to turn left without giving the statutory signal and hit plaintiff's vehicle, which had been traveling in the opposite direction along the same street, as it had been brought to a standstill six feet within the intersection. *Held:* Conflicting evidence as to whether plaintiff's driver, in the exercise of due care, should have seen defendant's vehicle in the act of turning in time to have stopped short of the intersection and thus avoided the collision, takes the case to the jury upon the issue of plaintiff's contributory negligence.

4. Trial § 22c—

Discrepancies and contradictions, even in plaintiff's evidence, are for the jury and not for the court.

5. Negligence § 19c—

Nonsuit on the ground of contributory negligence may be allowed when, and only when, no other inference is reasonably deducible from the evidence.

APPEAL by plaintiff from *Phillips, J.*, at May Term, 1951, of IREDELL.

Civil action to recover for property damage resulting from a collision of two motor vehicles in a street intersection due to the alleged negligence of the driver of the defendant's truck.

The plaintiff's automobile and the defendant's truck were being operated in opposite directions along East Broad Street, which runs east and west in the city of Statesville, approaching the intersection of Tradd Street, which runs north and south. The plaintiff's car was proceeding easterly and the defendant's truck was being driven in a westerly direction. Over the center of the intersection was an electric traffic signal device. Both vehicles,—meeting each other on opposite sides of the intersection,—entered the intersection on a green light. The defendant's truck entered first. The collision occurred as the driver of the defendant's truck was in the act of making a left turn through the intersection into Tradd Street in front of the plaintiff's approaching car. The driver of the defendant's truck did not give a signal of his intention to make the left turn into Tradd Street. The truck, after swinging left from its line of travel on the north side of Broad Street, had reached at the time of the impact a point 10 or 12 feet from the entrance into Tradd Street. The plaintiff's car was in the regular traffic lane for vehicles going easterly through the intersection, and was about 6 feet inside of the intersection. It had approached the intersection at a speed of 15 or 20 miles per hour, but at the time of the impact it had been brought to a standstill. "The right front fender and bumper of the truck hit the left (front) fender" of the car.

The witnesses estimated the width of Broad Street at from 50 to 75 feet, and of Tradd Street from 35 to 50 feet. The collision occurred about 4:30 o'clock in the afternoon of 3 November, 1948. The weather was cloudy. It had rained that day. The evidence, however, was both ways as to the condition of the surface of the street. The plaintiff said it was "not wet." One witness said "it was dry," and another said it "was wet."

The plaintiff's car was being driven by her 18-year-old son. It was admitted that the truck was being driven by the defendant's agent within the scope of his employment.

At the close of the plaintiff's evidence the defendant's motion for nonsuit was allowed. From judgment based on such ruling the plaintiff appealed, assigning errors.

Adams, Dearman & Winberry for plaintiff, appellant.
Land, Sowers & Avery and W. I. Ward, Jr., for defendant, appellee.

JOHNSON, J. The evidence adduced below, when viewed in its light most favorable to the plaintiff, as is the rule on motion to nonsuit, leaves

the impression that the plaintiff made out a *prima facie* case of actionable negligence for the jury. *Ervin v. Mills Co.,* 233 N.C. 415, 64 S.E. 2d 431; *Brafford v. Cook,* 232 N.C. 699, 62 S.E. 2d 327; *Howard v. Bell,* 232 N.C. 611, 62 S.E. 2d 323.

Undoubtedly, the court below allowed the defendant's motion on the theory that plaintiff's driver was contributorily negligent as a matter of law. It may be conceded that certain aspects of the testimony tend to support the view that the plaintiff's driver may have failed to exercise due care in the circumstances: It was in evidence that the defendant's truck was first in the intersection and in the act of turning into the side street before the plaintiff's car reached the intersection. Even so, the uncontradicted evidence is that the driver of the truck failed to give any signal of his intention to turn left in front of the plaintiff's approaching car, as required by G.S. 20-155 and G.S. 20-154.

This is not a case where a vehicle approaching from a side street has a favored position by virtue of having entered the intersection first. (*Cab Co. v. Sanders,* 223 N.C. 626, 27 S.E. 2d 631, and G.S. 20-155 (a)). Here, the vehicles were meeting as they approached the intersection. Hence, the applicable statutes are G.S. 20-155 (b) and G.S. 20-154.

While this record may be sufficient to sustain the inference that the plaintiff's driver, in the exercise of due care, should have seen the truck in the act of turning in time to have stopped short of the intersection, nevertheless, the record also supports the opposite inference,—that in the absence of a signal by the truck driver of his intention to turn, the plaintiff's driver, in the exercise of due care, may have been unable to stop in time to avert the collision. This makes it a case for the jury. "Discrepancies and contradictions, even in plaintiff's evidence, are for the twelve and not for the court." *Brafford v. Cook, supra* (232 N.C. 699, p. 701); *Maddox v. Brown,* 233 N.C. 519, 64 S.E. 2d 864. See also *Piner v. Richter,* 202 N.C. 573, 163 S.E. 561.

A motion to nonsuit on the ground of contributory negligence may be allowed when, and only when, no other reasonable inference is deducible from the evidence. *Ervin v. Mills Co., supra* (233 N.C. 415); *Grimm v. Watson,* 233 N.C. 65, 62 S.E. 2d 538; *Hobbs v. Drewer,* 226 N.C. 146, 37 S.E. 2d 121; *Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209; *Cole v. Koonce,* 214 N.C. 188, 198 S.E. 637.

Reversed.

ROYAL COTTON MILL COMPANY, INC., A CORPORATION, v. TEXTILE WORKERS UNION OF AMERICA, CIO; TEXTILE WORKERS UNION OF AMERICA, CIO, LOCAL ...., WAKE FOREST, NORTH CAROLINA, HOWARD E. PARKER, BERNICE BARHAM, W. ROBERT MURRAY, ALF CATLETT, DEAN CULVER, EDNA CASH, NORWOOD HOLFORD, WESLEY SHORT, WILLIAM FREEMAN, CLAUDE DAVIS, CATHLEEN CATLETT, ROBERT MABREY, CLAUDIA HORTON, LILLIAN HORTON, DARWIN JACKSON, GEORGE W. TIMBERLAKE, WILEY BEDDINGFIELD, ELSIE MABREY, AND OTHERS TO WHOM THIS ACTION MAY BECOME KNOWN.

(Filed 28 November, 1951.)

1. Constitutional Law § 11: Courts § 12—

The Superior Court of this State has jurisdiction of an action to restrain mass picketing, obstructing or interfering with factory entrances, and the threatening and intimidation of employees in the conduct of a strike, and demurrer on the ground the controversy is in the exclusive jurisdiction of the National Labor Relations Board and the Federal Courts is properly overruled.

2. Contempt of Court § 7—

The findings of fact of the judge in contempt proceedings, when supported by any competent evidence, notwithstanding that incompetent evidence may have been admitted also in support thereof, are binding and conclusive on appeal. Whether an assistant clerk of a recorder's court has authority to administer oaths except in the discharge of duties pertaining to that court, *quære?*

3. Same—

Respondents are entitled to appeal from judgment for contempt not committed in the immediate presence of the court.

APPEAL by Norwood Holford and George W. Timberlake, respondents, in a contempt proceeding before *Bone, J.,* in Chambers at the WAKE County Courthouse, Raleigh, North Carolina, 18 June, 1951.

The plaintiff instituted this action in the Superior Court of Wake County, North Carolina, on 7 April, 1951, against the Textile Workers Union of America, CIO, and others, including these appellants.

A temporary restraining order was issued on 7 April, 1951, by his Honor W. C. Harris, Resident Judge of the Seventh Judicial District of North Carolina, restraining the defendants, and all other persons to whom notice or knowledge of the order might come, from doing the following: (1) From loitering or congregating within 150 yards of the fence surrounding plaintiff's premises, or within a like distance of plaintiff's office building, or from picketing within said area except as many as ten persons, but no more, might peaceably picket within such area, but not closer than 10 feet of any gate in the fence around plaintiff's premises,

nor closer than 10 feet from the outside edge of the driveway or road leading to plaintiff's premises, nor any closer than 30 feet from the plaintiff's office building; (2) "No person or persons shall interfere in any manner with the free ingress or egress of any other person whomsoever to and from the plaintiff's premises; (3) No person or persons shall anywhere assault, abuse, threaten or in any manner intimidate any person because he or she works, or seeks to work in plaintiff's plant or because he or she does or seeks to do business with the plaintiff."

The defendants were ordered to appear before the Judge holding the Superior Court of Wake County in the Superior Court room in the Wake County Courthouse in Raleigh, North Carolina, on 16 April, 1951, at 10:00 o'clock a.m., and then or as soon thereafter as they could be heard and show cause, if any they have, why the order should not be made permanent.

The order was to become effective upon the plaintiff filing with the Clerk of the Superior Court of Wake County a justified bond in the sum of $1,000, conditioned upon the terms set out in the order.

The court directed the Sheriff of Wake County to post copies of the restraining order in conspicuous places at and in the vicinity of the plaintiff's plant and particularly at the main entrance gate to plaintiff's premises.

Bond was given as required by the order; and while the printed record filed herein does not disclose that the restraining order was served on the appellants, an examination of the original trancript of the case on appeal filed in this Court, does disclose that the summons, copy of the complaint, notice of order, and copy of the restraining order were duly served on each of the appellants and others on 7 April, 1951. Copies of the restraining order were posted as directed by the court.

On 3 May, 1951, his Honor W. H. S. Burgwyn, Judge Presiding, acting upon a petition and affidavits filed in support thereof to adjudge these appellants and fifty-two others in contempt for violating the restraining order theretofore issued, entered an order directing the fifty-four individuals named in the petition to appear before the Presiding Judge of the Superior Court at the Wake County Courthouse in Wake County, North Carolina, on 18 May, 1951, at 9:30 a.m., and then and there to show cause, if any they have, as to why each of them should not be adjudged in contempt of court and punished therefor. This order was duly served on the appellants and others on 6 May, 1951.

The defendants filed a demurrer to the complaint on 3 May, 1951, and moved for a dismissal of the action on the ground (1) that the plaintiff's complaint failed to state a cause of action; and (2) that the action arises out of a labor dispute between the plaintiff, a corporation, engaged in the manufacture and sale of textile products in interstate commerce, and its

employees and their union, a labor organization, and that the allegations of the complaint amount to no more than an allegation of an unfair labor practice on the part of the defendant labor organization and its agents in violation of Section 8 (b) (1) and other sections of the Labor Management Act of 1947, and that the exclusive jurisdiction of the controversy is in the National Labor Relations Board and in the federal courts, thereby excluding the courts of North Carolina from any jurisdiction in the controversy.

Likewise, each of the defendants and respondents on 24 May, 1951, filed a demurrer to and a motion to dismiss the contempt proceeding on the ground (1) that the court is without jurisdiction, stating the same ground therefor as set out in the demurrer to the complaint; (2) that there is no petition or other proper document which states facts sufficient to constitute a cause of action, or upon which the court may issue the order to show cause or punish the defendants or respondents for contempt.

This contempt proceeding came on for hearing on 24 May, 1951, and the demurrer entered by each respondent, as appears of record, was overruled.

At the conclusion of the petitioner's evidence, which consisted of some twenty-four affidavits, the respondents introduced in evidence their verified "Response to the Petition and Order to Show Cause," and moved that they be given additional time to respond to the petitioner's evidence; and the court continued the proceeding until 18 June, 1951.

The court, upon consideration of the petition and affidavits filed by the respective parties, found as a fact that the evidence was insufficient to show that any of the respondents, excepting Norwood Holford and George W. Timberlake, had knowledge or actual notice of the restraining order issued herein, prior to 27 April, 1951; that summons, copies of complaint, and the aforesaid restraining order, were duly served on Norwood Holford and George W. Timberlake by the Sheriff of Wake County on 7 April, 1951, and that each one of them had actual knowledge and notice of said restraining order, but notwithstanding said knowledge and notice, these appellants willfully and contemptuously disobeyed the provisions of the restraining order by committing the acts set out in the court's findings of fact.

From the judgment entered, imposing fines on these respondents and prison sentences which were suspended for 12 months provided the fines were paid and certain other conditions set out therein were observed, the respondents appeal, and assign error.

Robert S. Cahoon for respondents, appellants.

Smith, Leach & Anderson, Brassfield & Maupin, and J. Russell Nipper for petitioner, appellee.

DENNY, J. The challenge to the jurisdiction of the court below on the ground that this controversy involves a labor dispute and that the exclusive jurisdiction thereof is in the National Labor Relations Board and the federal courts, is without merit. The ruling of the court below in this respect will be upheld on authority of *Erwin Mills v. Textile Workers Union of America, C.I.O., et al., ante,* 321, and the authorities cited therein.

The appellants assign as error the introduction of certain affidavits subscribed and sworn to before the assistant clerk of the Recorder's Court of Wake Forest Township. It is contended that Chapter 755, Public-Local Laws of North Carolina, 1915, Section 19, as amended by Public-Local Laws of 1937, Chapter 550, Section 3, does not give the assistant clerk of the Recorder's Court of Wake Forest Township the authority to administer oaths except in the discharge of duties pertaining to that court. They likewise contend that G.S. 11-8 limits the authority of a deputy to administer oaths only in the discharge of duties imposed upon the deputy while acting for and in lieu of the principal officer in matters pertaining to the duties of such principal officer.

Conceding, but not deciding, that the contentions of the appellants are correct, the judgment below will not be disturbed. For, upon a careful examination of the verified petition, the affidavits filed by the respective parties, and the admissions contained in the Respondents' Further Response to the petitioner's evidence, the findings of fact set out in the judgment entered below are supported by competent evidence exclusive of the affidavits subscribed and sworn to before the assistant clerk of the Recorder's Court of Wake Forest Township.

The judgment below was not for contempt committed in the immediate presence of the court, and the respondents were entitled to appeal therefrom. However, the findings of fact by the Judge are conclusive on us when there is any competent evidence to support them. *Bank v. Chamblee,* 188 N.C. 417, 124 S.E. 741; *In re Fountain,* 182 N.C. 49, 108 S.E. 342, 18 A.L.R. 208; *Flack v. Flack,* 180 N.C. 594, 105 S.E. 268; *In re T. J. Parker,* 177 N.C. 463, 99 S.E. 342; *Ex Parte McCown,* 139 N.C. 95, 51 S.E. 957; *Green v. Green,* 130 N.C. 578, 41 S.E. 784; *Young v. Rollins,* 90 N.C. 125.

The judgment entered below is

Affirmed.

HOMER W. BROOKS, J. D. RAY, W. T. DUCKWORTH, W. PERRY CROUCH, W. B. ARCHER, E. E. WHEELER, EDGAR J. DUCKWORTH, AND JAMES L. WAGNER, AS TRUSTEES OF THE HAYWOOD STREET BAPTIST CHURCH, v. W. T. DUCKWORTH, J. D. RAY, EDGAR J. DUCKWORTH AND JAMES L. WAGNER, AS TRUSTEES OF THE ESTATE OF OLIVER D. REVELL.

(Filed 28 November, 1951.)

Trusts § 27—

A court of equity has jurisdiction to authorize trustees of a charitable trust to sell the property devised and reinvest the proceeds in other property when necessary to accomplish the purpose of the trust, which otherwise would be defeated because of changed conditions not contemplated by trustor, and this notwithstanding provision in the trust forbidding the trustees to mortgage or sell the property.

APPEAL by defendants from *Nettles, J.*, 13 October, 1951, BUNCOMBE. Affirmed.

This was a suit under the Declaratory Judgment Act to construe a provision in the will of Oliver D. Revell, deceased, and to determine the power of the trustees named in his will to convey property devised in trust for a charitable purpose. All the material facts are admitted and the only question is the power of a court of equity to authorize the trustees to make the conveyance of the described property for the reasons set out in the complaint and admitted in the answer.

In the twenty-eighth item of his will Oliver D. Revell devised to the Board of Trustees of Haywood Street Baptist Mission certain real property therein described "to be used as a Baptist Mission, for the purpose of holding religious meetings on week-days and Sundays as the trustees may determine, and is to be established in memory of O. D. Revell and his wife Caroline E. Revell." No funds were allocated for the erection of a suitable building on the described property, but the trustees were authorized to solicit funds for this purpose.

The real property described is a vacant lot in the City of Asheville located immediately adjacent to the Battery Park Hotel and in immediate vicinity of Asheville City Auditorium and George Vanderbilt Hotel. It has a frontage of 22 feet and a depth of 30 feet. Because of its location and size it cannot be used advantageously as a site for a mission church. The plaintiffs trustees do not have nor have they been able to secure funds for the purpose of erecting a suitable building on this lot.

The plaintiffs trustees have entered into an agreement to sell this lot to the defendants for $5,000, which is the reasonable market value thereof. Relying upon this agreement plaintiffs have agreed to purchase a house and lot on Liberty Street in Asheville at a location suitable for the establishment and operation of a mission church and have secured an agree-

ment with the First Baptist Church of Asheville that if plaintiffs establish a mission church at the Liberty Street location the First Baptist Church would contribute $1,500 to the purchase price and would furnish without cost to plaintiffs trustees an experienced minister to conduct religious services and render other necessary spiritual and financial aid in connection with the establishment and operation of a mission church, the mission church to be operated under the name of "The O. D. Revell and Caroline E. Revell Baptist Memorial Mission." In compliance with this agreement the First Baptist Church has paid the $1,500, and religious meetings on week-days and Sundays are now being conducted in the building on Liberty Street, and a Baptist Mission in memory of O. D. Revell and his wife is there being operated and maintained. It is also admitted that if the sale of the lot on Haywood Street and the purchase of the house and lot on Liberty Street are not consummated, the lot devised will remain vacant and plaintiffs will not be able to perform the duties imposed upon them by item twenty-eight of the will of O. D. Revell.

The defendants have refused to accept deed for the lot on Haywood Street for the sole reason that the devise of the lot on Haywood Street is coupled with the direction, "said Board of Trustees cannot mortgage or dispose of said property." The plaintiffs are the trustees named in the will as constituting the Board of Trustees of Haywood Street Baptist Mission. The defendants are the trustees of the estate of O. D. Revell. The will bore date of December 1934.

The court being of opinion that on account of changed conditions and exigencies which have arisen not contemplated by the testator the trust set up in item twenty-eight of the will would fail and its usefulness be impaired, entered decree authorizing and empowering the plaintiffs trustees to convey the lot devised and to use the proceeds for the purchase of the property on Liberty Street for the purposes set out in the complaint.

Defendants excepted and appealed.

J. Marvin Glance for plaintiffs, appellees.
Sale, Pennell & Pennell for defendants, appellants.

DEVIN, C. J. By the express language of paragraph 28 of the will of Oliver D. Revell creating a charitable trust under the name of "Haywood Street Baptist Mission" and devising real property in Asheville to be used in connection therewith, the trustees were prohibited from mortgaging or disposing of the property. This provision clearly limited the right of the trustees in relation thereto, but would not prevent a court of equity from using its power, in a proper case, to modify the terms of the trust

to the extent necessary to prevent the failure of the trust and to effectuate the primary purpose of the trustor. *Henshaw v. Flenniken,* 183 Tenn. 232, 168 A.L.R. 1010, 1022 note.

Where changes in conditions not contemplated by the trustor have rendered impossible the accomplishment of the charitable purposes intended by the devise of property in trust, the equitable jurisdiction of the court may be invoked to modify the terms of the trust in order to give effect to the general intent expressed in the will. The substantial intention should not be defeated by the insufficiency of the form in which expressed. The principle is firmly established in equity jurisprudence that courts of equity have general and inherent jurisdiction, as incident to the administration of charitable trusts, to authorize in proper cases the alienation of property though devised in trust. *Keith v. Scales,* 124 N.C. 497, 32 S.E. 809; *Holton v. Elliott,* 193 N.C. 708, 138 S.E. 3; *Johnson v. Wagner,* 219 N.C. 235, 13 S.E. 2d 419; *Trust Co. v. Rasberry,* 226 N.C. 586, 39 S.E. 2d 601; *Hospital v. Comrs.,* 231 N.C. 604, 58 S.E. 2d 696; 2 Bogert on Trusts, sec. 392; 3 Scott on Trusts, sec. 381; 14 C.J.S. 505. "Courts of equity have long exercised jurisdiction to sell property devised for charitable uses, where, on account of changed conditions, the charity would fail or its usefulness would be materially impaired without a sale." *Church v. Ange,* 161 N.C. 314, 77 S.E. 239. But the equally well established principle of equity must not be overlooked that the power to modify the terms of a trust when necessary to preserve it should not be exercised to destroy the trust or defeat the purpose of the donor. *Cutter v. Trust Co.,* 213 N.C. 686, 197 S.E. 542; *Penick v. Bank,* 218 N.C. 686, 12 S.E. 2d 253; *Duffy v. Duffy,* 221 N.C. 521, 20 S.E. 2d 835; *Redwine v. Clodfelter,* 226 N.C. 366, 38 S.E. 2d 203.

It will be noted that in *Johnson v. Wagner, supra,* we considered a trust set up by the same testator Oliver D. Revell in paragraph 27 of his will, and for the reasons therein set forth held that the trustees were properly authorized to sell the real property described in that paragraph and to use the proceeds in carrying out the general purposes of the trust under the supervision of the court.

For the reasons stated, we conclude that the court below has correctly ruled, and that the decree authorizing the conveyance of the described lot and the purchase of the property on Liberty Street for the purpose of effectuating the intent of the trustor should be in all respects

Affirmed.

STATE v. BOBBY WILSON.

(Filed 28 November, 1951.)

1. Criminal Law § 17d: Indictment § 13—

Defendant interposed a written plea alleging that the indictment charged the same offense as that charged in a prior indictment upon which defendant had been acquitted. *Held:* The sustaining of the plea on the theory alleged is sustaining a plea of former acquittal, and provision in the order calling the plea a motion to quash will be disregarded, since the law regards the substance and not the form.

2. Criminal Law § 68a—

The State has no right of appeal from an order sustaining a plea of former acquittal. G.S. 15-179.

BARNHILL, J., concurring.

APPEAL by State from *Sink, J.*, at the June Term, 1951, of the Superior Court of GASTON County.

Plea of *autrefois acquit* in criminal prosecution for willfully failing or refusing to provide adequate support for illegitimate child.

The facts are these:

1. The defendant, Bobby Wilson, was placed on trial before Judge George B. Patton and a jury at the March Term, 1951, of the Superior Court of Gaston County upon a first indictment charging that "on the 5th day of February, 1951, . . . (he) did unlawfully and willfully fail and refuse to provide adequate support for his illegitimate child born to Elzonie Forney." Judge Patton dismissed the prosecution on the first indictment on a compulsory nonsuit under G.S. 15-173. He gave this reason for his ruling: "There is sufficient evidence to be submitted to the jury on the question of the paternity of the child, but the evidence is insufficient to be submitted to the jury on the question of willful failure or refusal of the defendant to support the child."

2. The grand jury subsequently returned a second indictment against the defendant charging that on an undesignated "day of March, 1949, . . . (he) did unlawfully and willfully fail and refuse to provide adequate support for his illegitimate child born to Elzonie Forney."

3. When the solicitor undertook to put the defendant on trial on the second indictment at the June Term, 1951, of the Superior Court of Gaston County, the defendant interposed a written plea, alleging, in substance, that both indictments charged the same offense, and pleading his former acquittal in the first prosecution as a bar to the second prosecution. Judge H. Hoyle Sink, who presided, thereupon inspected the two indictments and sustained the defendant's plea in an order, which called such plea a motion to quash.

4. The State excepted to the order and appealed.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Charles G. Powell, Jr., Member of Staff, for the State, appellant.

Wade H. Sanders for defendant, appellee.

ERVIN, J. Since the law looks at substance rather than form, the misnaming of the defendant's plea cannot blot out the reality that Judge Sink sustained a plea of former acquittal. He evidently concluded the plea to be good on the theory that an inspection of the two indictments disclosed that the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first. *S. v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871.

The validity of such conclusion cannot be reviewed by us, for the very simple reason that the State cannot appeal from an order sustaining a plea of former acquittal. *S. v. Lane,* 78 N.C. 547.

The right of the State to appeal to the Supreme Court from adverse rulings of the Superior Court or to the Superior Court from adverse rulings of an inferior court is governed by the statutory provision that "an appeal . . . may be taken by the State in the following cases and no other":

1. Upon a special verdict.
2. Upon a demurrer.
3. Upon a motion to quash.
4. Upon arrest of judgment.
5. Upon motion for a new trial on the ground of newly discovered evidence, but only on questions of law.
6. Upon declaring a statute unconstitutional. G.S. 15-179; 1945 Session Laws, Ch. 701.

Appeal dismissed.

BARNHILL, J., concurring: That the appeal by the State in this cause is without authority in law would seem too clear to require discussion. Even so, the judgment entered in the court below and the disposition of the appeal here may create some doubt in the minds of the solicitors of the State as to their right to prosecute for a willful failure by a defendant to support his alleged illegitimate child after he has been once acquitted. As the appeal is dismissed, discussion of, or comment upon, this question has no proper place in the majority opinion.

Concededly, what is here said is not germane to the question of the right of the State to appeal, which is the sole ground upon which the appeal is dismissed. Yet some of us are of the opinion there should be

some clarifying comment on the question of the effect of the judgment entered in the court below. For this reason, I file this concurring opinion.

The first bill of indictment charges a violation of the statute, G.S. 49-2, on or about 5 February 1951, and the second, on or about March 1949. So then, acquittal on the first bill unquestionably constitutes a bar to prosecution under the latter. The defendant having been acquitted on his trial under the first bill, he could not thereafter be prosecuted under a warrant or bill charging a willful failure to support prior to the date named therein. *S. v. Johnson,* 212 N.C. 566.

But the crime created by G.S. 49-2 is a continuing offense. Therefore, the prior acquittal may not be pleaded in bar of a prosecution under a bill which charges a violation of the statute at a date subsequent to 5 February 1951, the date named in the first bill. *S. v. Johnson, supra.* The only prosecution contemplated under the statute is grounded on the willful neglect or refusal of a parent to support his illegitimate child. The mere begetting the child is not denominated a crime. The question of paternity is incidental to the prosecution for the crime of nonsupport—a preliminary requisite to conviction. *S. v. Stiles,* 228 N.C. 137; *S. v. Summerlin,* 224 N.C. 178; *S. v. Bowser,* 230 N.C. 330. Hence a verdict of not guilty on the charge of willful nonsupport does no more than find the defendant not guilty of the crime laid in the bill. The verdict could not be construed to be a verdict of not guilty of begetting the child.

It follows that the solicitor is free to prosecute for a violation of the statute subsequent to 5 February 1951, unaffected by the judgment entered in the court below, if he is so advised.

VERA HOPKINS BOST v. E. L. BOST.

(Filed 28 November, 1951.)

1. Husband and Wife § 12d (2)—

A deed of separation between husband and wife which purports to make a complete property settlement between the parties in contemplation of permanent separation precludes the wife from testifying to the effect that the husband, prior to the execution of the agreement, verbally promised that in the event he thereafter sold his business he would give her half the sale price, there being no allegation that anything was left out of the separation agreement through fraud or mutual mistake.

2. Evidence § 39—

Negotiations leading up to the execution of a written instrument are considered as varied by and merged in the writing.

3. Evidence § 40—

The rule that consideration for a written contract may be shown by parol and that the recital of a monetary consideration is but *prima facie* evidence of payment and may be rebutted by parol proof, *held* not to permit the introduction of parol testimony which seeks to incorporate into the agreement property not therein set out, and thus vary the terms of the writing.

4. Same—

While parol evidence is competent to explain some written contracts, it is not competent to vary the terms of an unambiguous agreement.

APPEAL by plaintiff from *Phillips, J.*, June 1951 Term, CABARRUS.

Civil action to recover upon an oral promise alleged to have been a part of the consideration of a separation agreement.

Plaintiff and defendant were formerly husband and wife but are now divorced. During the marriage, two written separation and property settlement agreements, both under seal, were entered into, one dated 24 December, 1946, and the other dated 10 July, 1947. Both agreements were executed in conformity to G.S. 52-12.

The first agreement recites that the parties are living separate and apart from each other with the intention to continue so to do; that they "deem it for the mutual advantage of themselves and the advantage of said children that there should be an agreement between them respecting their rights and obligations"; that "in consideration of the premises and the agreements hereinafter contained and other good and valuable considerations, it is agreed as follows": that plaintiff and defendant thereafter live separate and apart from each other without interference or molestation one from the other; that the defendant pay to the plaintiff as maintenance the sum of $70.00 per week for two years; that the title to certain real property belonging to the defendant be transferred to plaintiff and defendant as an estate by the entireties.

The second agreement entered into at the "special insistance of the wife" made certain changes in the former agreement, in that the provision for the weekly payment to the wife was stricken out and a payment to her of $15,000.00 in cash and payment of $15.00 per week for support of the children were substituted in lieu thereof. The status of the title to the real estate was so altered as to provide for the conveyance of the home on Kerr Street valued at $15,000.00 and the household and kitchen furniture to the wife for life with remainder to the children, and for the conveyance of other real property valued at $10,500.00 to the husband. This second contract ratified all the provisions of the first agreement except as to the changes indicated.

Both agreements contain the following paragraph:

"Each party hereby releases and relinquishes to the other any and all rights of property growing out of the marital relationship whether by way of maintenance and support, dower, curtesy, or otherwise, and each party shall in all respects own, have, and enjoy all personal and real property belonging to him or her, or which he or she may hereafter acquire, as his or her sole and separate property, free from any rights of the other party and free from any interference of the other party and with full power to each of the said parties to sell, lease, assign, convey, deal with, bequeath, devise or dispose of his or her said property as fully, freely and effectually, in all respects as if he or she were sole and unmarried; and each of the parties hereto shall, at the request of the other, execute and release, whether of dower or otherwise, or other documents necessary or desirable to carry this provision into effect."

The ownership of the property in question is established by the following language in the complaint: "That at the time said separation and property agreements were entered into and prior thereto, the defendant was the owner of the Concord Motor Coach Company which operated a bus line in the City of Concord, North Carolina."

It is the plaintiff's position that a part of the separation agreement was not reduced to writing but rested in parol. She does not, however, allege the omission of anything from the separation and property settlement agreements by fraud or mistake. Both written agreements were introduced by the plaintiff as a part of her evidence. Thereafter, the plaintiff took the stand as a witness in her own behalf and was asked the following question: "At the time you entered into the settlement agreement dated 10th of July 1947 state if you had any understanding between yourself and the defendant, E. L. Bost, in regard to the terms of the agreement, what he was to do and what you were to do?" Defendant's objection to this question was sustained and plaintiff excepted. If the witness had been allowed to answer, she would have said: "He promised to give me half of the bus line if he ever sold it; promised me faithfully that he wouldn't sell it; if he ever did, he would give me half of it. This conversation took place several days before the settlement agreement was signed. Since that time he has sold the bus company. We had a conversation about the sale of the bus line. We argued about it and he said I would get my share when he got his money. He said he received $65,000 for the bus line. The reason he gave me for not paying me at the time we had a talk was that he didn't have his pay yet. He said he was to be paid in 1951."

Plaintiff rested, and upon defendant's motion, judgment as of nonsuit was entered. Plaintiff excepted and appealed, assigning errors.

M. B. Sherrin for plaintiff, appellant.
E. T. Bost, Jr., and Hartsell & Hartsell for defendant, appellee.

VALENTINE, J. The parol evidence rule presents an insurmountable obstacle to the plaintiff upon this record. Her effort to establish by word of mouth an interest in the Concord Motor Coach Company owned by her husband and a right to one-half of the proceeds in case of a sale thereof is in direct contravention of the written instruments by the terms of which she released and relinquished to her husband all property rights. She does not attack the separation deeds on the ground of fraud or mutual mistake, but attempts to establish by parol proof a prior collateral agreement which varies and contradicts the written word. This she cannot do.

It is a well established rule of evidence and of substantive law that matters resting in parol leading up to the execution of a written contract are considered as varied by and merged in the written instrument. *Williams v. McLean,* 220 N.C. 504, 17 S.E. 2d 644. This Court has consistently held that "parol evidence will not be heard to contradict, add to, take from or in any way vary the terms of a contract put in writing, and all contemporary declarations and understandings are incompetent for such purpose, for the reason that the parties, when they reduce their contract to writing, are presumed to have inserted in it all the provisions by which they intend to be bound." *Ray v. Blackwell,* 94 N.C. 10; *Oliver v. Hecht,* 207 N.C. 481, 177 S.E. 399. "The writing is conclusive as to the terms of the bargain." *Williams v. McLean, supra.*

Applying this rule to the instant case, the parties are presumed to have integrated their negotiations and agreements into the written memorial embodying the unequivocal terms and conditions of their separation agreement. The term "separation and property settlement agreement" in the absence of clear language or impelling implications connotes not only complete and permanent cessation of marital relations, but a full and final settlement of all property rights of every kind and character.

Plaintiff's contention that the agreement with respect to the bus line was part of the consideration for the separation deed, and that this could be shown by parol evidence does violence to this rule. The contract plaintiff proposes to prove by parol does more than to establish the consideration for the contract. It seeks to incorporate in the agreement property not therein set out and thus to vary its terms. It is sometimes said that the recital of a monetary consideration in a deed is no more than a receipt, is only *prima facie* proof of payment and may be rebutted by parol proof, but this rule has not been extended to authorize the admission of parol evidence to contradict or modify the terms of a deed or other document executed with the same formalities. *Westmoreland v. Lowe,* 225 N.C. 553, 35 S.E. 2d 613.

Parol testimony may sometimes be used to explain a written contract, but it cannot be offered to alter or contradict any of its provisions. An explanation of a document implies uncertainty, ambiguity and doubt, but a plain case of alteration, that is, an offer to prove by witnesses that a person promised to do something beyond the plain words and meaning of his written contract, is precluded by the rule. "It is best to trust to the words of the writing, which the parties have chosen to protect and preserve the integrity of their treaty, than to rely on human memory for the exact reproduction of their words." *Pierce v. Cobb,* 161 N.C. 300, 77 S.E. 350.

In rejecting the parol evidence of the plaintiff, there was no error. It follows, therefore, that the judgment of nonsuit was correct and must be upheld.

Affirmed.

GEORGE A. DEESE, ADMINISTRATOR OF THE ESTATE OF GEORGE M. DEESE, v. CAROLINA POWER & LIGHT COMPANY.

(Filed 28 November, 1951.)

Electricity § 7—

Intestate felled a tree across a tap line maintained by defendant power company under a written easement, and was electrocuted when he came in contact with the wire while attempting to disengage the tree top from the line. The wire was not insulated and was 18 feet or more above the ground. *Held:* Nonsuit was proper since defendant could not have reasonably foreseen injury under the circumstances, and therefore was not guilty of actionable negligence.

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

APPEAL by plaintiff from *Crisp, J.,* February 1951 Term, RICHMOND.

This is a civil action instituted by plaintiff to recover damages for the alleged wrongful death of his intestate.

The record shows that by authority of a written easement defendant maintained across plaintiff's land an uninsulated tap line 18 feet or more above the ground, which line was energized with approximately 2300 volts of electric current. Plaintiff's intestate felled a tree across defendant's tap line and while attempting to disengage the tree from the line, he came in contact, directly or indirectly, with the said line and was electrocuted. Plaintiff's intestate, a staff sergeant in the United States Army, was 29 years of age, and was on furlough visiting his father, the plaintiff, and other members of his family.

At the conclusion of plaintiff's evidence, the court sustained a motion for judgment as of nonsuit. Plaintiff appealed.

Jones & Jones for plaintiff, appellant.
Fred W. Bynum and A. Y. Arledge for defendant, appellee.

PER CURIAM. The evidence disclosed no actionable negligence on the part of defendant. The death of plaintiff's intestate evidently resulted from his own independent acts in felling the tree across defendant's tap line and thereafter attempting to cut the tree top or bough in order to release the wire. This is a situation which, under the circumstances here presented, could not have been reasonably foreseen by the defendant. *Parker v. R. R.,* 169 N.C. 68, 85 S.E. 33; *Stanley v. Smithfield,* 211 N.C. 386, 190 S.E. 207.

The judgment of nonsuit is
Affirmed.

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

WESLEY BLACKWELL AND I. SHAIN, TRADING AND DOING BUSINESS AS SHAIN'S AUTO FINANCE COMPANY, v. NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, AND COLONIAL FIRE UNDERWRITERS BRANCH OF NATIONAL FIRE INSURANCE COMPANY OF HARTFORD.

(Filed 28 November, 1951.)

Insurance § 43b—

A policy covering collision and upset may not be avoided by insurer on the ground that at the time of the loss the driver of the car insured was endeavoring to escape arrest while transporting intoxicating liquor in violation of law, the policy containing no exception on this ground and there being nothing to show that the insurance promoted the commission of the unlawful act.

APPEAL by defendants from *Bone, J.,* August Term, 1951, of NEW HANOVER. Affirmed.

This was an action to recover on an automobile insurance policy for loss due to collision and upset. Upon agreed statement of facts judgment was rendered in favor of plaintiffs and the defendants appealed.

John D. Bellamy & Sons and Lloyd S. Elkins, Jr., for plaintiffs, appellees.

Poisson, Campbell & Marshall for defendants, appellants.

PER CURIAM. Issuance of the policy and loss as claimed were admitted, but defendants denied liability on the ground that the loss occurred while the insured was transporting in the automobile intoxicating liquor in violation of law and endeavoring to escape arrest. However, the policy contains no exception on this ground, and as the loss comes within the terms of the insurance policy, as issued and paid for, this defense will not avail the defendants. *Poole v. Ins. Co.,* 188 N.C. 468, 125 S.E. 8. The insurance contract had no direct connection with the violation of law admitted, but was only collateral thereto. *Electrova Co. v. Ins. Co.,* 156 N.C. 232, 72 S.E. 306; 29 A.J. 208. The insurance here cannot be said to have promoted the unlawful act referred to. 132 A.L.R. 126.

There was no evidence of loss by intentional act of the insured. Nor does the statement of facts show misrepresentation in the plaintiffs' declarations on which the policy was issued.

Judgment affirmed.

STATE v. NATALLIE DOBBS.

(Filed 28 November, 1951.)

Criminal Law § 77a—

Where the record contains no warrant or indictment the appeal will be dismissed for want of essential parts of the record.

APPEAL by defendant from *Sink, J.,* June Term, 1951, of GASTON.

The defendant was tried in Superior Court and found guilty of having in her possession three pints of nontax-paid liquor.

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

Attorney-General McMullan, Assistant Attorney-General Moody, and Robert B. Broughton, Member of Staff, for the State.

Frank P. Cooke for defendant, appellant.

PER CURIAM. While the assignments of error appear to be without merit, they are not properly before us for consideration.

The record filed in this Court is fatally defective for the reason that no warrant or bill of indictment appears therein.

The appeal is dismissed on authority of *S. v. Dry,* 224 N.C. 234, 29 S.E. 2d 698; *S. v. Currie,* 206 N.C. 598, 174 S.E. 447; *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126.

Appeal dismissed.

IN THE MATTER OF THE WILL OF BART M. GATLING.

(Filed 12 December, 1951.)

1. Evidence § 46b—Expert's reference to manner in which testator made certain letters held not prejudicial as personifying testator.

Caveator admitted that the body of the will was in testator's handwriting, it being controverted by the parties only as to whether an interlineation therein was written by testator. Photostatic copies of the instrument in natural size were given the jury in order to enable them to follow the testimony. *Held:* Testimony by an expert, in undertaking to point out the reasons for his opinion in respect of the interlineation, that testator (calling his name) would make a particular letter in a certain manner, etc., was merely the witness' method of referring to the letters of the writing admitted to be in testator's handwriting, for the purpose of comparison, and cannot be held prejudicial. G.S. 8-40.

2. Wills §§ 9½, 25—

In order to be effective, an interlineation or alteration substantially changing the provisions of a holographic will must be executed in conformity with G.S. 31-5, and therefore, in applying the law to the evidence in this case, an instruction to the effect that an interlineation in the handwriting of testator would not be a part of the will unless testator placed the altered writing in an envelope and wrote his name on the back thereof *is held* without error.

APPEAL by propounder John Gatling from *Bone, J.*, at June Term, 1951, of WAKE.

Civil action, an issue of *devisavit vel non,* upon caveat filed by Louie G. White, daughter of Bart M. Gatling, deceased.

The caveator, in her caveat, set forth, among other things:

(1) That Bart M. Gatling, late of the County of Wake, died in said county on 2 August, 1950.

(2) That on 4 August, 1950, John Gatling presented to the court a paper writing, Exhibit A, purporting to be the holographic last will and testament of Bart M. Gatling, and same was admitted to probate in common form, and letters testamentary were issued to John Gatling as the executor of Bart M. Gatling.

(3) That the paper writing so probated reads in pertinent part:

"Raleigh, N. C., Jan. 24, 1950.

"I Bartholomew Moore Gatling, do make, publish and declare this as my last will and testament, hereby revoking all previous wills made by me.

"Item 1. I give devise and bequeath all of my property both real and personal to my very faithful and devoted wife Lenora Crudup Gatling in Trust for herself for life and after her death equally to my children, and if any child or children be dead leaving any lawful issue then alive

such issue shall take the share, his her or their parent would have received if alive, *per stirpes*. . . .

"Item 5. I direct that the 13 lots facing South on E. Martin Street and numbered 143, 144, 145, 146, 147, 148, 149, 177, 178, 179, 180, 181 and 182 shall not be subject to the provisions of Item *One* of this will during the life of my wife, but that in the final distribution or division of my lands, they be allotted to Bart M. Gatling, Jr., James Moore Gatling, Louie Gatling White, Claude B. Barbee 3rd and Sarah Gatling Barbee and John Gatling one lot at least to each
and accounted for in the division—and with the request that they hold the same as a protection against any undesirable encroachments in close proximity to the home. That if any of them need to sell their part of these lots—they first offer the same to Louie Gatling White or other member of the family then owning the Home Place. If however the home should pass out of the family this request is not to have any force or effect. . . .

"Item 8. I appoint my son John Gatling as Executor of this will, written in my own handwriting, . . .

"In witness whereof I have hereunto set my hand and seal, the day and year first above written.

"BARTHOLOMEW MOORE GATLING (Seal)."

(4) That the said paper writing of which Exhibit A is a copy is not in its entirety the last will and testament of the said Bart M. Gatling, deceased, for the reason, among others, as this caveator is informed and believes, the interlineation in Item 5 of said will in words as follows, to wit: "and John Gatling one lot at least to each," was obtained by the said John Gatling through undue and improper influence exercised over and upon the said Bart M. Gatling by the said John Gatling . . ., etc.

The caveat was amended by adding a new paragraph which reads as follows:

"V½. That the interlineation in Item 5 of the said will was made subsequently to the execution of the will and the name of Bart M. Gatling, the maker of the will, is not signed to, nor does it appear in said interlineation, which interlineation is in words as follows: 'and to John Gatling one lot at least to each'; that as this caveator is informed and believes and therefore alleges, said interlineation does not conform to the provisions of the General Statutes of North Carolina and does not constitute a part of the will of Bart M. Gatling."

John Gatling, executor, answering the caveat, denies the allegations in respect of the said interlineation in Item 5, but admits all other allegations of the caveat, and prays that the court adjudge the paper writing

and each and every part thereof to be the will of Bart M. Gatling, and that same be probated in solemn form.

The proceeding was transferred to the trial docket of Superior Court, and there, after citations served on or accepted by interested parties, same was tried.

After the jury was impaneled and the pleadings read, and before the introduction of evidence, counsel for caveator stated: "The caveator does not contest the will except as to the interlineation in Item 5, consisting of nine (9) words, as follows: 'and John Gatling one lot at least to each.' We admit the body of the will, with the exception just noted, as the will of Mr. Bart M. Gatling, deceased."

Thereupon, the propounder offered evidence tending to show the following: (1) The identity of the paper writing purporting to be the last will and testament of Bart M. Gatling, deceased, as probated in common form, designated as Exhibit A, and of the opened envelope in which same was presented for such probate, designated as Exhibit B.

(2) That on 4 August, 1950, Exhibit B, then sealed, was taken from a locked metal box found in the secretary in the home of the late Bart M. Gatling, and opened by breaking the seal thereof, and the paper writing, Exhibit A, was taken from the envelope all in the presence of members of the family and then read by an attorney.

(3) The testimony of more than three persons acquainted with the handwriting of Bart M. Gatling, to the effect that the paper writing Exhibit B, and every part thereof, as well as the words and figures "My will. Bart M. Gatling. 1950," written on the outside of the envelope Exhibit B are in the handwriting of Bart M. Gatling. And while each of the witnesses, under cross-examination, take note of difference in the appearance of the writing of the words constituting the interlineation in Item 5, each stated that in his or her opinion, as the case may be, these words are in the handwriting of Bart M. Gatling.

Thereupon Exhibit A was offered in evidence. And Exhibit B with the following written on it: "My will. Bart M. Gatling," was also offered in evidence.

The caveator then offered the testimony of several witnesses tending to show:

That Bart M. Gatling became ill in the latter part of 1949, and was carried to Duke Hospital, and stayed there from 25 November to 5 December; that he became "very ill" and again was taken to Duke Hospital on 25 January and was there until about 17 February; that while he grew worse gradually both physically and mentally until his death, he retained his mental faculties until about two weeks before his death.

The caveator further offered evidence tending to support the allegations of the caveat,—the details of which are unnecessary to decision on this appeal.

The caveator, Mrs. Louie G. White, testified that she is familiar with, and knows the handwriting of her father, Bart M. Gatling,—having carried on regular correspondence with him, and that, in her opinion, the handwriting in which the controverted interlineation in Item 5 of the will of Bart M. Gatling is written, is not his handwriting.

The caveator also offered a witness as an expert examiner in the field of questioned documents and "all matters pertaining to pen and ink writings, pencil writing, paper, ink, intersection of lines, creases in paper, sequence in writing," etc. He testified that he has examined Exhibit A in this case; that it is written on a sheet of paper mechanically folded in the center,—thus making it a four-page document,—the description being substantially as follows: The writing begins on the right outside page, and extends to the left outside page, and then to two inside pages left to right, and ends on page four; that there are thirty-six lines on page two, and the interlineation in Item 5 appears at line nineteen; and that as folded there is a crease in the paper at the interlineation.

The witness further testified that he has made examination of the handwriting of Bart M. Gatling, using as a standard the admitted handwriting of Bart M. Gatling as same appears in the body of his will, Exhibit A; that in his opinion an appreciable length of time existed between the writing of the body of the will and the inscribing of the words "and John Gatling one lot at least to each"; that in his opinion also that these quoted words were added, following the writing of the body of the will, including the testator's signature and the seal found on page four of the will; that he bases his opinion upon this ground that the body of the will from page 1 to page 4 was written in one kind of ink, and the words "and John Gatling one lot at least to each" in an entirely different manufacture of ink; and upon the further ground that the body of the will was written before the sheets were folded, and the above quoted words after the will was folded; and that he is strongly inclined to the opinion that the handwriting in the interlineation in Item 5 is not in the handwriting of Bart M. Gatling.

And this witness testified in detail as to reasons on which he bases his opinion. In this connection six sets of photostatic reproductions of the will, Exhibit A, in natural size, were, with permission of the court, given to the jury so that each two of them might share a copy and follow the testimony of the witness. Then the witness proceeded to compare the letters, individually and in word combination, in the interlineation in Item 5 with the same letters individually and in word combination in the body of the will,—pointing out in detail characteristics in the admitted handwriting of Bart M. Gatling, as distinguished from those in the words "and John Gatling one lot at least to each" as same appears in Item 5 of the will.

In the course of his testimony, propounders complained of the manner in which the witness pointed out the characteristics in the handwriting of Bart M. Gatling,—asserting that he was personifying Gatling, and speaking to the jury, rather than testifying as a witness.

The caveator offered in evidence various exhibits used by the handwriting expert witness in the course of his testimony, including photographic enlargements of portions of the writing, and same were admitted in evidence not as substantive evidence but only for purpose of illustrating the testimony of the witness.

Propounder in rebuttal offered as witnesses two handwriting experts, each of whom testified that he is familiar with handwriting of Bart M. Gatling; that he is of opinion that the writing on end of Exhibit B, reading "My will. Bart M. Gatling. 1950," is the signature of Bart M. Gatling; and that in his opinion the words "and John Gatling one lot at least to each" are in the same handwriting as the body of the instrument.

And the propounder, John Gatling, testified: "I saw a paper, very similar to his will, and my father asked me to get him an envelope. My father was sitting at the table in his room, the southeast corner of the room, and he was writing on the paper." Then on cross-examination he continued, "The first time he saw his father's will was one Sunday in June, at about 3 P.M., when he saw him sitting at a desk and writing half-way in the middle of a page, the upper page, and my father asked me to get an envelope in which to seal his will. My father could walk at that time . . . I do not remember what Sunday in June I saw the will, that was the only time I saw it. I had not made any inquiry about it. My father had told me some things about his will. I did not ask my father about it at Duke Hospital in February. My father had told me then that he had made his will . . . that it was in his handwriting; that he, John Gatling, was the executor and that such a will was illegal unless found among the dead man's valuable papers. My father did not say that it was among his valuable papers, but that it was in the tin box marked Robert Gatling in James' secretary in the living room, among his valuable papers. I did not assist my father to obtain the will on the day in June when I saw it. My father was sitting at the table writing; that as I came to the door my father asked me for an envelope and I went past the table to a little room where my father's office furniture was stored and got a brown envelope just like that in which we found my father's will. I did not put the will up, nor do I know who did. Father folded his will, stuck it in the envelope, sealed it and started walking to the door after he finished writing on the envelope. He walked out of the room with the will in his hand. The will was found in the front room in James Gatling's secretary, in a tin box marked Robert Gatling. The box was in the top of the secretary . . . an old-fashioned kind with doors

that could be opened . . . and to my knowledge Mr. Farmer opened the doors and got the box out . . . I do not know what pen Father was using, but it was similar to the one counsel had up in court this morning. He had not folded the will, but he (I) saw his (my) father fold it. I did not see what my father had written, but that he was writing about the middle of the page."

The case was submitted to the jury upon these two issues which the jury answered as shown:

"1. Is the paper writing propounded for probate and each and every part and clause thereof the last will and testament of Bart M. Gatling, deceased? Answer: No.

"2. If not, is the paper writing propounded for probate and every part and clause thereof except the interlineation in Item 5, line 19, 'and John Gatling one lot at least to each,' the last will and testament of Bart M. Gatling, deceased? Answer: Yes."

From judgment in accordance with the verdict the propounder appeals to Supreme Court, and assigns error.

I. W. Farmer, Allen Langston, and Brassfield & Maupin for propounder, appellant.

John W. Hinsdale and Frank S. Katzenbach, III, for caveator, appellee.

WINBORNE, J. The assignments of error presented by appellant on this appeal are based in the main upon exceptions, I, to the testimony of the handwriting expert introduced by the caveator, and, II, to portions of the charge. These will be considered in this order.

I. Propounder in his brief filed in this Court states that all of his exceptions to the testimony of the handwriting expert come down to these points: "1. His insistence upon personifying the writer as 'Mr. Gatling,' describing his habits, and stating what 'Mr. Gatling' or 'the writer' would do or would not do.

"2. He insisted upon repeated graphic demonstrations of just how 'Mr. Gatling' did or did not form certain letters or combinations of letters.

"3. In spite of repeated objections by counsel, and frequent admonitions by the court, his discourse throughout was simply an argument delivered from the witness chair rather than the testimony of a witness."

In this connection it is provided by statute G.S. 8-40 that "In all trials in this State, when it may otherwise be competent and relevant to compare handwritings, a comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence

of the genuineness or otherwise of the writing in dispute: Provided, this shall not apply to actions pending on March 5, 1913."

This statute was enacted by the General Assembly of 1913, and ratified 5 March, 1913, and later became Section 1784 of Consolidated Statutes of North Carolina 1919. It has been referred to in decisions of this Court, and applied in others. See *Boyd v. Leatherwood,* 165 N.C. 614, 81 S.E. 1025; *Bank v. McArthur,* 168 N.C. 48, 84 S.E. 39; *Newton v. Newton,* 182 N.C. 54, 108 S.E. 336; *Gooding v. Pope,* 194 N.C. 403, 140 S.E. 21. See also Stansbury's North Carolina Evidence, Sec. 198 *et seq.*

While prior to the enactment of this statute it seems to have been settled law in North Carolina that an expert witness in the presence of the jury might be allowed to compare a disputed paper with other papers in the case, whose genuineness was not denied, and that the jury must pass upon its genuineness upon the testimony of witnesses, and that no comparison by the jury was permitted. See *Outlaw v. Hurdle,* 46 N.C. 150; *Tunstall v. Cobb,* 109 N.C. 316, 14 S.E. 28, and cases cited.

But after the enactment of this statute, this Court in *Newton v. Newton, supra,* recognized "an unequivocal declaration of change in the rule obtaining theretofore." And in the opinion it is said: "As we understand the statute, the admission of testimony as to the genuineness of a writing by comparison of handwriting is now on the same basis as the declarations of agents. The court determines whether there is *prima facie* evidence of agency or of the genuineness of writing admitted as a basis of comparison, and then the testimony of the witnesses and 'the writings' (in the plural) themselves are submitted to the jury."

To like effect is the holding in *Gooding v. Pope, supra.* And in the *Gooding case* the use of a magnifying glass, with permission of the court, is recognized.

Moreover, this Court in the case *S. v. Young,* 210 N.C. 452, 187 S.E. 561, held that the trial court erred in excluding the testimony of a handwriting expert in giving his reasons for his opinion that a certain signature was not genuine. And *Schenck, J.,* wrote for the Court: "Our holding is based upon the fact that the conclusion of a handwriting expert as to the authenticity or nonauthenticity of a signature, standing alone, might be of little or no probative force, but if his conclusion be supported by cogent reasons, it would be strengthened and its value as evidence correspondingly enhanced. When the reasons of the witness are given, the jury is afforded a better opportunity to determine the soundness of his conclusion."

Applying these principles to the situation in hand of which appellant complains, it must be borne in mind: That the body of the will, admittedly in the handwriting of Bart M. Gatling, was used as the standard

of his handwriting; that the jurors had before them photographic copies of the will, in natural size; and that the witness was undertaking in his testimony to point out to the jury, as reasons for his opinion in respect of the interlineation in dispute, characteristic formation of certain letters individually and in word combination, peculiar to the handwriting of Bart M. Gatling, as found in the standard handwriting, and then to compare them with the same letters, individually and in word combination, as found in the interlineation. For instance, in comparing the two, and referring to the former, the witness said, without objection, "You'll observe that Mr. Gatling would make his 'n' in a form that if you were to lift it from the context, the 'n' in 'and,' you would have a form that approximates the letter 'u' that is in the handwriting of Mr. Gatling's, and that is true of the two 'ands' to which I have referred . . ." Thus it seems clear that the witness was merely using a short-hand method of referring to the letter as it appeared in the standard handwriting. Hence, after careful reading of the testimony of the witness, and the rulings of the trial judge, we conclude that the witness was kept within the bounds of expert testimony, and that no prejudicial error is made to appear.

II. As to the assignments of error based upon exceptions to portions of the charge, it is well to bear in mind the theory upon which the case was tried in Superior Court. In this connection, let it be noted: (1) That the wording of the interlineations in Item 5 materially alters the effect of Item 5 as it appears without the interlineation. (2) That as is seen from the charge, as set out in the record, the court stated the contentions of the parties as follows: "Now, as to the interlineation which is found on the second page of propounder's Exhibit A the words 'and John Gatling one lot at least to each,' there is a serious controversy between the caveator and the propounder . . . it being contended by the caveator that . . . the interlineation is not in the handwriting of the testator . . . On the other hand, the propounder contends that the interlineation or alteration is in the handwriting of the testator Bart M. Gatling, deceased, and that after making it he placed it in an envelope and wrote on the outside of it 'My will' and signed his name 'Bart M. Gatling.'" (3) That the propounder bases one of his prayers for instruction on this contention. And (4) that there is evidence tending to support same, and there seems to be none to the contrary.

The court after stating the contentions of the parties as above shown, proceeded to charge the jury as follows: "Now, we have a testamentary law which prescribes how alterations in a will shall be made and executed in order to be valid; the pertinent portion of that statute is as follows: '. . . or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, all of which shall be in the handwriting of the testator, and his name subscribed thereto or

inserted therein and lodged by him with some person for safekeeping or left by him in some secure place or among his valuable papers and effects, every part of which will or codicil or other writing shall be proved to be in the handwriting of the testator by three witnesses at least.' (So that in order for this interlineation or alteration to be a valid part of the last will and testament of Bart M. Gatling, deceased, it would be necessary for the propounder to show by the greater weight of the evidence that the questioned interlineation or alteration was entirely in the handwriting of the testator Bart M. Gatling and that his name was subscribed thereto or inserted therein), and that it was found among his valuable papers and effects and the handwriting would have to be proved by three witnesses at least." Exception is taken to the portion in parentheses.

"The burden of proof is on the propounder to satisfy the jury by the greater weight of the evidence that the interlineation or alteration in question here was executed in that manner and that if he has failed so to do then such alteration or interlineation would not be any part of the will of the testator; but if he has so satisfied you by the greater weight of the evidence then such alteration or interlineation would become a part of the last will and testament of Bart M. Gatling, deceased, and you would then answer the first issue Yes; if he has failed so to do you would answer it No.

"Now, what is required in the way of the execution of this alteration or interlineation in order to make it valid as applied to the evidence in this case? That is a crucial question, as to that I charge you that this is the law as applied to the evidence in this case: That if the testator Bart M. Gatling wrote his will in his own handwriting, subscribed his name thereto, and subsequently took it and in his own handwriting wrote the words of the interlineation or alteration, to wit, 'and John Gatling one lot at least to each,' that the same is entirely in his handwriting, and after writing it with his own hand he took it and placed it in an envelope and in his own handwriting wrote the words 'My will' and signed his name 'Bart M. Gatling,' and placed the envelope with the altered writing in it among his valuable papers and effects, and it was found there after his death, then the requirements of the law would have been met with regard to the execution of the alteration.

"But, on the other hand, if the words of the interlineation or alteration in question here were not in his own handwriting, that is, the handwriting of the testator, then those words would not be any part of his will; (or, if they are in his handwriting, unless after making such alteration or interlineation in his own handwriting he placed the altered writing in the envelope, Propounder's Exhibit B, and wrote on the back thereof the words, 'My will Bart M. Gatling,' then it would not be a part of his will)." Propounder excepts to foregoing portion of charge in parentheses.

In connection with the above charge the statute G.S. 31-3 pertaining to formal execution of holograph wills is as follows: "No last will or testament shall be good or sufficient in law, to convey or give any estate, real or personal . . . unless such last will and testament be found among the valuable papers and effects of any deceased person, or shall have been lodged in the hands of any person for safekeeping, and the same shall be in the handwriting of such deceased person, with his name subscribed thereto or inserted in some part of such will; and if such handwriting shall be proved by three credible witnesses, who verily believe such will and every part thereof is in the handwriting of the person whose will it appears to be, then such will shall be sufficient to give and convey real and personal estate."

This statute has been pertinently applied in the case of *Alexander v. Johnston,* 171 N.C. 468, 88 S.E. 785. There two papers were offered for probate as the will of Julia W. Johnston. One of these papers was an envelope on which was written the words "Julia W. Johnston Will," and the other was a paper found on the inside of the envelope and was unsigned. The propounders offered evidence tending to prove that the words "Julia W. Johnston Will" endorsed on the envelope and the whole of the paper inclosed therein were in the handwriting of Julia W. Johnston, the testatrix; that the papers were found after her death among her valuable papers, and that she had stated prior to her death that she had made her will, and told where it could be found, which is the place where it was found—and when found the envelope was lightly sealed. The propounders contended that the envelope and the paper on the inside constituted the will of Julia W. Johnston and should be admitted to probate.

There this Court held that "the right to dispose of property by will is statutory, and can only be exercised by following the requirements of the statute"; that "these requirements, prescribed by the legislative department for the execution of a will, are essential, and cannot be disregarded"; that "all these provisions of the statute have admittedly been followed in the present case, unless there has been a failure to subscribe or insert the name of the testator in the paper offered for probate." The Court, answering the question "Has there been such failure, and what is the meaning of the language to subscribe or insert the name of the testator?," and after reviewing the authorities, held that the evidence offered was sufficient in this respect to establish the writing as her holograph will. See also *In re Will of Williams, ante,* 228, and cases cited, as to the signing of a will with witnesses.

Now the statute pertaining to revocation of wills in this State, G.S. 31-5, in so far as pertinent to case in hand, reads as follows: "No will or testament in writing, or any clause thereof, shall be revocable otherwise than by some other will or codicil in writing . . . but all wills or testa-

ments shall remain and continue in force . . . unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, all of which shall be in the handwriting of the testator, and his name subscribed thereto or inserted therein and lodged by him with some person for safekeeping, or left by him in some secure place, or among his valuable papers and effects, every part of which will or codicil or other writing shall be proved to be in the handwriting of the testator, by three witnesses at least . . ."

It will be observed that the court in charging the jury read the latter part of this statute. And it may also be observed that the provisions in this statute for the execution of a codicil to a holograph will are substantially the same as those in G.S. 31-3 for the formal execution of such will.

Moreover, in the case of *In re Will of Watson,* 213 N.C. 309, 195 S.E. 772, this Court interpreting the statute G.S. 31-5, last above quoted, then C.S. 4135, held in effect that a revocation of a will offered for probate should be brought within a method of revocation or cancellation provided by the statute, and that "a written will duly and truly prepared and executed cannot be revoked or cancelled by verbal declarations."

Appellant speaking to the assignment of error covered by the exception to the charge as above shown, concedes here that the right to make a will is not an inherent right, and depends entirely upon legislative authorization, and that the statutory requirements are mandatory and not directory. But he contends that the construction of the statute should not be so rigid and binding as to defeat its clearly expressed purpose,—that it must be construed and enforced strictly, but at the same time reasonably.

However, in the light of the requirements of the statutes, as interpreted by the Court, applied to the evidence, on the theory on which the case in hand was tried in Superior Court, we hold that the charge as given is correct. The exceptions are not sustained.

And for like reasons the requests for instruction, which the court declined to give, were properly refused.

Other exceptions have been considered, and fail to show error.

Hence in the judgment below we find

No error.

VICTORY CAB COMPANY, A CORPORATION, ET AL. v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, HON. VICTOR SHAW, MAYOR; CLAUDE ALBEA, S. R. JORDAN, B. M. BOYD, STEVE DELLINGER, W. I. CODDINGTON, PHILLIP VAN EVERY, COUNCILMEN; HENRY YANCEY, MANAGER, L. L. LEDBETTER, TREASURER, AND J. M. ARMSTRONG, COLLECTOR OF REVENUE; AND H. H. BAXTER, COUNCILMAN.

(Filed 12 December, 1951.)

1. **Statutes § 5a—**

Ordinarily, words of a statute will be given their natural, approved and recognized meaning.

2. **Same—**

In construing an ambiguous statute, its language must be read contextually and with reference to the matters dealt with and the objects and purposes sought to be accomplished.

3. **Same—**

In construing an ambiguous statute, earlier statutes on the subject and the history of legislation in regard thereto, including statutory changes over a period of years, may be considered in connection with the object, purpose and language of the statute.

4. **Statutes § 5d—**

Related statutes should be construed so as to give full force and effect to each of them if they can be reconciled and harmonized by reasonable interpretation.

5. **Statutes § 13—**

Where provisions of related statutes are irreconcilable by any reasonable interpretation, ordinarily the last in point of enactment will prevail.

6. **Carriers § 5—**

An accepted franchise creates a contractual relation under which, in consideration of the granting of the privilege, the grantee usually obligates itself to express conditions and stipulations as to the standard of service, etc.

7. **Statutes § 13—**

Repeals by implication are not favored and will not be indulged if there is any other reasonable construction.

8. **Municipal Corporations § 7—**

Under the provisions of G.S. 20-97 (a) (b) a municipality is limited to a total annual levy of $16.00 on each taxicab operated within its limits, which limitation is not affected by the later enacted provision of G.S. 160-200 (36a) authorizing it to grant franchises to taxicab operators on such terms as it deems advisable, it being evident that the word "terms" as used in the statute refers to regulations in regard to service rather than to fees or taxes, and this result is consonant with legislative policy as gathered from the history and statutory changes.

9. Taxation § 38a—

The provisions of G.S. 105-267 must be strictly complied with, and a taxpayer may recover from a municipality an amount paid under an unauthorized levy only in those cases in which the tax is paid under written protest with later written demand for its return.

10. Same—

G.S. 105-407 applies solely to State taxes and not to taxes of local units.

APPEAL by plaintiffs from *Patton, Special Judge,* at 17 September Term, 1951, of MECKLENBURG.

Civil action by plaintiffs, taxicab owners and operators, for refund of approximately $6,600 alleged to have been illegally collected by the City of Charlotte in connection with granting the plaintiffs franchises to operate taxicabs during the years 1949, 1950, and 1951. The complaint joins two causes of action: the first for refund of $2,205 paid under protest for the year 1951, and the second for approximately $4,400 paid for the years 1949 and 1950, not under protest, but nevertheless, as the plaintiffs allege, under circumstances entitling them to refund.

The case was heard on the plaintiffs' motion for judgment on the pleadings and the defendants' demurrer to the second cause of action for failure to state facts sufficient to constitute a cause of action.

From judgment disallowing the plaintiffs' motion for judgment and sustaining the defendants' demurrer, the plaintiffs appealed, assigning errors.

Henry L. Strickland for plaintiffs, appellants.
John D. Shaw for defendants, appellees.

JOHNSON, J. It is admitted in the pleadings that the plaintiffs paid the City of Charlotte for each of the three years in question the sum of $51.00 for each taxicab in operation, "$1.00 thereof being for automobile license tag," and $50.00 thereof being assessed by special taxicab ordinance of the City as a fee "for franchised operations" of the cabs.

The plaintiffs contend that by the terms of G.S. 20-97 (a) and (b) the City was limited to the collection of $1.00 for the "license tag" and $15.00 for all other purposes,—a total of $16.00. Accordingly, the plaintiffs insist they are entitled to a refund of $35.00 on each cab licensed. The statute on which they rely (G.S. 20-97) is a part of the composite motor vehicle statute law of the State. It reads as follows:

"20-97. Taxes compensatory; no additional tax.—(a) All taxes levied under the provisions of this article are intended as compensatory taxes for the use and privileges of the public highways of this state, and shall be paid by the commissioner to the state treasurer, to be credited by him to the state highway fund; and no county or municipality shall levy any

license or privilege tax upon the use of any motor vehicle licensed by the state of North Carolina, except that cities and towns may levy not more than one dollar ($1.00) per year upon any such vehicle resident therein: *Provided, however, that cities and towns may levy, in addition to the one dollar ($1.00) per year, herein set forth, a sum not to exceed fifteen dollars ($15.00) per year upon each vehicle operated in such city or town as a taxicab.*

"(b). No additional franchise tax, license tax, or other fee shall be imposed by the state against any franchise motor vehicle carrier taxed under this article *nor shall any county, city or town impose a franchise tax or other fee upon them,* except cities and towns may levy a license tax not in excess of fifteen dollars ($15.00) per year on each vehicle operated in such city as a taxicab as provided in subsection (a) hereof." (Italics added.)

The defendant City of Charlotte relies on the provisions of G.S. 160-200 (36a), as amended by Chapter 564, Session Laws of 1945, to sustain the validity of the ordinance under which it collected the franchise license fee of $50.00 on each cab. This statute is one of a series of enactments by which the Legislature conferred upon cities and towns broad discretionary powers of control over taxicab operators and drivers. These enactments as codified are embraced in the following three sections of the General Statutes of North Carolina: (1) G.S. 20-37; (2) G.S. 20-87 (c); and (3) G.S. 160-200 (36a). These statutes were in force and effect at the times laid in the plaintiffs' complaint.

G.S. 20-37 grants to cities and towns "power to license, regulate, and control drivers and operators of taxicabs" . . .

G.S. 20-87 (c), as amended, precludes the State Department of Motor Vehicles from issuing a license for the operation of any taxicab until the governing body of the city or town in which such taxicab is principally operated, if the principal operation is in a city or town, has issued a certificate showing *inter alia* "that the convenience and necessity of the public requires the operation of such taxicab."

G.S. 160-200 (36a) confers power upon cities and towns to require drivers and operators of taxicabs operating over its streets to apply for and receive a driver's permit before operating any such vehicle, with the governing board being vested with power to reject applications and revoke permits previously issued for failure to meet or comply with certain requirements as to moral character and proficiency as a driver. The statute contains this further provision which is pertinent to this appeal: "The governing board is also authorized to establish the rates which may be charged by taxicab operators, and may grant *franchises* to taxicab operators on such *terms* as it deems advisable." (Italics added.)

The City Council of the City of Charlotte on 3 October, 1946, acting under the provisions of the foregoing statutes, adopted a comprehensive

taxicab ordinance by which it set up the office of Taxicab Inspector and prescribed his duties. The ordinance sets up rules under which taxi-driver permits may be issued and revoked. It also establishes terms and conditions under which taxicab operators may be granted certificates of public convenience and necessity, and prescribes various other rules and regulations in respect to the operation of taxicabs in the City of Charlotte. Among other things, the ordinance provides that each certificate of public convenience and necessity issued by the City Council shall expire "on December 31 of the year during which such certificate was granted," with provisions prescribed for renewal from year to year. The ordinance contains the following requirement for payment of fees in connection with the issuance of certificates:

"SECTION 16. FEE FOR CERTIFICATE. The owner of each taxicab which is granted a certificate shall pay annually to the General Treasury of the City the sum of $50.00 for each cab so licensed; provided, however, that in the case of certificates issued on or after July 1st, in each year, the fee shall be $25.00. Such license fees shall be in addition to, and not in lieu of, any other license fees or charges established by proper authority and applicable to taxicabs in this city."

The question thus posed for decision here is this: Is the ordinance of the City of Charlotte requiring taxicab operators to pay an annual franchise or license fee of $50.00 authorized by G.S. 160-200 (36a), as amended, or is it prohibited by the provisions of G.S. 20-97 (a) and (b)?

The salient facts seem to be pleaded in the complaint and admitted in the answer so as to present squarely for interpretation these two statutes upon which decision rests.

In view of the limitations imposed by G.S. 20-97 (a) and (b), the defendant City of Charlotte concedes that the fees collected in excess of $16.00, to wit: $35.00, for each cab may not be justified as items of revenue. (*Cox v. Brown*, 218 N.C. 350, 11 S.E. 2d 152). It contends, however, that under the City Taxicab Ordinance the $50.00 (in addition to the license tag fee of $1.00) may be exacted as a charge for granting and renewing the annual certificates of public convenience and necessity (denominated by the defendants as "franchised certificates"). Thus the City of Charlotte takes the position that the $50.00 charge is not a revenue exaction, but is rather a police power measure, designed to produce funds with which to pay the costs of regulating taxicabs in the City under its regulatory ordinance, and that such comes within the powers conferred upon the City by G.S. 160-200 (36a), as amended, permitting it to "grant franchises to taxicab operators on such terms as it deems advisable." It is urged that the word "terms" as used in the statute is referable to and authorizes the assessment and collection of fees by a city or town in consideration for franchise privileges to be granted taxicab operators. The City of Charlotte contends there is no conflict between

G.S. 20-97 (a) and (b) and the City Taxicab ordinance passed under G.S. 160-200 (36a), as amended, but that if there be conflict the ordinance passed under the latter act must prevail.

Thus we face the question of statutory construction. In the final analysis decision here turns on the legislative intent and meaning of the word "terms" as used in G.S. 160-200 (36a), as amended.

It is an accepted rule of statutory construction that ordinarily words of a statute will be given their natural, approved, and recognized meaning. *Commissioners of Johnston County v. Lacy,* 174 N.C. 141, 93 S.E. 482; *Randall v. Richmond and Danville Railroad Co.,* 107 N.C. 748, 12 S.E. 605; 50 Am. Jur., Statutes, Sec. 238.

It is also an accepted rule of construction that in ascertaining the intent of the Legislature in cases of ambiguity, regard must be had to the subject matter of the statute, as well as its language, *i. e.,* the language of the statute must be read not textually, but contextually, and with reference to the matters dealt with, the objects and purposes sought to be accomplished, and in a sense which harmonizes with the subject matter. *Gill v. Board of Com's. of Wake County,* 160 N.C. 176, top p. 188, 76 S.E. 203; *Spencer v. Seaboard Air Line R. Co.,* 137 N.C. 107, p. 119, 49 S.E. 96; 50 Am. Jur., Statutes, Sec. 292.

It is the policy of the courts to avoid giving statutory phraseology an unusual, artificial, or subtle meaning. *Guano Co. v. Walston,* 187 N.C. 667, p. 672, 122 S.E. 663, and cases cited; 50 Am. Jur., Statutes, Sec. 238.

And where the meaning of a statute is doubtful, the history of legislation on the general subject dealt with, including statutory changes over a period of years, may be considered in connection with the object, purpose, and language of the statute, in order to arrive at its true meaning. *Nance v. Southern R. Co.,* 149 N.C. 366, 63 S.E. 116; *Erie R. Co. v. Steinberg,* 94 Ohio St. 189, 113 N.E. 814. See also 50 Am. Jur., Statutes, Sec. 294, p. 276; Annotation; 70 A.L.R. p. 5 (footnotes). It is also accepted practice in the interpretation of an ambiguous statute for the court to take into consideration the settled policy of the state where such is clearly deducible from consistent acts of the Legislature, and tends to shed light on the legislative intent as to the statute under consideration. 50 Am. Jur., Statutes, Sec. 299. Thus, in the construction of a statute, reference may be had to earlier statutes on the subject which are regarded as in *pari materia* with the later statute. 50 Am. Jur., Statutes, Sec. 354.

And in respect to related statutes, ordinarily they should be construed, if possible by reasonable interpretation, so as to give full force and effect to each of them (50 Am. Jur., Statutes, Sec. 362), it being a cardinal rule of construction that where it is possible to do so, it is the duty of the courts to reconcile laws and adapt that construction of a statute which harmonizes it with other statutory provisions. *Kearney v.*

Vann, 154 N.C. 311, 70 S.E. 747; *Corporation v. Motor Co.,* 190 N.C. 157, p. 160, 129 S.E. 414. See also 50 Am. Jur., Statutes, Sec. 363.

On the other hand, when the provisions of related statutes are irreconcilable, under reasonable interpretation, and one must give way to the other, ordinarily the last in point of enactment will prevail as being the latest expression of the legislative intent. 50 Am. Jur., Statutes, Sec. 365; *Commissioners v. Commissioners,* 186 N.C. 202, p. 204, 119 S.E. 206.

The word "terms" as used in the statute under consideration has a variety of definitions and is susceptible of a wide range of meaning, depending upon the subject matter to which it relates and the context in which it is used. (Webster). "Terms" is derived from the Latin "termini," meaning limits or bounds. Thus its primary meaning implies fixing the limits or extent of anything. See 62 C.J., p. 714. See also Words and Phrases (Permanent Edition) Vol. 41, p. 395 *et seq.* In the statute at hand, we think the word "terms" is used in its broad, primary sense as referring to the scope and limits of the franchise privileges to be granted by governing boards to cab operators. The more reasonable view seems to be that the Legislature by the use of the word "terms" intended thereby to grant unto the "governing body" of a city or town the power, when issuing franchise certificates to cab operators, to fix the rights of the parties, *i. e.,* to designate the requirements, the regulations, the exactions, the stipulations as to service, and the conditions upon which operators may receive, retain, and renew franchise certificates from the City. This view is supported by the natural inferences deducible from a consideration of the over-all purpose of the statutes,—that of delegating to cities and towns power to control the operation of taxicabs by the grant of franchises.

It is well to examine the meaning and scope of the word "franchise" as used in the statute. Here it denotes a right or privilege conferred by law,—a special privilege conferred by government on an individual, natural or corporate, which is not enjoyed by its citizens generally, of common right. 37 C.J.S., Franchises, Sec. 1; 23 Am. Jur., Franchises, Sec. 2, Ballentine, Law Dictionary, p. 525. Ordinarily, "The grant of a franchise when accepted and acted on creates a contract which is binding on the grantor and the grantee." 37 C.J.S., Franchises, Sec. 8. Hence, the grant of a franchise contemplates, and usually embraces, express conditions and stipulations as to standards of service, and so forth, which the grantee or holder of the franchise must perform. 37 C.J.S., Franchises, Sec. 20, p. 165.

It is generally considered that the obligation resting upon a franchise-grantee to comply with the stipulations, terms, and conditions of the grant constitutes a sufficient consideration to support a franchise granted by public authority. The "benefit to the community may constitute the sole consideration for the grant." 23 Am. Jur., Franchises, Sec. 6.

Accordingly, we think the word "terms" as used in the instant statute is referable to the covenants to be made and required in connection with the issuance of franchises, rather than to any monetary consideration to be charged therefor.

This view is supported by the natural inferences arising out of the legislative history of these related statutes as they have evolved through successive amendments.

Historically, G.S. 20-97 (a) and (b), (which limits the amount a municipality may levy as a license or privilege tax on the use of a motor vehicle) was section 61, Chapter 407, Public Laws of 1937. As originally enacted, this chapter was known as the Motor Vehicle Act of 1937, which as amended is now codified as Article 3, Chapter 20, of the General Statutes of North Carolina. This statute originally fixed $1.00 as the limit which a municipality might levy as a license or privilege tax on the use of any motor vehicle. The proviso to subsection (a) and the exception to subsection (b), by which the amount municipalities may levy upon taxicabs was increased by $15.00, were added by amendment in 1943. The amendment is part of Chapter 639, Session Laws of 1943, hereinafter referred to as the Taxicab Act of 1943. By the provisions of this act, governing boards of cities and towns were granted extensive powers "to license, regulate and control drivers and operators of taxicabs within the city or town limits." These powers of regulation and control so delegated to cities and towns by the Taxicab Act of 1943 are codified as (1) the proviso to G.S. 20-37 and (2) G.S. 160-200 (36a), as originally codified in the General Statutes of North Carolina of 1943. It thus appears that the Legislature, in conferring upon municipalities these new powers of regulation over taxicabs, took cognizance of the fact that the exercise of such powers of regulation would cast new financial burdens on cities and towns. Therefore, to grant relief for this, the Legislature by the same act which conferred the new powers of municipal control also expressly authorized the levy of an additional annual license or privilege tax of not exceeding $15.00 on each taxicab.

After this was done the Legislature in 1945 further extended the powers of cities and towns over taxicabs by the passage of Chapter 564, Session Laws of 1945, which is hereinafter referred to as the Taxicab Act of 1945. This act amended and extended the provisions of G.S. 160-200 (36a) by adding the following provisions: "The governing body is also authorized to establish the rates which may by charged by taxicab operators, and may grant franchises to taxicab operators on such terms as it deems advisable."

The Taxicab Act of 1945 also amended G.S. 20-87 (c), which has to do with the procedure followed by the State Department of Motor Vehicles in licensing taxicabs. Here the Taxicab Act of 1945 provides that (subject to certain exceptions not material to this appeal), "no license shall

issue for the operation of any taxicab until the governing body of the city or town in which such taxicab is principally operated, if the principal operation is in a city or town, has issued a certificate showing," among other things, "that the convenience and necessity of the public requires the operation of such taxicab."

It thus appears that while the Taxicab Act of 1945 amended and extended the provisions of the Taxicab Act of 1943 so as to confer upon the "governing body" the power to "grant franchises to taxicab operators, on such terms as it deems advisable," and made other material changes in the original act, nevertheless, the latter act leaves unchanged the sections of the act of 1943 by which cities and towns are limited to license or privilege tax levies of $16.00 on each taxicab.

Thus, it would seem that the silence of the 1945 act as to a matter to which the 1943 act had spoken in express terms, indicates a legislative intent to preserve the *status quo,* and negatives the theory of implied repeal of the former act, as urged by the defendants. Repeals by implication are not favored by the law and will not be indulged if there is any other reasonable construction. *Leonard v. Sink,* 198 N.C. 114, top p. 119, 150 S.E. 813. Moreover, an examination of the legislative history of G.S. 20-97 shows a fixed and unvarying legislative policy to curb the powers of municipalities in taxing motor vehicles of all kinds, including taxicabs.

Accordingly, we conclude it was the legislative intent to leave in full force and effect the provisions of G.S. 20-97 (a) and (b), as amended, by which cities and towns are limited to total annual levies of $16.00 in connection with the operation of taxicabs. It follows, therefore, that the City of Charlotte was without power under G.S. 160-200 (36a) or cognate statutes to impose exactions beyond the limits fixed by G.S. 20-97 (a) and (b).

G.S. 105-267 provides, *inter alia,* that "whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and notify such officer in writing that he pays the same under protest. Such payment shall be without prejudice to any defense of rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the Commissioner of Revenue of the State, if a State tax, or if a county, city, or town tax, from the treasurer thereof for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, may sue such official in the courts of the State for the amount so demanded."

The plaintiffs complied with the provisions of this statute in respect to the fees paid for the year 1951. Accordingly, they are entitled to

recover back the excess portion of the fees paid for the year 1951, sued on in their first cause of action.

However, the record indicates that the payments for the years 1949 and 1950 were not made under protest, nor did the plaintiffs otherwise comply with the mandatory provisions of G.S. 105-267. This being so, they are not entitled to recover for the excess fees paid in those years, declared on in the second cause of action. Strict compliance with the provisions of this statute is necessary. See *Power Co. v. Clay County*, 213 N.C. 698, p. 708, 197 S.E. 603.

The statute, G.S. 105-407, relied on by the plaintiffs, is specifically limited to State taxes. It has no application to local taxing units.

The results, then, are:

On the first cause of action: Reversed.

On the second cause of action: Affirmed.

MRS. ANNIE BELL PARSONS, MOTHER, LEROY PARSONS, MINOR, BY HIS GUARDIAN BRADFORD TILLERY; MARY TROY, MATTIE BELL PARSONS, ETHEL LEE TIZZELLE AND CLYDE JENKINS, BROTHERS AND SISTERS OF JAMES PARSONS, DECEASED, EMPLOYEE, v. SWIFT & COMPANY, EMPLOYER, AND SECURITY MUTUAL CASUALTY COMPANY, INSURANCE CARRIER.

(Filed 12 December, 1951.)

1. Master and Servant § 55d—

Where the record fails to show that the Superior Court ruled on any of the specific exceptions made by appellant to the findings of the Industrial Commission and fails to show any exception to the failure of the judge to make such specific rulings, the exceptions taken on appeal from the Industrial Commission are not presented on the appeal to the Supreme Court notwithstanding that such exceptions are listed following the appeal entries from the judgment of the Superior Court.

2. Same—

An exception to the ruling of the Superior Court sustaining the findings of fact and conclusions of law of the Industrial Commission is a broadside exception, and is insufficient to bring up for review the findings of fact or the evidence upon which they are based.

3. Same—

Exceptions to the affirmance of the decision and award of the Industrial Commission and to the judgment and signing thereof constitute no more than an exception to the signing of the judgment and raise only the question of whether the facts found by the Industrial Commission and approved by the judge of the Superior Court are sufficient to support the judgment.

4. Master and Servant § 40c—

Evidence tending to show that the employee was fatally injured when he attempted to move a tractor which was in his way in the performance of his duties, that there was a rule of the employer, not submitted to or approved by the Industrial Commission as a safety rule, that only employees specifically directed to do so should operate the tractors but that the employee had theretofore moved similar tractors as had also other employees in the plant, *is held* sufficient to sustain the findings of the Industrial Commission that the employee was injured in an accident arising out of and in the course of his employment.

5. Master and Servant § 53d—

Where the employee is survived only by his mother and his minor brother, his mother is his sole next of kin within the meaning of G.S. 97-40.

6. Same—

Where the employee's mother and minor brother are partial dependents, the mother being the sole next of kin as defined in G.S. 97-40, the mother and minor brother may not elect to take as next of kin rather than as partial dependents, since both are not next of kin, and it is necessary under the provisions of G.S. 97-38 that all the partial dependents be next of kin in order to be entitled to make the election.

APPEAL by defendants from *Bone, J.*, at August Civil Term, 1951, of NEW HANOVER.

Proceeding under the North Carolina Workmen's Compensation Act for compensation on account of the death of James Parsons on 31 August, 1949, as a result of an injury by accident, arising out of his employment by defendant Swift & Company.

The parties stipulated before the hearing commissioner on 9 March, 1950, that the deceased employee, James Parsons, and the employer, Swift & Company, were subject to and bound by the provisions of the North Carolina Workmen's Compensation Act; that the deceased was regularly employed on 31 August, 1949, at an average weekly wage of $30.80; that he was injured by accident as a result of which he died; and that the employer's insurance carrier is the Security Mutual Casualty Company.

Counsel for plaintiff Annie Bell Parsons stated in open hearing that she elected to take any compensation that may be due as next of kin.

Thereafter the parties stipulated that Bradford Tillery is the duly appointed legal guardian of Leroy Parsons, minor. And the record shows that this minor, through his said guardian, was made a party to this proceeding.

In addition to stipulations, the hearing commissioner found the following facts:

"1. That on and prior to 31 August, 1949, the deceased employee, James Parsons, was employed in the fertilizer plant operated by the defendant employer at Wilmington, N. C.

"2. That James was employed as a laborer by Swift; that he was required to perform such jobs and duties as might be assigned to him by his superiors, together with such details incident to the performance of his assigned duties as were necessary to the expeditious performance thereof.

"3. That on 31 August 1949, James was assigned to the job of hauling filler used in the preparation of commercial fertilizer; that this job required him to use a shovel to load filler or sand into a wheelbarrow from a pile of filler, then to wheel the loaded barrow to the weighhouse or scales to be weighed, and thence to deliver the filler to the 'hole,' an aperture through which the filler material was dumped onto a conveyor belt which carried the batch into the mixing machinery; that the pile of filler material or sand from which James was hauling was located in an aisle or open way between a wall or bulkhead on one side and the conveyor well on the other; that the pile of filler or sand extended more than half-way across the aisle or open way from the bulkhead toward the conveyor well; and that a piece of self-propelled hauling equipment, known as a tractor or dump truck, was parked near the bulkhead and parallel thereto between the filler pile and an exterior loading platform on the path followed by James in wheeling his loads of sand or filler as above described.

"4. That at that time Swift had a total of ten such tractors in use at the plant; that there were other employees assigned to the specific job of operating the tractors; that the particular tractor above referred to was comparatively new, having been in use for approximately one week; and that this tractor differed in the manner of its operation from the other tractors in use at that time and prior thereto at the Swift plant.

"5. That Henry Alston, an employee of Swift, customarily assigned to operate tractors, had been using this particular tractor earlier in the morning; that he had parked this tractor near the bulkhead and the filler pile and was using a smaller, faster tractor for hauling purposes; that Felix Singletary, a fellow employee, was tending the 'hole,' *i.e.*, assisting in dumping material into the opening above the conveyor belt and keeping it clear of obstructions; that James requested Singletary to move the parked tractor; that James said the tractor was in his way; that James then asked Henry Alston to move the tractor out of his way and that both Singletary and Alston refused to move the tractor as requested by James.

"6. That James then undertook to move the parked tractor; that in undertaking to move the tractor, he was acting in furtherance of his employer's business; that, while so moving the tractor, it accidentally rolled off the edge of the loading platform, falling to the ground on top of James, causing his immediate death; and that James Parsons was killed on 31 August 1949 as the direct and unavoidable result of an injury by accident arising out of and in the course of his employment by the defendant employer, Swift & Company.

"7. That Swift had established a rule with reference to the operation of such tractors to the effect that no one should operate the tractors except those employees specifically directed to do so; that this rule or regulation had never been submitted to and approved by the Industrial Commission as a safety rule or regulation; that the deceased James Parsons had moved similar tractors previous to this occasion and that other employees in the plant had moved the tractors previous to this occasion.

"8. That there was no person actually totally dependent for their support upon the earnings of the deceased employee at the time of his death.

"9. That James Parsons was never married and that he left him surviving no wife nor child nor issue of such.

"10. That Mrs. Annie Bell Parsons, mother of James, and Leroy Parsons, minor brother of James, were both partly dependent for their support upon the earnings of the deceased employee at the time of his death.

"11. That no other person than those above named was dependent in whole or in part for their support upon the earnings of the deceased employee at the time of his death.

"12. That Mrs. Annie Bell Parsons and Bradford Tillery, guardian for Leroy Parsons, have elected to take the compensation payable for the death of the deceased employee as next of kin rather than as partial dependents."

Upon these findings of fact the hearing commissioner, after briefing and discussing the law, concludes as matters of law (1) that the accident causing the death of James Parsons arose out of his employment by the defendant employer as well as in the course of such employment; (2) that compensation is payable according to the terms of G.S. 97-38 and G.S. 97-40; (3) that the mother and infant brother, being partially dependent and also being next of kin, are entitled to receive compensation as next of kin rather than as partial dependents if they so elect, and, having so elected, the claimant, Annie Bell Parsons, and the claimant, Bradford Tillery, guardian for Leroy Parsons, infant, are entitled to receive the compensation payable for the death of the deceased employee as next of kin as provided by G.S. 97-40.

And pursuant to the foregoing findings of fact and conclusions of law, and in accordance therewith, the hearing commissioner entered an award, of which notice was duly given to the parties.

Defendants appealed to the Full Commission, and, on such appeal, the Full Commission adopted as its own the findings of fact and conclusions of law of the hearing commissioner, and ordered that the result reached by him be, and the same was thereby affirmed,—and directed that an award issue accordingly, which was done, and notice thereof given.

Defendants appeal therefrom to the Superior Court, and filed as grounds therefor fifteen specific exceptions to certain findings of fact and to certain conclusions of law made by the commission as shown in the record on this appeal. The record was thereupon certified to Superior Court.

And upon hearing such appeal, the Judge of Superior Court, after reciting that the appeal "being heard upon the record herein and full argument by counsel for appellants and appellees, it appearing to the satisfaction of this court that the findings of fact and conclusions of law of the Full Commission are correct and that the decision and award of the Full Commission should be affirmed," adjudged "that the decision and award of the Full Industrial Commission herein be, and are hereby affirmed."

Appeal entries are: "The defendants in open court except to the rulings of the court sustaining the findings of fact and conclusions of law of the Full Commission, and except to the affirming of the decision and award of the Full Commission, and except to the judgment and the signing thereof, further notice waived. Appeal bond fixed at $100. Defendants allowed until October 10, 1951, to serve statement of case on appeal, and plaintiff allowed until October 20, 1951, to serve exceptions or counterstatement."

And while the record fails to show that the Judge specifically ruled on exceptions filed by defendants to decision and award of the Full Commission, or that defendants took specific exceptions to the failure of the Judge to so rule, the record shows following the appeal entries, and under heading "Exceptions" list of the same exceptions to the decision and award of the Full Commission as filed on the appeal to Superior Court, with these added:

"16. That his Honor Walter J. Bone erred in sustaining the findings of fact and conclusions of law of the Full Commission, and in affirming the decision and award of the Full Commission, as contained in the judgment entered in said cause at the August 1951 Term of Civil Court for New Hanover County. Exception No. 16.

"17. That his Honor Walter J. Bone erred in failing to find as a matter of law that the claimants were not entitled to recover anything of the defendants. Exception No. 17.

"18. That his Honor Walter J. Bone erred in signing the judgment set out in the record. Exception No. 18."

The assignments of error, shown in the record, are identical with the list of exceptions as above shown.

Defendants appeal to Supreme Court, and so assign error.

Addison Hewlett, Jr., and Solomon B. Sternberger for plaintiff, appellee.

James & James for defendants, appellants.

WINBORNE, J. While the record on this appeal shows that defendants based their appeal from the Industrial Commission to the Superior Court upon fifteen specific exceptions to the findings of fact and conclusions of law on which the decision and award of the Industrial Commission were made to rest, the record fails to show that the Judge of Superior Court ruled on any of the specific exceptions so filed by defendants, and there is in the record no exception to the failure of the Judge to make such specific rulings. Hence the exceptions so filed by defendants are not presented on this appeal. And the exception "to the rulings of the court sustaining the findings of fact and conclusions of law of the Full Commission," as shown in the appeal entries, is "insufficient to bring up for review the findings of fact or the evidence upon which they are based." It is a broadside which fails to point out the particular ruling to which the exception is taken. See *Rader v. Coach Co.,* 225 N.C. 537, 35 S.E. 2d 609, and cases there cited. See also *Fox v. Mills,* 225 N.C. 580, 35 S.E. 2d 869; *Brown v. Truck Lines,* 227 N.C. 65, 40 S.E. 2d 476; *Simmons v. Lee,* 230 N.C. 216, 53 S.E. 2d 79; *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351.

Moreover, the exceptions "to the affirming of the decision and award of the Full Commission" and "to the judgment and the signing thereof," as appear in the appeal entries, constitute no more than an exception to the signing of the judgment. And such exception raises only the question as to whether or not the facts as found by the Industrial Commission, and approved by the Judge of Superior Court, are sufficient to support the judgment. That is, such exception challenges only the conclusions of law upon the facts so found. See *Smith v. Davis,* 228 N.C. 172, 45 S.E. 2d 51, 174 A.L.R. 643. *Simmons v. Lee, supra,* and cases cited, and numerous others.

In the light of these decisions we hold that the facts found by the Industrial Commission are sufficient to support an award of compensation for the death of James Parsons under the provisions of the North Carolina Workmen's Compensation Act.

But a question of law arises upon the face of the record as to whether or not the partially dependent widowed mother of the deceased employee and his partially dependent brother may elect to take as next of kin rather than as partial dependents.

This is the second question raised by defendants. The answer is "No."

G.S. 97-38 in pertinent part provides: ". . . If the employee leaves dependents only partially dependent upon his earnings for support at the

time of the injury, the weekly compensation to be paid, as aforesaid, shall equal the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury: Provided, when the partial dependents are all next of kin as defined in G.S. 97-40, and all so elect, they may receive benefits under Sec. 97-40 instead of under this section . . ."

It is seen that the election provided for in the proviso in the above statute G.S. 97-38 is available when the partial dependents are all next of kin as defined in G.S. 97-40.

And G.S. 97-40 provides in pertinent part: "If the deceased employee leaves no dependents the employer shall pay to the next of kin as herein defined the commuted amount provided for in Sec. 97-38 for whole dependents; but if the deceased left no next of kin as herein defined, then said commuted amount shall be paid to the Industrial Commission to be held and disbursed by it in the manner hereinafter provided; one-half of said commuted amount shall be retained by the Industrial Commission and the other one-half paid to the personal representative of the deceased to be by him distributed to the next of kin as defined in the Statutes of Distribution; but if there be no next of kin as defined in the Statutes of Distribution, then the personal representative shall pay the same to the Industrial Commission after payment of costs of administration. For purpose of this section the term 'next of kin' shall include only father, mother, widow, child, brother, or sister of the deceased."

Appellant contends, and we think rightly so, that under the facts found the mother of James Parsons is his next of kin within the meaning of the Workmen's Compensation Act. G.S. 97-40. This statute, as an act of the General Assembly of North Carolina, P.L. 1931, Chap. 274, Sec. 5, was applied by this Court in *Hamby v. Cobb,* 214 N.C. 813, 1 S.E. 2d 101.

In the *Hamby case, supra,* as the record on appeal shows, the Industrial Commission found that the employee, whose death resulted from injury by accident arising out of and in the course of his employment, died leaving his mother, his father being dead, but neither widow nor children; that his mother was not dependent on him for support; and that his mother was his next of kin. In accordance therewith an award was made to her and affirmed, on appeal thereto, by the Superior Court. And the case came to this Court on appeal.

And this Court, in a *Per Curiam* opinion, held that the court below correctly ruled. Then the Court quoted from Sec. 40: "If the deceased employee leaves no dependents the employer shall pay to the next of kin as herein defined the commuted amount provided for in Sec. 38 of this Act for whole dependents, etc. . . . For the purpose of this Section the term 'next of kin' shall include only the father, mother, widow, child,

brother or sister of the deceased." The Court then said: "The father being dead, the mother was the next of kin. We think the evidence clearly indicates that the deceased left no dependent or dependents and plaintiff, his mother, was the next of kin under the statute and entitled to the award."

True no reference is made to other kin enumerated in the statute. But the decision is significant that the father being dead, the mother is the next of kin. This is accordant with the statute of distribution, G.S. 28-149 (5) as interpreted by this Court. See *Wells v. Wells,* 158 N.C. 330, 74 S.E. 114. *In re Estate of Pruden,* 199 N.C. 256, 154 S.E. 7.

Moreover, it seems manifest that the General Assembly in defining "next of kin" for purpose of G.S. 97-40 intended to limit recovery to persons within that group, to the exclusion of other more remote next of kin under the statute of distribution. Article 17 of Chap. 28 of General Statutes. Indeed, the "next of kin" are named in the alternative,—clearly indicating that it was intended that those named should not necessarily be of equal degree.

For error in the respect above indicated the case will be remanded for further proceeding in accordance with the decision here made.

Error and remanded.

ELLISON MULDROW v. ALEXANDER WEINSTEIN AND BENJAMIN WEINSTEIN INDIVIDUALLY AND TRADING AS WEINSTEIN HIDE AND METAL COMPANY.

(Filed 12 December, 1951.)

1. Master and Servant § 14a—

Where an employer has exempted himself from the Workmen's Compensation Act, the defenses of contributory negligence, assumption of risk and that injury was due to the negligence of a fellow servant are not available to him in an employee's action against him for negligent injury. G.S. 97-14.

2. Same—

In common law actions by an employee to recover for personal injury a mere showing that the injury occurred while the employee was in the performance of the duties of his employment is insufficient, but he must show some breach of duty on the part of the employer proximately causing the injury.

3. Same—

An employer is not an insurer of the safety of the employee but is required only to exercise the care of an ordinarily prudent man under like circumstances to provide a reasonably safe place to work and reasonably safe implements and appliances.

4. **Same—Evidence held insufficient to be submitted to jury on issue of negligence of employer.**

The evidence tended to show that plaintiff was employed to feed scrap metal into an open pit wherein it was compressed, and that he was injured when a projection on a large piece of scrap caught his glove and caused him to fall into the pit. *Held:* There being no evidence of any defect or unsafe condition in the platform on which plaintiff was required to stand to perform his duties or that the manner of doing the work was not usual and reasonably necessary in the conduct of the business, or that plaintiff was lacking in ordinary strength and intelligence, defendant employer's motion to nonsuit should have been allowed, since the evidence discloses injury by accident which could not have been reasonably foreseen, nor may the failure to provide guard rails under the circumstances nor to warn the employee of the obvious and ordinary conditions be held for negligence.

5. **Same—**

Whether the employer is under duty to provide guard rails depends upon the nature of the work, and an employer is not required to provide guard rails around an opening when the danger is apparent and known and guard rails would interfere materially with the practical use of the premises and there is nothing to show special circumstances rendering the place or the method of work dangerous to an employee possessing average intelligence.

JOHNSON, J., dissenting.

ERVIN and VALENTINE, JJ., concur in dissent.

APPEAL by defendants from *Burgwyn, Special Judge,* April Term, 1951, of WAKE. Reversed.

This is an action to recover damages for personal injury sustained by reason of a fall into a compresser pit on defendants' premises alleged to have been due to the negligence of the defendants.

Plaintiff alleged that he was employed as a laborer by defendants in their junk yard in the City of Raleigh, and that defendants in the conduct of their business had constructed and were using a method of compressing certain scrap metals into compact blocks by means of a metal-lined pit some 6 feet square and 9 feet deep into which the bulky material was thrown and, by electric power and hydraulic pressure exerted on all sides, reduced to convenient size for handling. There was a concrete platform on which the scrap material was placed and from which it was pushed or thrown into the opening for compression. Much of this material consisted of severed parts of automobile bodies. On the afternoon of 14 February, 1949, plaintiff was on this platform engaged in pushing or throwing material into the pit when a projection from the edge of a part of an automobile body he was handling caught his glove and caused him to fall into the pit on his head and sustain injury.

Plaintiff alleged negligence on the part of defendants in that they failed in the exercise of due care to provide him a reasonably safe place in which to do his work, and reasonably safe methods and appliances for this purpose; that defendants failed to provide guard rails or any other protective devices; that the conditions under which he was required to work were of inherently dangerous character, and that defendants failed to give him warning and instructions such as were reasonably required by his inexperience and want of capacity.

On the trial plaintiff testified he was 67 years of age and had been working for defendants three months immediately before he was injured, at a wage of $35 per week; that he was employed to do whatever came to hand; that he had been piling metal on the platform to be fed into the press, when he was told to take the place just vacated by another employee feeding the material into the press. He said the defendants had told him to do anything that had to be done—"no picking and choosing—just keep the press running." He had had no experience with machinery. No one pointed out any dangers that might be involved, but he was told to "keep the tin in there—keep it fed." No one told him how far to stand from the edge of the pit while feeding the metal into it. On the occasion of his injury he was handling part of an automobile body which had been cut off by a blowtorch and as he threw it over into the pit it caught his glove and pulled him in. The press is located in a cinder-block building. There were no guard rails between the platform and the pit. The scrap metal was compressed into blocks, weighing about 500 pounds. If the pieces of scrap metal, were heavy they were thrown or pushed in one by one. Plaintiff had worked for the defendants in this yard at other times for a number of years. He testified he was standing on the platform close enough to turn this tin down over into the pit, and that when he threw this piece over it caught his glove. "The piece of metal I was putting in the pit at the time I fell in it . . . was the back of an old car. . . . I was shoving it, had pulled it around until I got it straight to shove over there . . . about the time I was pulling it around it flew up and caught my glove." . . .

Plaintiff's witness Alex Terrell, also a laborer employed by defendants, and who at times fed metal into the pit, testified he had seen plaintiff working at that press doing the same work at other times prior to the day he got hurt. "I would say I'd seen him at least once a day every day previous to his accident working there feeding metal into this pit to the press." He would work at intervals—as much as half a day. He had been working at it half an hour feeding the metal into the pit when he was hurt. The platform was nearly full of tin. Witness heard another employee tell plaintiff to come and throw some tin in while the other man was away, to keep the work going. Plaintiff was standing on the plat-

form just where it would be convenient for him to feed metal down into this pit.

Defendants' motion for judgment of nonsuit was denied. Issues were submitted to the jury and answered in favor of the plaintiff, and from judgment on the verdict defendants appealed.

W. Brantley Womble and Bickett & Banks for plaintiff, appellee.

Ehringhaus & Ehringhaus for defendants, appellants.

DEVIN, C. J. Though the plaintiff's injury was sustained in the course of his employment by the defendants, employers of more than five persons in the same business, the defendants in the manner prescribed by G.S. 97-4 had exempted themselves from the operation of the Workmen's Compensation Act. Accordingly plaintiff instituted common law action to recover damages for the injury on the ground of negligence. Under these circumstances the defendants were not permitted to defend on the ground that the employee was negligent, that he had assumed the risk of injury, or that the injury was due to negligence of a fellow employee. G.S. 97-14.

Substantially, it was alleged in the complaint that plaintiff's injury was caused by the negligence of the defendants in that they failed to exercise due care to provide him a reasonably safe place to work, and reasonably safe methods and appliances in connection therewith, and omitted to give him warning and instruction reasonably required by his inexperience and want of capacity in performing work of the character in which he was engaged.

There was no evidence that there was any defect in the platform on which the plaintiff was standing and from which he fell to his injury, or that the method of compressing pieces of thin metal into blocks was other than was in approved and general use, or that the manner of pushing or throwing pieces of scrap material into the pit for compression was not such as was usual and reasonably necessary in the conduct of the business. There was no evidence that the concrete platform did not afford a firm foothold or that there was failure to provide proper tools. The plaintiff was familiar with the manner in which this work was being carried on, having been engaged at intervals during the past three months on this platform in putting material into the pit. There was no evidence he was lacking in ordinary strength and intelligence. He was being paid for his labor at the rate of $35 per week. Plaintiff was not brought in contact with any machinery and was doing unskilled work in handling pieces of scrap material in the customary manner. There was no evidence of lack of help as the work the plaintiff was doing was such as was suitable for one man; nor was the injury due to the negligent order of a foreman

(*Thompson v. Oil Co.,* 177 N.C. 279, 98 S.E. 712); nor does it appear that his fall was due to lack of warning or instruction. *Watson v. Construction Co.,* 197 N.C. 586, 150 S.E. 30. There was no evidence that anyone had been injured by falling into the pit during the ten years of its use. No negligence is predicated of the gloves plaintiff used or of the occurrence of a projection on the scrap metal he was handling.

The fact that plaintiff suffered an injury while at work for the defendants would not of itself impose liability therefor. *Fore v. Geary,* 191 N.C. 90 (94), 131 S.E. 387. In order to sustain recovery plaintiff must allege and offer evidence tending to show negligence on the part of his employers, and that such negligence was the proximate cause of his injury. *Newbern v. Great Atlantic & Pacific Tea Co.,* 68 F. 2d 523. It is fundamental that in actions to recover damages for personal injury on the ground of negligence the plaintiff must show a breach of some duty which under the circumstances the defendants owed him, and which proximately caused his injury, and that the act or omission constituting the breach of duty was such that a reasonably prudent man would have foreseen it would likely be productive of injury. One may not be held liable for an injury which he could not in exercise of due care have anticipated. *Watson v. Construction Co.,* 197 N.C. 586 (593), 150 S.E. 30; *Beach v. Patton,* 208 N.C. 134, 179 S.E. 446; *Broadhurst v. Blythe Bros.,* 220 N.C. 464, 17 S.E. 2d 646; *Lee v. Upholstery Co.,* 227 N.C. 88, 40 S.E. 2d 688; *Wood v. Telephone Co.,* 228 N.C. 605, 46 S.E. 2d 717; *McIntyre v. Elevator Co.,* 230 N.C. 539, 54 S.E. 2d 45; *Howard v. Bell,* 232 N.C. 611, 62 S.E. 2d 323. Negligence is gauged by the ability of one to anticipate danger. *McGlone v. Angus,* 248 N.Y. 197. Reasonable apprehension does not include anticipation of every conceivable danger, nor does the duty to exercise care impose obligation to guard against dangers which are remote and improbable. 1 Sherman & Redfield, secs. 24 and 25. A situation not reasonably to be viewed as dangerous does not require safeguards or warning against injuries which in the exercise of due care could not have been foreseen.

It was the duty of the defendants under the allegations and proof in this case, incumbent upon them as employers of the plaintiff, to exercise ordinary care to provide for the plaintiff a reasonably safe place in which to do his work, and reasonably safe implements and appliances with which to work. The defendants were not insurers of the safety of their employee, but were required only to exercise the degree of care which a man of ordinary prudence would have used under like circumstances and charged with like duty. *Murray v. R. R.,* 218 N.C. 392, 11 S.E. 2d 326; *Mintz v. R. R.,* 233 N.C. 607, 65 S.E. 2d 120; *West v. Tanning Co.,* 154 N.C. 44, 69 S.E. 687.

The plaintiff's injury appears to have been due to the accidental catching of some projection from a piece of scrap metal in his glove. In neither the character of the scrap metal nor in the glove furnished by defendants was negligence alleged. *Richardson v. Surety Co.*, 194 N.C. 469, 139 S.E. 839. The place where plaintiff was working was not unsafe. The evidence gives rise to the controlling inference that his injury resulted from an incident in the performance of his work which in the exercise of ordinary care could not reasonably have been anticipated. *Brown v. Scofields Co.*, 174 N.C. 4, 93 S.E. 381. The rule of liability flowing from breach of the duty of an employer, in the exercise of due care, to provide a reasonably safe place for his employee "does not, as a rule, apply to the use of ordinary everyday tools, nor to ordinary everyday conditions, requiring no special care, preparation or prevision: where the defects are readily observable, and where there was no good reason to suppose that the injury complained of would result." *Hoke, J.*, in *House v. R. R.*, 152 N.C. 397, 67 S.E. 981; *Newbern v. Great Atlantic & Pacific Tea Co.*, 68 F. 2d 523. There was no allegation or proof that plaintiff's work or movement was impeded by the scrap metal placed on the platform, or that his fall was caused thereby.

The plaintiff, however, contends that defendants negligently failed to provide him a reasonably safe place to work, in that there were no guard rails or other protective devices to prevent his falling from the platform into the pit. *Batson v. Laundry Co.*, 205 N.C. 93, 170 S.E. 136.

Plaintiff's evidence tended to show that in the ordinary conduct of defendants' business pieces of scrap metal of various sizes, weights and shapes were placed on the platform to be "fed" into the pit for compression. Some of these pieces were as large as half an automobile body, and many were small. Some were pushed in and some were thrown in. In view of the different sizes, shapes and character of the material described and the manner in which the business was being carried on, we find no basis for declaring that due care under the circumstances required the erecting of guard rails which would have rendered to a large degree the method of handling scrap metal in defendants' plant impracticable. The evidence does not warrant the view that a guard rail was required to meet a danger not reasonably to be anticipated. There was no moving machinery to be guarded against such as would invoke the rule applied in *Boswell v. Hosiery Mills*, 191 N.C. 549, 132 S.E. 598. Here was merely an opening six feet long and six feet wide into which the plaintiff pushed or threw scrap metal. A rail along the platform in front of the pit such as plaintiff argued should have been erected, would have required that bulky material be lifted up to be thrown over and into the pit and small pieces cast over. In the absence of any record of a previous accident like that which happened to the plaintiff, the unusual manner of plaintiff's injury

could hardly have been anticipated. The law does not require omniscience.

Whether the failure to provide guard rails is evidence of a breach of the duty to exercise due care depends upon the nature of the work. In the absence of a showing of conditions dangerous to one possessing average intelligence and the ordinary capacity of a laborer, the employer is not required to provide devices which will interfere with the use of the place or the instrumentalities sought to be guarded, or which will make it unsuitable for the work required. 56 C.J.S. 986. Failure to provide a guard rail for a known and visible opening necessary for and continuously used in the employer's business may not be imputed to the employer for negligence where there is no special circumstance which would render the work of throwing scrap metal into the opening peculiarly dangerous. 3 Labatt's Master & Servant 979. The employer is not required to guard instrumentalities in such a way as to materially interfere with their practical use and efficiency. *R. R. v. Bell,* 149 Va. 720 (726).

Plaintiff cites in support of his position that it was the duty of defendants to provide guard rails, *West v. Tanning Co.,* 154 N.C. 44, 69 S.E. 687; *Lynch v. Veneer Co.,* 169 N.C. 169, 85 S.E. 289, and *Beck v. Tanning Co.,* 179 N.C. 123, 101 S.E. 498. But we think the facts underlying the ruling in those cases are distinguishable from those in the case at bar.

In *West v. Tanning Co., supra,* the plaintiff's intestate was required to use a narrow walkway near large vats containing boiling water used in extracting tannic acid from chips of wood. This walkway was covered with oil and grease and the covering of the vat had decayed. Plaintiff's intestate slipped on the greased surface of the platform and fell into the vat, and sustained injury from which he died. It was held motion for judgment of nonsuit was properly denied.

In *Lynch v. Veneer Co., supra,* the plaintiff in that case fell into a large vat used for softening logs for veneering. Until shortly before plaintiff's injury a piece of scantling extending ten or twelve inches above the floor had been placed along the side of the vat, but this had rotted and had not been replaced. Plaintiff was required to peel and drag logs on a narrow platform saturated with water, covered with slick bark and adjoining deep vats filled with boiling water. In handling a log plaintiff slipped on a piece of bark and fell into an uncovered vat. Verdict and judgment for plaintiff were upheld.

In *Beck v. Tanning Co., supra,* plaintiff fell into a tub which he was filling with chipped wood for boiling in order to extract acid therefrom. There was evidence that obstructions were permitted in the walkways used which caused Beck to stumble and fall into one of the tubs. There was insufficient light and the cover was off the tub. It was held that the evidence warranted submission of the case to the jury.

After a careful examination of the evidence offered by the plaintiff as shown by the record in this case, we are constrained to hold that it is insufficient to warrant submission to the jury on the issue of actionable negligence. The plaintiff's injury was due to an accident for which the defendants cannot be held legally liable. Unfortunately for the plaintiff his employers had exempted themselves from the provisions of the Workmen's Compensation Act, and recovery for plaintiff's injury, which would otherwise have been compensable under that Act, was made to depend upon proof of negligence which plaintiff in this case was unable to furnish.

There was error in denying defendants' motion for judgment of nonsuit, and the judgment must be

Reversed.

JOHNSON, J., dissenting: I have no complaint with the principles of law discussed in the majority opinion, but get a different impression as to the factual implications of the record.

The defendant, Alex Weinstein, referring to the job of feeding the press, testified: "I realized a man of his age couldn't do it. . . . When I hired him I told him that he had no business up to the press house,—that wasn't his duties,—his duties was to keep these roads clean. I never saw him up there, and if I had, I would have discharged him immediately. . . . he stated he was 67 years old . . . and in my opinion he is older than that . . . I certainly wouldn't have put him feeding the press. I realized a man of his age could not do it."

The defendants' witness Ernest Little also testified that he told the plaintiff on one occasion not to stay up on the press platform,—told him "I would go on back and do my job that the man give me, because you might fall into that press."

Yet from time to time the plaintiff was called upon to supply temporarily for persons assigned regularly at feeding the press. This with the knowledge and acquiescence of the foreman, and as the defendant's witness Sanders put it, "it was a matter of common knowledge that Ellison (the plaintiff) did from time to time supply there in feeding the press."

The defendants had rejected the provisions of the Workmen's Compensation Act. This eliminated their common law defenses of assumption of risk and contributory negligence. With these gone, it seems to me there was enough evidence to take the case to the jury on the single issue of actionable negligence.

ERVIN and VALENTINE, JJ., concur in dissent.

I. W. LEGGETT v. SOUTHEASTERN PEOPLE'S COLLEGE, INC.

(Filed 12 December, 1951.)

1. Appeal and Error § 8—

A claimant may not contend in the Supreme Court for a higher priority for the payment of its claim than it asserted either before the receiver or the Superior Court on appeal, since the appeal to the Supreme Court *ex necessitate* follows the theory of the trial in the lower court.

2. Receivers § 12c—

The lien of employees for wages for the two months next preceding the appointment of a receiver, G.S. 55-136, does not exist so long as the property remains in the hands of the insolvent but arises only when the property of the insolvent is taken *in custodia legis* for the purpose of distribution among the creditors, and though denominated a lien, in practical effect it is a right of priority of payment requiring neither levy upon nor sequestration of property by the lienee.

3. Receivers § 12c—

The right of the United States to priority of payment of taxes out of the general fund of the debtor in the hands of the receiver or assignee attaches upon the appointment of the receiver or the date of the debtor's assignment for the benefit of creditors. 31 U.S.C.A. sec. 191 (R.S. 3466).

4. Same—

The receiver was appointed 12 January 1950. *Held:* United States income taxes for the year 1949 were due 1 January 1950, and the United States is entitled to priority of payment of the taxes under 31 U.S.C.A. sec. 191 without assessment, registration, sequestration or levy, notwithstanding that the taxpayer was not required to report and pay same until a later date.

5. Courts § 12—

An Act of Congress adopted within the field of legislative powers granted to the United States Government by the Constitution is a part of the supreme law of the land, and constitutional and statutory provisions of the State in conflict therewith cannot be given effect. U. S. Const., Art. VI, sec. 2.

6. Receivers § 12c—

The receiver was appointed 12 January 1950. *Held:* The right of the United States to priority of payment for income taxes for the year 1949, 31 U.S.C.A. sec. 191, and the lien of the employees for wages for the two months next preceding the appointment of the receiver, G.S. 55-136, came into being at the same time, and the claim for income taxes has priority, since the Federal statute takes precedence and since the claim of the employees, though denominated a lien, is not a lien on specific property so as to bring it within the exceptive provisions of 26 U.S.C.A. sec. 3672.

APPEAL by the United States, creditor, from *Bennett, Special J.*, June Extra Term, 1951, MECKLENBURG.

Receivership proceeding heard on the report of the receiver allowing and fixing the priorities of claims filed for payment.

The defendant was adjudged insolvent and on 12 January, 1950, a receiver was appointed to liquidate its assets. Claims were filed as follows:

(1) By employees of the corporation aggregating more than $65,000, claiming a lien on the assets of the corporation for the payment thereof under G.S. 55-136;

(2) By the plaintiff who asserts a debt secured by mortgage;

(3) By the Federal Government for (a) income tax, Federal insurance contribution and unemployment taxes, with interest, penalties, etc., in the amount of $4,467.38, (b) overpayments for services rendered veterans, allegedly procured by fraud, and, (c) fines imposed in criminal proceedings: $88,000;

(4) By the State of North Carolina for income tax, employer's contributions, etc., with penalties and interest in the sum of $1,417.99; and

(5) By unsecured creditors in the amount of $27,475.31.

The receiver disallowed the claim of the plaintiff and also the claim of the Government for fraudulent overpayments. He allowed the other claims and classified them for payment as follows:

(1) Employees allowed $31,002.74 as secured claims under G.S. 55-136, classified first in order of payment, and $6,519.70, classified as unsecured and placed in the fourth class.

(2) The claim by the United States for taxes in the amount of $3,541.29 plus interest, classified second in order of payment.

(3) The State of North Carolina claim for taxes in the amount of $1,417.99, classified third in order of payment.

(4) Unsecured claims allowed in the amount of $17,683.36, classified fourth in order of payment.

(5) United States Government fines, allowed $88,000, classified fifth in order of payment.

The United States Government excepted and appealed. In its exceptions it requested that its claim for fines imposed be classified as an unsecured claim to be paid in the same order as other unsecured claims.

On the appeal the court below, in ruling on the conflicting claims to priority between the employees and the Federal Government and as a basis for its decision, found that the taxes due the Federal Government for the year 1949 for which the Federal Government filed claim did not become due until after the appointment of the receiver. It likewise, by consent, allowed $30,000 for overpayments made by the Federal Government to the defendant for services rendered veterans and, as so amended, affirmed the report of the receiver. The court expressly rejected the Government's claim for penalties but allowed its claim for interest.

The United States excepted for that (1) the court erred in overruling its exception to the report of the receiver and entering the judgment which appears of record; (2) the court erroneously concluded that the lien on the assets of the corporation created by G.S. 55-136 in favor of employees for wages due for services rendered within two months next preceding the appointment of the receiver is entitled to priority of payment over the claim of the United States for taxes, interest, and penalties for that "none of the taxes became due and payable until after the appointment of the Receiver"; (3) the court affirmed the report of the receiver "insofar as it allows priority of payment of claims of employees for wages earned within two months preceding the date of the Receivership, over claims of the United States for . . . overpayment of vouchers, because of alleged fraud on the part of" the defendant; and (4) the court disallowed its claim for penalties. Having so excepted, the United States Government appealed.

Theron Lamar Caudle, Assistant Attorney General; Ellis N. Slack, A. F. Prescott, Homer R. Miller, Special Assistants to the Attorney General; Thomas A. Uzzell, Jr., United States Attorney; Frances H. Fairley, Assistant United States Attorney; for claimant appellant.

Covington & Lobdell for receiver appellee.

BARNHILL, J. The appellant, without waiving its position in respect thereto, withdraws its exception to the disallowance of the small amount of penalties claimed by it, and the first exception is general in nature, presenting no question for decision.

In its appeal to the superior court and in the hearing in the court below on its exceptions to the report of the receiver, the appellant took the position that its claim for fraudulent overpayments should be classified in the fourth class along with other unsecured claims. There was no exception to the receiver's report which presented any other contention. Even so, pending its appeal to this Court, it takes another mount and seeks to ride a different horse here. This it may not do.

It is well established that a party to a suit may not change his position with respect to a material matter during the course of litigation. *Hill v. R. R.*, 178 N.C. 607, 101 S.E. 376; *Lindsey v. Mitchell*, 174 N.C. 458, 93 S.E. 955. "Especially is this so where the change of front is sought to be made between the trial and the appellate courts." *Shipp v. Stage Lines*, 192 N.C. 475, 135 S.E. 339; *Ingram v. Power Co.*, 181 N.C. 359, 107 S.E. 209; *Coble v. Barringer*, 171 N.C. 445, 88 S.E. 518. After he has elected to try his case on one theory in the lower court, he may not be permitted to change his attitude with respect thereto on appeal. *Walker v. Burt*, 182 N.C. 325, 109 S.E. 43, and cases cited. Instead, the appeal,

ex necessitate, must follow the theory of the trial in the court below. *Hargett v. Lee,* 206 N.C. 536, 174 S.E. 498, and cases cited; *Wilson v. Hood, Comr. of Banks,* 208 N.C. 200, 179 S.E. 660.

It is apparent that the two claims clearly entitled to priority in payment exceed in amount the total available assets of the insolvent corporation. Therefore, the question whether this claim should be classified as an unsecured claim is, on this record, purely academic. Decision thereof should await the time when it is more clearly presented in a case in which it is a material issue. We therefore pass the question without decision other than to say the contention of the Government, made for the first time in this Court, that it is entitled to first priority in payment may not now be considered.

As between the claims of the employees secured under the terms of G.S. 55-136 and the claim of the United States Government for taxes and interest, which is entitled to priority in payment? This is the crux of the controversy. The court below answered in favor of the employees. A careful examination of the authorities leads us to the contrary view.

31 U.S.C.A. sec. 191 (R.S. 3466) provides that "whenever any person indebted to the United States is insolvent . . . the debts due to the United States shall be first satisfied . . .," and G.S. 55-136 gives the employees a lien on the property of their insolvent employer in this language: "In case of the insolvency of a corporation . . . all persons doing labor or service of whatever character in its regular employment have a lien upon the assets thereof for the amount of wages due to them for all labor, work, and services rendered within two months next preceding the date when proceedings in insolvency were actually instituted and begun against the corporation . . . which lien is prior to all other liens that can be acquired against such assets . . ."

While the Federal statute merely uses the word "insolvent," it is now well established that no right to priority of payment comes into being under the statute, however insolvent the debtor may be, until or unless the debtor is divested of possession of his property for the purpose of liquidation. In receivership proceedings, the receiver, in distributing the assets among the creditors, shall first pay the debts due the United States. It is a mere right of prior payment out of the general fund of the debtor in the hands of the receiver or assignee which attaches upon the appointment of a receiver or upon the date of the debtor's assignment for the benefit of creditors. *Bishop v. Black,* 233 N.C. 333.

Likewise, the lien of the employees arises upon the sequestration of the property of the insolvent for the purpose of liquidation, or rather the institution of a proceeding for that purpose. Thus the right of priority of payment of the claim of the United States Government and the lien of the employees are created and come into being contemporaneously by

virtue of one and the same act. Neither exists so long as the property remains in the hands of the insolvent. Both arise when the property is taken *in custodia legis* for the purpose of distribution among the creditors. Each is a legislative directive as to such distribution.

In the first place, however, the appellee contends that on this record the question is not presented for the reason there was no debt due the United States at the time the receiver was appointed; that since there was no debt due at that time, no right of priority of payment exists; that the right of priority is created in respect to debts due the Government at the time the property is segregated for the benefit of creditors and the rights and priorities of creditors are to be fixed as of that time. *U. S. v. Marxen,* 307 U.S. 200, 83 L. Ed. 1222.

This brings us to a construction of the meaning of "debts due" as used in the Federal statute. The term does not connote a debt past due or in default. It simply means debts owed or owing; that which one contracts or is under legal obligation to pay; a legal charge, fee, toll, tribute, or the like. Webster, New Int. Dic.; Black, Law Dic., 3rd Ed. It denotes a state of indebtedness. *U. S. v. The State Bank of N. C.,* 31 U.S. 29, 8 L. Ed. 308; *N. J. v. Anderson,* 203 U.S. 483, 51 L. Ed. 284; *Kavanas v. Mead,* 171 F. 2d 195. A debt due is a debt accrued, and a debt is accrued when all events have occurred which fix and determine the liability of the debtor to the creditor. *Comr. v. Oil Co.,* 148 F. 2d 671, Cert. denied 325 U.S. 881; *U. S. v. Anderson,* 269 U.S. 422, 70 L. Ed. 347.

The taxes which are the subject matter of the Government's claim are taxes due for the year 1949. While the taxpayer was not required to report and pay the same until a later date, they accrued during the year 1949 and were payable as of the first day of January 1950. The amount thereof was readily ascertainable. The receiver was appointed 12 January 1950. So then, at that time there was a debt due the United States within the meaning of 31 U.S.C.A. sec. 191. *Bishop v. Black, supra; Price v. U. S.,* 269 U.S. 492, 70 L. Ed. 373; *Ill. v. Campbell,* 329 U.S. 362, 91 L. Ed. 348.

As the Federal statute creates a right to prior payment out of the assets of an insolvent, and not a lien against his property, assessment, registration, or sequestration by levy is not required. *Bishop v. Black, supra; U. S. v. Okla.,* 261 U.S. 253, 67 L. Ed. 638; *U. S. v. Chamberlain,* 219 U.S. 250, 55 L. Ed. 204; *U. S. v. Ayer,* 12 F. 2d 194; *Meyersdale Fuel Co. v. U. S.,* 44 F. 2d 437.

Thus it appears that the respective statutes upon which the parties rely are in irreconcilable conflict. Both cannot be given full force and effect. One must yield to the other. Which takes precedence?

An Act of the Congress adopted within the field of legislative powers granted to the national Government by the Constitution is a part of the

supreme law of the land "and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." U. S. Const., Art. VI, sec. 2.

Hence, the priority of payment demanded by R.S. 3466, 31 U.S.C.A. sec. 191, cannot be set aside by State legislation. *Michigan v. U. S.,* 317 U.S. 338, 87 L. Ed. 312, and cases cited; *U. S. v. Texas,* 314 U.S. 480, 86 L. Ed. 356. It must be observed, notwithstanding the positive language of G.S. 55-136. *U. S. v. Emory,* 314 U.S. 423, 86 L. Ed. 315.

The lien of the employees is not specific or preferred in the sense necessary to give it precedence over the claim of the Government under the provisions of 26 U.S.C.A. sec. 3672. It is not a lien that may be recorded. Neither may there be any levy upon or sequestration of property by the lienee for the satisfaction thereof. It arises only upon the institution of an action, the purpose of which is the sequestration of the property in the hands of the court for the purpose of liquidation, and the segregation of the property by the court is for the benefit of all the creditors and not the employees alone. This is not sufficient to bring the lien within the exceptive provisions of 26 U.S.C.A. sec. 3672.

While the statute creates what is denominated a lien, it, in practical effect, grants to the employees of the insolvent a right of payment of the designated wages prior to the payment of any other claim, secured or unsecured. *Cf. Roberts v. Manufacturing Co.,* 169 N.C. 27, 85 S.E. 45. This preference is subordinate to the right of the appellant under the provisions of R.S. 3466, 31 U.S.C.A. sec. 191.

It follows that the court below erred in directing the payment of the secured claims of the employees prior to the payment of the claim for taxes and interest filed by the appellant herein. To that extent the judgment entered is modified and, as so modified, the same is affirmed.

Modified and affirmed.

JOE EVANS, JR., v. CREED C. MORROW AND CREED C. MORROW, ADMINISTRATOR OF THE ESTATE OF CREED C. MORROW, JR.

(Filed 12 December, 1951.)

1. Injunctions § 4f—

Our courts will not interfere with the right of a resident of this State to institute and prosecute an action in another state except for compelling equities.

2. Same—

A citizen of this State will not be enjoined from instituting and prosecuting a suit in another state merely because (1) of convenience or econ-

omy, (2) a difference in rules of practice and procedure, (3) distrust of the competency of the courts of the other state to do justice in cases within its jurisdiction.

3. Courts § 15—

A cause of action for wrongful death resulting from an accident occurring in another state is governed as to all matters of substantive law by the laws of such other state.

4. Death § 5—

Under the laws of South Carolina, only the executor or administrator may maintain an action for wrongful death.

5. Injunctions § 4f—North Carolina court held not to have acquired prior jurisdiction of action for wrongful death.

A collision occurred between a truck and an automobile in South Carolina, resulting in the death of the driver of the car and damage to the truck and its cargo. The owner of the truck instituted suit here against the father of the driver of the car, seeking recovery on the ground of *respondeat superior* and the family purpose doctrine. Thereafter, the driver's father qualified as administrator and instituted suit in South Carolina for wrongful death. Later, the father, in his representative capacity, was brought in as a party in the North Carolina suit. *Held:* The North Carolina court did not acquire prior jurisdiction of the action for wrongful death, and the administrator may not be enjoined from maintaining his suit in South Carolina on the ground that our courts acquired prior jurisdiction of the action, or on the ground that it was the duty of the administrator to plead his cause of action for wrongful death as a counterclaim in the North Carolina suit.

6. Automobiles § 24½b: Negligence § 15—

Where the driver of a car is killed in a collision with a truck, the truck owner may sue the owner of the car individually on the theory of *respondeat superior* or, when the car owner has qualified as administrator of the driver, as administrator, either jointly or separately.

7. Same—

Where the injured party elects to sue the administrator of the tort-feasor in his individual capacity upon the theory of *respondeat superior* and not in his capacity as administrator, the defendant is bound by plaintiff's election, and is powerless in law to compel plaintiff to sue him in his representative capacity.

8. Torts § 1—

The exercise of a legal right in an equitable manner cannot be converted into a tort by a supposed wrongful intent.

9. Injunction § 4f—

A resident of this State cannot be enjoined from prosecuting an action in another state in an equitable manner in accordance with his legal rights on the ground of an asserted inequitable intent.

APPEAL by Creed C. Morrow, Administrator of Creed C. Morrow, Jr., from *Bennett, Special Judge,* at May Term, 1951, of MECKLENBURG.

Civil action in which one resident of North Carolina seeks to restrain another from prosecuting a judicial proceeding in South Carolina.

For convenience of narration, Joe Evans, Jr., a resident of Mecklenburg County, North Carolina, is called Evans, and Creed C. Morrow, a resident of Rowan County, North Carolina, is designated as Morrow.

On 11 February, 1950, a Studebaker automobile operated by Morrow's son, Creed C. Morrow, Jr., and a loaded tractor-trailer combination owned by Evans and driven by his duly authorized agent collided on a highway in Lancaster County, South Carolina, killing Creed C. Morrow, Jr., and damaging the tractor-trailer combination and its cargo.

On 9 March, 1950, Evans brought an action entitled "Joe Evans, Jr., *versus* Creed C. Morrow" in the Superior Court of Mecklenburg County, North Carolina, to recover damages of Morrow as an individual for the injuries to the tractor-trailer combination and its cargo. The complaint in this action, which is herein called the North Carolina suit, alleges, in substance, that these injuries resulted from the negligent operation of the Studebaker by Creed C. Morrow, Jr., and that Morrow is liable to Evans therefor in his individual capacity for these reasons: (1) That Creed C. Morrow, Jr., was driving the Studebaker on a business mission for his father at the time of the collision; and (2) that Morrow owned and maintained the Studebaker as a family purpose car and permitted it to be driven by his son on the occasion of the collision for family purposes. The answer of Morrow denies all material allegations of the complaint.

On 15 April, 1950, Morrow qualified as administrator of Creed C. Morrow, Jr., in the Superior Court of Rowan County, North Carolina, where the decedent had his domicile.

On 22 September, 1950, Morrow, as administrator of Creed C. Morrow, Jr., brought an action against Evans under the South Carolina wrongful death statute in the Court of Common Pleas of Lancaster County, South Carolina, to recover damages for the death of his son. The complaint in this action, which is herein designated as the South Carolina suit, alleges, in substance, that the death of the intestate was occasioned by the actionable negligence of the driver of the tractor-trailer combination while carrying out a business mission for Evans. Summons was served upon the Chief Highway Commissioner of South Carolina as process agent of Evans pursuant to South Carolina law on 23 September, 1950, and thereafter, to wit, on 12 October, 1950, Evans filed an answer in the South Carolina suit, denying the material allegations of the complaint and pleading a counterclaim against the administrator for the injuries to the tractor-trailer combination and its cargo.

Meantime, to wit, on 9 October, 1950, Judge George B. Patton, acting on motion of Evans, entered an order in the North Carolina suit authorizing Evans to bring Morrow, as administrator of his son, into that suit as a party defendant by summons, and to file an amended complaint in it seeking damages from Morrow for the injuries to the tractor-trailer combination and its cargo in both his individual and his representative capacities. On 2 May, 1951, this order was affirmed by the North Carolina Supreme Court, which reviewed it on the appeal of Morrow, as administrator, who had entered a special appearance before Judge Patton and opposed the entry of the order on the ground that the court had no jurisdiction under G.S. 1-78 to make him a party in his representative capacity to an action in any county other than Rowan, the county of his qualification. *Evans v. Morrow,* 233 N.C. 562, 64 S.E. 2d 842. Evans has not yet caused summons to be served on Morrow, as administrator, in the North Carolina suit, or filed an amended complaint in that suit asking relief against Morrow in his representative capacity.

The persons qualified to testify as witnesses in litigation arising out of the collision between the Studebaker car and the tractor-trailer combination are equally divided in residence between North Carolina and South Carolina.

The South Carolina suit was set for trial on 16 May, 1951. Six days earlier, Judge Harold K. Bennett, acting on an *ex parte* application of Evans, issued an order in the North Carolina suit temporarily restraining Morrow, as administrator, from prosecuting the South Carolina suit, and requiring Morrow, as administrator, to show cause before him in the Superior Court of Mecklenburg County, North Carolina, on 22 May, 1951, why the restraining order should not be continued in force until the final determination of the North Carolina suit. Morrow, as administrator, entered what he called "a special appearance" before Judge Bennett on the show-cause day, and opposed the continuance of the restraining order on these grounds: That the court had no jurisdiction of him in his representative capacity because summons had not been served on him as administrator; and that the continuance of the restraining order could not be justified on the merits.

On the show-cause day, Judge Bennett found facts conforming to those stated above, and made this declaration respecting adjective law: North Carolina procedure makes it certain that all matters in controversy between Evans and Morrow in his representative capacity as well as all matters in controversy between Evans and Morrow in his individual capacity can be determined in the North Carolina suit, whereas South Carolina procedure leaves it doubtful whether Morrow as an individual can be served with summons, or made a party to the South Carolina suit between Morrow, administrator, and Evans at the instance of Evans.

Judge Bennett thereupon concluded that it would be "unjust and inequitable" for Morrow, administrator, to prosecute the South Carolina suit against Evans for these reasons:

1. That Evans will be put to extra expense and inconvenience in defending the South Carolina suit if the administrator is not compelled to litigate his claim against Evans for damages for the wrongful death of his intestate in the North Carolina suit.

2. That Evans will be deprived of the advantages of the more favorable procedural rules applicable to the North Carolina suit if the administrator is permitted to prosecute the South Carolina suit.

3. That the South Carolina court may render a decision in respect to legal responsibility for the collision different from that of the North Carolina court in the event both actions proceed to trial.

4. That the Superior Court of Mecklenburg County, North Carolina, acquired prior jurisdiction of the wrongful death action when Evans sued Morrow individually in the North Carolina suit.

5. That it was the duty of Morrow as administrator to make himself a party defendant in the North Carolina suit, and to plead the cause of action for wrongful death as a counterclaim in it instead of bringing the South Carolina suit.

6. That the administrator brought the South Carolina suit with intent to deprive Evans of the beneficial provisions of North Carolina procedure, and to confuse, frustrate, and forestall the North Carolina suit.

Judge Bennett thereupon entered judgment in the North Carolina suit permanently enjoining Morrow, as administrator, from prosecuting the South Carolina suit against Evans; and Morrow, as administrator, excepted to such judgment and appealed, assigning errors.

Smathers & Carpenter and William B. Webb for plaintiff, Joe Evans, Jr., appellee.

Frank H. Kennedy and Marcus T. Hickman for Creed C. Morrow, administrator of Creed C. Morrow, Jr., appellant.

ERVIN, J. Where a sufficient equitable ground is shown, the Superior Court has power as a court of equity to enjoin a citizen of this State subject to its jurisdiction from prosecuting a judicial proceeding against another citizen in another state. *Wierse v. Thomas,* 145 N.C. 261, 59 S.E. 58, 15 L.R.A. (N.S.) 1008, 122 Am. S. R. 446. As a general rule, however, citizens of this State are free to go into other states to pursue such remedies and secure such relief as may there be available. 28 Am. Jur., Injunctions, section 204. In consequence, the question on this appeal is whether the plaintiff showed a sufficient equity in the court below to deprive the appellant of a legal right commonly possessed by

citizens. *Boston & M. R. R. v. Whitehead,* 307 Mass. 106, 29 N.E. 2d 916.

These propositions are well established in this field of equity jurisprudence:

1. A court of equity will not restrain a citizen from invoking the aid of the courts of another state simply because it may be somewhat more convenient or somewhat less expensive to his adversary to compel him to carry on his litigation at home. *Carpenter v. Hanes,* 162 N.C. 46, 77 S.E. 1101, Ann. Cas. 1915 A, 332; *McWhorter v. Williams,* 228 Ala. 632, 155 So. 309; *Illinois Life Ins. Co. v. Prentiss,* 277 Ill. 383, 115 N.E. 554; *Mason v. Harlow,* 91 Kan. 807, 139 P. 384; *Boston & M. R. R. v. Whitehead, supra; Paramount Pictures v. Blumenthal,* 256 App. Div. 756, 11 N.Y.S. 2d 768; *American Express Co. v. Fox,* 135 Tenn. 489, 187 S.W. 1117, Ann. Cas. 1918 B, 1148.

2. A court of equity will not grant an injunction against an action in another state on the ground that the rules of practice and procedure in the state where the injunction is asked may differ from those which obtain in the state where the action is brought. *Carpenter v. Hanes, supra; Standard Oil Co. of Louisiana v. Reddick,* 202 Ark. 393, 150 S.W. 2d 612; *Bavuso v. Angwin,* 166 Kan. 469, 201 P. 2d 1057; *Missouri Kansas Texas R. Co. v. Ball,* 126 Kan. 745, 271 P. 313; *New Orleans Brewing Co. v. Cahall,* 188 La. 749, 178 So. 339, 115 A.L.R. 231; *Lancaster v. Dunn,* 153 La. 15, 95 So. 385; *Boston & M. R. R. v. Whitehead, supra; Tri-State Transit Co. of Louisiana v. Mondy,* 194 Miss. 714, 12 So. 2d 920; *E. J. Platte Fisheries v. Wadford,* 170 Miss. 617, 155 So. 161; *Delaware, L. & W. R. Co.,* 300 Pa. 291, 150 A. 475, 69 A.L.R. 588; *Chicago M. & St. P. Ry. Co. v. McGinley,* 175 Wis. 565, 185 N.W. 218.

3. A court of equity will not enjoin judicial proceedings in the court of another state through distrust of the competency of such court to do justice in cases within its jurisdiction. *Carpenter v. Hanes, supra; Jones v. Hughes,* 156 Iowa 684, 137 N.W. 1023, 42 L.R.A. (N.S.) 502; *New Orleans Brewing Co. v. Cahall, supra; Missouri P. R. Co. v. Harden,* 158 La. 889, 105 So. 2; *Columbian Nat. Life Ins. Co. v. Cross,* 298 Mass. 47, 9 N.E. 2d 402; *United States Fire Ins. Co. v. Fleenor,* 179 Va. 268, 18 S.E. 2d 901.

Under these rules, the first, second, and third grounds assigned for the issuance of the injunction in the case at bar do not disclose any equities entitling Evans to such relief.

There is no basis for the conclusion that the Superior Court of Mecklenburg County acquired prior jurisdiction of the wrongful death action when Evans sued Morrow individually in the North Carolina suit. All matters of substantive law relating to the wrongful death action are governed by the law of South Carolina, where the fatal accident occurred.

Wise v. Hollowell, 205 N.C. 286, 171 S.E. 82. Under that law, nobody can sue to enforce a cause of action for death by wrongful act except the executor or administrator of the decedent. Code of Laws of South Carolina, 1942, section 412; *Harrill v. R. R.,* 132 N.C. 655, 44 S.E. 109; *In re Mayo's Estate,* 60 S.C. 401, 38 S.E. 634, 54 L.R.A. 660; *Edgar v. Castello,* 14 S.C. 20, 37 Am. R. 714; *Heath v. Smyther,* 19 F. Supp. 1020. For this reason, Evans conferred no power whatever upon the Superior Court of Mecklenburg County to try and determine the wrongful death action by suing Morrow as an individual for the injuries to the tractor-trailer combination and its cargo. *Journigan v. Ice Co.,* 233 N.C. 180, 63 S.E. 2d 183; *Bennett v. R. R.,* 159 N.C. 345, 74 S.E. 883. As the question does not arise on the present record, we express no opinion as to whether the injunction would have been proper if the North Carolina court had obtained jurisdiction of the wrongful death action prior to the South Carolina court.

There is likewise no foundation for the somewhat novel notion that it was the duty of Morrow as administrator to make himself a party defendant in the North Carolina suit, and to plead the cause of action for wrongful death as a counterclaim in it instead of bringing the South Carolina suit. This is plain when due heed is paid to the significant circumstances that Evans seeks to hold Morrow individually liable to him for the supposed negligence of Creed C. Morrow, Jr., under the family purpose rule and the *respondeat superior* doctrine, and that Morrow as administrator stands in the shoes of Creed C. Morrow, Jr. These things being true, Evans had an absolute legal right to pursue either of these courses at his election: (1) To sue Morrow, the individual, and Morrow, the administrator, jointly; or (2) to sue Morrow, the individual, or Morrow, the administrator, separately. *Hough v. R. R.,* 144 N.C. 692, 57 S.E. 464; *Miller v. Strauss,* 38 Ga. App. 781, 145 S.E. 501; *Martin v. Starr,* 255 Ill. App. 189; 57 C.J.S., Master and Servant, section 579; 61 C.J.S., Motor Vehicles, section 500. Evans elected to sue Morrow, the individual, separately when he brought the North Carolina suit. This election was binding on Morrow, the administrator, who was powerless in law to compel Evans to sue him in his representative capacity. *Charnock v. Taylor,* 223 N.C. 360, 26 S.E. 2d 911, 148 A.L.R. 1126; *Hough v. R. R., supra;* 57 C.J.S., Master and Servant, section 613.

The statements in the judgment relating to the supposed intent of the administrator in bringing the South Carolina suit constitute factual inferences rather than legal conclusions. The inferences are *non sequiturs* of the facts found by the court. Moreover, they are immaterial to the controversy on the present record. Since the administrator exercised his legal right in an equitable manner, his supposed intent did not convert his innocent acts into inequitable conduct.

For the reasons given, the judgment is reversed, and the injunction is vacated.

Reversed.

MAUDE GRAY EFIRD v. PAUL H. EFIRD, JR., JOHN E. EFIRD, MAY GRAY EFIRD MASON AND JENNIE ANN EFIRD ALLEN, INDIVIDUALLY AND AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF PAUL H. EFIRD, SR.

(Filed 12 December, 1951.)

1. Wills § 31—

The intention of testator as gathered from the entire instrument is the primary object in interpreting the will, and must be given effect unless contrary to some rule of law or at variance with public policy.

2. Wills § 33a—*Language of will in this case held sufficient to constitute devise by implication.*

Title to one of the lots constituting the home place was in testator's name individually. In two items he referred to the property as held by him and his wife as tenants by entirety and stated that she would automatically own the estate, and gave her all furniture and household effects therein, and also bequeathed to her a part of his general estate. By later item he stated that "after the above properties which have been given to my wife" the remainder should be divided equally among his four children. *Held:* There was not merely an incorrect description of an instrument extrinsic to the will but also language evincing the unmistakable intent of testator that his wife should have the home place, and such intent must be given effect.

APPEAL by defendants from *Patton, Special Judge,* October Civil Term, 1951, of MECKLENBURG.

This is an action brought pursuant to the provisions of the Uniform Declaratory Judgment Act, G.S. 1-253, *et seq.,* for the construction of certain provisions contained in the last will and testament of the late Paul H. Efird, Sr., which instrument has been duly probated in the office of the Clerk of the Superior Court of Mecklenburg County, North Carolina. The pertinent parts of the will read as follows:

"ITEM III. Upon my death, if my wife, Maude Gray Efird, be living, she will automatically own our home place located at 224 Hermitage Road, Charlotte, North Carolina, and any other real estate that she and I may own as tenants by the entirety. I give and bequeath to my said wife, Maude Gray Efird, any automobile or automobiles that I may own at the time of my death and also all of my right, title and interest in and to all furniture, household effects and other tangible property contained in our family residence, to be hers absolutely and forever.

"ITEM IV. After the personalty hereinabove bequeathed to my wife has been given to her, and she has received the real estate that may be owned at the time of my death by her and me as tenants by the entirety, and after the debts of my estate shall have been paid from the *corpus* of my general estate, but before any death, inheritance or estate taxes shall have been considered or taken into effect, my said wife, Maude Gray Efird, shall have, and I hereby give, bequeath and devise to her outright, a two-sixths interest in all of my estate.

"ITEM V. After all of my debts shall have been paid, and after the above properties shall have been given to my wife, and after all death, estate, inheritance or other similar taxes and duties shall become payable with respect to any property passing to any beneficiary hereunder or with respect to the proceeds of any policy or policies of insurance on my life or with respect to any other property which shall be included in my gross estate, for the purpose of such taxes and any and all other taxes properly chargeable against my estate, or any beneficiary hereunder, shall have been paid, from what is then left in my estate, no part of the said taxes to be charged to any particular beneficiary,—then what remains of my estate shall be divided one-fourth to my daughter, May Gray Efird Mason; one-fourth to my daughter, Jennie Ann Efird Allen; one-fourth to my son, Paul H. Efird, Jr.; and one-fourth to my son, John E. Efird. If any one of these, my children, shall predecease me, then the portion of my estate that would have gone to such deceased child of mine shall go to his or her issue, the issue of any deceased child to take what his or her parent would have taken had he or she not predeceased me."

The controversy arises out of the fact that the testator was under the impression that his home place located at 224 Hermitage Road, Charlotte, North Carolina, where he and his wife, the plaintiff, had lived for more than twenty-five years prior to his death, on 23 September, 1948, was owned by them as tenants by the entirety, when as a matter of fact, one of the two lots comprising the home place, being Lot 1 in Block 3A, of Myers Park, and the one on which the residence is located, valued at $30,000, had not been held by the parties as tenants by the entirety, but by Paul H. Efird, Sr., individually. The other lot adjacent thereto which is vacant, except for the outhouses and garage located thereon, was conveyed to and held by Paul H. Efird and his wife, Maude Gray Efird, as tenants by the entirety.

When this cause came on to be heard, the parties waived a trial by jury and agreed that the court should hear the evidence, find the facts, and enter judgment. The court found as a fact, and concluded as a matter of law, that Paul H. Efird, Sr., by his last will and testament devised to his wife, Maude Gray Efird, among other things, Lot 1 in Block 3A of Myers Park, together with the house located thereon, and that she is the

owner thereof in fee simple. The court further held that no part of the value of the aforesaid Lot 1, together with the house located thereon, shall be charged to the said Maude Gray Efird in arriving at the "two-sixths' interest" in all of his estate, bequeathed and devised to the wife in Item IV of the aforesaid last will and testament.

From the judgment so entered, the defendants appeal, and assign error.

David J. Craig, Jr., for defendants, appellants.

Pierce & Blakeney and Richard E. Wardlow for plaintiff, appellee.

DENNY, J. The primary object in interpreting a will is to ascertain what disposition the testator intended to make of his estate. *Bank v. Brawley,* 231 N.C. 687, 58 S.E. 2d 706; *Carroll v. Herring,* 180 N.C. 369, 104 S.E. 892. Consequently, the intention of the testator is the polar star that must guide the courts in the interpretation of a will. *Buffaloe v. Blalock,* 232 N.C. 105, 59 S.E. 2d 625; *Elmore v. Austin,* 232 N.C. 13, 59 S.E. 2d 205; *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17; *Holland v. Smith,* 224 N.C. 255, 29 S.E. 2d 888. This intention is to be gathered from a consideration of the will from its four corners, and this intention should be given effect, unless contrary to some rule of law or at variance with public policy. *Coppedge v. Coppedge,* 234 N.C. 173, 66 S.E. 2d 777; *House v. House,* 231 N.C. 218, 56 S.E. 2d 695; *Williams v. Rand,* 223 N.C. 734, 28 S.E. 2d 247; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356.

Furthermore, *Stacy, C. J.,* speaking for the Court in the case of *Bank v. Corl,* 225 N.C. 96, 33 S.E. 2d 613, said: "The intention of the testator is his will. This intention is to be gathered from the general purpose of the will and the significance of the expressions, enlarged or restricted according to their real intent. In interpreting a will, the courts are not confined to the literal meaning of the words. A thing within the intention is regarded within the will though not within the letter. A thing within the letter is not within the will if not also within the intention."

In construing the instrument before us, what do we find to be the intention of the testator with respect to the disposition of his property?

In the first place, it is clear that when the testator wrote Item III of his will, he was under the erroneous impression that he and his wife owned their home place, located at 224 Hermitage Road, Charlotte, North Carolina, as tenants by the entirety. Being under this impression, he stated that the property upon his death, if his wife, Maude Gray Efird, be living, she would automatically own the property. He then proceeded to bequeath to her any automobile or automobiles that he might own at the time of his death and also all of his right, title and interest in and

to all furniture, household effects, and other tangible property contained in their family residence, to be hers absolutely and forever.

In Item IV of his will, the testator provided that after the personalty bequeathed in Item III of his will had been given to his wife, and she had received the real estate that might be owned at the time of his death by them as tenants by the entirety, and after the debts of his estate were paid from the *corpus* of his general estate, but before any death, inheritance, or estate taxes shall be considered or taken into account, his wife, Maude Gray Efird, should have two-sixths or one-third interest in all his estate. Again it is clear that the testator did not intend for the home place to constitute a part of the estate at the time of this division. He was under the impression that when this division would take place, his wife would be the absolute and fee simple owner of the property.

Even so, he did not stop there. He included an additional provision in Item V of his will, directing the payment of death, estate, inheritance and other similar taxes and duties, properly chargeable against his estate, "after all my debts shall have been paid, and after the above properties shall have been given to my wife." In other words, "the above properties," which "properties" necessarily include the home place, must first be set apart and given to his wife, and then out of the remainder of the estate the taxes properly chargeable against the estate were to be paid. He further provided that when such taxes were paid, no part thereof should be charged against any particular beneficiary under his will. Finally, the net remaining assets in the estate were to be divided equally among his four children.

We are not inadvertent to the rule, which the appellants contend is controlling here, to the effect that where "a testator erroneously recites that he has made some disposition of property belonging to him by an instrument other than the will, it is held that such recital is merely an incorrect description of an instrument extrinsic to the will and may not operate as a gift by implication." 57 Am. Jur., Wills, section 1193, page 784. We think this rule would be applicable in the instant case if the plaintiff had to rely exclusively on the provisions of Items III and IV of the will. In these items, the testator does not refer to the real estate held by the entireties as a gift or devise, but merely as passing to his wife, but in Item V of the will he said: "after the above properties shall have been given to my wife," the various taxes, properly chargeable against the estate should be paid, and the remainder of his estate divided among his four children named therein.

A careful consideration of the entire will leads us to the conclusion that in using the language contained in Item V of the will, the testator intended to give whatever interest he might have in the properties re-

ferred to in Items III and IV of his will, to his wife, and that such intention should be made effective.

In the case of *Kerr v. Girdwood,* 138 N.C. 473, 50 S.E. 852, 107 Am. S. R. 551, the testatrix left a will in which she said: "I wish to record the wishes of my darling husband . . . At my death he wished the two laundry properties to be sold, . . . and the proceeds of the sale to be equally divided between his sister (if living) and his brothers, who are living." No other disposition of these properties was made by the testatrix. In construing the above provisions of the will, *Brown, J.,* in speaking for the Court said: "Are these words testamentary in character, or merely a recital of an occurrence which had taken place between her and her husband? After carefully considering the entire will, in the light of the authorities, we have concluded that it was the intention of the testatrix in employing these words that they should have a testamentary effect, and that the language employed by her is of such legal efficacy that the law can give force to it and execute her intention. . . . There is nothing in the entire will inconsistent with the purpose to give the laundry properties in accordance with her husband's wishes. To refuse to give them effect would be at variance with her plain intent. No particular form of expression is necessary to constitute a legal disposition of property. Underhill on Wills, sections 37-43; Schouler, sections 262, 263; *Alston v. Davis,* 118 N.C. 202. Although apt legal words are not used and the language is inartificial, the court will give effect to it where the intent is apparent as that of the testatrix in this will." *In re Edwards' Will,* 172 N.C. 369, 90 S.E. 418; *In re Will of Margaret Deyton,* 177 N.C. 494, 99 S.E. 424; *Burcham v. Burcham,* 219 N.C. 357, 13 S.E. 2d 615.

In *Burcham v. Burcham, supra,* where, in giving effect to a devise by implication, the Court said: "While a devise or bequest by implication should not be presumed except upon cogent reasoning and where necessary to carry out the intent of the testator, the doctrine is well established in the law." The Court quoted with approval the following statement from *Parker v. Tootal,* 11 H. S. Cas. 143, 161: "If a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court may supply the defect by implication, and so mould the language of the testator as to carry into effect, so far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared."

In 57 Am. Jur., Wills, section 1192, page 782, *et seq.,* it is stated: "A bequest or devise may be made by mere implication, unless the implication violates public policy or some established rule of law, but to raise such implication it must be necessary to do so in order to carry out a manifest and plain intent of the testator which would fail unless the

implication is allowed. Gifts by implication are not favored, and cannot rest upon conjecture. Such a gift will not be inferred from mere silence, but must be founded on expressions in the will, and is only admitted as a means of carrying out what the testator appears on the whole to have really meant, but failed somehow to express as distinctly as he should have done. It has been said that the probability of an intention to make the implied gift must be so strong that an intention contrary to that which is imputed to the testator cannot be supposed to have existed in his mind. On the other hand, it is not required that the inference be absolutely irresistible; it is enough if the circumstances, taken together, leave no doubt as to the testatorial intention, and in some cases it is said that the implication may be drawn from slight circumstances appearing from the will." See also 69 C.J., Wills, section 1123, page 69, citing *Kerr v. Girdwood, supra,* and *Ferrand v. Jones,* 37 N.C. 633.

The judgment of the court below is
Affirmed.

STATE v. HUBERT TEW.

(Filed 12 December, 1951.)

1. Criminal Law § 38d—

Photographs of fingerprints and of the glass at the scene from which they were taken, and of other related objects, are competent for the purpose of explaining the testimony of the State's fingerprint expert witness.

2. Criminal Law § 81c (3)—

Testimony of the State's fingerprint expert that the fingerprints photographed by him were compared with those of defendant taken by some other person at a local prison camp cannot be held for prejudicial error as putting defendant's character in evidence when it appears that defendant on cross-examination brought out testimony that the fingerprints corresponded with many others of defendant that the officers had in their files, and further that testimony was admitted without objection that defendant had stated he had learned "after being arrested for different cases" to keep his mouth shut.

3. Criminal Law § 52a (3)—

Expert testimony to the effect that defendant's fingerprints corresponded with those taken at the scene of the crime, together with evidence tending to show that the prints found at the scene could have been impressed only at the time the offense was committed, *is held* sufficient to show that defendant was either the perpetrator or was present and participated in the commission of the crime, and therefore is sufficient to withstand motion to nonsuit.

APPEAL by defendant from *Sharp, Special Judge,* at August Term, 1951, of JOHNSTON.

Criminal prosecution upon bill of indictment, found by grand jury at said August Term, 1951, containing two counts charging, in substance, that on 12 January, 1949, defendant (1) did unlawfully, willfully and feloniously break and enter a certain dwelling house and building with intent to steal certain personal property of Mrs. P. T. George, and (2) did feloniously steal and carry away certain personal property of Mrs. P. T. George of the value of four hundred dollars then and there found, contrary to the statute, etc.

Defendant pleaded not guilty.

And upon the trial in Superior Court, the State offered testimony of Mrs. P. T. George and her daughter tending to show: That in January, 1949, Mrs. George was in service station business, with a place of business on road 701, thirteen miles from Smithfield, N. C.; that her home was in sight of, but some distance across the highway from the service station; that she carried a line of groceries in the service station; that she locked there, and left for her home about 6 or 6:30 o'clock on night of 13 January, 1949; that about 7:30 o'clock same night she and her daughter left home to visit a home in which a death had occurred, and, in returning about 11 o'clock, passed by the service station, and saw that the door to it was closed; that next morning, about 7 o'clock, pursuant to information received, she and her daughter went to the filling station and found that the upper part of the glass in the front door was broken out, apparently with a piece of iron seen nearby, and the building entered, and groceries and other property of the value of about $350.00 had been taken therefrom; that the glass had fallen on inside of the building; that the sheriff's department was notified, and pending the arrival of officers no one entered the building; and that officers came, and a representative of the S.B.I. arrived in about an hour and a half.

Mrs. George also testified: "I did not know the defendant at the time. I had not ever seen him before, as I remember . . . I stayed in my store every day along at the time of this robbery, without I would have to go to town and then I would get somebody to stay for me."

The State also introduced as a witness a representative of the State Bureau of Investigation, held by the court to be a fingerprint expert, who testified that he visited the scene of the alleged crime on 13 January, 1949, and processed broken glass found there for fingerprints.

His testimony, on direct examination, admitted over general objections by defendant, tends to show, summarily stated, that fingerprints described by him were lifted from the broken glass, and photographed; that when these prints were compared with fingerprints of Hubert Tew, previously taken by some other person, at a local prison camp, and then on file in

the files of the Bureau, they corresponded therewith, and that after defendant's arrest he, the representative of the Bureau, took other fingerprints from the hand of defendant, and same corresponded with the fingerprints lifted from the broken pieces of glass, and with those on file in the files of the Bureau.

Then this witness, under cross-examination, and without objection by defendant, testified in pertinent part: "As to whether I say I had some fingerprints of this man in my file at the time this crime was committed, yes Sir, he had been previously arrested for several other offenses. As to your not asking me what he had been previously arrested for, but whether I had the fingerprints of this man in my file up there, yes Sir, I do. I will be glad to tell the jury why I waited for three years when I say that these fingerprints are identical, before I came down here and asked for a trial of this cause; besides the fingerprints of the defendant we found also some fingerprints on a piece of jagged glass which were not the defendant's, so that we knew that there was another subject in the case, and after we learned that this defendant's fingerprints were identical with part of the fingerprints, we attempted then to get identification on the second subject who was in the case, and we never were convinced or been able to satisfy ourselves who the other person was. Therefore for that reason we finally brought this case to court and try only this one defendant in the case . . . I come down here and took his fingerprints for that purpose. I did not come down here today with the fingerprints which I had in that file up there at the time the crime was committed, of this man. I come down here with the photographs of the prints which I took of the defendant . . . up here in jail several days ago. I certainly am attempting to tell that jury that those fingerprints in my office up there are the same as the prints I took when he was in jail up there. The fingerprints which I developed, they are not only identical with the fingerprints which I took several days ago in the county jail, but they are identical with many other fingerprints we have of the defendant in our files . . . I don't understand the question of how many other fingerprints I compared this defendant's with in this particular case, those which I took off of the glass, and those I had in my file. I did not make any comparison with his fingerprints which I had in my file in Raleigh, and those which I took off of the glass, with the other 5,000 fingerprints I have testified I have taken; . . . I compared his prints with the prints which I developed from the glass . . . I had a conversation with this defendant in jail the day I come down here . . . I did not take the fingerprints that are in my office in Raleigh of the defendant. I know whether they are his fingerprints or some one else's; I compared those also . . . whether I don't have them here in court today either, no, Sir,

I have his criminal record, but I don't have his fingerprints, nor any of the ones that are on file . . ."

Then the witness, on re-direct examination, and without objection, continued: "There are more than five sets of the defendant's fingerprints in our files; I don't recall exactly how many. They were all together at the time of this alleged robbery in the files with the State Bureau of Investigation."

And then the witness, likewise without objection, stated: "I talked to the defendant in jail. When I asked him about the commission of this crime . . . he said 'I will keep everything I know to myself, and you keep everything you know to yourself . . . I have learned that after being arrested for different cases that it is best to keep your mouth shut.' "

A deputy sheriff, as witness for the State, corroborated the last witness as to statement by defendant. He also testified without objection that defendant, when arrested, "proclaimed his innocence"; and that since this case came up he had heard he had been in trouble and served some time on the roads.

The State introduced in evidence card containing fingerprints of defendant taken in jail; cards used by the expert to illustrate his testimony; and the lift used in preparation of fingerprints. Objection by defendant. Overruled. Exception.

Defendant moved for judgment as of nonsuit at the close of the State's evidence. The motion was overruled and defendant excepted.

Defendant offered no evidence.

Verdict: Guilty as charged in bill.

Judgment: On the count of house-breaking, confinement in Central Prison for a term of not less than 2 years and not more than 3 years; and, on the count of larceny, sentence of 18 months in the common jail of the county, and assigned to work the roads under the supervision of the State Highway and Public Works Commission,—the jail sentence being suspended on condition stated.

Defendant appeals to Supreme Court and assigns error.

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

E. R. Temple, Jr., and Jane A. Parker for defendant, appellant.

WINBORNE, J. Appellant lists sixty-four assignments of error in the record on this appeal, of which thirty are based upon exceptions to the admission of evidence, and twenty-five or more upon exceptions to the charge of the court,—covey shots, so to speak. Upon these, ten questions are stated in brief of appellant, as being involved. We find, however,

upon careful consideration, that only a few of them require express treatment.

1. Defendant in his brief contends that the court erred in admitting into evidence "pictures of the glass, fingerprints and other objects in explanation of the testimony of the witness," the fingerprint expert. This contention is based upon numerous exceptions. It is without merit.

While the decisions of this Court uniformly hold that in the trial of cases, civil or criminal, in this State, photographs may not be admitted as substantive evidence, *Honeycutt v. Brick Co.,* 196 N.C. 556, 146 S.E. 227; *S. v. Perry,* 212 N.C. 533, 193 S.E. 727, the decisions hold that where there is evidence of the accuracy of a photograph, a witness may use it for the restricted purpose of explaining or illustrating to the jury his testimony relevant and material to some matter in controversy. See *S. v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824, citing cases.

Among the cases there cited is *Elliott v. Power Co.,* 190 N.C. 62, 128 S.E. 730, in which this Court said: "Plaintiff excepted because certain pictures were submitted to the jury. All of these pictures were used to explain the witnesses' testimony to the jury. It was not error for the court to allow the jury to consider the pictures for this purpose and to give them such weight, if any, as the jury may find they are entitled to in explaining the testimony."

Defendant cites and relies upon *S. v. Hooks,* 228 N.C. 689, 47 S.E. 2d 234, and *S. v. Palmer,* 230 N.C. 205, 52 S.E. 2d 908. It does not seem, however, that the decisions in these cases are in conflict with the principles hereinabove stated.

2. The next group of assignments of error treated in defendant's brief is based upon exceptions to testimony of the representative of the State Bureau of Investigation, the fingerprint expert, given on direct examination as to comparison of fingerprints lifted from the broken glass at the scene of the alleged crime, and photographed by him, with fingerprints of Hubert Tew, the defendant here, taken by some other person, at a local prison camp, and then on file in the files of the Bureau, and that they corresponded. It is noted that when the testimony was admitted, defendant entered a general objection. But in the brief of defendant the objection is expressly limited to the effect of the testimony, that is, that, by the admission of it, "defendant's character was placed in issue . . . without legal justification." It is contended that by this testimony the jury was informed that defendant had previously served in a prison camp— which had the effect of bringing his character in issue.

The well settled rule, as restated by *Denny, J.,* in *S. v. Godwin,* 224 N.C. 846, 32 S.E. 2d 609, that when incompetent evidence is admitted over objection and the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost;

but, as stated by *Brogden, J.*, in *Shelton v. R. R.*, 193 N.C. 670, 139 S.E. 232, "The rule does not mean that the adverse party may not, on cross-examination, explain the evidence, or destroy its probative value, or even contradict it with other evidence, upon peril of losing the benefit of his exception."

Applying this rule, as so interpreted, to the situation in hand, if it be conceded that the testimony to which objection was made is objectionable, testimony to the same effect was brought out on cross-examination. Moreover, it appears that the cross-examination was not kept within the bounds of the rule as above stated. It developed testimony that the State Bureau of Investigation had five sets of fingerprints of defendant in its files. And, indeed there is testimony, admitted without objection, that defendant stated that he had learned "after being arrested for different cases that it is best to keep your mouth shut." Hence on this record these assignments of error fail to show prejudicial error.

3. The assignment of error based upon exception to denial of defendant's motion for judgment as of nonsuit was properly overruled. *S. v. Huffman,* 209 N.C. 10, 182 S.E. 705; *S. v. Combs,* 200 N.C. 671, 158 S.E. 252; *S. v. Helms,* 218 N.C. 592, 12 S.E. 2d 243.

It is well established that evidence of the correspondence of fingerprints found at the scene of an alleged crime with those of an accused person, when given by a fingerprint expert, is admissible to prove the identity of the perpetrator of the offense. See *S. v. Combs, supra; S. v. Huffman, supra; S. v. Helms, supra; S. v. Hooks, supra.* See also 20 Am. Jur. 329, Evidence, Sec. 357; 23 C.J.S. 755, Criminal Law, Secs. 876, 877, 878; Rogers on Expert Testimony, 3rd Ed. (Werne), Sec. 88; Wigmore on Evidence, 3rd Ed., Section 414; N. C. Evidence by Stansbury, Sec. 86 and Sec. 134; see also Annotations 16 A.L.R. 370; 63 A.L.R. 1324.

In *S. v. Huffman, supra,* this Court said: "The testimony of the fingerprint expert was competent as evidence tending to show that defendant was present when the crime was committed and that he at least participated in its commission," citing *S. v. Combs, supra.*

And in *S. v. Helms, supra,* it is stated that evidence of fingerprint identification, that is, proof of fingerprints corresponding to those of the accused, found in a place where the crime was committed under such circumstances that they could only have been impressed at the time when the crime was committed, may be sufficient to support a conviction in a criminal prosecution. 20 Am. Jur. pp. 329 and 1076.

In the light of these principles the testimony of the fingerprint expert tending to show that fingerprints found at the scene of the crime correspond with those of defendant, taken after his arrest in this action, coupled with the testimony of Mrs. George tending to show that, though she personally attended her service station, she did not know, and had not

seen defendant before the date of the crime, is sufficient to take the case to the jury and to support a finding by the jury that defendant was present when the crime was committed and that he, at least, participated in its commission. *S. v. Huffman, supra.*

4. The assignments based upon exceptions to the charge, upon careful consideration, fail to point out prejudicial error.

5. Other assignments of error have been given due consideration, and fail to disclose reason for disturbing the judgment on the verdict rendered by the jury.

No error.

DAISY B. QUEVEDO AND HUSBAND, SOTERO QUEVEDO; MAUDE SMITH, UNMARRIED; MARY LENNON, WIDOW; HELEN TRIGG, WIDOW; AND JAMES SMITH v. GEORGE T. DEANS AND F. L. TOLAR AND WIFE, THELMA G. TOLAR.

(Filed 12 December, 1951.)

1. Reference § 10—

Upon the hearing upon exceptions to the referee's report, the trial judge in his supervisory power has authority to amend, modify, set aside, confirm, or disaffirm the report, which authority includes the power to make such additional findings of fact as the court deems advisable.

2. Taxation § 40g—

The persons named as owners of the land, who were residents of the county, were dead at the time of the institution of the tax foreclosure suit. Summons against them was returned "not found." Service by publication was had against the persons named as owners and "all persons claiming any interest in the lands." *Held:* Judgment of foreclosure was not binding upon the heirs at law, residents of the county.

3. Evidence § 37—

A party may not object that the original record was not introduced in evidence when it is disclosed that such record was in his own possession.

4. Judgments § 25—

A judgment which is void for want of service of process may be attacked in any proceeding.

5. Taxation § 40g—

Publication of notice in a tax foreclosure suit to "all persons claiming any interest in the lands" is ineffective as to unnamed claimants, since it offends the constitutional guarantee of due process of law, G.S. 105-391, and as to such persons the entire proceeding is void.

6. Same—Purchaser at tax foreclosure is charged with notice of want of valid service when record discloses such defect.

While a purchaser at a judicial sale is only required to ascertain from the record if the court had jurisdiction of the parties and subject matter

and that the judgment authorized the sale, when the judicial sale is a tax foreclosure it is the duty of the purchaser to investigate or cause to be investigated all sources of title, and when the record discloses that process was not served on those named as owners and fails to show affidavit prerequisite for service by publication, grantees in *mesne* conveyance from the county are charged with notice and will not be protected against the rights of the true owners who were not served with process in the tax foreclosure suit in any manner sanctioned by law.

7. Same—

The commissioner's deed to the county as purchaser at a tax foreclosure sale and the county's subsequent deed to the purchaser of the land from it, conveying the interest conveyed to it by the commissioner's deed, are no more than quitclaim deeds, and the purchaser from the county can acquire no better title than that conveyed in the commissioner's deed.

8. Taxation § 40d—

No statutes of limitation bar the right of the owners of land to assert their title as against a tax foreclosure in which they were not made parties or served with process in any manner sanctioned by law.

APPEAL by defendants from *Williams, J.*, April Term, 1951, ROBESON. Affirmed.

Civil action in ejectment heard on report of referee.

One James M. Smith, a resident of Robeson County, died intestate on or about 27 February 1934, seized and possessed of two tracts of land described in the complaint. Said land had been listed for taxes in his name on the tax books of Robeson County for 1934 and prior years. On 11 September 1934, Robeson County instituted a tax foreclosure action against Smith and his wife, both of whom were then dead, for the collection of the taxes then in default. The summons in the action was returned endorsed by the sheriff "Not Found."

In respect to said action, the clerk's docket discloses the following entries: "Publication October 5, 1934. Affidavit of Printer and Order signed November 7, 1934. Judgment of Foreclosure January 22, 1935. Decree of Confirmation June 10, 1935."

None of plaintiffs, heirs at law of Smith, were made parties or served with process. The service of summons by publication was addressed to the defendants in the action "And all persons claiming any interest in the lands herein described." The only attempted service on plaintiffs is such as may have been effected by said phrase in the notice of the action pending.

A commissioner was appointed; the land was sold and purchased by the county, to which the commissioner executed a foreclosure deed 10 June 1935. On 5 March 1946, Robeson County conveyed the premises to the defendant Deans by deed without warranty but containing the following:

"The interest hereby conveyed is that conveyed by F. D. Priest, Commissioner, to Robeson County by deed recorded in Book 8-P, at page 100, Robeson County Registry."

Deans entered into possession of the *locus* and remained in possession until 17 February 1948, on which date he conveyed the same by warranty deed to the defendant F. L. Tolar.

This action was instituted 7 April 1948, and at the August Term 1948 was referred, by consent. The referee, after hearing, found the essential facts and concluded that (1) the deeds from the commissioner to the county, to Deans, to Tolar, conveyed a fee simple title to the *locus;* (2) the plaintiff's cause of action is barred by the one-year (G.S. 105-393), the three-year (G.S. 1-52), and the ten-year (G.S. 1-56) statute of limitations; and (3) the plaintiffs have no interest in or title to the *locus.*

When the cause came on for hearing in the court below on the exceptions to the referee's report, the plaintiffs withdrew their exceptions to the findings of fact made by the referee and the cause was heard upon their exceptions to the referee's conclusions of law. The court, in its judgment, recited the following facts:

". . . and it appearing to the Court from the uncontradicted evidence taken before the Referee, and the record, that the plaintiffs in this action were not named parties in the foreclosure proceeding instituted by Robeson County in the summons or caption in said suit, and that the plaintiffs at the time this suit was instituted were living in Robeson County, North Carolina, and amenable to process of this Court, and that summons was not served upon them in this action except by publication as set out in the findings of fact of the referee, said findings of fact are adopted by the Court as set out in said report . . ."

It concluded that the foreclosure suit was not properly constituted, the court did not acquire jurisdiction, and judgment entered therein is void. It thereupon sustained the exceptions to the referee's conclusions of law and rendered judgment for the plaintiffs. The defendants excepted and appealed.

Johnson & Johnson for plaintiff appellees.

George T. Deans, defendant, in propria persona, and Varser, McIntyre & Henry for defendants Tolar.

BARNHILL, J. Did the court err (1) in making additional findings of fact, and (2) in holding that the plaintiffs are the owners of the land in controversy? These are the questions the defendants pose for decision. Each must be answered in the negative.

As the cause came on for hearing before the trial judge on exceptions to the report of the referee, he was not bound by the findings of fact or

conclusions of law made by the referee. Instead he, in the exercise of his supervisory power, was vested with full authority to amend, modify, set aside, confirm, or disaffirm the report. This included the authority to make such additional findings of fact as he deemed advisable. *Keith v. Silvia,* 233 N.C. 328.

It is now settled law in this jurisdiction that in a tax foreclosure action the owners of the equity of redemption must be made parties to the action and served with process. *Comrs. of Roxboro v. Bumpass,* 233 N.C. 190; *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 255; *Wilmington v. Merrick,* 231 N.C. 297, 56 S.E. 2d 643.

The failure to make the owners parties to the action and have them served with process is not a mere irregularity or defect of procedure. It is the omission of an essential requirement of due process which renders the whole proceedings, as to those not parties, void and of no effect. *Comrs. of Roxboro v. Bumpass, supra; Eason v. Spence, supra.*

That the validity of the judgment in the foreclosure proceeding was subject to challenge in this action is well settled by the decisions of this Court. *Powell v. Turpin,* 224 N.C. 67, 29 S.E. 2d 26; *Hill v. Stansbury,* 224 N.C. 356, 30 S.E. 2d 150; *Monroe v. Niven,* 221 N.C. 362, 20 S.E. 2d 311.

While it is true that one who buys at a judicial sale is required only to look to the record to see if the court had jurisdiction of the parties and the subject matter of the proceeding and that the judgment authorized the sale, *Graham v. Floyd,* 214 N.C. 77, 197 S.E. 873, this rule, even if applicable here, can bring little comfort to the defendants. The only persons named as parties defendant were dead. The summons as to them was returned unserved. They, before their death, were residents of the county, and it does not appear that the required affidavit for service by publication was filed. Nor does the judgment recite service. These are defects disclosing the want of jurisdiction, readily discoverable by anyone who might search the record.

The contention that the original record is not now available does not affect this conclusion. Furthermore, in this connection, it was stated here, and not denied, that the record of the hearing before the referee discloses that the judgment roll in the foreclosure proceeding was traced to the office of one of the defendants. They cannot now complain that the plaintiffs failed to produce it.

The publication of notice to "all persons claiming any interest in the lands" made in the foreclosure proceeding does not remedy the lack of service of summons. Speaking to the subject in *Eason v. Spence, supra, Ervin, J.,* says:

". . . it is now well established by authoritative decisions that the provisions of section 5 of Chapter 260 of the Public Laws of 1931 relating

to the posting of notices and the making of general advertisements as a procedure for bringing unnamed claimants before courts in tax foreclosure suits offend the constitutional guaranty of due process of law because such procedure does not afford the claimants reasonable notice and reasonable opportunity to be heard."

The limited scope or purpose of such notice as now required by G.S. 105-391 is likewise discussed in *Wilmington v. Merrick, supra.*

In any event, the judicial sale upon which defendants rely was a tax foreclosure sale and "it is the duty of one who would purchase a tax title to investigate, or cause to be investigated, all sources of title, 'and if he fail to do so, it is his folly, against which the law, that encourages no negligence, will give him no relief.' (*Foy v. Haughton,* 85 N.C. 169)" *Wilmington v. Merrick,* 234 N.C. 46. This rule applies with particular force when the very contents of the deed the purchaser receives puts him on notice that no title is assured but, as here, the grantor conveys only such title as he received under the commissioner's deed.

No statute of limitations bars the right of plaintiffs to maintain this action. *Comrs. of Roxboro v. Bumpass, supra.*

The commissioner's deed to the county and the county's deed to Deans are no more than quitclaim deeds. *Wilmington v. Merrick, supra* (234 N.C. 46). The defendant purchased a "pig in the poke," but when he opened the bag he found no pig. For him the situation is unfortunate. It is nonetheless a situation for which the law affords no relief.

The judgment entered in the court below is

Affirmed.

ALICE STAFFORD v. DAVID DRAPER WOOD, LEWIS M. CONN, TEXTILE WORKERS UNION OF AMERICA, CIO, JOHN P. CHAVIS, AND KENNETH E. BRYSON.

(Filed 12 December, 1951.)

1. Courts § 2—

A court must observe the limits of its own authority, and stay or dismiss a legal proceeding of its own motion in case it lacks power to try the cause.

2. Associations §§ 1, 5—

At common law, an unincorporated association is but a body of individuals acting together, and has no legal entity or existence independent of its members, and therefore may not take, hold, or transfer property, or sue or be sued.

3. Associations § 5—

Under the provisions of G.S. 1-97 (6) any unincorporated association, including an unincorporated labor union, whether resident or nonresident,

which does business in North Carolina by performing any of the acts for which it was formed, is subject to suit as a separate legal entity, and may be served with process in the manner prescribed by the statute.

4. Same: Process § 8d—

A finding that a foreign, unincorporated labor union had an affiliated local union in a county of this State, without any finding as to the connection between the nonresident union and the resident local union, is insufficient to sustain the conclusion that the nonresident union was doing business in this State by performing acts for which it was formed so as to justify the service of process on it under G.S.. 1-97 (6).

5. Same—

Service of process on a foreign unincorporated labor union by service on an individual named its "agent" is a nullity, since it is not accordant with the manner prescribed by statute for service of process upon such association.

SEPARATE appeals by defendants, the Textile Workers Union of America, CIO, and David Draper Wood, from *Crisp, Special Judge,* at the February Term, 1951, of RICHMOND.

Civil action for tort heard upon the special appearance of the defendant, the Textile Workers Union of America, CIO, and the demurrer of the defendant, David Draper Wood.

For convenience of narration, the defendants, Kenneth E. Bryson, John P. Chavis, and David Draper Wood, are hereinafter called by their respective surnames, and the defendant, the Textile Workers Union of America, CIO, is hereinafter designated as the Textile Workers Union.

This civil action grows out of a collision between a motor truck owned by Bryson and operated by Chavis, and a passenger automobile driven by Wood, which occurred upon a public highway in Richmond County, North Carolina, 13 August, 1949. The plaintiff, Alice Stafford, who was a guest in the passenger automobile, sues Bryson, Chavis, Wood, and the Textile Workers Union for damages for personal injury suffered by her in the collision. She filed a complaint averring in specific detail that the collision was proximately caused by the concurrent negligence of Chavis and Wood in the operation of the motor vehicles in their charge; and that their concurrent negligence is imputable to Bryson, the alleged employer of Chavis, and the Textile Workers Union, the alleged employer of Wood, under the doctrine of *respondeat superior.*

The summons, the complaint, and the other proceedings in the court below disclose that the Textile Workers Union is an unincorporated labor union, having its principal office in New York City, New York. Summons for it was issued to Richmond and Wake Counties. The Sheriff of Richmond County made return that he served the summons directed to him "by delivering a copy of the summons and a copy of the complaint

to . . . Joel Layton, agent" of the Textile Workers Union, and the Sheriff of Wake County made return that he served the summons directed to him "by delivering a copy of the summons and a copy of the complaint to . . . Hon. Thad Eure, Secretary of State for the State of North Carolina," as process agent of the Textile Workers Union.

The Textile Workers Union, through counsel, entered a special appearance and moved to dismiss the action as to it for want of jurisdiction, alleging in detail that it had not been brought into court by any proper service.

Upon the hearing on the special appearance, the trial judge found these facts: That the Textile Workers Union had an affiliated local union in Richmond County, North Carolina, on the date this action was instituted; that the Textile Workers Union had not appointed a resident process agent in this State; that the Sheriff of Wake County had served the summons directed to him upon the Secretary of State as recited in his return; and that the Secretary of State had forwarded the copy of the summons and the copy of the complaint to the last known address of the Textile Workers Union. He concluded as matters of law that the Textile Workers Union was doing business in North Carolina within the purview of G.S. 1-97 (6) because it "had an affiliated local union in Richmond County"; that the Secretary of State was the lawful process agent of the Textile Workers Union under G.S. 1-97 (6) because it had failed to appoint a resident process agent of its own selection; and that the service of summons on the Secretary of State was binding on the Textile Workers Union. The Judge thereupon denied the motion to dismiss lodged by the Textile Workers Union on its special appearance, and the Textile Workers Union appealed, assigning the conclusions of law and ruling of the judge as error.

Wood demurred in writing to the complaint, asserting that it does not state facts sufficient to constitute a cause of action against him. The judge overruled the demurrer, and Wood appealed, assigning that ruling as error.

Pittman & Webb and McNeill Watkins for plaintiff, appellee.

Robert S. Cahoon for the defendants, David Draper Wood and the Textile Workers Union, appellants.

ERVIN, J. It appears on the face of the record that the Textile Workers Union is an unincorporated labor union. In consequence, we necessarily consider at the outset whether this organization is such a being as can be subjected to the jurisdiction of the court. *Jinkins v. Carraway,* 187 N.C. 405, 121 S.E. 657. In the very nature of things, a court must observe the limits of its own authority, and stay or dismiss a legal pro-

ceeding of its own motion in case it lacks power to try the cause. *Henderson County v. Smyth,* 216 N.C. 421, 5 S.E. 2d 136; *Miller v. Roberts,* 212 N.C. 126, 193 S.E. 386; *Nelson v. Relief Department,* 147 N.C. 103, 60 S.E. 724.

An unincorporated association is merely a body of individuals acting together, without a corporate charter, but upon the methods and forms used by incorporated bodies, for the prosecution of some common enterprise. *Hecht v. Malley,* 265 U.S. 144, 44 S. Ct. 462, 68 L. Ed. 949. At common law such an association is not an entity, and has no existence independent of its members. This being true, an unincorporated association has no capacity at common law to contract, or to take, hold, or transfer property, or to sue or be sued. *Lodge v. Benevolent Asso.,* 231 N.C. 522, 58 S.E. 2d 109. In short, the common law regards an unincorporated association as an "airy nothing," or a "non-existent legal ghost," no matter how powerful it may be in reality. *Lodge v. Benevolent Asso., supra; Nelson v. Relief Department, supra.* The common law view that an unincorporated association does not exist as a legal entity and can neither sue nor be sued still prevails in this State, except to the extent it has been altered by statute. *Ionic Lodge v. Masons,* 232 N.C. 648, 62 S.E. 2d 73, and 232 N.C. 252, 59 S.E. 2d 829.

The common law rule that an unincorporated association cannot be sued was applied to unincorporated labor unions in these cases: *Hallman v. Union,* 219 N.C. 798, 15 S.E. 2d 361; *Citizens Co. v. Typographical Union,* 187 N.C. 42, 121 S.E. 31; *Tucker v. Eatough,* 186 N.C. 505, 120 S.E. 57.

Subsequent to the rendition of these decisions, the Legislature enacted chapter 278 of the 1943 Session Laws, which is now embodied in G.S. 1-97 (6) and reads as follows:

"Any unincorporated association or organization, whether resident or nonresident, desiring to do business in this State by performing any of the acts for which it was formed, shall, before any such acts are performed, appoint an agent in this State upon whom all processes and precepts may be served, and certify to the clerk of the Superior Court of each county in which said association or organization desires to perform any of the acts for which it was organized the name and address of such process agent. If said unincorporated association or organization shall fail to appoint the process agent pursuant to this subsection, all precepts and processes may be served upon the Secretary of State of the State of North Carolina. Upon such service, the Secretary of State shall forward a copy of the process or precept to the last known address of such unincorporated association or organization. Service upon the process agent appointed pursuant to this subsection or upon the Secretary of State, if no process agent is appointed, shall be legal and binding on said associa-

tion or organization, and any judgment recovered in any action commenced by service of process, as provided in this subsection, shall be valid and may be collected out of any real or personal property belonging to the association or organization. Any such unincorporated association or organization, now performing any of the acts for which it was formed, shall, within thirty days from the ratification of this subsection, appoint an agent upon whom processes and precepts may be served, as provided in this subsection, and in the absence of such appointment, processes and precepts may be served upon the Secretary of State, as provided in this subsection. Upon such service, the Secretary of State shall forward a copy of the process or precept to the last known address of such unincorporated association or organization."

This statute clearly manifests the legislative intent to make all unincorporated associations or organizations doing business in North Carolina legally accountable as separate entities for acts done by them in furtherance of the objects for which they are formed.

When the statute is read aright, it does these things: (1) It provides that any unincorporated association or organization, whether resident or nonresident, which is doing business in North Carolina by performing any of the acts for which it is formed, is subject to suit as a separate legal entity; and (2) it prescribes the manner in which service of process is to be made upon such association or organization when it is so sued. It necessarily follows that an unincorporated labor union, whether resident or nonresident, which is doing business in this State by performing any of the acts for which it is formed, is suable as a separate legal entity.

Notwithstanding our decision as to the suability of unincorporated labor unions, we are compelled to hold on the present record that the court below erred in denying the motion of the Textile Workers Union lodged on its special appearance for a dismissal of the action as to it for want of jurisdiction over it. Under G.S. 1-97 (6), the service of process upon the Secretary of State is not binding on an unincorporated association or organization unless it is doing business in North Carolina by performing acts for which it is formed. There is no factual foundation for the legal conclusions and ruling that the Textile Workers Union has been brought before the court by a proper service of process in this action. The underlying finding that the Textile Workers Union had an affiliated local union in Richmond County, North Carolina, on the date this action was instituted merely indicates an undefined connection between the nonresident Textile Workers Union and the resident local union. 2 C.J.S. 988. It does not show, however, that the Textile Workers Union is doing business in North Carolina by performing acts for which it is formed. *Radio Station v. Eitel-McCullough,* 232 N.C. 287, 59 S.E. 2d 779. The court below properly paid no heed to the supposed service of process upon

"Joel Layton, agent." Such attempted service was unavailing, for it ignored the statutory provision relating to service upon unincorporated associations or organizations. *Medlin v. Ebenezer Methodist Church,* 132 S.C. 498, 129 S.E. 830; *International Brotherhood of Boilermakers, Iron Shipbuilders, Welders and Helpers of America v. Wood,* 162 Va. 517, 175 S.E. 45.

We pretermit an analysis of the allegations which the complaint levels at the defendant Wood. That pleading was ample to withstand his demurrer.

Error on the appeal of the defendant, Textile Workers Union of America.

Affirmed on the appeal of the defendant, David Draper Wood.

FRED DONLOP v. GROVER EUGENE SNYDER.

(Filed 12 December, 1951.)

1. **Negligence §§ 19b (1), 19c: Trial § 22a—**

   On motions to nonsuit on the ground of lack of sufficient evidence of negligence and on the ground that plaintiff's evidence establishes contributory negligence as a matter of law, the evidence must be considered in the light most favorable to plaintiff, giving him the benefit of every reasonable intendment and legitimate inference fairly deducible therefrom.

2. **Trial § 22b—**

   In determining motions to nonsuit, defendant's evidence must be ignored in so far as it is in conflict with that of plaintiff, but may be considered in so far as it is favorable to plaintiff or tends to clarify or explain plaintiff's evidence.

3. **Negligence § 19c—**

   Nonsuit on the ground of contributory negligence may be allowed only when plaintiff's own evidence establishes contributory negligence so clearly that no other reasonable inference is deducible therefrom.

4. **Automobiles §§ 8i, 18h (2)—Evidence tending to show that plaintiff was first in intersection held for jury on issue of negligence.**

   Plaintiff's evidence to the effect that before entering an intersection he stopped and looked in both directions and, seeing no vehicle approaching, entered upon the intersection, and that the front part of his car had cleared the intersection when defendant's car, approaching from plaintiff's right, struck the right rear of plaintiff's car, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence, since it supports the inference that plaintiff was first in the intersection and that defendant negligently failed to yield the right of way as required by G.S. 20-155 (b).

5. Automobiles §§ 8i, 18h (3)—That defendant's car approached intersection from plaintiff's right at approximately same time held not sole reasonable inference from evidence.

Plaintiff's evidence tended to show that on a rainy, foggy night he stopped before entering an intersection, and, seeing no vehicle approaching from either direction, entered upon the intersection and, after the front part of his car had cleared the intersection and while he was still traveling slowly in second gear, was struck by defendant's car which approached the intersection from plaintiff's right. There was evidence that plaintiff's view of the street in the direction from which defendant approached was unobstructed for some 400 feet, and the evidence further showed that plaintiff's car was hit with such force as to knock it beyond the curb, where it snapped off a fire hydrant, broke off a fourteen inch telephone pole, and struck a tree with such force as to crush the car in ten inches. Plaintiff also introduced testimony of a declaration of defendant that he saw plaintiff in the intersection but was traveling too fast to stop. *Held:* That defendant's car was at a point relatively remote when plaintiff entered the intersection is an inference equally logical as the inference that the two cars approached the intersection at approximately the same time, G.S. 20-155 (a), and therefore nonsuit on the ground of contributory negligence was properly denied.

6. Trial § 22c—

Contradictions and discrepancies, even in plaintiff's evidence, are for the jury and not the court.

7. Negligence § 19c—

Nonsuit for contributory negligence may not be allowed even if a phase of plaintiff's own evidence tends to establish this defense as a reasonable inference, when such evidence, construed contextually with plaintiff's other evidence, supports the opposite conclusion with equal logic.

APPEAL by defendant from *Sharp, Special Judge,* and a jury, at May Civil Term, 1951, of DAVIDSON.

Civil action to recover for personal injuries and property damage resulting from a collision of two automobiles in a street intersection due to the alleged negligence of the defendant.

The record discloses these background facts: The collision occurred about midnight, 23 October, 1950, at the intersection of West Third and North State Streets, which is within a residential district of the city of Lexington, North Carolina. The electric traffic signal device over the center of the intersection had been cut off. The plaintiff was driving his Chevrolet coach westwardly on West Third Street, which is about 24 feet wide. The defendant was driving his Oldsmobile southwardly on North State Street (width not shown). There was no stop sign on the side of either street approach to the intersection. A slow rain was falling, the streets were wet, "and it was foggy."

The plaintiff testified that as he approached the intersection his brakes "and lights were all right," and his "windshield wiper was working."

He then gave this narrative of how the wreck occurred: "Before starting across the intersection I pulled up and stopped about 5 feet from the intersection. When I stopped I looked both ways up and down the street. I did not see anybody coming on State Street, North or South. After looking in both directions, I pulled on and was going in second gear at the time I was hit. At the time I was hit the front of my car was across State and Third Streets" (out of the intersection). The plaintiff also stated: "When I came up and stopped, I could see about a block up North State Street,"—the direction from whence the defendant was coming. The plaintiff was knocked unconscious. The evidence discloses that the points of impact on the two cars were as follows: the front part of the defendant's car struck the plaintiff's car "just back of the right door."

Police Officer Parker testified that from a point 5 feet from the intersection "you could see approximately 400 feet North on North State Street." On cross-examination, he testified, "I never measured the blocks. They are approximately 400 feet, but I could see a block." However, the record reveals that the testimony of Officer Parker as to sight distances was based on estimates made on the premises the day of the trial, during a break in his testimony, and in response to request of counsel.

The plaintiff's evidence further discloses that his car was knocked beyond the curb, where it snapped off a fire hydrant, broke off a 14-inch telephone pole, and ended up against a tree with such force the left side of the plaintiff's car was crushed in 10 inches and "demolished." The plaintiff testified that the defendant later came to see him at the hospital and that the defendant said "he saw me in the intersection but was coming so fast he could not stop."

Issues of negligence, contributory negligence, and damages were submitted to the jury and answered in favor of the plaintiff.

From judgment on the verdict awarding the plaintiff damages, the defendant appeals, assigning errors.

Philip R. Craver and Stoner & Wilson for plaintiff, appellee.
Don A. Walser for defendant, appellant.

JOHNSON, J. The only exceptions brought forward on this appeal relate to the refusal of the trial court to allow the defendant's motion for nonsuit made at the conclusion of the plaintiff's evidence and renewed at the close of all the evidence.

The defendant contends the motion for nonsuit should have been allowed for the reasons (1) that the evidence fails to make out a *prima facie* case of actionable negligence against the defendant, but (2) if so, that the plaintiff's evidence establishes contributory negligence as a matter of law.

In determining the questions thus presented the rule is that the evidence must be considered in its light most favorable to the plaintiff "and he is entitled to every reasonable intendment and legitimate inference fairly deducible therefrom." *Brafford v. Cook,* 232 N.C. 699, 62 S.E. 2d 327. See also *Fowler v. Atlantic Company, Inc., ante,* 542; *Ervin v. Mills Co.,* 233 N.C. 415, 64 S.E. 2d 431.

And where, as here, the motion for judgment of nonsuit is renewed at the close of all the evidence, the court may consider "so much of the defendant's evidence as is favorable to the plaintiff or tends to clarify or explain evidence offered by the plaintiff not inconsistent therewith; but it must ignore that which tends to establish another and different state of facts or which tends to contradict or impeach the testimony presented by the plaintiff." *Bundy v. Powell,* 229 N.C. 707, p. 711, 51 S.E. 2d 307. See also *Howard v. Bell,* 232 N.C. 611, 62 S.E. 2d 323.

Contributory negligence is an affirmative defense which must be pleaded and proved. G.S. 1-139. However, the defendant may take advantage of such plea on motion for nonsuit "when the facts necessary to show contributory negligence are established by the plaintiff's own evidence." *Bundy v. Powell, supra.* But, it will not do for the court to rely on any part of the evidence offered by the defendant. *Bundy v. Powell, supra; Beck v. Hooks,* 218 N.C. 105, p. 112, 10 S.E. 2d 608; *Lunsford v. Manufacturing Co.,* 196 N.C. 510, 146 S.E. 129.

And it is firmly established by the decisions of this Court that a motion for nonsuit on the ground of contributory negligence shown by the plaintiff's evidence will be allowed only when the evidence is so clear that no other reasonable inference is deducible therefrom. *Bundy v. Powell, supra; Fowler v. Atlantic Company, Inc., supra.*

An examination of the evidence in the light of these principles of law impels the conclusion that the plaintiff made out a *prima facie* case of actionable negligence, free of facts and circumstances shown by his own evidence entitling the defendant to judgment of nonsuit on the ground of contributory negligence.

This conclusion is supported by the evidence showing these factors: (1) that the night was rainy and foggy, indicating limited visibility; (2) that the plaintiff, after stopping and looking, moved slowly through the intersection in second gear, and was hit from the right side as the front part of his car was emerging from the far side of the intersection; (3) the defendant's admission that he saw the plaintiff "in the intersection but . . . was coming so fast he could not stop"; and (4) the evidence as to the position and condition of the plaintiff's car after the wreck, showing it was practically demolished,—knocked sideways beyond the curb and embedded in a tree, after breaking off a fire hydrant and a 14-inch telephone pole.

This evidence supports the inference that the plaintiff was first in the intersection and that defendant negligently failed to yield the right of way to him as required by G.S. 20-155 (b), as amended. This statute provides that "The driver of a vehicle approaching but not having entered an intersection . . . shall yield the right-of-way to a vehicle already within such intersection . . ." See *Kennedy v. Smith,* 226 N.C. 514, 39 S.E. 2d 380; *Crone v. Fisher,* 223 N.C. 635, 27 S.E. 2d 642; *Yellow Cab Co. v. Sanders,* 223 N.C. 626, 27 S.E. 2d 631; *Piner v. Richter,* 202 N.C. 573, 163 S.E. 561. See also *S. v. Hill,* 233 N.C. 61, 62 S.E. 2d 532, where *Ervin, J.,* succinctly states and explains the rules governing the rights and duties of motorists approaching and entering highway and street intersections.

The defendant urges that the plaintiff proved himself out of court on the theory of contributory negligence when he offered evidence tending to show that from a point 5 feet from the intersection, where he stopped before entering, he could see up the side street "almost a block" in the direction from which the defendant was approaching, and that he looked up the street but saw no car coming. From this, the defendant insists it is inferable that the plaintiff failed to see the obvious and is chargeable with contributory negligence as a matter of law for failure to observe the defendant's approach and yield the right of way to him, under the provisions of G.S. 20-155 (a), which direct that "when two vehicles approach or enter an intersection . . . at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right . . ."

Here, the defendant's argument seems to be grounded on the assumption that this evidence conclusively shows the two cars approached the intersection at approximately the same time. Such does not appear. The evidence does not give the defendant's car any fixed location. The plaintiff said he looked and did not see the defendant's car. It is simply negative evidence. While this testimony may support the inference that the two cars approached the intersection "at approximately the same time," with equal logic it supports the inference that the defendant's car was at a point relatively remote from the intersection when the plaintiff looked. He said he could see up the street about a block. That the defendant was some considerable distance up the street when the plaintiff said he stopped and looked is supported by the physical evidence at the scene of the wreck tending to show that the defendant was driving at a high rate of speed; whereas the plaintiff said he moved through the intersection in second gear and was hit as he was emerging on the far side.

True, this phase of plaintiff's evidence tends to contradict other aspects of his evidence, particularly the testimony as to the defendant's admission that the plaintiff was first in the intersection,—that defendant said he saw

plaintiff in the intersection "but was coming so fast he could not stop." But, it is the rule in such cases that "discrepancies and contradictions, even in plaintiff's evidence, are for the twelve and not for the court." *Brafford v. Cook, supra* (232 N.C. 699, p. 701). See also *Maddox v. Brown,* 233 N.C. 519, 64 S.E. 2d 864, and cases cited.

A single phase of the plaintiff's evidence tending to weaken or contradict other aspects of his evidence and tending to show negligence on his part may not be lifted out of context and construed so as to warrant sustaining a motion for nonsuit on the ground of contributory negligence when on the rest of the evidence, or upon a contextual interpretation of the whole of it, in the light most favorable to the plaintiff, the opposite inference that the plaintiff was free of contributory negligence is reasonably deducible therefrom. A motion for nonsuit on the ground of contributory negligence may be sustained when, and only when, no other reasonable inference is deducible from the plaintiff's evidence. *Fowler v. Atlantic Co., Inc., supra (ante,* 542); *Maddox v. Brown,* 232 N.C. 244, p. 249, 59 S.E. 2d 791; *Gladden v. Setzer,* 230 N.C. 269, 52 S.E. 2d 804; *Thomas v. Motor Lines,* 230 N.C. 122, 52 S.E. 2d 377; *Bundy v. Powell, supra* (229 N.C. 707).

The question of whether it was shown that the defendant's car was without headlights as alleged by the plaintiff, treated in the briefs and debated on the argument, does not seem to be of controlling importance one way or the other.

The plaintiff's evidence being susceptible of dual inferences on both the issue of negligence and that of contributory negligence, the case was properly submitted to the jury. The jury resolved the conflicting inferences in favor of the plaintiff in a trial in which we find

No error.

WARREN FITCH, ADMINISTRATOR OF THE ESTATE OF EDWIN ALONZO FITCH, DECEASED, v. SELWYN VILLAGE, INC., A CORPORATION.

(Filed 12 December, 1951.)

1. Negligence § 4b—

Ponds, pools, lakes, streams, reservoirs, and other bodies of water do not *per se* constitute attractive nuisances, and while the owner of land upon which there is an artificial body of water may be guilty of negligence in failing to provide reasonable safeguards against injuries to children when he has notice, actual or constructive, that children of tender years frequent the place, no such duty arises in regard to a branch or stream flowing in its natural state.

2. Same—

The complaint alleged that plaintiff's intestate, aged two years and eight months, was drowned when he fell into a stream running through defendant's land near the house in which he lived, which his parents rented from defendant, and averred negligence on the part of defendant in that it had constructive notice that children frequented the place and had not erected any fence, guard rail or obstruction to keep them away from the open waters. *Held:* Demurrer to the complaint on the ground that it fails to state a cause of action was properly allowed.

APPEAL by plaintiff from *Crisp, Special Judge,* August Extra Civil Term, 1951, of MECKLENBURG.

This is an action to recover for the wrongful death of plaintiff's intestate, his minor son, Edwin Alonzo Fitch, who was drowned in Sugar Creek in the City of Charlotte on 6 October, 1950, at the age of two years and eight months.

The pertinent facts, as alleged by the plaintiff, are as follows:

1. The defendant corporation owns a tract of land consisting of slightly more than 28 acres in the City of Charlotte, lying on both sides of Wakefield Drive, and bounded on the westerly side by Sugar Creek, the defendant's westerly boundary extending to the center line of Sugar Creek.

2. That during 1950 and prior to the death of plaintiff's intestate, the defendant erected on said property a large multiple-unit rental housing project known as Selwyn Village Apartments.

3. That on and prior to 6 October, 1950, plaintiff's intestate lived with his parents and his brother in one of the defendant's apartments known as No. 231A, Wakefield Drive; that this apartment was located about 19 yards from Wakefield Drive and about 20 yards from the easterly banks of Sugar Creek; that the banks of Sugar Creek, in the vicinity of the apartment house, dropped to a depth of about 15 feet to the waters of the creek, within a distance of about 10 feet, the bank being gradually sloping at some points and steep and precipitous at others; that the depth and current of Sugar Creek varied from a slow, sluggish stream not over a foot deep in very dry weather, to a more swiftly flowing stream with a depth of about three and one half feet after a heavy or prolonged rainfall.

4. That on the occasion in question, there was no fence or other obstruction to prevent small children from falling or climbing down the creek banks to the open waters of Sugar Creek; that defendant knew, or by the exercise of reasonable care could have known, that the banks and waters of Sugar Creek, as it passed over the apartment properties, was a common resort of children and constituted a condition which was inherently dangerous to small children.

5. That on the morning of 6 October, 1950, while at play, and at the moment when his mother had stepped indoors to answer her doorbell,

plaintiff's intestate wandered down to the waters of Sugar Creek, on the defendant's properties, fell into the creek and was drowned.

6. That the death of plaintiff's intestate was due to, caused and occasioned by, and followed as a direct and proximate result of the negligence of the defendant, its agents and servants, in that: The defendant knew, or by the exercise of reasonable care could have known, that for several months prior to the death of the plaintiff's intestate, children of tender years living in the defendant's apartments, were habitually attracted to the waters of Sugar Creek as it flowed over the defendant's property, and were accustomed to play along its waters and banks and that Sugar Creek as it flowed over the defendant's apartment property, often reached a depth sufficient to drown small children; that the defendant negligently invited families with young children to rent its apartments, and did in fact rent said apartments to families with small children, without erecting any fence, guard rail, or other obstruction, or taking any precaution whatever to protect children of tender years from Sugar Creek, or to keep them away from the open waters.

The defendant interposed a demurrer to plaintiff's complaint on the ground that it does not state facts sufficient to constitute a cause of action against the defendant in that: (1) It appears from the complaint that Sugar Creek is a natural creek or stream whose natural condition had in no way been changed or altered by the defendant, and as a matter of law, natural objects are not attractive nuisances; (2) defendant was under no legal duty to plaintiff to take any action or precaution with regard to any natural objects; and (3) that the complaint does not state any cause of action.

The court being of the opinion the demurrer should be sustained on the several grounds set forth therein, entered judgment accordingly. The plaintiff appeals, and assigns error.

Shannonhouse, Bell & Horn for plaintiff, appellant.
Francis H. Fairley for defendant, appellee.

DENNY, J. The overwhelming weight of authority in this country is to the effect that ponds, pools, lakes, streams, reservoirs, and other bodies of water, do not *per se* constitute attractive nuisances. 56 Am. Jur., Waters, section 436, page 850. "The attractive nuisance doctrine generally is not applicable to bodies of water, artificial as well as natural, in the absence of some unusual condition or artificial feature other than the mere water and its location." 65 C.J.S., Negligence, section 29 (12) j, page 475.

It is, therefore, not negligence *per se* to maintain an unenclosed pond, pool, lake, or reservoir on one's premises. *Barlow v. Gurney,* 224 N.C. 223, 29 S.E. 2d 681; *Hedgepath v. Durham,* 223 N.C. 822, 28 S.E. 2d 503.

It is generally held, however, in this jurisdiction that where one maintains an artificial lake, pond, or reservoir, and children of tender years are attracted thereto and it becomes a common resort for such children to gather and play, "and it appears that the owner knows, or by the exercise of ordinary care should know that it is being so used, then it becomes his duty to exercise ordinary care to provide reasonably adequate protection against injury. Failure so to do constitutes an act of negligence." *Barlow v. Gurney, supra; Hedgepath v. Durham, supra; Cummings v. Dunning,* 210 N.C. 156, 185 S.E. 653; *Brannon v. Sprinkle,* 207 N.C. 398, 177 S.E. 114; *Gurley v. Power Co.,* 172 N.C. 690, 90 S.E. 943; *Starling v. Cotton Mills,* 171 N.C. 222, 88 S.E. 242; *Starling v. Cotton Mills,* 168 N.C. 229, 84 S.E. 388. But, we know of no decision in this or any other jurisdiction, where the owner of land has been held liable for failure to erect a fence or other obstruction to protect small children from obtaining access to a branch or creek upon his premises which flows in its natural state.

It is a matter of common knowledge that streams of water are attractive to children, and that thousands of them flock to them during each year for the purpose of wading or swimming in their cool and refreshing waters, or to fish therein, notwithstanding the common dangers that may exist in such use of our natural streams.

The rule with respect to liability for these dangers which exist in nature, is well stated in the case of *Peters v. Bowman,* 115 Cal. 345, 47 Pac. 598, where the Court said: "The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common, or artificial and uncommon; to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing; and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions. As to common dangers, existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care. But, with respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different; and such is the rule of the turntable cases, of the lumber-pile cases, and others of a similar character."

If it should be conceded that a branch or creek is inherently dangerous to children of tender years, it must also be conceded that such streams cannot be easily guarded and rendered safe. A street is ordinarily an unsafe place for a child of tender years to play, but the location of a house near a street does not impose upon the landlord any obligation to protect the children of his tenant from injury caused by playing in such

street. Streets, like streams, cannot be easily guarded and rendered inaccessible to children.

The plaintiff is relying upon the decisions of this Court heretofore cited and the case of *Comer v. Winston-Salem,* 178 N.C. 383, 100 S.E. 619. All of these cases involved artificial ponds or reservoirs except *Comer v. Winston-Salem,* which case is also distinguishable from the facts disclosed on the present record. In this latter case, an artificial condition had been created by the construction of a culvert through which the natural stream flowed. The water, as it flowed out of the culvert, made considerable noise, and people passing over a bridge, which the city had constructed 20 feet above the culvert, could hear the rushing water. At times, certain dyes were discharged in the stream by mills above the bridge, and the water presented a beautiful spectacle as it came gurgling through the culvert with its many-hued colors. For twenty years the locality adjacent thereto had been used as a playground for children, and the water of many colors, as it came out of the culvert, could be heard by children crossing the bridge but could only be seen by them by leaning over the bannister or railing, or getting through it. The plaintiff's intestate, a child 28 months of age, got through the bannister or railing which consisted of two parallel pipes one and one-half inches in diameter, one was placed about eleven inches above the bridge and the other eighteen inches above the lower one. The child fell to the culvert and was fatally injured by the fall. Recovery was allowed on the ground that the defendant knew of these conditions and failed to construct adequate bannisters or guards for the protection of children under the existing circumstances.

In the instant case, however, as regrettable as the unfortunate death of plaintiff's intestate was, in our opinion the allegations of the plaintiff's complaint do not make out a cause of action for actionable negligence against the defendant, and this view is supported by numerous decisions from other jurisdictions. *Peters v. Bowman, supra; Williams v. Kansas City, Clay County & St. Joseph Ry. Co.,* 222 Mo. App. 865, 6 S.W. 2d 48; *Beeson v. City of Los Angeles,* 115 Cal. App. 122, 300 Pac. 993; *McCall v. McCallie,* 48 Ga. App. 99, 171 S.E. 843; *Simon v. Hudson Coal Co.,* 350 Pa. 82, 38 A. 2d 259; *Denver Tramway Corp. v. Callahan,* 112 Colo. 460, 150 Pac. 2d 798; *McGuire v. Carey,* 366 Pa. 627, 79 A. 2d 236; 38 Am. Jur., Negligence, section 149, page 815. *Cf. Salt River Valley Water Users' Ass'n v. Compton,* 39 Ariz. 491, 11 Pac. 2d 839, and *Hunsche v. Southern Pacific Co.* (D.C. Cal.) 62 F. Supp. 634.

The judgment of the court below is

Affirmed.

HILDA W. PATE, BY HER NEXT FRIEND, KATE WRIGHT, v. R. L. PITTMAN HOSPITAL, INC., AND OTTIS BEDSOLE.

(Filed 12 December, 1951.)

1. **Judgments § 27a—Findings held insufficient predicate for conclusion that neglect was excusable.**

The findings of fact were to the effect that after service on the defendant corporation and its bookkeeper, the individual defendant, the summons and complaint were delivered to the president of the corporation, who handed them to the business manager with direction to send them to defendant's liability insurance carrier, that the carrier disclaimed liability, but that the business manager failed to so advise the president. There was also a finding that the president was out of town about twelve of the thirty days following the service of summons. *Held:* The findings are insufficient predicate for the conclusion that defendants' neglect was excusable so as to justify the court in setting aside the default judgment, G.S. 1-220, since, in the absence of an inference to the contrary it will be assumed that the insurance company gave notice of disclaimer without delay and in ample time to enable defendants to file answer, and the neglect of the business manager, a responsible agent, is imputed to defendants.

2. **Same—**

Parties who have been duly served with summons are required to give their defense that attention which a man of ordinary prudence usually gives his important business, and failure to do so is not excusable within the meaning of G.S. 1-220.

3. **Same—**

In the absence of excusable neglect the question of meritorious defense is immaterial.

4. **Appeal and Error § 6c (3)—**

An exception and assignment of error to the holding of the court that the facts set forth in the affidavit and order of the court constitute excusable neglect are sufficient to present the question whether the facts found were sufficient to support the order setting aside the judgment under G.S. 1-220.

APPEAL by plaintiff from *Williams, J.*, at June Term, 1951, of CUMBERLAND. Reversed.

Motion to set aside judgment by default and inquiry and also the final judgment entered after inquiry, on the ground of excusable neglect.

The motion was allowed and from the order based on such ruling, the plaintiff appealed.

Malcolm McQueen and N. H. Person for plaintiff, appellant.
Robert H. Dye for defendants, appellees.

JOHNSON, J. The single question presented by this appeal is whether the facts found were sufficient to justify the court below in setting aside the judgments on the ground of excusable neglect. G.S. 1-220.

This is an action instituted by the plaintiff to recover damages against the corporate defendant, R. L. Pittman Hospital, Inc., and Ottis Bedsole, "agent and employee of the corporate defendant," for the alleged unlawful restraint of plaintiff's liberty by forcing her to remain in the hospital of the corporate defendant when she, not having paid her bill, sought to leave after being discharged by her physician.

The record indicates the action was properly instituted in the Superior Court of Cumberland County and summons and copy of the verified complaint were duly served on the defendants on 29 March, 1951. G.S. 1-89, G.S. 1-97, and G.S. 1-121. Both defendants having failed to file answer or other pleading within the statutory time, the plaintiff obtained judgment by default and inquiry before the Clerk on 30 April, 1951. G.S. 1-209, and G.S. 1-212. Thereupon the cause was transferred to the civil issue docket and came on for hearing at the May Civil Term, 1951, of the Superior Court, at which term the inquiry as to damages was executed by a jury and a verdict of $1,500 was rendered in favor of the plaintiff (G.S. 1-212), and on 14 May, 1951, judgment was duly entered on the verdict by Judge Williams. Thereafter, on 17 May, 1951, the defendants moved before Judge Williams to set aside both judgments. The motion was continued until the June Term, 1951. When the case came on for hearing, Judge Williams upon facts found entered an order setting aside both judgments.

These are the facts found by the court (from the defendants' affidavits) in support of the order entered: "Dr. R. L. Pittman is and was the President of R. L. Pittman Hospital, Inc., K. D. Garner its business manager, and Ottis Bedsole its bookkeeper; that after service on the last named he delivered copy of the summons and complaint to the first named, who handed them to K. D. Garner, business manager as aforesaid, with directions to send them to the American Mutual Liability Insurance Company, who had issued its liability policy which was thought to cover defendants' liability for such cases as set forth in the complaint, and he did communicate with said insurance company, which disclaimed liability thereunder for the matters set out in the complaint, but he failed to call Dr. Pittman's attention to such disclaimer until after judgment was rendered, believing the corporate defendant was covered for such liability with another company, and Dr. Pittman being absent from town much of the time during the 30-day period following service as aforesaid, not only because of his wife's sickness but because his eyes were affected he could not perform his usual duties, having done no surgery for several weeks,

and undergoing treatment therefor by eye specialists in Charlotte, North Carolina, and in New York, as well as accompanying his sick wife out of town, at the suggestion of another doctor, for the needed rest and relaxation of both, and he was so absent in (April) 1951 from the 16th to 19th, 23rd to 26th, and from the 26th to 1 May; that Dr. Pittman did not know this action was not being defended, until after judgment and if he had known it an answer would have been filed in due time for both defendants, as the corporate defendant was to handle the suit for both." (Omitted here, as not being pertinent to decision, are the facts found showing a meritorious defense.)

It thus appears that the findings of fact are silent as to the period of time which elapsed between the service of the suit papers and their transmittal to the insurance company. The record is also silent as to when Business Manager Garner received from the insurance company its notice of disclaimer. Since the defendants claim no delay as to this, the inference is that the insurance company acted with dispatch. Mr. Garner simply says he received such notice but "failed to call Dr. Pittman's attention to such disclaimer until after judgment was rendered, believing the corporate defendant was covered . . . with another company, and Dr. Pittman being absent from town much of the time during the 30-day period following service."

Accordingly, in the absence of a showing to the contrary, it may be assumed that Garner received notice from the insurance company in ample time to have prevented, in the exercise of reasonable diligence, the entry of judgment by default against the defendants. His statement that he believed the corporate defendant was covered with another company adds nothing by way of excuse for his inattention. Indeed, it may even tend to indicate something of a disregard for consequences.

Nor is the position of the defendants materially improved by the showing that Dr. Pittman "was out of town much of the time during the 30-day period following service." It appears that the responsibility for arranging the preliminary phases of the defense was committed largely to K. D. Garner, business manager of the hospital. It is conceded by Dr. Pittman in his affidavit that he "expected Mr. Garner to look after the matter." This being so, and Mr. Garner being a responsible agent, it is not of controlling importance that Dr. Pittman was absent from town for good cause "much of the time during the 30-day period following service" of summons. Ordinarily, the inexcusable neglect of a responsible agent will be imputed to the principal in a proceeding to set aside a judgment by default. *Stallings v. Spruill,* 176 N.C. 121, 96 S.E. 890. See also *Kerr v. Bank,* 205 N.C. 410, 171 S.E. 367; *Morris v. Ins. Co.,* 131 N.C. 212, 42 S.E. 577; *Norwood v. King,* 86 N.C. 80.

Besides, the record indicates that Dr. Pittman was out of town only about ten or twelve of the thirty days in question and that he was in town four or five of the last ten days.

In *Pepper v. Clegg,* 132 N.C. 312, p. 316, 43 S.E. 906, it is said: "When a man has a case in court the best thing he can do is attend to it. If he neglects to do so he cannot complain because the other party attended to his side of the matter."

In ruling on a motion to set aside a judgment for excusable neglect, the rule is that parties who have been duly served with summons are required to give to their defense "that amount of attention which a man of ordinary prudence usually gives to his important business." *Sluder v. Rollins,* 76 N.C. 271; *Roberts v. Allman,* 106 N.C. 391, 11 S.E. 424; *Pierce v. Eller,* 167 N.C. 672, 83 S.E. 758; *Queen v. Gloucester Lumber Co.,* 170 N.C. 501, 87 S.E. 325; *Cahoon v. Brinkley,* 176 N.C. 5, 96 S.E. 650; *Elramy v. Abeyounis,* 189 N.C. 278, 126 S.E. 743; *Lumber Co. v. Chair Co.,* 190 N.C. 437, 130 S.E. 12; *Johnson v. Sidbury,* 225 N.C. 208, 34 S.E. 2d 67. Anything short of this requirement would endanger the vital mechanics of orderly court procedure as fixed by statute.

We conclude that the facts as found by the court below do not in law constitute such excusable neglect as will relieve an intelligent and active business man from the consequences of his inattention, as against a diligent suitor proceeding in accordance with orderly procedure fixed by statute. *Whitaker v. Raines,* 226 N.C. 526, 39 S.E. 2d 266; *Johnson v. Sidbury, supra* (225 N.C. 208); *Jernigan v. Jernigan,* 179 N.C. 237, 102 S.E. 310; *Lumber Co. v. Blue,* 170 N.C. 1, 86 S.E. 724.

"In the absence of sufficient showing of excusable neglect, the question of meritorious defense becomes immaterial." *Whitaker v. Raines, supra; Johnson v. Sidbury, supra.*

The defendants challenge the sufficiency of the plaintiff's assignment of error. The record indicates that the plaintiff excepted to and appealed from the order and assigned as error: "the holding of the Court that the facts set forth in the affidavits and the judgment(s) (order) constitute mistake, surprise, inadvertence and excusable neglect." This is sufficient to present the question here posed for decision: whether the facts found are sufficient to support the order. *Dixon v. Osborne,* 201 N.C. 489, 160 S.E. 579; *Brown v. Truck Lines,* 227 N.C. 65, 40 S.E. 2d 476.

For the reasons given, the order setting aside the judgments heretofore rendered in the cause is

Reversed.

OTIS TIPPITE, ADMINISTRATOR OF THE ESTATE OF WILLIAM CHARLES TIPPITE, DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 12 December, 1951.)

1. **Trial § 22a—**

Upon motion to nonsuit, plaintiff's evidence must be taken as true and considered in the light most favorable to him, giving him every reasonable inference and intendment deducible therefrom.

2. **Trial § 23a—**

If there is more than a scintilla of evidence in support of plaintiff's contentions it should be submitted to the jury.

3. **Railroads § 5—**

Where a railroad company rents to its employees houses along its right of way a short distance from its tracks, with knowledge that the employees' families include small children, such children are not trespassers while playing around the premises, and the railroad company is under duty to exercise reasonable care and diligence to keep a proper and sufficient lookout along its tracks in front of these residences so as to avoid injuring the children of its tenants.

4. **Same—Evidence held sufficient to be submitted to the jury on the question of defendant's negligence in failing to keep a proper lookout.**

The evidence tended to show that plaintiff was employed by defendant railroad company and rented a house on its right of way, that plaintiff's intestate, his fourteen months old son, had been placed in a play pen in the back yard by his mother, that as defendant's train approached along its track, which was straight a distance of 1,041 yards, intestate was sitting on a crosstie and another child was toddling toward him, that the train's whistle indicated that the children were seen while the train was yet some distance away, and that its brakes were applied at about the point intestate was struck, stopping the train after it had traveled only some 200 yards. *Held:* The evidence was sufficient to be submitted to the jury on the issue of defendant's actionable negligence in failing to keep a proper lookout.

5. **Trial § 31d—**

The burden of proof is a substantial right, and the failure of the court to instruct the jury as to the burden of proof in regard to one of the issues constitutes prejudicial error. G.S. 1-180.

APPEAL by defendant from *Williams, J.*, and a jury, March-April 1951 Civil Term, CUMBERLAND.

Civil action to recover damages for the wrongful death of a child.

From a verdict and judgment in the amount of $3,000.00, defendant excepted and appealed, assigning errors. The facts are sufficiently stated in the opinion.

Shepard & Wood and Rose & Sanford for defendant, appellant.
Nance & Barrington for plaintiff, appellee.

VALENTINE, J. Before a plaintiff's cause of action yields to a defendant's motion for judgment as of nonsuit, plaintiff is entitled to have his evidence viewed in the light most favorable to him, and it is the duty of the presiding judge to accept as true all evidence tending to support the plaintiff's claim and in so doing every reasonable inference and intendment deducible from the plaintiff's evidence must be given full consideration. If upon all these considerations there is more than a scintilla of evidence in support of plaintiff's contentions, the matter becomes a question of fact to be determined by a jury. *Graham v. Gas Co.*, 231 N.C. 680, 58 S.E. 2d 757, and cases there cited; *Maddox v. Brown*, 232 N.C. 244, 59 S.E. 2d 791, and cases there collected.

Using this rule as a yardstick, an appraisal of plaintiff's evidence discloses this factual situation: On 20 October, 1949, plaintiff's intestate resided as a member of plaintiff's family in a house owned by the defendant and located upon its right of way within the corporate limits of the town of Hope Mills, a distance of 30 to 35 feet west of defendant's southbound track. Plaintiff was an employee of the defendant and paid the required rental for the privilege of living in defendant's house on its right of way and of using the adjacent terrain as his yard. The plaintiff's intestate could not be regarded as a trespasser on defendant's roadbed or right of way adjacent to the front of plaintiff's residence. *Starling v. Cotton Mills,* 168 N.C. 229, 84 S.E. 388. Defendant had four other houses along and upon its right of way which were occupied by other employees of the defendant and in whose homes there were altogether 8 or 9 small children. The tracks from a point in front of plaintiff's residence a distance of 1,041 yards in the direction of Hope Mills was practically straight.

On the day in question, plaintiff's intestate had been placed by his mother in a box or play pen, the sides of which were about 2½ feet high, at a position near the back door of plaintiff's residence and was left alone there while the mother went to the rear of the premises. Plaintiff's intestate was 14 months old, in good health, well developed and large for his age. He had been walking or toddling about for something like six months. Shortly after plaintiff's intestate was placed in the box, defendant's train number 75, then approaching, was heard to give a long or station blow at or beyond the station at Hope Mills and immediately thereafter, two short blows indicating that some object was on the track. At that moment a witness saw the child seated on the crosstie. Defendant's train struck and instantly killed the child, knocking him a few feet from the track. It was about 12 o'clock, noon. The day was clear. Immediately before the child was killed, the train was traveling 60 to 70 miles per hour. The train was carrying 16 or 18 cars and was stopped in the distance of its length, or about 200 yards, after striking the child.

The train gave the appearance of having had brakes applied at the time of or immediately before plaintiff's intestate was struck, with evidence of a complete application of brakes immediately after the injury. At the time plaintiff's intestate was seen sitting on the crosstie of defendant's track, another child about his age and size was near and toddling toward the point where the plaintiff's intestate was seated. The operator of the train had a clear and unobstructed view for a distance of 1,041 yards within which to see in the noonday light plaintiff's intestate and his approaching playmate and within which to bring the train under control and prevent the injury and death to the child.

Defendant is charged with the duty of knowing that the plaintiff resided as a tenant upon its right of way within 30 to 35 feet of its tracks and that there were other tenants and employees who likewise resided in houses upon defendant's right of way and that in these residences there were small children who would have both the inclination and the right to play in the front yard of their respective residences, and that a failure to keep a proper lookout might result in injury or death to one or more of these children. It was, therefore, the duty of the defendant to exercise reasonable care and diligence and to keep a proper and sufficient lookout along its tracks in front of these residences so as to avoid injuring the children of its tenants. On this question the Court has said: "In *Pickett v. R. R.*, 117 N.C. 634; *Lloyd v. R. R.*, 118 N.C. 1012, and a long line of similar cases, it is held that it is the duty of the *defendant* to keep a proper lookout. It is not held anywhere that such lookout as the engineer may be incidentally able to give, will relieve the company, if that lookout is not a proper lookout." *Arrowood v. R. R.*, 126 N.C. 629, 36 S.E. 151; *Jeffries v. R. R.*, 129 N.C. 236, 39 S.E. 836.

Here, the defendant offered no evidence, and the jury had a perfect right under the facts disclosed by plaintiff's evidence to reach the conclusion that the accident was reasonably within the foreseeability of the defendant and that the resulting injury and death of plaintiff's intestate was due to the defendant's negligence. The court below was entirely correct in submitting the case to the jury. *Ward v. Smith,* 223 N.C. 141, 25 S.E. 2d 463; *Ballard v. Ballard,* 230 N.C. 629, 55 S.E. 2d 316; *Higdon v. Jaffa,* 231 N.C. 242, 56 S.E. 2d 661; *Graham v. Gas Co., supra.*

However, among the defendant's exceptions brought forward there is one upon which defendant is entitled to a new trial. The crucial exception involves that portion of his Honor's charge which relates to the second issue, the issue of damages. The able and painstaking trial judge in referring to the first issue, the issue of negligence, said, "Now, the burden of that issue, Gentlemen, is upon the plaintiff to establish by the greater weight of the evidence." This language accentuated the fact that his Honor's reference to the burden of proof related only to the first

issue, in view of the fact that he failed to mention the burden of proof or to declare upon whom it rested when in his charge he discussed the second issue. He discussed the facts and gave the contentions of the parties, but omitted any reference to the burden of proof on that issue. For this error, the defendant is entitled to a new trial. G.S. 1-180, as amended, requires that the judge "shall declare and explain the law arising on the evidence given in the case." This places a duty upon the presiding judge to instruct the jury as to the burden of proof upon each issue arising upon the pleadings. It is said that " 'the rule as to the burden of proof is important and indispensable in the administration of justice. It constitutes a substantial right of the party upon whose adversary the burden rests; and, therefore, it should be carefully guarded and rigidly enforced by the Court. *S. v. Falkner,* 182 N.C. 793, and cases cited.' *Hosiery Co. v. Express Co.,* 184 N.C. 478." *Coach Co. v. Lee,* 218 N.C. 320, 11 S.E. 2d 341; *Crain v. Hutchins,* 226 N.C. 642, 39 S.E. 2d 831.

We have examined the other assignments of error, but since there must be a new trial for the error pointed out, it is not deemed necessary to comment upon them.

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

New trial.

LEGRAND GUERRY, JR., EXECUTOR OF LEGRAND GUERRY, DECEASED, v. AMERICAN TRUST COMPANY, A CORPORATION, EXECUTOR OF HERMAN A. MOORE, DECEASED.

(Filed 12 December, 1951.)

1. Pleadings § 15—

The sufficiency of the answer to state a defense may be raised by demurrer.

2. Pleadings § 19c—

Upon demurrer to the answer, its allegations will be liberally construed, admitting for the purpose the truth of all allegations of fact as well as all relevant inferences of fact reasonably deducible therefrom, and the demurrer must be overruled if the answer is sufficient in any part or to any extent to state facts constituting one or more defenses. G.S. 1-151.

3. Money Received § 1—

The voluntary payment of money by a person who has full knowledge of all the facts cannot be recovered.

4. Waiver § 2—

Waiver is the voluntary relinquishment of a known right expressed or implied from acts and conduct naturally and justly leading the other party to believe that the right has been intentionally foregone.

5. **Landlord and Tenant § 10—Landlord voluntarily paying for repairs requested by sublessee without notice to lessee may not recover on covenant to repair.**

This suit involved the right of lessor to recover under the terms of the lease requiring lessee to keep the property in repair, the cost of repairs made by lessor. Defendant's answer alleged that lessee subleased by instrument requiring sublessee to repair, that lessor, with knowledge of all the facts, voluntarily paid for the repairs requested by sublessee without notice to lessee or demand that lessee perform the covenant to repair, and that the sublessee was in possession so that lessee had no knowledge of the necessity for repairs or opportunity to investigate. *Held:* The answer alleges the defense of a waiver in the nature of an estoppel, and demurrer thereto was improvidently sustained.

APPEAL by defendant from *Bennett, Special Judge,* 19 March, 1951 Extra Civil Term, MECKLENBURG.

Civil action to recover payments made by plaintiff and his testator for repairs or replacements upon a building described in a lease. Both the lessor and the lessee are now dead and this suit is between the personal representatives of each.

The original lease, dated 11 October, 1940, contains an extension option which was exercised extending the lease to 31 October, 1952. Under the lease the tenant was obligated to do all repair work and maintain the building both inside and out, except for injuries resulting from natural decay and unavoidable accident. The lessee, Herman A. Moore, was granted the right to assign the lease and on 7 January, 1944, he assigned said lease to his wife, Emmie McConnell Moore. Under this assignment, Mrs. Moore subleased the property to Hood Motor Company, Inc., for the full extended term. The sublease contained substantially the same provisions with respect to repairs as the original lease.

Plaintiff alleges a violation by the tenant of the original lease in that he failed to make repairs as therein required, and alleges that repairs were made by plaintiff's testator in the year 1946 and by plaintiff in the years 1948 and 1949 in the aggregate amount of $3,261.00. Plaintiff demands reimbursement from the tenant.

The defendant answering avers that the repairs referred to were made by plaintiff and his testator at the request of the subtenant, Hood Motor Company, Inc., without notice to the defendant and without giving him an opportunity to examine the premises or otherwise protect his rights under the original lease and under the sublease. The subtenant is in possession. Defendant further alleges that he had no notice that any repairs were necessary or that the plaintiff claimed any repairs were necessary until 1949, after the repairs had been made. He asserts that the plaintiff and his testator did not give the defendant any notice or opportunity to determine whether the repairs were necessary, or if neces-

sary, a chance to call upon Hood Motor Company, Inc., to make the repairs under the terms of the sublease. He also contends that such actions and conduct of the plaintiff and his testator amounted to abandonment and a waiver of their rights with respect to the repair and maintenance provisions of the original lease and further that the plaintiffs are estopped to make a claim against the defendant for the repairs so voluntarily made. The defendant also contends that the payments made by the plaintiff and his testator were voluntary payments made with full knowledge of all the facts and in such a way as to make the plaintiff and his testator volunteers and to preclude a recovery in this action.

Plaintiff filed a general demurrer to the defendant's answer, further answer and defense, and second further answer and defense, on the ground that the defendant's pleading did not state facts sufficient to constitute a defense to plaintiff's cause of action. The demurrer was sustained. Defendant excepted and appealed.

Lassiter, Moore & Van Allen for plaintiff, appellee.
B. Irvin Boyle for defendant, appellant.

VALENTINE, J. Was the court below correct in sustaining the plaintiff's general demurrer to the defendant's entire answer? This is the only question for decision upon this appeal.

It is settled that the sufficiency of an answer may be challenged and tested by a demurrer. McIntosh, page 507, sec. 475; *Williams v. Hospital Association, ante,* 536. A demurrer admits the truth of all the allegations of fact contained in the pleading as well as all relevant inferences of fact reasonably deducible therefrom. *Insurance Co. v. McCraw,* 215 N.C. 105, 1 S.E. 2d 369, and cases there cited. Both the statute, G.S. 1-151, and the decisions of this Court on the subject are to the effect that a pleading as against a demurrer must be liberally construed in favor of the pleader. Facts alleged in an answer, although inartfully drawn, are sufficient to withstand a demurrer, if upon a liberal construction thereof the pleading is sufficient to present one or more defenses. *Pridgen v. Pridgen,* 190 N.C. 102, 129 S.E. 419; *Dixon v. Green,* 178 N.C. 205, 100 S.E. 262; *Farrell v. Thomas,* 204 N.C. 631, 169 S.E. 224; *King v. Motley,* 233 N.C. 42, 62 S.E. 2d 540.

A pleading must be fatally and wholly defective before it will be rejected as insufficient. If the answer contains facts sufficient to constitute one or more defenses in any part or to any extent or if facts sufficient for that purpose can be fairly gathered from it, it is not demurrable, regardless of how uncertain or inartfully drawn it appears, or how defective or redundant its statements may be. Every reasonable intendment and presumption must be made in favor of the pleader. *Fairbanks v.*

Murdock, 207 N.C. 348, 177 S.E. 122; *Vincent v. Powell,* 215 N.C. 336, 1 S.E. 2d 826; *Insurance Co. v. McCraw, supra; Presnell v. Beshears,* 227 N.C. 279, 41 S.E. 2d 835; *Dickensheets v. Taylor,* 223 N.C. 570, 27 S.E. 2d 618; *S. v. McCanless,* 193 N.C. 200, 136 S.E. 371; *Steele v. Cotton Mills,* 231 N.C. 636, 58 S.E. 2d 620; *Bryant v. Ice Co.,* 233 N.C. 266, 63 S.E. 2d 547.

The defendant sets up as defenses that sometime during the year 1946 Hood Motor Company, Inc., the subtenant then in possession of the premises, notified and called upon Dr. LeGrand Guerry, the owner and lessor of the premises, to make certain repairs to the building, and pursuant thereto Dr. Guerry procured the repairs and paid for the same; that after the death of Dr. Guerry the said Motor Company in the years 1948 and 1949 notified and called upon the executor of the estate of Dr. Guerry for further repairs to the leased building and on both occasions the plaintiff caused the said repairs to be made and paid for the same; that the defendant was never notified either by Dr. Guerry or his executor or anyone else that repairs were necessary to the said premises; that neither Dr. Guerry nor his executor required the Motor Company to make the repairs although they knew at all times that the said Motor Company was in possession of the premises under a sublease of the defendant; that the failure of such notice to the defendant prevented him from ascertaining whether repairs were necessary, and, if so, whether such repairs were required of him under the terms of his lease and further prevented him from requiring the Hood Motor Company to make said repairs as required of it under the sublease. Upon these facts, the defendant contends that he had no chance to ascertain whether the repairs to the building were necessary and whether they were included in or excluded from the covenant to repair contained in his lease. He further contends that Dr. Guerry and his executor had full knowledge of all the facts and circumstances surrounding the entire transaction and that the repairs were voluntarily made and paid for by Dr. Guerry and his executor and that the defendant is therefore not liable for the costs of said repairs or any part thereof.

Defendant's allegation that the plaintiff and his testator were volunteers in making and paying for the repairs brings them within the well established rule of law that the voluntary payment of money by a person who has full knowledge of all the facts cannot be recovered. *Commissioners v. Commissioners,* 75 N.C. 240; *Commissioners v. Setzer,* 70 N.C. 426; *Brummitt v. McGuire,* 107 N.C. 351, 12 S.E. 191. To the same effect is *Bank v. Taylor,* 122 N.C. 569, 29 S.E. 831; *Bernhardt v. R. R.,* 135 N.C. 258, 47 S.E. 427; *Williams v. McLean,* 220 N.C. 504, 17 S.E. 2d 644.

A waiver is sometimes defined to be an intentional relinquishment of a known right. The act must be voluntary and must indicate an intention or election to dispense with something of value or to forego some advantage which the party waiving it might at his option have insisted upon. The waiver of an agreement or of a stipulation or condition in a contract may be expressed or may arise from the acts and conduct of the party which would naturally and properly give rise to an inference that the party intended to waive the agreement. Where a person with full knowledge of all the essential facts dispenses with the performance of something which he has the right to exact, he therefore waives his rights to later insist upon a performance. A person may expressly dispense with the right by a declaration to that effect, or he may do so with the same result by conduct which naturally and justly leads the other party to believe that he has so dispensed with the right. *Alexander v. Bank,* 155 N.C. 124, 71 S.E. 69; *Furniture Co. v. Cole,* 207 N.C. 840, 178 S.E. 579.

Neither the plaintiff nor his testator were under legal or contractual obligation to make the repairs. They had the right to demand that the tenant comply with his contract in this respect and make the necessary repairs. They knew that the original tenant was not in possession and that he, therefore, would have no knowledge of the necessity for repairs. There was no demand upon or refusal by the defendant to perform the covenant to repair. Hence, the voluntary acts of plaintiff and his testator in making the repairs and paying for the same without notice to or demand upon the tenant constitute a waiver in the nature of an estoppel. *Clement v. Clement,* 230 N.C. 636, 55 S.E. 2d 459.

Substantial justice between the parties is the point always in view in the construction of pleadings. *Kemp v. Funderburk,* 224 N.C. 353, 30 S.E. 2d 155. Measuring the facts set up in defendant's answer by the applicable rules of law, it would appear that the defendant's answer is sufficient to repel plaintiff's demurrer. It follows, therefore, that his Honor was in error in sustaining plaintiff's demurrer, and we so hold.

Reversed.

IN THE MATTER OF OBEDIAH (OBIE) SELLERS (STATE v. SELLERS).

(Filed 12 December, 1951.)

1. Criminal Law § 67c—

Where the record discloses a patent invalidity in the judgment pronounced which works a substantial injustice, the Supreme Court will take cognizance thereof and correct it regardless of how the cause reaches the Court.

2. Criminal Law § 60b—

Where the bill of indictment to which defendant pleaded *nolo contendere* is with certainty referred to by number, error in the caption of the case and in the judgment in referring to the charge does not render the plea void as not supported by a bill of indictment, there being no uncertainty in the identity of the bill to which the plea was made.

3. Robbery § 1b—

G.S. 14-87 merely provides a more severe punishment for robbery when committed with firearms, without adding to or subtracting from the common law offense of robbery.

4. Robbery § 3—

Where the indictment charges highway robbery and not robbery with firearms, sentence in excess of ten years exceeds the limit permitted by law. G.S. 14-2, G.S. 14-87.

5. Criminal Law §§ 62a, 83—

Where the court imposes a sentence in excess of the limit prescribed by law the prisoner is not entitled to a discharge or to a new trial, but the judgment will be vacated and the cause remanded for proper sentence, with allowance for the time already served.

6. Criminal Law § 62e—

Provision in a judgment upon an indictment containing two counts that the sentence on each count should begin at the expiration of the sentence on the other, does not render the sentences void for ambiguity, the sentence imposed on each count being the essential part of the judgment and the provision with respect to the time of execution being merely directory.

PETITION for *certiorari.*

Petitioner was put on trial in Columbus County at the May Term, 1946, before Burney, J., on two separate bills of indictment. In case No. 568 he was charged in two counts with housebreaking and larceny and in case No. 569 with highway robbery. The record discloses that he entered a plea of *nolo contendere* to the bill in No. 568 and a like plea in the bill in No. 569 which is inadvertently designated in the caption of the case, as it appears on the minutes of the court, as "robbery with firearms." The court in its judgment likewise so referred to it and pronounced judgment that the defendant be confined in the State's prison for a term of not less than twenty nor more than twenty-five years, said sentence to begin at the termination of a sentence the defendant was then serving. Admittedly this prior term was completed in 1948. In No. 568 petitioner was sentenced on the first count, sentence to begin at the expiration of the sentence in No. 569 and on the second count, sentence to begin at the expiration of the sentence on the first count.

The petitioner brings the cause to this Court on petition for *certiorari* contending (1) that he was not indicted on a charge of robbery with

firearms under G.S. 14-87, and that his sentence on a plea unsupported by a bill of indictment is void; (2) that if it is held that his plea was in fact entered in case No. 569, then the sentence exceeds the limit permitted by law; and (3) the invalidity or irregularity, as the case may be, in the sentence in No. 569 renders the sentences in No. 568, as to their beginning dates, too ambiguous, uncertain, and indefinite to be enforceable.

Charles F. Blanchard and William H. Yarborough, Jr., for petitioner.

R. Brookes Peters, E. O. Brogden, Jr., and L. J. Beltman for respondent.

BARNHILL, J. How this cause reached this Court is of little moment. The record discloses the patent invalidity of the judgment pronounced which works a substantial injustice to the petitioner. It is our duty to take cognizance thereof and correct it, either in the exercise of our appellate or our supervisory jurisdiction, depending on how the case is presented. *S. v. Shipman,* 203 N.C. 325, 166 S.E. 298; *S. v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663.

The identity of the bill of indictment for robbery to which the petitioner entered his plea cannot be successfully challenged. The bill was returned in case No. 569; the plea was entered in that case; and judgment was pronounced on that plea. That the trial judge, for some undisclosed reason, acted upon a misapprehension as to the contents of the bill does not affect this conclusion.

G.S. 14-87 creates no new offense. It does not add to or subtract from the common law offense of robbery except to provide that when firearms or other dangerous weapons are used in the commission of the offense, more severe punishment may be imposed. *S. v. Jones,* 227 N.C. 402, 42 S.E. 2d 465; *S. v. Keller,* 214 N.C. 447, 199 S.E. 620; *S. v. Bell,* 228 N.C. 659, 46 S.E. 2d 834; *S. v. Chase,* 231 N.C. 589, 58 S.E. 2d 364.

The court below in pronouncing judgment on petitioner's plea to the bill of indictment under which he was put on trial was bound by the provisions of G.S. 14-2 which fixes ten years as the maximum sentence which may be imposed. Hence the sentence pronounced in case No. 569 cannot be sustained.

However, the petitioner is not entitled to a discharge or a new trial. The plea stands and the petitioner's debt to society thereby established must be paid. *S. v. Shipman, supra; S. v. Cherry,* 154 N.C. 624, 70 S.E. 294. To that end the judgment pronounced in case No. 569 on the charge of robbery is vacated and the cause is remanded to the Superior Court of Columbus County with direction that a proper sentence be imposed. The court below, in pronouncing sentence, should be careful to

so condition its judgment as to allow petitioner credit for the time he has served in execution of the sentence hereby vacated.

The contention that the sentences in case No. 568 are void for ambiguity is without substantial merit.

The invalidity of the judgment in case No. 569 does not render the judgment in No. 568 void for ambiguity or uncertainty as to the time of the beginning of the sentences thereby imposed. *S. v. Cathey,* 170 N.C. 794, 87 S.E. 532; *S. v. Satterwhite,* 182 N.C. 892, 109 S.E. 862; *S. v. McAfee,* 198 N.C. 507, 152 S.E. 391; *Blitz v. U. S.,* 153 U.S. 308, 38 L. Ed. 725; *U. S. v. Carpenter,* 151 F. 214; 24 C.J.S. 1242; 15 A.J. 124-5.

"The judgment is the penalty of the law, as declared by the court, while the direction with respect to the time of carrying it into effect is in the nature of an award of execution." The sentence imposed is the essential part of the judgment. The time of its execution is merely directory. *S. v. McAfee, supra.*

To the end that the directives herein contained may be fully complied with, the proper officials of the State's prison are directed to deliver custody of the petitioner to the sheriff of Columbus County prior to the convening of the term of the Superior Court for the trial of criminal cases to be held in said county next after the certification of this opinion.

Error and remanded.

IN THE MATTER OF: STATE OF NORTH CAROLINA, ON RELATIONSHIP OF THE EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA AND WILLIE BOWEN ET ALS., CLAIMANT EMPLOYEES, AND PEE DEE TEXTILE CO., INC.

(Filed 12 December, 1951.)

1. Appeal and Error § 1: Courts § 4e—

There is no inherent or inalienable right of appeal from an inferior court to a Superior Court or from a Superior Court to the Supreme Court.

2. Courts § 4e—

Right of appeal from administrative agencies or special statutory tribunals is purely statutory, and the statutory requirements are mandatory and not directory and must be complied with to avoid dismissal.

3. Master and Servant § 62—

The requirement of G.S. 96-15 (i) that the party appealing from the Employment Security Commission file statement of grounds upon which review is sought and the particulars in which it is claimed the Commission was in error is a condition precedent to the right of appeal, and failure to

file such statement within the time allowed by the statute for appeal requires dismissal.

4. Same—

The findings of fact by the Employment Security Commission are conclusive when supported by competent evidence, review being on questions of law only. G.S. 96-15 (i).

5. Master and Servant § 60—

Findings supported by evidence that the unemployment of claimants-employees for the period in question was due to vacation and that they were not available for work during such period supports order denying claimants compensation for the time in question.

APPEAL by claimant employees from *Crisp, Special J.*, February Term, 1951, RICHMOND. Affirmed.

The appealing claimants filed claims with the Employment Security Commission for unemployment compensation for a period which included the period from 20 June 1949 to 3 July 1949. The Commission, after finding the facts, found and concluded:

" . . . The record shows the unemployment of the claimants between June 20, 1949, and July 3, 1949, inclusive, to be due to a vacation, and they are thereby not available for work, and ineligible for benefits during such time."

It thereupon denied compensation for said period and, on 25 August 1950, mailed notice of its decision to the appellants herein.

On 13 September 1950, the claimants filed with the Commission notice of their appeal in the following language:

"In accordance with Section 96-4 (m) of the General Statutes of N. C., the claimants-employees give notice of appeal from the above decision."

However, they failed to file any statement of the grounds upon which a review was sought as required by G.S. 96-16 (h) (i).

The Commission made due return to the notice of appeal by filing the necessary papers and transcript of the evidence, together with its findings of fact and decision therein, in the Superior Court of Richmond County.

On 1 February 1951, after notice that the employer would move to dismiss the appeal, claimants filed in the Superior Court their "statement of grounds upon which review is sought and particulars in which it is claimed the Commission is in error." On 5 February 1951 the employer appeared and moved to dismiss the appeal for that the claimants failed to file said statement with the Commission at the time appeal was noted as required by statute. The motion was allowed and claimants appealed.

W. D. Holoman, R. B. Billings, R. B. Overton, and D. G. Ball for Employment Security Commission, appellee.

Robert S. Cahoon for appellants.

Thomas H. Leath for Pee Dee Textile Company, Inc., appellee.

BARNHILL, J. There is no inherent or inalienable right of appeal from an inferior court to a Superior Court or from a Superior Court to the Supreme Court. *Cox v. Kinston,* 217 N.C. 391, 8 S.E. 2d 252; *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143; 2 A.J. 847.

A fortiori, no appeal lies from an order or decision of an administrative agency of the State or from the Judgments of special statutory tribunals whose proceedings are not according to the course of the common law, unless the right is granted by statute. 2 A.J. 858, sec. 19. If the right exists, it is brought into being, and is a right granted, by legislative enactment. *Cox v. Kinston, supra; Pue v. Hood, Comr. of Banks,* 222 N.C. 310, 22 S.E. 2d 896; *Utilities Com. v. Coach Co.,* 218 N.C. 233, 10 S.E. 2d 824; *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377; Ann. 124 A.L.R. 1000.

"There can be no appeal from the decision of an administrative agency except pursuant to specific statutory provision therefor." 42 A.J. 670, sec. 232.

Obviously then, the appeal must conform to the statute granting the right and regulating the procedure. *Caudle v. Morris,* 158 N.C. 594, 74 S.E. 98.

The statutory requirements are mandatory and not directory. *Brown v. Kress & Co.,* 207 N.C. 722, 178 S.E. 248. They are conditions precedent to obtaining a review by the courts and must be observed. *Vivian v. Mitchell,* 144 N.C. 472. Noncompliance therewith requires dismissal. *Lindsey v. Knights of Honor,* 172 N.C. 818, 90 S.E. 1013.

G.S. 96-15 (h) permits a party aggrieved by a ruling or decision of the Employment Security Commission to appeal to the Superior Court, and G.S. 96-15 (i) prescribes the procedure to be followed in the exercise of this right. In the latter section, it is provided that "in every case in which appeal is demanded, the appealing party shall file a statement with the Commission within the time allowed for appeal, in which shall be plainly stated the grounds upon which a review is sought and the particulars in which it is claimed the Commission is in error with respect to its decision."

This statement of the grounds of the appeal must be filed within the time allowed for appeal. Its purpose is to give notice to the Commission and adverse parties of the alleged errors committed by the Commission and limit the scope of the hearing in the Superior Court to the specific questions of law raised by the errors assigned. Clearly it was intended,

and must be construed, as a condition precedent to the right of appeal. Noncompliance therewith is fatal.

We may note that there is sufficient evidence in the record to sustain the facts found, and the facts found support the order denying claimants compensation for the period of time in question. As the findings of fact made by the Commission, when supported by competent evidence, are conclusive and binding on the reviewing courts, which are to hear the appeal on questions of law only, G.S. 96-15 (i), the disposition of the appeal in the court below deprived the claimants of no substantial right to which, otherwise, they might have been entitled.

The judgment of the court below is

Affirmed.

C. E. MALLARD v. MARY BROWN MALLARD.

(Filed 12 December, 1951.)

1. Divorce § 2a—

Divorce under G.S. 50-6 may be granted only when the parties (1) have lived apart physically for an uninterrupted period of two years and (2) their physical separation is accompained by an intention on the part of one of them, at least, to cease matrimonial cohabitation.

2. Same—

Plaintiff's testimony to the effect that both he and defendant had resided in the State for a period of six months, that they had lived separate and apart for more than two years, and that at the time of separation he intended never to resume matrimonial cohabitation with her, is sufficient to overrule her motion to nonsuit.

3. Same—

Defendant's evidence was to the effect that plaintiff separated himself from her solely for the purpose of finding employment and that they mutually intended to resume living together as man and wife under one roof as soon as plaintiff was financially able to furnish shelter and support for defendant and their daughter at the place of his employment. *Held:* An instruction which fails to charge that if the parties, though physically separated, mutually intended to resume marital cohabitation they were not living separate and apart in contemplation of the statute, must be held for error.

APPEAL by defendant from *Grady, Emergency Judge,* at the August Term, 1951, of the Superior Court of ROBESON County.

Civil action under G.S. 50-6 for an absolute divorce on the grounds of two years' separation.

Plaintiff and defendant were married September 5, 1927, and lived together as man and wife from that time until 12 January, 1948, in the

home of defendant's mother in Mooresville, N. C. They have a daughter. Since the day last mentioned, the plaintiff has been working in Dunn, N. C., Lake City, S. C., and Fairmont, N. C., and the defendant and the daughter have been residing in Mooresville, N. C.

This action was begun 18 May, 1950. The complaint, reply, and testimony of the plaintiff made out this case:

On 12 January, 1948, the plaintiff notified defendant that his marital relations with her were unhappy and that he did not intend to live with her in the future. The defendant consented to the plaintiff's proposed course of action. The plaintiff forthwith departed the home in Mooresville, and ever since has resided elsewhere separate and apart from the defendant physically with the intention of never resuming conjugal relations with her. He has worked at Fairmont, N. C., since July, 1948. Although he contributed small sums to her support after leaving Mooresville, he did so simply to fulfill the obligation imposed upon him by law.

The answer denied that there had been any separation of the parties within the meaning of the statute, and pleaded the affirmative defense covered by the fourth issue set forth below. The evidence presented by the defendant tended to show that the plaintiff was destitute and unemployed on 12 January, 1948, and by reason thereof was unable to support his wife and daughter; that the plaintiff left the home of the parties in Mooresville on that day to obtain employment elsewhere, and absented himself from such home from that time until the commencement of the present action in an effort to make provision for his family pursuant to an understanding between him and the defendant that the parties were to resume matrimonial cohabitation just as soon as the financial circumstances of the plaintiff permitted him to furnish a home and support for his wife and daughter at the place of his employment; that from time to time after leaving Mooresville the plaintiff contributed small sums to the support of the defendant in recognition of his marital status and in partial performance of one of his marital duties; and that the plaintiff never intimated to defendant prior to the commencement of this action that he desired or intended to end his conjugal relations with her.

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

1. Were plaintiff and defendant married, as alleged in the complaint? Answer: Yes.

2. Has the plaintiff been a resident of the State of North Carolina for more than six months prior to the institution of this action? Answer: Yes.

3. Was there a separation of the plaintiff and defendant and have they lived separate and apart continuously for more than two years prior to the commencement of this action, as alleged in the complaint? Answer: Yes.

4. If so, was such separation caused by the wrongful and unlawful conduct of the plaintiff, as alleged in the answer? Answer: No.

Judgment was rendered on the verdict granting plaintiff an absolute divorce, and the defendant appealed, assigning the refusal of the judge to enter a compulsory nonsuit and various portions of the charge as error.

F. LeVerne Adams and F. D. Hackett for plaintiff, appellee.
Varser, McIntyre & Henry for defendant, appellant.

ERVIN, J. While the third issue is phrased in the language of G.S. 50-5 (4), the plaintiff bottoms his case on G.S. 50-6. Moreover, the record reveals that the action was tried under the last mentioned statute in the court below.

G.S. 50-6 specifies that "marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for two years, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months."

A husband and wife live separate and apart for the prescribed period within the meaning of G.S. 50-6 when, and only when, these two conditions concur: (1) They live separate and apart physically for an uninterrupted period of two years; and (2) their physical separation is accompanied by at least an intention on the part of one of them to cease their matrimonial cohabitation. *Young v. Young,* 225 N.C. 340, 34 S.E. 2d 154; *Moody v. Moody,* 225 N.C. 89, 33 S.E. 2d 491; *Byers v. Byers,* 222 N.C. 298, 22 S.E. 2d 902.

The testimony adduced by plaintiff is sufficient to establish that each of these things existed at the commencement of the action: That the plaintiff and defendant were husband and wife; that both of them had resided in the State for a period of six months; and that they had lived separate and apart within the meaning of the statute for an uninterrupted period of two years. This being true, the trial judge rightly refused to nonsuit the action. *Taylor v. Taylor,* 225 N.C. 80, 33 S.E. 2d 492.

The defendant assigns as error various portions of the charge in which the judge instructed the jury without explanation or qualification to answer the third issue in favor of the plaintiff, *i. e.,* in the affirmative, in the event it found by the greater weight of the evidence that the plaintiff separated from his wife in the early part of January, 1948, with her consent or knowledge, and remained separate and apart from her for two years. Since the charge is designed to aid the jury clearly to comprehend the case and to arrive at a correct verdict, this instruction must be held for error on the testimony in the instant action. *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484.

There is sharp conflict between the evidence of the plaintiff and that of the defendant respecting the character of their separation. The testimony for the defendant indicates that the plaintiff was in pecuniary difficulties and out of work in January, 1948; that he thereafter absented himself from the defendant merely to obtain employment and thus make some provision for his family; and that both he and the defendant entertained a mutual intention during their resultant physical separation to resume living together as man and wife under one roof just as soon as the plaintiff was financially able to furnish shelter and support for his family at the place of his employment.

If this evidence is true, the plaintiff and the defendant were not living separate and apart in contemplation of law while they were physically separated. *Byers v. Byers, supra.* Despite its crucial bearing on the third issue, the judge took no note of it in his charge, except to state that the defendant contended that the jury ought to answer such issue in the negative because the plaintiff's "absence from her was simply in search of employment." He did not advise the jury as to whether such contention had any legal validity. *S. v. Herbin,* 232 N.C. 318, 59 S.E. 2d 635.

Since the judge did not explain to the jury the law arising on this testimony, the unqualified instruction challenged by the assignments of error directed the jury to answer the third issue in the affirmative in the event it found by the greater weight of the evidence that the plaintiff and the defendant had lived separate and apart physically for an uninterrupted period of two years, even though their physical separation was not accompanied by an intent on the part of either of them to cease their matrimonial cohabitation.

The instruction was highly prejudicial to the defendant on the present record, and entitles her to a

New trial.

STATE v. ROBERT E. MEADOWS.

(Filed 12 December, 1951.)

Criminal Law § 14—

Under the provisions of G.S. 15-177.1, trial in the Superior Court upon appeal from an inferior court is *de novo* without regard to the plea, the trial, the verdict or the judgment of the inferior court, and therefore the Superior Court in all instances, including those in which the defendant pleads guilty in both the inferior court and in Superior Court, has power to impose sentence lighter or heavier than that imposed by the inferior court, provided the sentence is within the limit prescribed by law.

APPEAL by defendant from *Parker, J.*, at May Term, 1951, of NEW HANOVER.

Criminal prosecution against defendant for driving a motor vehicle upon the public highways of the State while his operator's license was revoked.

On 10 January, 1951, the defendant was arraigned in the Recorder's Court of New Hanover County upon a warrant alleging that he committed the misdemeanor defined by G.S. 20-28 by driving a motor vehicle upon the public highways of the State while his operator's license was revoked. He pleaded guilty, and the Recorder's Court, which has final jurisdiction of misdemeanors, entered this judgment: "Fined $200.00 and costs of court—90 days in default of the payment of the fine and cost." The defendant appealed to the Superior Court from this judgment.

When the case was called for trial at the May Term, 1951, of the Superior Court of New Hanover County, the defendant again pleaded guilty to the charge. The State thereupon adduced evidence showing that the defendant committed the offense at a time when his operator's license had been revoked for a period of three years because of a second conviction for driving a motor vehicle upon the public highways of the State while under the influence of intoxicating liquor, and the presiding judge thereupon entered this judgment: "The judgment of the court is that Robert E. Meadows be confined in the common jail of New Hanover County for a term of twelve months to be assigned to work the public roads under the direction of the State Highway and Public Works Commission." The defendant excepted to the judgment of the Superior Court, and appealed to the Supreme Court.

Attorney-General McMullan, Assistant Attorney-General Moody, and C. G. Powell, Jr., Member of Staff, for the State.

W. K. Rhodes, Jr., for defendant, appellant.

ERVIN, J. The assignment of error raises this question: Where the accused in a criminal action pleads guilty to the charge of a misdemeanor in the Superior Court upon the hearing of his appeal from the judgment pronounced against him on his former plea of guilty to the same charge in an inferior court having complete jurisdiction of the offense, does the judge of the Superior Court have power to impose a greater sentence than that imposed by the inferior court from which the appeal is taken?

The charge is bottomed on this statutory provision: "Any person whose operator's . . . license has been . . . revoked other than permanently, as provided in this article, who shall drive any motor vehicle upon the highways of the state while such license is . . . revoked, shall be guilty of a misdemeanor and upon conviction shall be punished by a

fine of not less than two hundred dollars ($200.00) or imprisonment in the discretion of the court, or both such fine and imprisonment." G.S. 20-28 (a); 1947 Session Laws, Ch. 1067, sec. 16.

The sentence of the Superior Court does not transgress the limits fixed by law. *S. v. Moschoures,* 214 N.C. 321, 199 S.E. 92. The defendant insists, however, that the sentence is void because the judge of the Superior Court was powerless in law to change the judgment of the recorder's court. To sustain this position, he invokes former decisions, which enunciated the rule that where the accused in a criminal action pleads guilty to a misdemeanor in an inferior court having complete jurisdiction of the offense and appeals to the Superior Court from the judgment pronounced by the inferior court on his plea, the Superior Court sits as a mere court of review to determine the legality of the judgment of the inferior court.

The defendant argues that this rule still obtains except in so far as it has been modified by Chapter 482 of the 1947 Session Laws, which is now codified as G.S. 15-177.1; that this statute abolishes the rule only in cases where the accused pleads not guilty in the Superior Court; that the rule applies in the present action because the defendant pleaded guilty in the Superior Court; that in consequence the judge of the Superior Court sat as a mere court of review in the present action with power to do one of these things only: (1) To discharge the defendant if he adjudged the proceedings of the inferior court to be fatally defective; (2) to remand the cause to the inferior court for proper sentence if he deemed the original sentence to be improper in form or substance; and (3) to affirm the sentence of the inferior court if he found it to be valid; and that the judge of the Superior Court disregarded his judicial function in the premises and usurped power not conferred upon him by law when he undertook to change the sentence of the inferior court.

These contentions overlook both the history of the rule and the manifest object of the Legislature in enacting G.S. 15-177.1.

The rule has never been concerned with the plea interposed by an accused on the hearing of his appeal in the Superior Court. It has rested on his plea in the inferior court. Its underlying rationale has been that the plea of guilty in the inferior court waived the right of the accused under G.S. 15-177 and similar laws to have the cause tried or even considered anew or *de novo* on its merits by the Superior Court on the appeal, and converted the Superior Court from an appellate trial court into a court of review for the correction of errors of law in the judgment of the inferior court.

The rule invoked by the defendant was first stated in 1893 in *S. v. Warren,* 113 N.C. 683, 18 S.E. 498. It has been applied in two subsequent cases only, namely, *S. v. Crandall,* 225 N.C. 148, 33 S.E. 2d 861, which was decided in 1945, and *S. v. Beasley,* 226 N.C. 577, 39 S.E. 2d

605, which was handed down in 1946. At its first session after the Crandall and Beasley decisions, to wit, that of 1947, the Legislature enacted G.S. 15-177.1, which reads as follows: "In all cases of appeal to the Superior Court in a criminal action from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and *de novo* by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon." 1947 Session Laws, Ch. 482.

This statute is aimed at the very foundation of the rule of the *Warren, Crandall,* and *Beasley cases, i.e.,* the plea of the accused in the inferior court. Its plain purpose is to uproot that rule in its entirety. It accomplishes this object by providing, in substance, that whenever the accused in a criminal action appeals to the Superior Court from an inferior court, the action is to be tried anew from the beginning to the end in the Superior Court on both the law and the facts, without regard to the plea, the trial, the verdict, or the judgment in the inferior court. As a result of this statute, the rules of practice and procedure regulating the trial of criminal actions appealed to the Superior Court by defendants who pleaded guilty in inferior courts have been brought into complete harmony with those heretofore followed in the trial of the criminal actions appealed to the Superior Courts by defendants who pleaded not guilty in inferior courts. *S. v. Moore,* 209 N.C. 44, 182 S.E. 692; *S. v. Goff,* 205 N.C. 545, 172 S.E. 407; *S. v. Pasley,* 180 N.C. 695, 104 S.E. 533; *S. v. Koonce,* 108 N.C. 752, 12 S.E. 1032. Since the trial in the Superior Court is without regard to the proceedings in the inferior court, the judge of the Superior Court is necessarily required to enter his own independent judgment. Hence, his sentence may be lighter or heavier than that imposed by the inferior court, provided, of course, it does not exceed the limit of punishment which the inferior court could have imposed. *S. v. Stafford,* 113 N.C. 635, 18 S.E. 256.

For the reasons given, the judgment entered in the Superior Court is Affirmed.

JAMES WESLEY TAYLOR v. JONES BROTHERS BAKERY, INC.

(Filed 12 December, 1951.)

1. Libel and Slander § 10—

In an action for slander allegedly uttered by defendant's route supervisor while acting in the course of his employment, the court correctly refused defendant's motions to strike allegations of the complaint that plaintiff's discharge by the supervisor was wrongful and without justifica-

tion or excuse, the defamatory matter being related to the asserted reason for plaintiff's discharge.

2. Libel and Slander § 5—

In order to form the basis of an action for slander it is necessary that the defamatory matter be communicated to some person or persons other than the person defamed.

3. Libel and Slander § 1—

Ordinarily a person may not maintain an action for a slander invited or procured by plaintiff himself or by a person acting for him, certainly when induced for the purpose of bringing suit thereon.

4. Libel and Slander § 10—

In an action for slander, allegations to the effect that upon plaintiff's inquiry as to the reasons he had been discharged, defendant's vice-president stated to him that he had been short in his deliveries of merchandise to customers which amounted to stealing, should be stricken on motion, there being no allegation that the defamatory words were communicated to any other person or that the vice-president authorized anyone to publish the statement made by him to plaintiff.

5. Damages § 8—

Where punitive damages are sought, evidence of the financial condition of defendant or of its imputed wealth is competent, and therefore motion to strike allegations of the reputed wealth of defendant is properly denied.

APPEAL by defendant from *Moore, J.*, April term, 1951, of GUILFORD—Greensboro Division.

The plaintiff, a former employee of the defendant, instituted this action to recover both compensatory and punitive damages against the defendant "on account of injury to plaintiff's good name, fame, credit, and reputation," caused by the utterance of alleged slanders of and concerning the plaintiff by one O. W. Biggerstaff, one of the defendant's route supervisors, who was allegedly acting in the course and scope of his employment by the defendant. In apt time, the defendant moved to strike from the plaintiff's complaint, the following:

1. The italicized portion of paragraph eight which reads as follows: "That on the 29th day of July, 1950, the said Mr. O. W. Biggerstaff, Route Supervisor as aforesaid, *wrongfully and without justification or excuse* discharged this plaintiff . . ."

2. All of paragraph nine of the complaint, as follows: "That on the following Monday, to-wit: July 31, 1950, Mr. Paul Jones, Vice-President of the defendant corporation, in a conversation with this plaintiff, who was then inquiring as to the reason for his discharge, stated to the plaintiff, 'You were fired for shorting merchants in loaves of bread, that Mr. Biggerstaff has the evidence to prove it, and that this is nothing short

of stealing, and we do not want a man like that in our organization.' That thereupon this plaintiff denied said charges."

3. The italicized portion of paragraph fifteen of the complaint which reads as follows: "That the defendant is a corporation of large means *and is reputed to be worth a large sum of money and physical properties."*

The motion to strike was overruled, and defendant appeals, and assigns error.

Hines & Boren and Welch Jordan for defendant, appellant.

H. L. Koontz, J. Elmer Long and Clarence Ross for plaintiff, appellee.

DENNY, J. The defendant's exception to the failure of the court to strike out that portion of paragraph eight of the plaintiff's complaint, alleging that the plaintiff was discharged by Biggerstaff *wrongfully and without justification or excuse,* is without merit.

The exception, however, to the refusal of the court to strike out paragraph nine of the complaint in its entirety, presents a more serious question. There is no allegation in the complaint to the effect that Paul Jones, the Vice President of the defendant corporation, ever communicated the statement made by him to the plaintiff to any other person, nor does the plaintiff allege in his complaint that any slanderous statement with respect to the conduct of the plaintiff was ever communicated to a third person by anyone, save and except by O. W. Biggerstaff, a route supervisor of the defendant.

Therefore, we must consider whether the statement made by the officer of the defendant corporation to the plaintiff upon the plaintiff's inquiry as to why he had been discharged, constituted a publication sufficient to support an action for slander. The answer must be in the negative.

It is generally held that the publication, of a libel or slander, invited or procured by the plaintiff, or by a person acting for him, is not sufficient to support an action for defamation. 33 Am. Jur., Libel and Slander, section 93, page 105; 53 C.J.S., Libel and Slander, section 80, page 129; *Renfro Drug Co. v. Lawson,* 138 Tex. 434, 160 S.W. 2d 246, 146 A.L.R. 732; *Taylor v. McDaniels,* 139 Okla. 262, 281 Pac. 967, 66 A.L.R. 1246; *McDaniel v. Crescent Motors,* 249 Ala. 330, 31 So. 2d 343, 172 A.L.R. 204; *Lovejoy v. Mutual Broadcasting Co.* (Tex. Civ. App.) 220 S.W. 2d 308; *Kaplan v. Edmondson,* 68 Ga. App. 151, 22 S.E. 2d 343; *Tucker v. Pure Oil Company of Carolinas,* 191 S.C. 60, 3 S.E. 2d 547. While it is not necessary that the defamatory words be communicated to the public generally, it is necessary that they be communicated to some person or persons other than the person defamed. *Hedgepeth v. Coleman,* 183 N.C. 309, 111 S.E. 517, 24 A.L.R. 232; *McKeel v. Latham,* 202 N.C. 318, 162 S.E. 747; 53 C.J.S., Libel and Slander, section 78, page 127; 33 Am. Jur., Libel and Slander, section 96, page 107.

An examination of plaintiff's complaint discloses that all his allegations with respect to his right to recover compensatory as well as punitive damages, are bottomed on the statement made by Biggerstaff to the various customers of the defendant corporation. He alleges no damages resulting from the statements made to him by the Vice President of the defendant corporation in response to his own inquiry as to the reason for his discharge. Certainly such a statement, unless made to a third person, would not support an action for slander. Moreover, it is generally held that where slanderous or libelous statements are induced for the purpose of bringing suit thereon, recovery will not be permitted. This is upon the theory that a plaintiff will not be permitted "to assist in building up a cause of action for the purpose of gathering fruitage for himself." *Richardson v. Gunby,* 88 Kan. 47, 127 Pac. 533, 42 L.R.A. (N.S.) 520. See 172 A.L.R. Anno. 214. Furthermore, there is no allegation in plaintiff's complaint to the effect that the vice-president of the defendant corporation authorized the defendant Biggerstaff, or anyone else, to publish the statement made by him to the plaintiff. 53 C.J.S., Libel and Slander, section 150 (a), page 233. Consequently, we think the defendant is entitled to have all of the allegations contained in paragraph nine of the plaintiff's complaint stricken out, and it is so ordered.

The exception to the failure of the court to grant the defendant's motion to strike from the plaintiff's complaint the allegation with respect to the reputed wealth of the defendant, will not be upheld.

In an action where punitive damages may be awarded, evidence of the financial condition of the defendant, or of its reputed wealth, is admissible in behalf of the plaintiff. *Roth v. News Co.,* 217 N.C. 13, 6 S.E. 2d 882; *Bryant v. Reedy,* 214 N.C. 748, 200 S.E. 896; *Baker v. Winslow,* 184 N.C. 1, 113 S.E. 570; *Carmichael v. Telegraph Co.,* 162 N.C. 333, 78 S.E. 507; *Arthur v. Henry,* 157 N.C. 393, 73 S.E. 206; *Tucker v. Winders,* 130 N.C. 147, 41 S.E. 8; *Reeves v. Winn,* 97 N.C. 246, 1 S.E. 448; *Adcock v. Marsh,* 30 N.C. 360.

The judgment of the court below will be modified as directed herein.

Modified and affirmed.

ELLA ROSS LAUGHRIDGE v. HOWARD ALFORD LOVEJOY, JR.

(Filed 12 December, 1951.)

Divorce § 21—

Unpaid installments for the support of the child of the marriage past due under a decree of another state may not be modified by our court in action here to enforce payment, and defendant is not entitled to allege as a defense the wife's violation of a provision of the decree that he should

be allowed to visit the child at reasonable times and places, such matter being proper only in a petition for modification of the original decree in the court of its rendition.

APPEAL by defendant from *Sink, J.*, April Term, 1951, of MECKLENBURG.

This action was instituted in the Superior Court of Mecklenburg County, North Carolina, 1 August, 1949, by the plaintiff, a citizen and resident of Jefferson County, Alabama, for the purpose of obtaining a judgment against the defendant for past due and unpaid monthly installments alleged to be due by the defendant to the plaintiff for the support and maintenance of their minor child, pursuant to the terms of a judgment theretofore entered in the State of Alabama.

The material facts are not in dispute and may be summarily stated as follows:

1. The plaintiff and defendant were married and one child, Howard Alford Lovejoy, III, was born of the marriage prior to 23 October, 1945.

2. On the above date, the plaintiff, then Ella Ross Lovejoy, wife of the defendant, instituted an action for divorce against him in the Circuit Court, Tenth Judicial Circuit, of Alabama—Equity Division. Process was duly served on the defendant, and he appeared in person and filed an answer to the plaintiff's complaint. The plaintiff was thereafter granted an absolute divorce from the defendant and awarded a lump sum settlement in lieu of alimony. Pursuant to an agreement of the parties filed in the cause, the custody of the minor child was awarded to the complainant, the mother, "with the right of the respondent, the father, to visit said child at reasonable times and places." The decree further directed the defendant to pay to the plaintiff the sum of $50.00 per month for the support and maintenance of their minor child.

3. The plaintiff, who has since intermarried with one Laughride, alleges that the defendant paid to the plaintiff, irregularly, these monthly installments under and pursuant to the above judgment, but has unlawfully and wrongfully discontinued the payments as required by the order; that plaintiff has demanded payment thereof, but the defendant has failed and refused to pay said past due installments; and that as of 28 July, 1949, the defendant was due the plaintiff, under the terms of the aforesaid judgment, the sum of $1,200, and that such judgment is still in full force and effect in the State of Alabama.

4. The defendant filed an answer to the complaint and does not deny the material allegations thereof, but set up a Further Answer and Defense thereto in which he alleges, among other things, that since the plaintiff and defendant were divorced he has been unable to see his child; that not long after the divorce was granted, plaintiff remarried and her whereabouts were unknown to him; that he sought through his counsel to

find out where she was in order that he might have an opportunity to visit his child; that after repeated efforts he was unable to communicate with his wife; "that after he became unable to see and visit his child, the defendant stopped making payments provided in said divorce decree, for the reason the plaintiff was violating the terms of said decree relating to the child by not giving the defendant the privilege of visiting said child.

The plaintiff, through her counsel, moved to strike out the defendant's Further Answer and Defense, which motion was allowed, and the defendant appeals and assigns error.

G. T. Carswell and Shannonhouse, Bell & Horn for defendant, appellant.

McRae & McRae for plaintiff, appellee.

DENNY, J. The defendant contends he is entitled to plead the failure of the plaintiff to give him an opportunity to visit his child "at reasonable times and places," as provided in the decree awarding custody of the child to the plaintiff, as a defense to her action for the collection of past due and unpaid installments due by him, under the provisions of the decree, for the support and maintenance of his child.

Such alleged violation of the provisions of the decree, if found to be true, might be adjudged sufficient to entitle the defendant to a modification of the decree upon a proper petition or motion lodged in the Alabama court in which the original decree was entered. However, under the full faith and credit clause of the Constitution of the United States, the courts of this State are without jurisdiction to modify or alter a duly entered judgment in a court of competent jurisdiction in another state. 31 Am. Jur., Judgments, section 535, page 145; 50 C.J.S., Judgments, section 890, page 492; *Allman v. Register,* 233 N.C. 531, 64 S.E. 2d 861; *Willard v. Rodman,* 233 N.C. 198, 63 S.E. 2d 106; *Howland v. Stitzer,* 231 N.C. 528, 58 S.E. 2d 104; *Lockman v. Lockman,* 220 N.C. 95, 16 S.E. 2d 670.

The defendant is relying upon those cases where the parties entered into a separation agreement and the wife violated the provisions thereof with respect to the right of the husband to visit his children, citing *Cole v. Addison,* 153 Ore. 688, 58 Pac. 2d 1013, 105 A.L.R. 897; *Duryea v. Bliven,* 122 N.Y. 567, 25 N.E. 908; *Muth v. Wuest,* 76 App. Div. 332, 78 N.Y.S. 431; *Haskell v. Haskell,* 201 App. Div. 414, 194 N.Y.S. 28, (aff. 236 N.Y. 635), 142 N.E. 314; *Myers v. Myers,* 143 Mich. 32, 106 N.W. 402. An examination of these cases, however, discloses, in each instance, that it was an original action to enforce the provisions of a separation agreement and the husband set up an alleged breach thereof as a bar to its enforcement, or it involved a petition or motion, lodged in the court which granted the original decree, for its modification.

It seems to be the general rule that where the wife is awarded the custody of the child and the father is given the right to visit it, and the order requires him to make periodic payments for the support of the child, the order for such support will not be construed as being conditioned on the father's right of visitation which he may claim has been denied him. 27 C.J.S., Divorce, section 319, page 1206; *Zirkle v. Zirkle,* 202 Ind. 129, 172 N.E. 192; *Hatch v. Hatch,* 15 N.J. Misc. 461, 192 Atl. 241; *Firestone v. Firestone,* 158 Penn. Super. 579, 45 Atl. 2d 923.

Moreover, it does not appear in the decree entered by the Alabama court on 24 October, 1945, that the plaintiff and the defendant ever entered into a separation agreement, but that they only filed with the court an agreement to the effect that the custody and control of the minor child of the marriage should be awarded to the mother with the right of the respondent, the father, to visit the child at reasonable times and places, and that the respondent would pay the claimant, as support and maintenance of such child, the sum of $50.00 per month, and the decree was so entered.

Furthermore, past due and unpaid installments for alimony for the support of a wife and children under a divorce decree duly entered in the State of Alabama, seems to be as absolute and final as any other decree for the payment of money. Upon a proper petition, supported by competent evidence, a decree for alimony and support of children may be modified in that jurisdiction with respect to future installments. *Rochelle v. Rochelle,* 235 Ala. 526, 179 So. 825; *Epps v. Epps,* 218 Ala. 667, 120 So. 150.

The ruling of the court below is
Affirmed.

BUFORD F. PRICE v. THE CITY OF MONROE.

MRS. ELIZABETH K. PRICE v. THE CITY OF MONROE.

PHYLLIS PRICE BY HER NEXT FRIEND BUFORD F. PRICE v. THE CITY OF MONROE.

(Filed 12 December, 1951.)

1. **Municipal Corporations § 14a—**

Defendant municipality dug a ditch entirely across the street leaving loose dirt piled along the eastern edge of the excavation to a height of from one and one-half to five feet. No barriers or lights were placed along the ditch. Plaintiff, traveling westward after dark, drove his car over the loose dirt and into the ditch. *Held:* Plaintiff was guilty of contributory negligence as a matter of law.

ERVIN and JOHNSON, JJ., dissent.

2. Negligence § 19c—

Nonsuit on the ground of contributory negligence is properly entered when this conclusion is the sole reasonable deduction from plaintiff's own evidence.

3. Automobiles § 20b—

Guests in a car who have no control over its movements are not responsible for the negligence of the driver.

4. Automobiles § 21: Municipal Corporations § 14a—

Plaintiffs, who were passengers in a car, were injured when the driver drove the car after dark over loose dirt and into a ditch. The municipality had left the loose dirt from the excavation piled along the side of the ditch, but had placed no barriers or lights along the excavation. *Held:* Probable injury resulting from the absence of barriers or lights could have been reasonably foreseen, and therefore the negligence of the city in failing to maintain proper warnings is not insulated by the negligence of the driver.

5. Negligence § 7—

If the intervening act is of such character that it could have been reasonably foreseen, it does not break the sequence of events put in motion by the primary negligence, and the primary negligence remains a proximate cause of the injury.

6. Appeal and Error § 6c (5)—

An assignment of error for that the court failed to apply the law to the facts of the case is ineffective as a broadside exception.

APPEAL by defendant from *Clement, J.*, February Term, 1951, of UNION.

Three separate suits by the above named plaintiffs against the City of Monroe to recover damages for tort were by consent consolidated for trial. All arose out of the same occurrence. The injury to person and property complained of was alleged to have resulted from the fall of the automobile in which plaintiffs were riding into an open and unguarded ditch across a street in the City of Monroe.

Verdicts were returned in favor of the plaintiffs, and from judgments thereon, the defendant appealed.

Coble Funderburk for plaintiffs, appellees.
O. L. Richardson and E. Osborne Ayscue for defendant, appellant.

DEVIN, C. J. *Buford F. Price Case.*

This plaintiff was the owner and driver of the automobile involved. On the evening of 12 October, 1949, about 9:30 p.m., with his wife and daughter as passengers in the automobile, he drove from the mill where he was employed northwardly along Mill Street in the City of Monroe, and then turned west into Avon Street, a paved street in general use

by the public. Across Avon Street 130 feet from Mill Street, the City had dug a ditch for the purpose of installing a new culvert. This work had been in progress several weeks. The ditch was 6 feet wide and 8 feet deep, and extended the entire width of Avon Street. The loose dirt from the excavation had been piled up along the eastern edge of the ditch to form a ridge or bank of earth 1½ to 2 feet high according to plaintiff, or 5 feet high according to the city engineer, and spreading out at the base.

Plaintiff testified there were no barriers or lights on this obstruction; that he was traveling along Avon Street at the rate of 15 miles per hour; that his automobile lights revealed this ridge of dirt but he thought it was dirt used in repairing pavement; that he did not know there was a ditch beyond the ridge and continued to drive without applying his brakes, though he did remove his foot from the accelerator. He said: "I ran straight in the ditch." His front bumper caught on the edge of the pavement on the west side of the ditch, with front wheels in the ditch, while the rear wheels were on top of the ridge of dirt. The automobile and each of the occupants sustained injury. Considering the plaintiff's evidence in the light most favorable for him, it is apparent the City was negligent in permitting an open excavation which it had made across a city street to remain without barriers or lights. *Russell v. Monroe,* 116 N.C. 720, 21 S.E. 550; *Seagraves v. Winston,* 170 N.C. 618, 87 S.E. 507; *Willis v. New Bern,* 191 N.C. 507, 132 S.E. 286; *Michaux v. Rocky Mount,* 193 N.C. 550, 137 S.E. 663; *Hunt v. High Point,* 226 N.C. 74, 36 S.E. 2d 694. But we think the injuries sustained by plaintiff Buford F. Price are attributable to his own contributory negligence, and that in his case the defendant City was entitled to have its motion for nonsuit sustained.

The conclusion seems inescapable that this observed obstruction in the form of a ridge or bank of recently excavated earth extending entirely across the street over which he was driving should have warned him of danger to his progress, and that if he had exercised reasonable care for his own safety and a proper lookout in the direction in which he was moving, he would and should have become aware of so extensive an excavation in the street in time to have avoided the injurious result now complained of. *Blake v. Concord,* 233 N.C. 480, 64 S.E. 2d 408. While compulsory nonsuit on the ground of contributory negligence may be rendered only when no other conclusion reasonably can be drawn from the plaintiff's evidence, *Carruthers v. R. R.,* 232 N.C. 183, 59 S.E. 2d 782; *Dawson v. Transportation Co.,* 230 N.C. 36, 51 S.E. 2d 921, we think his own testimony establishes such want of care on his part as should bar his recovery for the causes alleged. *Hampton v. Hawkins,* 219 N.C. 205, 13 S.E. 2d 227. Nonsuit should have been entered on defendant's motion, and the judgment in favor of the plaintiff Buford F. Price is reversed.

Cases of Elizabeth K. and Phyllis Price.

These cases stand upon a different footing from that of Buford F. Price. These plaintiffs were mere passengers in the automobile of which he was the owner and driver. Neither of them owned the automobile or controlled or had right of control over its movement. Under the facts presented they may not be held responsible for the negligence of the driver. *Crampton v. Ivie,* 126 N.C. 894, 36 S.E. 351; *Hunt v. R. R.,* 170 N.C. 442, 87 S.E. 210; *Dillon v. Winston-Salem,* 221 N.C. 512, 20 S.E. 2d 845.

Nor do we think the evidence supports the defendant's contention that these cases should have been nonsuited on the ground that the negligence of the driver was the sole proximate cause of the injuries sustained, or that his negligence insulated and rendered harmless the negligence of the City. *Harton v. Tel. Co.,* 141 N.C. 455, 54 S.E. 299; *Hinnant v. R. R.,* 202 N.C. 489, 163 S.E. 555; *Speas v. Greensboro,* 204 N.C. 239, 167 S.E. 807; *Haney v. Lincolnton,* 207 N.C. 282, 176 S.E. 573. The damage to vehicles traveling on this public street, due to so extensive an excavation across it, and the probability of injury resulting from the absence of barriers or lights should have been in the reasonable contemplation of the City. *Speas v. Greensboro, supra; Harton v. Tel. Co., supra.* "Foreseeability is the test of whether the intervening act is such a new, independent and efficient cause as to insulate the original negligent act." *Hinnant v. R. R.,* 202 N.C. 489, 163 S.E. 555; *R. R. v. Kellogg,* 94 U.S. 469.

The controlling principle is accurately stated by *Justice Hoke* in *Harton v. Tel. Co.,* 141 N.C. 455, 54 S.E. 299, as follows: "It will be seen that the test laid down by all of these writers, by which to determine whether the intervening act of an intelligent agent which has become the efficient cause of an injury shall be considered a new and independent cause, breaking the sequence of events put in motion by the original negligence of the defendant, is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected. If the intervening act was of that character, then the sequence of events put in motion by the primary wrong is not broken, and this may still be held the proximate cause of the injury. Numerous well considered decisions by courts of the highest authority show that this is a correct statement of the doctrine."

The defendant did not except to any part of the judge's charge to the jury, but assigned as error that he "did not apply the law to the facts in the case" as required by G.S. 1-180. However, the defendant did not specify in what respect or particulars the court's failure consisted. This is insufficient. *State v. Britt,* 225 N.C. 364, 34 S.E. 2d 408; *Steele v. Coxe,* 225 N.C. 726 (733), 36 S.E. 2d 288; *State v. Jones,* 227 N.C. 402, 42 S.E. 2d 465; *State v. Vanhoy,* 230 N.C. 162 (165), 52 S.E. 2d 278.

In the cases of Elizabeth K. and Phyllis Price only issues of negligence on the part of the defendant and damages to the plaintiffs were submitted to the jury. These issues were answered in favor of the plaintiffs. The evidence, which was offered without objection by the defendant, was sufficient to support the verdicts and judgments in favor of these plaintiffs. In the trial of these cases there was no error.

In case of Buford F. Price: Reversed.
In case of Elizabeth K. Price: No error.
In case of Phyllis Price: No error.

In case of Buford F. Price, ERVIN and JOHNSON, JJ., dissent.

STATE v. C. W. KIRKMAN.

(Filed 12 December, 1951.)

1. **Automobiles § 30d—**
   Evidence in this prosecution for drunken driving *held* sufficient to overrule nonsuit.

2. **Criminal Law § 81c (3)—**
   Exception to the admission of evidence cannot justify a new trial in the absence of prejudice.

3. **Criminal Law § 50g—**
   The preservation of order and the prevention of unfair tactics and behavior on the part of witnesses is within the sound discretion of the presiding judge, and sounds or coughing made by a deputy sheriff during the testimony of another witness *held* not prejudicial upon the facts of this case.

4. **Criminal Law § 53f—**
   The court's reference to the place where defendant was arrested as a "hang-out" in stating the State's contentions *held* not prejudicial in view of defendant's admission on cross-examination of previous convictions constituting a lengthy catalogue of criminal offenses.

APPEAL by defendant from *Sharp, Special Judge,* at April Term, 1951, of GUILFORD. No error.

The defendant was charged with operating a motor vehicle on the highway while under the influence of intoxicating liquor. G.S. 14-387. There was verdict of guilty as charged, and from judgment imposing sentence the defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Robert B. Broughton, Member of Staff, for the State.

James W. Clontz and Silas B. Casey for defendant, appellant.

DEVIN, C. J. The evidence was sufficient to carry the case to the jury and to support the verdict and judgment thereon. *S. v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688.

The defendant assigns error in the ruling of the court in admission of the testimony of the State's witness, in the narration of the attendant circumstances, that a second officer was called to assist in the arrest, but this would seem to corroborate the witness' testimony that the defendant was under the influence of intoxicating liquor, and in any event was not harmful. Also we think the exception to the evidence of the officer that in making the arrest he took from the defendant his pocket knife is untenable. Clearly, the officer after making the arrest was justified in relieving his prisoner of an article which might be used as a weapon. Exception on this score on the facts here disclosed cannot be sustained.

The defendant assigns as error that while the defendant was testifying, the State's witness Deputy Sheriff Wheeless "made a slight noise." Counsel for defendant objected that the State's witness was "blowing like an adder." The record recites that thereupon "the court having heard no comment or sound from Mr. Wheeless, looked in his direction, and observing him in a fit of coughing, said, 'I don't believe the sheriff meant any intentional comment on the witness.' "

We see nothing in the incident as shown by the record before us that would justify awarding a new trial. The conduct of a trial in the Superior Court, the preservation of order and the prevention of unfair tactics and behaviour on the part of witnesses and others must be left in large measure to the control and wise discretion of the presiding judge. Apparently the noise complained of here was not of sufficient moment to warrant action by the judge. *S. v. Vann,* 162 N.C. 534, 77 S.E. 295, 53 A.J. 55; 131 A.L.R. 323.

The defendant also noted exception to portions of the judge's charge to the jury in stating the contentions of the State on the evidence offered, but we see nothing in the matter or manner excepted to which may properly be regarded as prejudicial. Nor may the defendant justly complain that the court in stating the State's contentions referred to the place where the defendant was arrested as a "hang-out," in view of the defendant's admission, on cross-examination, of previous convictions constituting a lengthy catalogue of criminal offenses.

In the trial we find no error of which the defendant may justly complain.

No error.

R. B. McROY & COMPANY, INC., v. ATLANTIC COAST LINE RAILROAD COMPANY, INC.

(Filed 12 December, 1951.)

Railroads § 4—

Plaintiff's evidence *held* to show, as a matter of law, contributory negligence constituting a proximate cause of the crossing accident in suit.

APPEAL by plaintiff from *Burney, J.*, February Term, 1951, of COLUMBUS.

Civil action to recover for property damage caused by a truck-train collision at a grade crossing.

At the close of the plaintiff's evidence, the defendant moved for judgment of nonsuit. The motion was allowed, and from judgment based on such ruling the plaintiff appealed, assigning errors.

Irvin B. Tucker, Jr., for plaintiff, appellant.

Poisson, Campbell & Marshall and E. K. Proctor for defendant, appellee.

PER CURIAM. This case involves no new question or feature requiring extended discussion. The evidence offered by the plaintiff, when tested by settled principles of law, fails to make out a case for the jury. The collision occurred in broad daylight at the grade crossing on Lee Street in the business district of the town of Whiteville. The record discloses that the truck driver "was thoroughly familiar with the crossing." He said he had "crossed it many times." Also, just prior to the collision the driver had made a stop up the tracks about 100 yards from the crossing. Thereafter he drove westerly along a street parallel with and on the south side of the tracks intending to make a right turn at Lee Street and then cross the tracks. While so driving side of the tracks, he knew the train was in town just beyond the crossing. He said, "I heard it. I knew it was stopped there just west of the . . . station . . . I could have seen it if I had looked for it. When I stopped . . . I had a view down the track of almost 120 feet," beyond the box car which plaintiff urges was an obstruction. The train was traveling only about 6 miles per hour. The only reasonable inference deducible from this evidence is that the plaintiff's driver was contributorily negligent.

The plaintiff was not prejudiced by the exclusion of that part of the town ordinance making it unlawful "for any train to do any shifting across said streets (Lee Street included) without having first placed a watchman on crossings to direct traffic." Besides, the record discloses no evidence that the train was engaged in a shifting operation.

It follows that the judgment of nonsuit was properly entered below.

Affirmed.

HAMLET HOSPITAL AND TRAINING SCHOOL FOR NURSES, INCORPORATED, v. THE JOINT COMMITTEE ON STANDARDIZATION CREATED BY ARTICLE 9, CHAPTER 90 OF THE GENERAL STATUTES OF NORTH CAROLINA, THE NORTH CAROLINA BOARD OF NURSE EXAMINERS, AND AMY FISHER, FLORENCE WILSON, HILDRED HARRISON, GEORGE L. CARRINGTON, H. L. BROCKMAN, A. L. DAUGHTRIDGE, SAMPLE FORBUS, MIRIAM DAUGHTRY, ETHEL BURTON, FRANCES FARTHING, MOIR B. MARTIN AND LOUTEN R. HEDGPETH.

(Filed 1 February, 1952.)

1. **Pleadings § 19c—**

A demurrer tests the sufficiency of a pleading, liberally construed, to state a cause of action, admitting, for the purpose, the truth of every material fact properly alleged.

2. **Mandamus § 2a—**

Mandamus lies to compel a public official to perform a purely ministerial duty imposed by law, and will issue at the instance of the person who has a present, clear, legal right to insist upon performance and who is without other adequate remedy.

3. **Mandamus § 2b—**

Ordinarily, *mandamus* will not lie to control the exercise of discretion, but may lie to compel a public official to act in a matter within his discretion without in any manner controlling such action.

4. **Same—**

Mandamus will lie to control or review discretionary acts when it is made to appear that the discretion has been abused, as where the action complained of has been arbitrary or capricious.

5. **Same—**

Where the sole discretion of a public official is to determine the existence of facts imposing upon him the right and duty to perform an act, proof of the existence of such basic facts renders the act purely ministerial, and *mandamus* will lie to compel its performance.

6. **Same: Hospitals § 9—**

Plaintiff hospital alleged that it had corrected all deficiencies and criticisms pointed out by the joint accrediting boards as being necessary to comply with the requirements for approval as an accredited school for nurses, that it had met all minimum requirements for accreditation, that the boards had arbitrarily refused to accredit plaintiff, and that plaintiff would suffer irreparable damage by the removal of its school from the accredited list. *Held:* The facts alleged, taken as true upon demurrer, are sufficient to state a cause of action for *mandamus* to compel defendants to accredit plaintiff's school of nursing. G.S. 90-159.

7. **Appearance §§ 2a, 2b—**

The filing of a demurrer on the ground that the complaint fails to state a cause of action is a general appearance which waives any defects of service. G.S. 1-103.

8. Injunctions § 5: Mandamus § 4—

In an action for *mandamus*, a motion for a temporary restraining order to preserve the *status quo* pending hearing upon the merits is controlled by G.S. 1-581 and not by G.S. 1-513, and the court may set the hearing less than ten days after notice of the order to show cause.

9. Injunctions § 6: Mandamus § 4—

In an action for *mandamus*, a court of equity may issue a mandatory preliminary injunction in proper instances upon a showing that plaintiff would suffer irreparable loss and injury unless the *status quo* be preserved until the hearing upon the merits.

BARNHILL, J., concurring.

APPEAL by defendants from *Phillips, Resident Judge,* at Chambers in Rockingham, 30 June, 1951, in action pending in Superior Court of RICHMOND County.

Civil action by plaintiff for a writ of *mandamus* to compel the defendants, The North Carolina Board of Nurse Examiners and the Joint Committee on Standardization, and the members thereof, to certify plaintiff's school of nursing as an accredited school for nurses in North Carolina, heard below on (1) plaintiff's motion for interim writ to preserve the *status quo* pending trial of the case, (2) defendants' counter motion to dismiss, and (3) defendants' demurrer to the complaint for failure to state facts sufficient to constitute a cause of action.

The court below overruled the defendants' motion to dismiss and also their demurrer, and allowed the plaintiff's motion for interim writ, requiring the defendants to continue the nursing school of plaintiff on the accredited list of nursing schools in North Carolina until the final determination of the cause.

From the orders entered effectuating these rulings, the defendants appealed to this Court, assigning errors.

McLean & Stacy and Helms & Mulliss for plaintiff, appellee.
Lassiter, Leager & Walker for defendants, appellants.

JOHNSON, J. The statutory machinery for licensing trained nurses and accrediting training schools for nurses in this State is codified in Chapter 90 of the General Statutes of North Carolina (G.S. 90-158 through G.S. 90-171).

G.S. 90-158 sets up "The North Carolina Board of Nurse Examiners," composed of five members, consisting of three registered nurses to be elected by the North Carolina State Nurses' Association and one representative each from the State Medical Society and the State Hospital Association.

G.S. 90-159 sets up a Joint Committee on Standardization, consisting of three members appointed from the State Nurses' Association and four members from the State Hospital Association. The statute directs that the Joint Committee on Standardization shall advise with the Board of Nurse Examiners in the adoption of regulations governing the education of nurses. The statute also provides that the Board of Nurse Examiners and the Joint Committee on Standardization shall "have power to establish standards and provide minimum requirements for the conduct of schools of nursing of which applicants for examination for nurse's license . . . must be graduates before taking such examination." A related statute, G. S. 90-162, also requires in effect that an applicant before being permitted to take the examination for licensure as a registered nurse shall have graduated from a school of nursing connected with a general hospital giving a three years course of practical and theoretical instruction, meeting the minimum requirements and standards for the conduct of schools of nursing set up and established by the Joint Committee on Standardization provided for in G.S. 90-159.

The record in the instant case indicates that this joint accrediting agency had formulated regulations establishing certain minimum requirements and standards for the conduct of schools of nursing in this State. The regulations so promulgated contain a stipulation that if a school meets the minimum requirements for accreditation, it shall be accredited for a period of one year, with provision that "accreditation shall be renewed annually provided the school continues to meet the minimum requirements for approval."

It thus appears that under the regulations, an accredited nursing school automatically goes off the approved list at the end of the year (30 June), unless the accrediting agency in the meantime takes affirmative action and renews the listing for another year,—and so on from year to year.

The plaintiff's school was on the list of accredited schools of nursing for the year ending 30 June, 1951. The record also shows that on 24 May, 1951, the Joint Committee on Standardization and The North Carolina Board of Nurse Examiners met in executive session for the purpose of accrediting schools of nursing for the succeeding year. At that meeting "a motion was . . . passed to the effect that Hamlet Hospital School of Nursing should not be accredited for the school year June 30, 1951-June 30, 1952." And by notice dated 29 May, 1951, the plaintiff was notified and directed by this joint accrediting agency to show cause before the joint boards in Raleigh on 11 June, 1951, why plaintiff's school of nursing should be listed on the accredited list for the year 30 June 1951, to 30 June, 1952. The plaintiff appeared with witnesses before the joint boards at the appointed time and place and at the conclusion of the meeting "a motion was . . . passed to the effect

that plaintiff's school of nursing should not be placed on the accredited list for the year June 30, 1951-June 30, 1952," and a directive to that effect was issued by the joint boards.

The plaintiff then instituted this action to compel accreditation. After the summons was issued and the complaint filed, the plaintiff obtained from Judge Clement on 21 June, 1951, a temporary order of injunction restraining the defendants from removing the plaintiff's school of nursing from the list of accredited schools in the State until the further order of the court.

After this order of injunction was issued, the plaintiff obviously realized that under the terms of the defendants' regulation for accrediting schools from year to year, the then current accreditation of its school would terminate by virtue of the rule itself on 30 June, 1951, thus rendering the preliminary order of injunction, which merely restrained the removal of plaintiff's school of nursing from the accredited list, insufficient to compel the defendants to place the school on the accredited list for the next year, so as to preserve the *status quo* pending final determination of the case. Accordingly, the plaintiff on 25 June, 1951, sought and obtained from Judge Clement an order requiring the defendants to appear before Judge Phillips in Rockingham on 30 June, 1951, and show cause "why an interim *mandamus* should not be entered . . . commanding them to continue the nursing school of plaintiff on the accredited list . . . until the final determination of this cause."

When the plaintiff's motion for this affirmative, interim relief came on for hearing, the defendants entered a special appearance and by motion to dismiss challenged the power of the court to hear the matter or issue any form of *mandamus.* The defendants also interposed a demurrer alleging that the complaint fails to state facts sufficient to constitute a cause of action. At the hearing on 30 June, 1951, Judge Phillips overruled the defendants' demurrer and motion to dismiss, and allowed the plaintiff's motion for what is inexactly denominated an "interim *mandamus,*" requiring the defendants to continue the plaintiff's school on the accredited list until the final determination of the cause.

Thus the instant appeal challenges the action of the court below in (1) overruling the demurrer to the complaint, (2) disallowing the defendants' motion to dismiss, and (3) allowing the plaintiff's motion for interim writ compelling the defendants to keep plaintiff's school on the accredited list pending trial of the cause on its merits.

1. *The demurrer.*—The function of a demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of fact contained therein (*Brick Co. v. Gentry,* 191 N.C. 636, 132 S.E. 800), with liberal interpretation in favor of the pleader. *Jones v. Raney Chevrolet Co.,* 213 N.C. 775, 197 S.E. 757. Thus, the defendants by demurring to the sufficiency of the complaint to state a cause of action, ad-

mit as true every material fact properly alleged, *Gaines v. Manufacturing Co., ante,* 340, 67 S.E. 2d 355; *Hall v. Dairies, ante* 206, 67 S.E. 2d 63; *Bryant v. Little River Ice Co.,* 233 N.C. 266, 63 S.E. 2d 547. See also *McLean v. Ramsey,* 221 N.C. 37, 18 S.E. 2d 705.

These in substance are the pertinent facts alleged in the complaint:

1. The plaintiff, non-profit corporation, has operated a hospital and training school for nurses in the Town of Hamlet since 1915. This school is the only training school for nurses between Charlotte and Lumberton, North Carolina, and between Raleigh, North Carolina, and Columbia, South Carolina. It serves the areas referred to for those desiring training in nursing. Its graduates are well-trained, well-qualified graduate nurses. They have maintained a creditable average in passing the State Board of Nurse Examiners.

2. In January, 1951, an inspector of the Joint Committee on Standardization inspected plaintiff's school and made certain criticisms and recommendations. The plaintiff has met these criticisms and recommendations, and the corrections suggested have been made.

3. On or about 1 June, 1951, plaintiff received notice from The North Carolina Board of Nurse Examiners and the Joint Committee on Standardization to show cause before these boards in Raleigh on 11 June, 1951, why the Hamlet Hospital School of Nursing should be listed on the accredited list of schools of professional nursing in North Carolina for the year ending 30 June, 1952. Attached to the notice was a memorandum advising the plaintiff that, because of certain deficiencies and criticisms listed, its "school of nursing fails to meet the minimum requirements and standards prescribed by the Joint Committee on Standardization and approved by The North Carolina Board of Nurse Examiners, as set forth in the 'Regulations for Schools of Nursing in North Carolina 1948' as amended." Attached to the complaint is a copy of this list of deficiencies and criticisms pointed out by the joint accrediting boards as constituting the particulars in which the plaintiff's school of nursing failed to qualify for accreditation. These deficiencies and criticisms may be summarized as follows:

(1). *Records.*—The Board's memorandum of deficiencies points to and quotes from its regulations requiring that "a good system of record be . . . maintained,"—so as to furnish a continuous history of each student's education and practice, indicating "the student's efficiency in work, attendance, and rating in her classes; lectures and demonstrations; the time she has spent in each department (day and night); absence from duty; sickness; and vacation." Here, the memorandum charges violations in these particulars: (a) "No record of required clinical instruction for students"; (b) senior students' final records showed substantially more class hours than shown in class roll book, thus reflecting violation of rule requiring accuracy of records; and (c) records "showed that an

entire new curriculum was not started for the pre-clinical class admitted September 20, 1950, but that they began anatomy and physiology classes with the June 20, 1950 group," in violation of regulation requiring that "a new curriculum shall be started with each new class."

(2). *Personnel Practices for Students.*—Here, the memorandum of the Board charges: (a) that "student nurses on night duty were working eight hours per night plus class hours during the day," in apparent violation of the regulation limiting time on duty, including clinical practice and class hours, to 48 hours per week; (b) that the student residence was without adequate graduate supervision, furnishings, and bath facilities (as shown by annual report), with no provision for "a reception room where the nurses could entertain their friends,"—in violation of regulations providing that nurses shall have "comfortable living quarters with provision for rest and recreation," and that "there shall be a reception room where nurses can entertain their friends."

(3). *Clinical Facilities.*—Here the memorandum of the Board charges: (a) failure of the affiliated hospital to maintain the required daily average of twenty patients in medicine and ten each in the pediatric and obstetric departments; (b) "Hospital equipment appeared inadequate for students to practice good patient care," for that there were only "two thermometers for 20 patients," and "one bed pan sterilizer for entire hospital and that not in use," and "majority of patients did not have individual equipment," (no regulation cited as prescribing specific standards as to required articles of equipment or use thereof); (c) failure to maintain separate nutrition and cookery laboratory for teaching course, in violation of specific regulation to that effect.

(4). *Library Facilities.*—The memorandum quotes the regulation requiring maintenance of a reference library of "at least one hundred well selected reference books," including "new editions and no duplications." Here, it is charged that the annual report lists only 75 books, and that the survey "showed that majority were out of date and there was no reference book on nutrition or dietetics."

(5). *Student Supervision.*—The memorandum charges violation of the following regulation: "Head nurses and floor duty nurses shall be employed as needed in order that the nursing service of the hospital may go on without interruption, and that student nurses may be properly taught and supervised throughout the twenty-four hour period." Here, the particular violations charged are: (a) "only one full time instructor, and she does not supervise the students during their pre-clinical nor subsequent practice on the wards"; (b) "the instructor in the nursing arts course is in charge of the third floor which is the medical-surgical service." This "does not give her time to teach and supervise the students properly"; (c) "Sixteen registered nurses were listed as employed

on the annual report; whereas there were only twelve the day of the visit, and one of these was working in the office."

4. "On 11 June 1951, pursuant to notice previously issued, plaintiff appeared with witnesses before The North Carolina Board of Nurse Examiners and the Joint Committee on Standardization, and reported what progress had been made in meeting the criticisms of the Nursing Educational Consultant and gave assurance and promised to fully comply with these requirements insofar as was possible; that irrespective of the efforts that plaintiff had made to comply with the criticisms and requirements, as aforesaid, and its solemn sworn promise to comply with these requirements, defendants arbitrarily, and without giving plaintiff an opportunity to meet its alleged minimum requirements, issued a directive ordering that the Hamlet Hospital School of Nursing should be taken off the accredited list of schools of professional nursing in North Carolina, and no new certificates be issued after 30 June 1951. That . . . the votes of the members of the aforesaid Committee to deny plaintiff listing on the accredited list of Nursing Schools in North Carolina was by very small majority. . . ."

5. "Plaintiff has now met all of the minimum requirements of defendants as set out in 'the memorandum of deficiencies and criticisms' previously served on the plaintiff."

6. "That the regulations promulgated by defendants under the division entitled, 'Accredited Schools of Nursing,' contains, among other things, the following:

" 'If the school meets the minimum requirements for accreditation, it shall be accredited for a period of one year. Accreditation shall be renewed annually, provided the school continues to meet the minimum requirements for approval.' "

7. "That if plaintiff's school of nursing is removed from the accredited list of Schools of Nursing by defendants, the graduates of said school under the regulations promulgated by defendants, will not be permitted to take the examination for license to practice their profession in North Carolina, regardless of their education and other qualifications."

8. "If defendants are permitted to remove plaintiff's nursing school from the accredited list of nursing schools, as intended by defendants, such removal will make it impossible for the said nursing school to continue in operation and will make it impossible for student nurses, except seniors, to complete their training in said school and to take the examination for practice of their profession in North Carolina."

9. Plaintiff, having operated its training school for nurses for more than 35 years, has invested many thousands of dollars in buildings, laboratories, and other equipment in addition to employing instructors, supervisors, and assistants to operate and maintain, in connection with its hospital, its training school for nurses. If defendants are permitted

to remove plaintiff's school from the accredited list of nursing schools in North Carolina, plaintiff will suffer irreparable loss and damage for which it has no adequate remedy at law.

10. "Plaintiff . . . is also entitled to a writ of *mandamus* commanding and requiring defendants to certify, or to continue to certify, plaintiff's school of nursing as an accredited school of nursing so long as it meets the minimum requirements for accreditation, as is authorized by Chapter 90, Article 9 of the General Statutes of North Carolina, which it has done."

The demurrer filed by the defendants has put to test the legal sufficiency of the complaint to state a cause of action entitling the plaintiff to a writ of *mandamus* compelling certification of plaintiff's school as an accredited school of nursing in this State. Thus an issue of law is raised, the answer to which requires application of the principles of law which control the facts, taken to be true as alleged.

Mandamus is the proper remedy to compel public officials, such as members of an administrative board, to perform a purely ministerial duty imposed by law, where it is made to appear that the plaintiff, being without other adequate remedy, has a present, clear, legal right to the thing claimed and it is the duty of the respondents to render it to him. *Perry v. Commissioners,* 130 N.C. 558, 41 S.E. 787; *Board of Education of Alamance County v. Board of Commissioners of Alamance County,* 178 N.C. 305, 100 S.E. 698; *Gulf Refining Co. v. McKernan,* 179 N.C. 314, 102 S.E. 505; *Hickory v. Catawba County,* 206 N.C. 165, mid. p. 173, 173 S.E. 56; *Poole v. Board of Examiners,* 221 N.C. 199, 19 S.E. 2d 635. See also *Brown v. Turner,* 70 N.C. 93; *Lyon v. Commissioners of Granville County,* 120 N.C. 237, 26 S.E. 929.

But as a general rule, the writ of *mandamus* may not be invoked to review or control the acts of public officers and boards in respect to matters requiring and depending upon the exercise of discretion. *Board of Education of Cherokee County v. Board of Commissioners of Cherokee County,* 150 N.C. 116, 63 S.E. 724; *School Commissioners of City of Charlotte v. Board of Aldermen of City of Charlotte,* 158 N.C. 191, 73 S.E. 905; *Board of Education of Alamance County v. Board of Commissioners of Alamance County, supra* (178 N.C. 305); *Wilkinson v. Board of Education of Johnston County,* 199 N.C. 669, 155 S.E. 562; *Moore v. Board of Education of Iredell County,* 212 N.C. 499, 193 S.E. 732; *Harris v. Board of Education of Vance County,* 216 N.C. 147, 4 S.E. 2d 328. In such cases *mandamus* lies only to compel public officials to take action, but ordinarily it will not require them, in matters involving the exercise of discretion, to act in any particular way. *Board of Education of Alamance County v. Board of Commissioners of Alamance County, supra.*

However, the rule is that the discretion must be exercised according to law; and *mandamus* will issue to control or review discretionary acts where it is made to appear that the discretion has been abused. 34 Am. Jur., Mandamus, Sections 69 and 184; 55 C. J. S., Mandamus, Section 63, p. 103. See also *Pue v. Hood, Comr. of Banks,* 222 N.C. 310, p. 315, 22 S.E. 2d 896; *Wilkinson v. Board of Education of Johnston County, supra* (199 N.C. 669, top p. 673). And it may be said to be abused within the foregoing rule when the action complained of has been arbitrary or capricious. 55 C. J. S., Mandamus, Section 63, p. 103; 38 C. J., pp. 598 and 599.

Also, "where the discretion is as to the existence of facts entitling the relator to the thing demanded, if the facts are clearly proved or admitted, *mandamus* will lie to compel action according to law, for in such case the act to be done becomes purely ministerial and the duty to perform it absolute." 34 Am. Jur., Mandamus, Section 69, p. 859; *Pue v. Hood, Comr. of Banks, supra* (222 N.C. 310). See also *Tucker v. Justices of Iredell County,* 46 N.C. 451; *Perry v. Commissioners, supra* (130 N.C. 558); *Gilliland v. Board of Education of Buncombe County,* 141 N.C. 482, 54 S.E. 413; *Goins v. Board of Trustees Indian Training School,* 169 N.C. 736, 86 S.E. 629; *Hickory v. Catawba County, supra* (206 N.C. 165); *Poole v. Board of Examiners, supra* (221 N.C. 199).

And "an act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act." 55 C. J. S., Mandamus, Section 63, p. 101. See also *Pue v. Hood, Comr. of Banks, supra* (222 N.C. 310, bot. p. 314 and top p. 315); *States' Rights Democratic Party v. State Board of Elections,* 229 N.C. 179, 49 S.E. 2d 379; *Poole v. Board of Examiners, supra; Board of Education of Yancey County v. Commissioners,* 189 N.C. 650, 127 S.E. 692.

"It is one thing to provide that a thing may be done if it is made to appear that under the law a certain condition exists; it is another thing to provide that a thing may be done if in the opinion of a named party a certain situation exists." *Pue v. Hood, Comr. of Banks, supra* (222 N.C. 310, bot. p. 314).

Here, it is observed that the plaintiff does not challenge the legality of the exercise of the defendants' discretion in respect to the promulgation of any of the regulations setting the standards and minimum requirements for accreditation. Nor does the plaintiff question the validity of the anomalous rule under which accreditation automatically terminates at the end of the year unless in the meantime the accrediting agency takes affirmative action and renews the listing for another year. The plaintiff accepts the regulations and alleges full compliance. Specifically, it is alleged in the complaint that the plaintiff has corrected all the deficiencies and criticisms pointed out by the joint accrediting

boards as being the particulars in which the plaintiff's school failed to comply with the requirements for approval. It is further alleged that the "plaintiff has now met all the minimum requirements" for accreditation. The complaint also sets out the regulation promulgated by the defendants under which it is specifically provided that "accreditation shall be renewed annually, provided the school continues to meet the minimum requirements for approval."

Taking the foregoing facts as true, as we are required to do on demurrer, the defendants' duty to approve plaintiff's school becomes purely ministerial and the duty to perform absolute. These allegations, with the further averments that the defendants have refused arbitrarily to approve the plaintiff's school of nursing and that plaintiff will suffer irreparable damage by removal of its school from the accredited list, are sufficient to show that the plaintiff is without other adequate remedy and has a clear, legal right to the relief by *mandamus* as sought.

The complaint, when tested by the applicable principles of law, would seem to be sufficient to withstand the demurrer and entitle the plaintiff to a hearing on the issue of compliance.

Factually distinguishable are the decisions of this Court cited and relied on by the defendants, including *Ewbank v. Turner,* 134 N.C. 77, 46 S.E. 508. In that case the plaintiff, an unsuccessful applicant for license to practice dentistry in this State, sought by *mandamus* to have the court review and pass on his examination paper involving the application of intricate principles of scientific learning, found by the members of the examining board, in the exercise of their judgment, as experts, to be insufficient to justify a passing grade. The mode of dealing with an entirely different factual situation in the instant case suggests no such opening of a pandoran box as was sought by the plaintiff in the *Ewbank case.*

2. *The Motion to Dismiss.*—The defendants made a special appearance and moved the court to dismiss the plaintiff's motion for interim writ, assigning as the main ground for relief that the hearing was set to be held on less than ten days notice and that some of the defendants had not been served with process.

To the action of the court below in overruling the motion to dismiss, no error has been made to appear. The summons and complaint were duly served on Miriam Daughtry, Secretary of the Joint Committee on Standardization, and Secretary of The North Carolina Board of Nurse Examiners, by the Sheriff of Wake County on 25 June, 1951, and the order to show cause was served on her, as secretary of each board, on 27 June, 1951. All the defendants were represented by counsel of record at the hearing before Judge Phillips on 30 June, 1951, and the defendants, through their counsel, on that date consented to the entry of an order continuing until the final determination of the cause the temporary re-

straining order previously entered by Judge Clement on 21 June, 1951. Moreover, the defendants' appearance in filing the demurrer to the complaint constituted a general appearance. Consequently, any defect of service on any of the defendants was waived by these voluntary general appearances. G.S. 1-103; *Reel v. Boyd*, 195 N.C. 273, 141 S.E. 891; *Abbitt v. Gregory*, 195 N.C. 203, 141 S.E. 587.

Also, the time fixed for the return of the order to show cause is governed by G.S. 1-581, and not G.S. 1-513. The controlling statute by its terms allows the judge to "prescribe a shorter time" than ten days. *Jones v. Jones*, 173 N.C. 279, 91 S.E. 960.

3. *The interim writ requiring defendants to keep plaintiff's school on the accredited list pending trial.*—The writ applied for and obtained was designated by counsel as an "interim writ of *mandamus*." No such remedy or writ seems to be known to the language of the law. However, while *mandamus* is a legal remedy (*Maryland Casualty Co. v. Leland*, 214 N.C. 235, 199 S.E. 7), equity will lend its aid by injunction in *mandamus* proceedings in proper cases. Particularly is this so where, as in this jurisdiction, legal and equitable remedies are administered in the same courts, and when it is made to appear, as here, that the plaintiff would suffer irreparable loss and injury because of the delay incident to the remedy by *mandamus*. 55 C. J. S., Mandamus, Section 329; *Moore v. Jones*, 76 N.C. 188; *Lombard Iron Works v. Town of Allendale*, 187 S.C. 89, 196 S.E. 513; 28 Am. Jur., Mandamus, Section 43; 93 A. L. R., 1499, p. 1504. See also *Gaines v. Manufacturing Co., supra* (*ante* 340).

In the instant case, looking through form to substance, we are disposed to treat the interim writ issued by Judge Phillips as a temporary order of injunction, with direction that it remain in force to preserve the *status quo* until the further order of the court below. *Woolen Mills v. Land Company*, 183 N.C. 511, 112 S.E. 24. See also *Gaines v. Manufacturing Co., supra* (*ante* 340, bot. p. 346); *Springs v. Atlantic Refining Co.*, 205 N.C. 444, 171 S.E. 635; *Proctor v. Fertilizer Works*, 183 N.C. 153, 110 S.E. 861.

Upon this record, presented as it is by demurrer, we are constrained to the view that the plaintiff is entitled to be heard on the facts alleged. Therefore, the orders appealed from are affirmed. This necessitates a hearing on the plaintiff's allegations of full compliance with the minimum requirements for accreditation, and to that end the cause will be remanded by the court below to the Joint Committee on Standardization and The North Carolina Board of Nurse Examiners, the joint agency in which is vested the power to find the facts in the first instance, with direction that the plaintiff be given a hearing on the issue of compliance, after which the joint agency will report its findings and conclusions to the Superior Court of Richmond County for such further proceedings in the cause as may be appropriate, with the plaintiff's right to be heard in

the Superior Court on the report being preserved. To the end that the decision here reached may be effectuated, the cause is
Remanded.

BARNHILL, J., concurring: The Act as amended, now General Statutes Ch. 90, Art. 9, which is at least indirectly the subject matter of this action, created two administrative agencies: (1) a board of nurse examiners and (2) a joint committee on standardization. These two agencies, together with the individual members thereof, are defendants herein. For the sake of brevity and convenience of discussion I shall hereinafter refer to them as the Board and the Joint Committee.

The Legislature is the policy-making agency of the State government. The law-making function is assigned exclusively to it, and it alone can prescribe standards of conduct which have the force and effect of law. This function, except when expressly authorized by the Constitution—as is the case in respect to counties, cities, and towns—cannot be delegated to any other authority or body. *Motsinger v. Perryman*, 218 N.C. 15; *S. v. Harris*, 216 N.C. 746.

While the Legislature may not delegate the power to make the law, it may create an administrative agency and authorize it to make rules and regulations to effect the operation and enforcement of a law within the general scope and expressed general purpose of the statute. This authority, when granted, must be limited to the right "to fill in the details" in respect to procedural and administrative matters. It cannot lawfully include the power to make the law, for neither urgency of necessity nor gravity of situation arising from economic or social conditions allows the Legislature to abdicate, transfer, or delegate its constitutional authority or duty to an administrative agency. Hence, an administrative agency has no power to create a duty where the law creates none. *Motsinger v. Perryman, supra.*

The Legislature has the authority to regulate the practice of the professions. This includes the authority to establish minimum requirements to be observed by the schools which undertake to prepare applicants for license to practice such professions. It may likewise create administrative agencies to administer and enforce such laws. But standards of conduct to be observed can be prescribed only by the law-making branch of the government. Therefore, an act, the purpose of which is to regulate a profession or school, must establish the standards and minimum requirements; that is, standards of conduct must be prescribed by the Legislature. Only the power to enforce standards thus established may be delegated to a governmental agency. *Motsinger v. Perryman, supra.* This rule is inflexible.

There is no direct attack—on constitutional grounds—upon the statute under which defendants acted or purported to act. Even so, it is alleged

that the defendants, in withdrawing from plaintiff accreditation as a hospital school of nursing and refusing to place its name on the list of accredited schools for the year beginning 1 July 1951, was arbitrary and contrary to law. Therefore, if the Act prescribes no standards or minimum requirements for hospital schools of nursing in respect of the "deficiencies of Hamlet Hospital School of Nursing" listed by defendants as justification for their action in ordering "that the Hamlet Hospital School of Nursing not be listed on the said accredited list for the year beginning July 1, 1951, and ending July 30th, 1952," then their action was in fact arbitrary and contrary to law as alleged. This necessitates an examination of the statute to ascertain what standards, if any, are prescribed so as to determine whether said order of defendants is pursuant to and in furtherance of the enforcement of standards lawfully established. If not, the order is without force or effect and the restraining order was properly continued in force.

The Board is created by G.S. 90-158 and is empowered to give examinations to applicants for license to practice nursing, G.S. 90-162, on certain specified subjects, G.S. 90-163. The "prerequisites for applicants" are listed in G.S. 90-162. One of the requirements is that the applicant "shall have graduated from a school of nursing connected with a general hospital giving a three years' course of practical and theoretical instruction, which said hospital meets the minimum requirements and standards for the conduct of schools of nursing which may have been set up and established by the joint committee on standardization provided for in sec. 90-159."

The Act contains no specific standard to be observed or minimum requirement to be met by a hospital school of nursing. Instead, there is an attempt to delegate this law-making power to the Joint Committee. G.S. 90-159. It is there provided that "The joint committee on standardization shall advise with the Board of Nurse Examiners herein created in the adoption of regulations governing the education of nurses, and shall jointly with the North Carolina Board of Nurse Examiners have power to establish standards and provide minimum requirements for the conduct of schools of nursing of which applicants for examination for nurse's license under this chapter must be graduates before taking such examination." This does not serve to establish standards or to vest valid authority in the Joint Committee to do so.

However, the Act, in my opinion, does establish, by necessary implication, two standards or requirements for the conduct of hospital schools of nursing.

The applicant for license must have graduated from a school of nursing giving a three-year course of practical and theoretical instruction, G.S. 90-162, in specified subjects, G.S. 90-163. It would seem to follow by

necessary implication that the school must furnish a three-year course of instruction in the specified subjects. It may be the additional requirement that the school shall have a library containing approved reference books on the prescribed subjects of study and adequate laboratory facilities is likewise necessarily implied.

But the Act does not, either directly or indirectly, establish any standards or minimum requirements for the conduct of hospital schools of nursing in respect of the "records," "personal practices of nurses," absence on account of vacation or illness, hours of practical training, system of bookkeeping, reception room and bath tub facilities, or time for giving theoretical instruction, in respect to all of which it is charged plaintiff was deficient. No doubt the Legislature considered that these matters are best left to the hospitals themselves. The attempted delegation of authority to establish such requirements is without legal effect and any standards established by defendants in respect of such "deficiencies" are void. Any attempted enforcement thereof is of necessity arbitrary and in disregard of law. Therefore, the only course open to the court below was to continue the restraining order in full force and effect.

The objective of the law is to provide for a minimum standard of training for those who seek license as trained nurses and to ascertain by examination that such applicants possess the required degree of proficiency before being granted a license.

The duty of the defendant boards is to regulate, not eliminate—to enforce, not to establish—standards for the conduct of schools of nursing. And they must confine their activities to the enforcement of the standards established by the Legislature. Where there is no standard, they have no power to act.

No doubt the defendants have acted in absolute good faith. The statute purports to delegate to them the power to establish minimum requirements and standards for the conduct of hospital schools of nursing. This they undertook to do, believing no doubt, they had ample legal authority for their action. Even so, if some of the listed "deficiencies" of plaintiff are a fair indication of the "standards" prescribed by them, they have passed from the field of regulation into the hunting ground of unauthorized intermeddling. This is true notwithstanding their absolute good faith. The hours of active duty, the time for theoretical instruction, the personal conduct of trainee nurses while in school, and facilities for their entertainment are matters for the several schools to regulate, certainly in the absence of specific legislation to the contrary.

Likewise, in my opinion, the requirement that hospital schools of nursing must approach defendants each year, with hat in hand, and beg leave to be accredited once again for the ensuing year is arbitrary and unreasonable. As already noted, such schools must provide a three-year

course of training. Therefore, when the name of a school is once placed on the accredited list—granting for the present that defendants have the right to require accreditation—its name should not be removed from such list except after notice and full opportunity to be heard.

The enforcement of regulations such as those herein indicated will inevitably culminate in the elimination of many of the smaller schools of nursing and centralize the training of student nurses in a few large institutions. Such is not the purpose and intent of the Act. Small colleges and professional training schools play a vital role in the life of our State and, within reasonable bounds, their continued existence must be fostered and encouraged.

So long as defendants direct their efforts to enforcement of standards adopted by the Legislature to give assurance that student nurses shall receive adequate training in their chosen profession they are rendering a fine and useful service for which they should be commended. In seeking to accomplish this objective, however, they should always keep in mind the fact that this statute was not enacted for the benefit of nurses or to create a guild having the legal right to limit or proscribe competition, either of nurses or of hospital schools of nursing. It was enacted to promote the good health and general welfare of the people at large. Benefits accruing to nurses and schools are purely incidental. The Act can be justified and sustained on no other grounds. *S. v. Ballance,* 229 N.C. 764.

I concur in the direction that this cause be sent back to the Joint Committee to ascertain, upon hearing, whether plaintiff has now complied with the requirements of the Board which come within their legitimate field of action.

LEROY LEE v. EVERETT V. WALKER, CITY INSPECTOR OF BUILDINGS OF THE TOWN OF SOUTHERN PINES; C. N. PAGE, MAYOR OF THE TOWN OF SOUTHERN PINES; L. V. O'CALLAGHAN, C. S. PATCH, JR., HARRY LEE BROWN, LLOYD CLARK AND WALTER E. BLUE, COMMISSIONERS OF THE TOWN OF SOUTHERN PINES; AND THE TOWN OF SOUTHERN PINES.

(Filed 1 February, 1952.)

1. Dedication § 2—

The act of selling lots by reference to a map which shows streets and alleys is a dedication of such streets and alleys to the public use, and gives each purchaser of a lot the right to have all and each of the streets and alleys kept open, regardless of whether dedication of such streets and alleys is accepted by the municipality within which they lie.

2. Dedication § 3—

The act of selling lots with reference to a map showing streets and alleys is but a revocable offer of dedication as far as the public is concerned, and neither imposes burdens nor confers benefits upon the public unless and until the public accepts the dedication.

3. Municipal Corporations § 25b—

A municipality has the right to determine where its streets and alleys shall be and may not be forced to maintain a street or alley by dedication.

4. Dedication § 6—

The easement acquired by those who purchase lots by deeds which refer to a map showing streets and alleys cannot be defeated without their consent by a withdrawal of the dedication except in the manner provided by G.S. 136-96.

5. Dedication § 5—

The owners of lots who have purchased same by deeds which refer to a map showing streets and alleys may lose their rights in such streets and alleys by allowing them to be occupied and used adversely for more than twenty years.

6. Dedication § 3—Municipality held estopped from asserting any right to alleys dedicated to public.

Lots in a subdivision were sold by reference to a map showing streets and alleys. The municipality in which the subdivision now lies never opened up any of the alleys but duly passed a recorded resolution relinquishing any title that it might have to the alleys to avoid its statutory duty to keep same in repair, and thereafter recognized them as private property, issued permits for the construction of buildings upon and across the alleys, required them to be listed for taxes, assessed them for paving, and permitted the original dedicator and his successors in title to use and convey the alleys as private property without objection for more than fifty-eight years. *Held:* The municipality is estopped from asserting any right to the alleys in its own behalf or in behalf of the public or any other party or parties.

7. Same—

While the mere collection of taxes on dedicated property ordinarily will not estop a municipality from asserting the public character of the land dedicated, it is a factor which may be considered in connection with the other circumstances upon the question of estoppel.

8. Adverse Possession § 11—

The rule that no statute of limitations runs against a municipality in regard to streets and parks dedicated to the public does not apply where the offer of dedication is never accepted by it, or if accepted, such streets and parks have been abandoned. G.S. 1-45.

9. Dedication § 5—

The rights of purchasers of lots to the use of streets and alleys shown on a map referred to in their deeds may not be enforced by the municipality in which the subdivision lies.

10. Mandamus § 2b: Municipal Corporations § 37—

Mandamus will lie to compel the officials of a municipality to issue a building permit at the instance of an applicant who has performed all acts necessary and required by law to entitle him to its issuance.

APPEAL by plaintiff from *Clement, J.*, May Term, 1951, of MOORE.

This is a civil action instituted by the plaintiff, LeRoy Lee, for the purpose of obtaining a writ of *mandamus* against the defendants, requiring them to issue and deliver to him a building permit.

The plaintiff, prior to the institution of the action, applied for a building permit and the defendants refused to issue the same on the ground, as they contended, that the building permit requested by the plaintiff was for the construction of a building which would necessitate the closing of a public alley in the Town of Southern Pines.

When the cause came on for hearing it was agreed to waive a trial by jury and to let the trial judge hear the case on the pleadings, affidavits filed by plaintiff and defendants, and other pertinent evidentiary matters of record.

The trial judge found the facts in detail, the substance of which is as follows:

1. In the year 1884, John T. Patrick, who owned several hundred acres of land near the town of Manly in Moore County, North Carolina, subdivided the land into squares or blocks, lots, alleys, center squares, streets and avenues, and caused a map of the subdivision to be prepared, which map was entitled, "Map of Vineland, Moore Co., N. C.," which map was never recorded. The lots were numbered, and the streets and avenues named. Certain lands were sold by John T. Patrick by lot numbers as designated on the "Map of Vineland, Moore County."

2. The name of Vineland was changed to Southern Pines in 1884 and lots were sold in that year by lot numbers as designated on the "Map of Vineland, Moore County," being in Southern Pines, formerly known as Vineland.

3. In 1886, a map identical with the subdivision of Vineland was prepared but designated as "A Map of Southern Pines, Moore County, North Carolina." This map was recorded in the office of the Register of Deeds for Moore County. There are more than 125 squares or blocks appearing on the map. There are 24 lots in each block, and 4 narrow undesignated spaces leading from the central square in each block to the streets adjoining the respective blocks. On the bottom and left margin of the map designating each square or block appearing on the map, are letters of the alphabet beginning with the letter "B" and ending with the letter "U," both inclusive. On the right side of the map and appearing in each square or block bordering the right margin of the map, are the numbers "1" to "15," both inclusive. The map shows no scale or measurements

of any kind with respect to the width of lots, depth of lots, size of central squares, width of streets, or width of spaces originally intended for alleyways. Interior blocks can be located only by the point where a perpendicular line from a block designated by a letter intersects a horizontal line drawn from a block designated by a number.

4. The General Assembly of North Carolina in 1887, by Private Laws (Chapter 159) created the municipal corporation of Southern Pines with corporate limits embracing the subdivision entitled "A Map of Southern Pines, Moore County, North Carolina."

5. The charter of the Town of Southern Pines was amended by Chapter 274 of the Private Laws of 1891, among other things, with respect to the powers of the Board of Commissioners, as follows: "Section 13. . . . They shall provide for repairing the streets, sidewalks and alleys and cause the same to be kept clean and in good order, . . . Section 18. That the Commissioners shall have power to lay out and open any new street or streets, park or parks within the corporate limits of said town whenever by them deemed necessary, and they shall have the power at any time to widen, enlarge, add to, change, extend, narrow or discontinue any street or streets, park or parks within said corporate limits, whenever they may so determine by making a reasonable compensation to the owners of property damaged thereby. . . ."

6. On 22 February, 1892, the Board of Commissioners of the Town of Southern Pines duly passed a resolution to the effect that the town did thereby relinquish "all right and title that the town may have in the alleyways and parks within each square or block within the town forever," and, "to the end that the public and all persons buying, selling or dealing in real estate in the Town of Southern Pines might have full notice of the decision of said Board of Commissioners of said town, the said Board of Commissioners caused said order to be duly recorded in the office of the Register of Deeds of Moore County, in which county the Town of Southern Pines is situate, in Book of Deeds No. 7, at page 167, the said order having been recorded therein May 2, 1892." (From Finding of Fact No. XIII)

7. "After the adoption of the order of the Board of Commissioners of the Town of Southern Pines and its record in the office of the Register of Deeds as aforesaid set forth, all persons buying, selling or dealing in real estate in the Town of Southern Pines bought and sold what is generally termed as alleys and central squares designated upon the map referred to in real estate dealing in Southern Pines as the 'Map of Southern Pines, Moore County, N. C.,' indiscriminately and in the same way they sold, bought and used other lots and real estate in said town, and built upon such alleys and central squares so purchased to the same extent and as indiscriminately as they built upon other lots and real estate in said Town of Southern Pines, and such practices with respect to said alleys and real

estate were adopted and indulged in by the Town of Southern Pines itself through its Mayor and Board of Commissioners and other officers authorized thereto, and this practice and custom has been carried on in said town from the time said order of said Board of Commissioners was adopted until this date, and there has been no exception to said rule except when the defendant Board of Commissioners of said town, declined and refused to issue to the plaintiff the building permit referred to in the complaint." (Finding of Fact XIV)

8. On 2 March, 1895, John T. Patrick, as attorney in fact for New England Manufacturing, Mining and Estates Company, which company had become successor in title to Patrick, conveyed Lot No. 4 in Block K & 4, and the sixteen foot alleyway adjoining said lot, as designated on "Map of Southern Pines, Moore County, N. C.," to C. D. Tarbell by warranty deed. The plaintiff and his respective predecessors in title since 1895, have held title to Lot No. 4 in Block K & 4, and the adjoining alleyway which is now in dispute, under deeds containing the usual covenants of warranty.

9. ". . . . Following the action of the Board of Commissioners in the adoption of the order and the registration thereof hereinbefore referred to, Chapter 167 of the Private Acts of 1899 was enacted by the General Assembly, and by Section 22 of said Chapter 167 of the Laws of 1899, Section 13 of Chapter 274 of the Private Acts of 1891 was amended so as to strike out the words 'and alleys' in said Section 13 of said Chapter 274 so as to deprive the said Board of Commissioners of the Town of Southern Pines in law of the right to repair any alley within the corporate limits of the said Town of Southern Pines; that the said Board of Commissioners of the Town of Southern Pines never at any time accepted any offer of dedication made by any person or corporation for public use of any one of the alleys or central squares contained in any square or block in said Town of Southern Pines as delineated upon what is designated in real estate dealing as the 'Map of Southern Pines, Moore County, N. C.' Instead of accepting any offer of dedication of such alleys and central squares, the said Board of Commissioners of the Town of Southern Pines distinctly refused and repudiated said offer of dedication and caused to be enacted by the General Assembly of North Carolina, as hereinbefore set forth, a law taking from said defendant Board of Commissioners the authority to accept such alleys or central squares, and, by the conduct of said defendant Board of Commissioners, since said time, they are estopped in law and equity from attempting to use or regard said alleys and center squares as public thoroughfares over which any portion of the public have a right to travel." (Finding of Fact No. XV)

10. "The alleys and central squares in every block or square of said Town of Southern Pines delineated and indicated on Exhibit A (Map of

Southern Pines) hereunto attached have been for a long period of time, and are now, completely obstructed and blocked, and no protest has ever been made by the defendants, or either one of them with respect thereto until a very recent date when the permit applied for by the plaintiff was refused. No other application for a permit for the building of structures upon the alleys in Southern Pines and the central squares has ever been refused or denied by the Board of Commissioners of the Town of Southern Pines." (Finding of Fact No. XIX)

11. Nearly thirty years prior to the institution of this action, a building located on Lot No. 4, in Block K & 4, and the alley, was burned. The Town of Southern Pines thereafter permitted the construction of the two-story brick building now located on the premises, which covers the entire portion of the lot and alley on West Broad Street, said building having a depth of 75 feet. The plaintiff purchased the premises in August, 1950, for a consideration of $45,000, and has developed suitable and legal plans and specifications for the enlargement of the present building so as to cover substantially the entire parcel of land including that area originally designated as an alley. Prior to the institution of this action, "the plaintiff did and performed all the acts necessary and required by law to entitle him to a building permit from the authorities of the Town of Southern Pines, to enlarge and complete said building." (From Finding of Fact No. IX)

12. "Notwithstanding the refusal of the said defendants to issue said permit for the enlargement of said building, as hereinbefore set forth, the said defendants did issue and deliver to the plaintiff Permit No. 356, dated October 19, 1950, permitting the plaintiff, as owner, to alter and repair the two-story brick building now located on said lot as aforesaid, to be used as a store, at an estimated cost of $10,000 to $14,000, the permit so issued not to include the additions to said building desired and planned by the plaintiff, and this permit to make the repairs, alterations and improvements of the present building was issued notwithstanding it was known to the defendants that the present building for the repairs of which the permit was issued completely obstructs and closes that portion of the lands of the plaintiff designated as an alley, and this building and the obstruction has existed continuously for a period of over twenty years and for a period actually of nearly thirty years prior to the beginning of this action." (Finding of Fact No. XI)

13. In May, 1922, the Town of Southern Pines, acting through its Board of Commissioners, purchased all of Block L & 3 as shown on the said "Map of Southern Pines," and proceeded to obstruct all four of the alleys in said block and the central square, denying to the public generally any use thereof.

14. Approximately ten years ago, the Town of Southern Pines purchased a parcel of land in Block L & 4, as shown on the "Map of South-

ern Pines," as a site for a public library building. The land so purchased includes the alleyway leading from West Broad Street to the center of said block and the alleyway leading to the center of said block from New York Avenue, and the Town of Southern Pines has since that time erected and maintained a public library building on said parcel of land and completely obstructed both alleys and all or a larger portion of the central square in said block.

15. The alley in Block K & 4, leading from New Hampshire Avenue to the central square of said block, is now obstructed by the Jefferson Hotel and has been closed, blocked and denied to public use for more than twenty years next before the institution of this action.

16. The Town of Southern Pines issued a permit in the year 1950 for the construction of a building in Block K & 4, on Pennsylvania Avenue, running back 130 feet therefrom, completely covering and obstructing the alley leading from Pennsylvania Avenue to the central square in said block.

17. "The decision made by the defendant Board of Commissioners to refuse the issue to the plaintiff of the building permit was brought about by the objection of the interested parties, in the main, who have property adjoining or near to the property of the plaintiff, who have failed to provide on their own premises all the conveniences of approach to their back premises. Patch's Department Store is located on premises adjoining or near to the alleyway mentioned in the parcel of land owned by the plaintiff. C. S. Patch, the father of the defendant, C. S. Patch, Jr., is the principal owner of the Patch Department Store, and the defendant C. S. Patch, Jr., is employed in said store either as an employee or part owner. One of the principal protestants against the issue to the plaintiff of the said building permit is the operator of a store near to the plaintiff's property on West Broad Street, who is engaged in the same character of store as the plaintiff proposes to conduct in his new building. One member of a law firm, who are co-partners, in the hearing before said commissioners upon the application for a permit to the plaintiff, represented these protestants, including the owner of the store aforesaid mentioned in competition with plaintiff's store, in opposition to the said permit to the plaintiff, and the other co-partner member of said firm represented the Town of Southern Pines and the defendant Board of Commissioners of said town, and each member of said firm, advised the defendant Board of Commissioners and the Mayor of said town that the issue of a building permit to the plaintiff was wholly illegal and that the defendants had no right in law to issue said permit." (Finding of Fact No. XXIV)

The court being of the opinion that, as a matter of law, from the facts found, there was a valid dedication to and acceptance by the public of the streets, avenues, alleys, and central squares in the Town of Southern

Pines, as shown on the map entitled "A Map of Southern Pines, Moore County, N. C.," filed in the office of the Register of Deeds for Moore County, in Map Book 1, section 2, pages 69 and 70, entered judgment to the effect that the plaintiff is not entitled to the writ of *mandamus* for the issuance of a building permit to obstruct or build upon the alley as described in the complaint, and dismissed the action. The plaintiff appealed, and assigns error.

Spence & Boyette and W. A. Leland McKeithan for plaintiff, appellant.
Pollock & Fullenwider for defendants, appellees.

DENNY, J. It is now well settled with us that the dedication of a street may not be withdrawn by the grantor or those claiming under him, if the dedication has been accepted and the street or any portion thereof has been opened and is in use by the public. *Russell v. Coggin,* 232 N.C. 674, 62 S.E. 2d 70; *Insurance Co. v. Carolina Beach,* 216 N.C. 778, 7 S.E. 2d 13. Moreover, it is the general rule that, "where lots are sold and conveyed by reference to a map or plat which represents the division of a tract of land into subdivisions of streets and lots, such streets become dedicated to the public use, and the purchaser of a lot or lots acquires the right to have all and each of the streets kept open; and it makes no difference whether the streets be in fact opened or accepted by the governing boards of towns or cities if they lie within municipal corporations." *Hughes v. Clark,* 134 N.C. 457, 47 S.E. 462; *Conrad v. Land Co.,* 126 N.C. 776, 36 S.E. 282; *Green v. Miller,* 161 N.C. 24, 76 S.E. 505; *Sexton v. Elizabeth City,* 169 N.C. 385, 86 S.E. 344; *Wheeler v. Construction Co.,* 170 N.C. 427, 87 S.E. 221; *Elizabeth City v. Commander,* 176 N.C. 26, 96 S.E. 736; *Wittson v. Dowling,* 179 N.C. 542, 103 S.E. 18; *Stephens Co. v. Homes Co.,* 181 N.C. 335, 107 S.E. 233; *Insurance Co. v. Carolina Beach, supra; Broocks v. Muirhead,* 223 N.C. 227, 25 S.E. 2d 889; *Russell v. Coggin, supra.*

It should be kept in mind, however, that the dedication referred to in the rule above stated, in so far as the general public is concerned, without reference to any claim or equity of the purchasers of lots in a subdivision, is but a revocable offer and is not complete until accepted, and neither burdens nor benefits with attendant duties may be imposed upon the public unless in some proper way it has consented to assume them. *Irwin v. Charlotte,* 193 N.C. 109, 136 S.E. 368; *Wittson v. Dowling, supra.* A town has the right to determine where its streets and alleys shall be. *Sugg v. Greenville,* 169 N.C. 606, 86 S.E. 695.

In many of our cases in which a dedication is spoken of as irrevocable, the expression has been used with respect to the purchasers, or some of them, who were insisting on their rights in connection with such dedication. *Irwin v. Charlotte, supra.* And without the consent of the pur-

chasers of lots in a subdivision, the dedication of the streets and alleys shown on the map of such subdivision may not be withdrawn as to them except in the manner provided by law. G.S. 136-96; *Irwin v. Charlotte, supra; Foster v. Atwater,* 226 N.C. 472, 38 S.E. 2d 316. Such purchasers, however, may lose their right to have streets and alleys opened by permitting them to be occupied and used adversely for more than twenty years for purposes inconsistent with their use as streets and alleys. *Hunter v. West,* 172 N.C. 160, 90 S.E. 130; *Gault v. Lake Waccamaw,* 200 N.C. 593, 158 S.E. 104.

In the instant case it must be conceded that there was a dedication of the streets, avenues, alleys, and central squares, as shown on the map of Southern Pines and it does not appear from the record that the dedicator, or his successors in title, have ever withdrawn such dedication in the manner prescribed by G.S. 136-96. However, the dedication of the alley in question was revocable, in so far as the public and the Town of Southern Pines were concerned, unless there was an acceptance of the offer of dedication prior to the withdrawal thereof by conveyance of the alley to C. D. Tarbell by warranty deed in 1895. *Kennedy v. Williams,* 87 N.C. 6; *Stewart v. Frink,* 94 N.C. 487; *S. v. Long,* 94 N.C. 896; *S. v. Fisher,* 117 N.C. 733, 23 S.E. 158; *Sugg v. Greenville, supra; Wittson v. Dowling, supra; Irwin v. Charlotte, supra; R. R. v. Ahoskie,* 202 N.C. 585, 163 S.E. 565; *Gault v. Lake Waccamaw, supra;* 26 C. J. S., Dedication, section 34 (a), page 93, *et seq.*

We now come to the question whether the Town of Southern Pines accepted the offer of dedication of the alleys and central squares as designated on the map of Southern Pines. This question has been answered in the negative by a finding of fact in the court below and such finding is supported by competent evidence.

In amending the charter of the Town of Southern Pines by Chapter 274 of the Private Laws of 1891, the Board of Commissioners of the Town of Southern Pines was directed in section 13 of the Act, to keep in repair the streets, sidewalks, and alleys in the town, and to cause the same to be kept clean and in good order. But in section 18 of the same Act, the Board was given power to discontinue any street or streets, park or parks, within the corporate limits of the town whenever it might determine to do so, by making reasonable compensation to owners of property damaged thereby.

The Board of Commissioners being faced with the mandatory provision in the charter of the town to keep in repair approximately fourteen miles of alleyways, determined on 22 February, 1892, to relinquish all the right and title that the town had in such alleyways and parks within each square, or block, within the town, forever.

There being no evidence offered in the hearing below tending to show that the town had previously accepted the dedication of the alleys and

parks as shown on the map of Southern Pines, by user or otherwise, the action of the Board was tantamount to a formal rejection of the offer of dedication and was so construed and regarded by the Town of Southern Pines, the original dedicator and his successors in title for more than fifty-eight years prior to the time this controversy arose.

According to the findings of fact in the court below, and to which there is no exception, from and after the adoption of the resolution by the Board of Commissioners of Southern Pines, on 22 February, 1892, until the action of the Board in 1950, refusing to issue a building permit to the plaintiff, the town had at all times recognized these alleys and parks as private property. As evidence of this fact, the town has never at any time opened up or kept in repair a single one of the alleys or parks shown on the map of Southern Pines. Prior to October, 1950, it had, without a single exception, issued building permits for the construction of buildings upon and across the alleys shown on said map whenever requested, including the alley in question. And while it does not appear in the findings of fact, it does appear in the evidence adduced in the hearing below that the Town of Southern Pines and the Board of Commissioners of Moore County have through all these years treated these alleys and parks as private property and required them to be listed for tax purposes. Likewise, the Town of Southern Pines, whenever it has paved a street along which any of these alleys abut, the alleys have been treated as private property and duly assessed in the names of the owners thereof for the pro rata part of the cost of such paving.

The mere collection of taxes on dedicated property ordinarily will not estop a municipality from asserting the public character of the land dedicated, but it is a factor that may be considered, and may, in connection with other circumstances, estop the city from asserting the dedication. 26 C. J. S., Dedication, section 63 (a), page 151.

Another significant fact in connection with the action of the Town of Southern Pines on 22 February, 1892, is that the dedicator thereafter conveyed these alleys and parks as private property, giving warranty deeds therefor. And the particular alleyway now in dispute was conveyed to C. D. Tarbell on 2 March, 1895, by warranty deed. The plaintiff and his predecessors in title have owned this alleyway under warranty deeds for nearly fifty-seven years. And no part of the alley has been opened and used by the public in the meantime. Moreover, according to the record, there has been a building or buildings located on Lot 4 in Block K & 4, and the alley in question, for more than fifty years since the lot and alley were conveyed to C. D. Tarbell in 1895.

In our opinion, in view of the facts found by the court below, it makes no difference whether the resolution passed by the Board of Commissioners of Southern Pines on 22 February, 1892, be considered a renunciation of the offer of dedication of the alleys and parks referred to therein, or as

an intention to abandon such alleyways and parks pursuant to the authority contained in its charter. In either event, the Town of Southern Pines, by reason of such action and its conduct since that time, is now estopped from asserting any right to the alleyway in question in its own behalf or in behalf of the public or any other party or parties.

The provisions of G.S. 1-45 which provide that the statute of limitations shall not run against a municipality or other governing body of public ways where the streets, alleys and parks have been dedicated and accepted by the municipality or other governing board, does not apply to streets, alleys and parks that have been offered for dedication and the offer has not been accepted; or if accepted, the streets, alleys or parks have been abandoned. *Gault v. Lake Waccamaw, supra; Savannah v. Bartow Inv. Co.,* 137 Ga. 198, 72 S.E. 1095; *Clokey v. Wabash Ry. Co.,* 353 Ill. 349, 187 N.E. 475; *Mebane v. City of Wynne,* 127 Ark. 364, 192 S.W. 221; *United Finance Corp. v. Royal Realty Corp.,* 172 Md. 138, 191 A. 81; *Charles C. Gardiner Lumber Co. v. Graves,* 63 R.I. 345, 8 A. 2d 862; *Reynolds v. City of Alice,* (Tex. Civ. App.), 150 S.W. 2d 455; 26 C. J. S., Dedication, section 62, page 150, *et seq.*

In the last cited case, it is said: "A mutually acquiesced in abandonment of a public easement terminates same, and frees the property in the hands of the grantor from such easement."

In *Mebane v. City of Wynne, supra,* the Court said: "There having been no acceptance by or for the public, the dedication may become extinct either by an express withdrawal on the part of the original dedicator or by his death before acceptance, or by lapse of time. So, according to that rule, the present attempt on the part of the public authorities to accept the dedication and put the property in use comes too late. The statutory exemption of cities from the operation of the general statute of limitations with respect to public property has no application in this case for the reason that the public rights have never accrued and there are no such rights in existence to be exempted."

Likewise, in the case of *United Finance Corp. v. Royal Realty Corp., supra,* it is said: "Whether the basis for the relief be called equitable estoppel, or abandonment and reverter, is a mere matter of terminology of little relative importance, except to the verbal precision. For in any case it involves the principle that one who having an easement of way whether public or private, suffers his right to lie fallow and unused for a long period of time and throughout the period suffers the owners of the servient tenements, not only to use it as though no such right existed, but actually acquiesces in such use by taking taxes or other charges assessed against it or profits therefrom as though no such easement existed, or by permitting any uses of the land inconsistent with the existence of the easement, may be held to have sufficiently manifested such an intention of abandoning the right as will estop him from asserting it."

It is clear in the instant case, in view of the findings of fact disclosed by the record, that the defendants are not entitled to have the alley in question opened for public use. And if those who are protesting the issuance of the building permit requested by the plaintiff, own property in the subdivision, as shown on the map of Southern Pines, are of the opinion that they have any easement rights in the alley in question, the Town of Southern Pines and its officials are not the proper parties to enforce those rights.

An action for the enforcement of a private easement in a street or alley may be maintained only by an owner or owners of property who are entitled to have the easement enforced and preserved. However, unless facts are made to appear which are substantially different from those found on the present record, no private rights to an easement in the alley in question exist.

The court below having found that the plaintiff has performed all the acts necessary and required by law to entitle him to a building permit from the authorities of the Town of Southern Pines, and having found that by reason of the conduct of the defendant Board of Commissioners of the Town of Southern Pines the defendants are "estopped in law and equity from attempting to use or regard the alleys and center squares as public thoroughfares over which any portion of the public have a right to travel," the court should have granted to the plaintiff the relief sought.

The judgment of the court below is set aside and the cause remanded to the end that judgment may be entered in accord with this opinion.

Error and remanded.

NATIONAL SHIRT AND HAT SHOPS OF THE CAROLINAS, INC., v. AMERICAN MOTORISTS INSURANCE COMPANY AND WILLIAM W. WADE.

(Filed 1 February, 1952.)

1. **Trial § 22a—**

On motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff.

2. **Indemnity § 2d—Evidence held for jury on question of whether loss was due to wrongful act of employee within coverage of indemnity contract.**

The evidence favorable to plaintiff insured tended to show not only an inventory shortage on the part of its store manager, but also that the manager admitted his responsibility for the shortage, that he had failed to follow instructions that he keep the cash register tickets constituting the only record evidence which would conclusively show whether he had properly accounted for merchandise sold, that he requested one of his clerks to overcharge customers, that his asserted prior report of inventory shortage had not been received by insured, and that he kept reporting

inventories which he knew he did not have on hand. *Held:* Although contradicted in material respects by the testimony of the manager, the evidence shows more than a mere possibility or opportunity on the part of the manager to misappropriate the property or a mere equal opportunity for others to have abstracted the goods, and is sufficient to be submitted to the jury in an action on a contract indemnifying the insured against loss arising from misappropriation or wrongful act of the manager.

3. Same: Evidence § 7a—

The general rule that plaintiff in a civil action, even though the issue include a criminal charge, has the burden of proving his case by the preponderance or the greater weight of the evidence *held* not altered or modified by the language of the indemnity contract sued on obligating insurer to make good inventory shortage which "insured shall conclusively prove to have been caused by the dishonesty of any employee."

4. Trial § 23e—

In a civil action it is not required that circumstantial evidence preclude any other reasonable hypothesis in order to be sufficient to be submitted to the jury upon the issue, but only that it be sufficient reasonably to establish the facts in issue.

APPEAL by defendants from *Sharp, Special Judge,* February Term, 1951, of GUILFORD (Greensboro Division).

This is a civil action instituted originally against the American Motorists Insurance Company, which is hereinafter called Insurance Company, to recover under a blanket position bond executed and delivered by the original defendant to the plaintiff. The plaintiff alleges that it sustained a loss of $1,041.35 arising from embezzlement by the manager of its Charlotte store, William W. Wade, hereinafter called Wade, during the time the bond was in force. Wade was made a party defendant on motion of the defendant Insurance Company so that in the event a judgment was obtained by the plaintiff against the Insurance Company, it could recover judgment over against Wade, who would, in that event, be primarily liable for any recovery by the plaintiff.

It was conceded in the trial below that the bond was in force while Wade was an employee of the plaintiff and that the plaintiff complied with the provisions of the bond as to notice and proof of loss. And the defendant Wade does not contest the right of the Insurance Company to have judgment over against him for any amount the plaintiff is entitled to recover from it. However, both Wade and the Insurance Company contend that the plaintiff suffered no loss for which it is entitled to be indemnified under the terms of the bond in suit.

The plaintiff owns and operates six retail stores in North Carolina, South Carolina, and Virginia, engaging in the sale of men's clothing, principally shirts, hats, jackets, ties, and related items and accessories. For several months prior to 8 August, 1946, the defendant Wade was

employed by the plaintiff as a sales clerk in its Greensboro store. On the above date, he was promoted to the position of manager of the plaintiff's Charlotte store and given authority to employ and discharge the personnel employed in the store. Physical inventories of the merchandise in this store were taken under the supervision of the plaintiff's district manager, Thomas H. Asbury, on 8 August, 1946, 17 January, 1947, 9 March, 1947, and 13 January, 1948. The inventory on 13 January, 1948, disclosed a merchandise shortage of $1,041.35 at retail prices. The shortage reflected by this inventory amounted to 327 items with a total retail sales price of $1,377.25, less an overage of 82 items in the amount of $335.90, leaving a net shortage of $1,041.35.

The indemnifying clause of the bond in suit provides that the defendant insurer will indemnify the plaintiff "against any loss of money or other property, real or personal, (including that part of any inventory shortage which the Insured shall conclusively prove has been caused by the dishonesty of any Employee or Employees) belonging to the Insured, or in which the Insured has a pecuniary interest, . . . which the insured shall sustain, . . . through larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, willful misapplication, or other fraudulent or dishonest act or acts committed by one or more of the employees . . . acting directly or in collusion with others, . . ."

According to the evidence offered by the plaintiff, all merchandise in its Charlotte store, as well as in its other retail stores, is marked at retail price when shipped to the store and the manager of the store enters such merchandise in his inventory. A special inventory sheet is used on which the total number of the various items selling at a fixed price are entered. For example, the number of shirts to be sold at $2.95 would be listed in one column, the shirts to be sold at $3.95 would be listed in another, and the hats to be sold at $5.95 would be listed in still another column. By this method the company carried what is called a perpetual inventory. As merchandise was sold, such sale was to be rung up on the cash register, and the register would throw out a sales ticket. Every ticket thrown out of the cash register would have a number on it, the date, and the amount of the sale. The cash register numbered the sales tickets consecutively. It was the duty of the respective clerks in the store to write on each ticket, the article or articles sold. The sales force in the Charlotte store, except occasionally on busy days, usually consisted of the manager and two clerks. It was the duty of the manager of the store to take the cash register tickets each day and check them against the cash, and to ascertain the different items of merchandise sold during the day. It was also his duty to subtract the items sold from the inventory and to add to the inventory any new merchandise received that day. The manager of the store, the defendant Wade, was instructed to deposit his cash receipts in

the bank each day and to mail a copy of the deposit slip to the principal office of the company in Greensboro. He was likewise instructed to send in a copy of his inventory each week, which he did, and to take a physical inventory each two weeks which he never did at any time except when he assisted Mr. Asbury to take such inventories at the times referred to above. He was instructed, according to the plaintiff's evidence, to keep the cash register tickets so that any discrepancies in the inventory might be checked against the actual sales. Mr. Chandgie, president of the corporation, testified, "all those tickets are consecutively numbered. If we had those tickets we could determine if he had deposited all the cash he has received. Wade was given instructions to retain those tickets. He was instructed to retain them so that at any time it was found necessary to check up, we could check with those tickets and with the reports and also with the deposits in the bank. He did not have those tickets when the check was made."

Also, according to the plaintiff's evidence, when the physical inventories were made by Mr. Asbury on 17 January, 1947, and 9 March, 1947, while there were a number of shortages and overages, the inventories were correct, with normal differences; therefore, according to the testimony of Mr. Asbury, there was no occasion to check the cash register tickets against the inventories. But when the physical inventory was again taken by him on 13 January, 1948, and the shortage in the inventory was discovered, upon inquiry as to the cash register tickets so that a check could be made on the defendant Wade's daily reports, Wade said he had torn them up and thrown them away. He only had in his possession the cash register tickets for the day on which the inventory was taken. He admitted he was responsible for the shortage, but said he could not explain how it occurred.

One of the clerks, Charm Smith, who was employed by Wade, testified that about two months prior to the time the inventory shortage was discovered, Mr. Wade requested him to overcharge customers, but he refused to do so. This witness also testified he was present when Mr. Wade and Mr. Asbury took the inventory in January, 1948, and heard Wade "make about the same statement to Mr. Asbury in reference to the shortage as he told Mr. Chandgie. He said that he would try to pay it back as soon as he could."

It further appears from the evidence that within the period from 17 January, 1947, to 9 March, 1947, less than sixty days, there were 111 transactions which were in error. There was an overage in this period of $188.15 and a shortage of $180.30, or a net overage of $7.85. It is pointed out in the evidence that such discrepancies normally occur in failing to list accurately the items sold. A shirt might be listed, for instance, when actually a jacket was sold. The number of jackets in that

event would be short one, and the shirts selling at the same retail price, would be over, etc. These overages and shortages usually balanced each other out with small differences, and the difference would be adjusted in the inventory.

When Mr. Wade took charge of the Charlotte store of the plaintiff, the locks were changed and the keys delivered to him. He used his own discretion as to what clerk or clerks he permitted to have a key to the store. One of the clerks was given a key for his use while Mr. Wade was manager.

The defendant Wade testified in his own behalf and denied that he was ever instructed to save the cash register tickets so they could be checked against the physical inventories taken by Mr. Asbury, or that he was instructed to take a physical inventory each two weeks. He testified that Mr. Asbury gave him instructions to keep the cash register tickets only from one report to the next. He denied having ever taken any cash or merchandise from the store other than that to which he was entitled. He denied having requested his clerk, Charm Smith, to overcharge customers, but on the contrary said he had discharged one clerk for overcharging. He further testified, "All this shortage could have been the result of shoplifting. It could all have gotten out without even catching the men. Yes, I think that you could be short 350 items right under your nose in that store from shoplifting over a period of time. . . . It was nine months from the time the inventory was taken, and I did not say there were 350 items shoplifted from that store. I know plenty of times of shoplifting. I know of every time merchandise was recovered, yes. I couldn't prove if any of the clerks or anyone in the store took any merchandise."

It appears from the defendant Wade's evidence that the value of the stock of merchandise varied while he was manager of the plaintiff's store. It was approximately $30,000 during the fall of the year, and at other times it was about $18,000 or $19,000.

The defendant Wade also testified that about two or four months before the physical inventory was taken, showing a shortage of $1,041.35, he wrote Mr. Asbury that he "was short at the time one hundred and some $4.45 shirts," he thought it was about 150, and asked Mr. Asbury to check back and find out how he got that shortage in his inventory. "I was over in some other price. . . . I do not have a copy of that letter. I did not know that that letter would be important today. Why should I think it would be? It is true that I kept reporting inventories which I did not have on hand and which I knew I did not have on hand. My reports were not correct and I knew they were not correct. So did Greensboro."

The witness, in answer to a question about spot inventories and what it meant, explained it in this manner: "I could count two or three items . . . in the trade that is what is known as spot inventory . . . Occasionally I counted it . . . It is true that any spot inventories I took showed that I did not have on hand the amount of merchandise I had received. I don't know when. I reported it only once. That was in August. . . . I did not ever tell Mr. Asbury I realized it was my responsibility and I would pay for it." At this point the witness was handed a letter in his own handwriting, dated February 25, 1948, which he had sent to Mr. Chandgie, in which he stated: "I have never taken one cent out of the store other than what was paid me as salary . . . I realize this is my responsibility, I am offering no alibis, I have failed in my duty. I intend to make your loss good, but I can only do it over a period of time, as I earn money."

According to Mr. Wade's testimony, his earnings were from $4,200 to $4,300 a year while he was manager of the plaintiff's store. He was married 15 March, 1947, and has two children, one of them a stepchild. Since his marriage he had withdrawn and spent his savings of several hundred dollars. He had found it necessary to sell his automobile and "to borrow money from time to time to keep running on. When I went there I had saved several hundred dollars and left there penniless."

The plaintiff, in rebuttal, recalled Mr. Asbury, who testified he never instructed Mr. Wade to throw away the cash register tickets. "I instructed Mr. Wade, as I instructed all managers, to hold on to those tickets as they are a definite record of the amount of business he has done." The witness further testified he did not recall ever having received any letter from Mr. Wade with respect to any shortage in his inventory. And neither the plaintiff nor defendant offered any evidence of any request for an adjustment of inventory resulting from shoplifting. Small differences had been allowed from time to time, when physical inventories were taken, for shrinkage supposed to be due to shoftlifting. However, most of the inventories were over.

The issues submitted to the jury and the answers thereto, are as follows:

"1. Did William W. Wade embezzle money or other property of the plaintiff, as alleged? Answer: YES.

"2. If so, what amount of money or other property belonging to the plaintiff did said William W. Wade embezzle? Answer: $1,041.35."

Accordingly, judgment was entered in favor of the plaintiff and against the Insurance Company, for $1,041.35 and costs, and a further judgment was entered in favor of the Insurance Company against the defendant Wade, for $1,041.35 and costs.

The defendants appeal, assigning error.

Welch Jordan for defendant appellant, American Motorists Insurance Company.

Shuping & Shuping for defendant appellant, William W. Wade.

Falk, Carruthers & Roth for plaintiffs, appellees.

DENNY, J. The defendants challenge the correctness of the ruling of the court below in denying their motions for judgment as of nonsuit interposed at the close of the plaintiff's 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 plaintiff, as it must be on a motion for judgment as of nonsuit, is sufficient to warrant the submission of the case to the jury. *Chambers v. Allen,* 233 N.C. 195, 63 S.E. 2d 212; *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.

We concede that the loss disclosed by the shortage in plaintiff's inventory at its Charlotte store, without any further evidence tending to show that such loss was the result of larceny, theft, embezzlement, forgery, misapplication, wrongful abstraction, wrongful misapplication, or other fraudulent or dishonest act or acts, committed by one or more of the employees of the plaintiff, during the period covered by the bond in suit, would be insufficient to support a verdict against the defendant Insurance Company. *Bank v. Fairley,* 202 N.C. 136, 162 S.E. 229; 98 A.L.R. 1271n; *Home Owned Stores v. Standard Acc. Ins. Co.,* 256 Ky. 482, 76 S.W. 2d 273; *Crescent Cigar & Tobacco Co. v. National Casualty Co.* (La. 1934), 155 So. 505; *Phipps v. American Employers' Ins. Co. of Boston, Mass.,* 118 Pa. Super. 133, 179 A. 816; *Salley v. Globe Indemnity Co.,* 133 S.C. 342, 131 S.E. 616; *Hartford Acc. & Indemnity Co. v. Hattiesburg Hdw. Stores* (Miss. 1951), 49 So. 2d 813; *Cobb v. American Bonding Co. of Baltimore* (5th C.C.A.), 118 F. 2d 643.

While the defendant Wade denied the commission of any dishonest acts in connection with the alleged shortage, he did not deny the correctness of the amount of the shortage as reflected by the inventory but simply claimed he could not explain how it occurred. However, according to the evidence, he admitted he was responsible for the shortage and wrote the president of the plaintiff corporation that he realized the shortage was his responsibility; that he was offering no alibis; that he had failed in his duty and intended to make the loss good.

This admission of responsibility for the shortage does not constitute an admission of guilt, but it does tend to show that he did not believe, nor contend, that the shortage occurred as a result of shoplifting or by any other method over which he had no control and for which he was not responsible. Moreover, it appears from the evidence that he destroyed

the cash register tickets which constituted the only record evidence that would have shown conclusively whether or not he properly accounted for all the merchandise sold in the plaintiff's Charlotte store while he was manager. He denies having ever been instructed to preserve the cash register tickets. However, there is ample evidence to support a finding to the contrary. There is also evidence to the effect that he requested one of his clerks to overcharge customers. This would tend to show that some reason existed which made it necessary or desirable to obtain surplus cash. Furthermore, according to Wade's testimony, he reported one shortage in inventory to the Greensboro office of the company and requested Mr. Asbury to check on it. No such report was received or any such request made, according to Mr. Asbury's testimony. Moreover, the defendant Wade testified he made reports to the company in Greensboro which were not correct and he knew they were not correct. "It is true that I kept reporting inventories which I did not have on hand and which I knew I did not have on hand." He undertakes, however, to absolve himself of blame in this respect by saying, "So did Greensboro."

When the above evidence is taken into consideration, we think it is sufficient to support the verdict rendered below and to distinguish this case from those relied upon by the defendants. The evidence goes beyond showing possibility of misappropriation on the part of the defendant Wade (*Broughton v. Oil Co.*, 201 N.C. 282, 159 S.E. 321), or mere opportunity to commit the offense alleged (*State v. Gordon,* 225 N.C. 757, 36 S.E. 2d 143), or equal opportunity for others to have abstracted the goods or money (*S. v. Penry,* 220 N.C. 248, 17 S.E. 2d 4), as contended by the defendants.

It is further contended by the defendants that the charge on the burden of proof on the first issue was erroneous, which was as follows: "The burden of proof upon this first issue is upon the plaintiff to satisfy you by the greater weight of the evidence that William W. Wade embezzled money or other property of the plaintiff as alleged in the complaint."

It is contended that since the bond in suit provides indemnity "against any loss of money or other property, real or personal (including that part of any inventory shortage which the Insured shall conclusively prove has been caused by the dishonesty of any Employee or Employees) belonging to the Insured . . . through embezzlement . . .," etc., the court is required to charge the jury as to its duty in "measuring the burden of the issue" in the light of this language. However, it is not contended that the purpose of the bond with respect to the conclusiveness of proof as to an inventory shortage was designed for or could have the effect of altering, modifying, or enlarging the rules of evidence.

We think the contention is without merit. It is settled with us that in a civil action containing an issue including a criminal charge, the party

required to carry the burden of proof is only required to do so by a preponderance of the evidence or by its greater weight. *Rippey v. Miller,* 46 N.C. 479; *Blackburn v. Insurance Co.,* 116 N.C. 821, 21 S.E. 922; *Hyder v. Hyder,* 215 N.C. 239, 1 S.E. 2d 540. See also *Stadham Co. v. Century Indemnity Co.,* 167 Pa. Super, 268, 74 A. 2d 511.

In the case of *Miller v. Massachusetts Bonding & Ins. Co.,* 247 Pa. 182, 93 A. 320, the Court construed a provision in an indemnity bond which required any loss thereunder to be proven by "direct and affirmative evidence," and in which action the defendant contended that by reason of this provision, loss could not be established by circumstantial evidence. The Court said: "Appellant's contention is that the evidence adduced by plaintiff to show the felonious taking of the property was wholly circumstantial, and that, conceding the sufficiency of the evidence in ordinary case to warrant an inference of theft, yet, because here the agreement of the parties required for the establishment of this material fact on which defendant's liability was made dependent evidence direct and affirmative, of the former of which there was none, binding instructions should have been given. This contention gives to the words 'direct and affirmative evidence,' a meaning so severely technical that, if this meaning alone can be given them, a policy containing the provision we have here would avail the assured only in the rarest and most exceptional cases, so exceptional that the average person would hardly think the contingency in which the policy could operate worth guarding against. . . . To limit the assured's right to recovery to cases where the *corpus delicti* can be proved by direct testimony—that is, by the testimony of witnesses who saw the actual taking—would make the policy next to valueless. We will not impute to the defendant company any such purpose in the use of these words; nor can we assume that the assured understood them in this narrow and restricted sense. . . . Stated plainly, what is contended for is that, the *factum probandum* being the felonious taking of the property, this could only be established by the testimony of one or more witnesses who were present and saw the theft or larceny actually committed; or it may be stated thus, that the parties intended by the words to exact a higher degree of proof to charge the company with liability for the loss than the law requires to convict the burglar or thief of the crime itself. . . . A reasonable construction of the words would ascribe to the parties the single purpose to require something more than the mere fact of loss to entitle the assured to recovery on the policy."

In construing a provision similar to that considered in the last cited case, the Court in the case of *Gaytime Frock Co. v. Liberty Mut. Ins. Co.* (7th C.C.A.), 148 F. 2d 694, said: "Concededly, to establish defendant's liability, it was necessary that plaintiff prove that the inventory shortages were caused by fraud or dishonesty of plaintiff's employees. . . . It was

not necessary that the plaintiff's proof should establish facts sufficient to convict the employee or employees of larceny, . . . To be sure, the fact that the shortages were caused by the dishonesty of plaintiff's employee or employees may be established by circumstantial evidence, but the evidence to establish that fact must be of such a nature that it is the only conclusion that can fairly or reasonably be drawn, that is to say, such evidence must fairly and reasonably exclude any other explanation."

The mere fact that plaintiff's loss was discovered as a result of an inventory computation does not mean necessarily that the loss actually resulted from the shortage disclosed by the inventory. It is just as plausible to conclude from the evidence disclosed on this record that the actual shortage resulted from a failure to account for cash received from the sale of merchandise. A failure to account for such proceeds from the sale of merchandise, and the further failure to deduct such merchandise sold from the perpetual inventory, would create a shortage in the inventory. Nevertheless, the actual embezzlement, in such case, would be of money, the loss of which the plaintiff is only required by the terms of the bond in suit, to prove by evidence that "reasonably establishes that such loss was in fact due to the fraud or dishonesty of one or more" of its employees.

Plaintiff, in the present action, had to rely on circumstantial evidence to prove its loss. Even so, in order to carry the burden of proof in establishing such loss, the rule that circumstantial evidence must be such as to preclude every other hypothesis, but the guilt of the accused, does not apply in civil cases. *Rippey v. Miller, supra; Blackburn v. Insurance Co., supra; Hyder v. Hyder, supra.*

The evidence is only required to be sufficient to reasonably establish that the loss was due to the dishonest acts of Wade, as alleged. *Bottling Co. v. Casualty Co.,* 228 N.C. 411, 45 S.E. 2d 375. The charge of the court below was ample on this phase of the case, and also contained this further instruction: "If you find that there was a shortage but that it came through errors in making sales or by shoplifting or on account of negligence on the part of Wade in the way he managed the shop, that is, on account of Wade's failure to use that degree of care which an ordinarily prudent person would have exercised under the same or similar circumstances when charged with a like duty, or by a combination of these ways or that it came about in any manner other than by a fraudulent conversion on the part of Wade you would answer the first issue No."

We have carefully considered the remaining exceptions and assignments of error, and do not consider them to be of sufficient merit to warrant a disturbance of the verdict below.

In the trial below, we find

No error.

H. W. SPAUGH AND HIS WIFE, EMMA C. SPAUGH, v. CITY OF WINSTON-SALEM.

(Filed 1 February, 1952.)

1. Municipal Corporations § 36—

Knowledge of a municipal ordinance relating to water and sewer systems is presumed within one mile of its corporate limits. G.S. 160-203.

2. Municipal Corporations § 15a—

The rights of owners of water and sewer systems in a subdivision to compensation upon the taking over of the systems consequent to the annexation of the territory by a municipality must be determined in accordance with the facts of each particular case.

3. Same—Under the facts of this case, owners of subdivision held not entitled to compensation for water and sewer systems taken over by city.

Owners of a real estate development within one mile of the limits of a city constructed water and sewer systems therein. To promote the sale of lots, the systems were connected with the municipal systems, with the consent of the city, and the city collected for water furnished through the pipes to residents of the subdivision under its general ordinances. At the time the connections were made, a municipal ordinance was in force which provided that water and sewer systems and rights and easements pertaining thereto should become the property of the city whenever the territory was incorporated by the city. Upon annexation of the subdivision, the city assumed exclusive control of the water and sewer systems and continued to furnish water and sewer service to the residents in the same manner as it had done during the preceding twenty years. *Held:* The owners of the subdivision are not entitled to compensation for the water and sewer lines, and the city did not wrongfully deprive them of property rights therein by the incorporation of the water and sewer systems into the municipal systems. 14th Amendment Constitution U. S.; Art. I, sec. 17, Constitution of N. C.

BARNHILL, J., concurring.

APPEAL by plaintiffs from *Pless, J.*, September Term, 1951, of FORSYTH. No error.

This was an action to recover of the defendant city the value of a water and sewer system installed by plaintiffs in a suburban real estate development which was subsequently taken over by the city in the extension of its corporate limits.

The plaintiffs, the owners of land outside the corporate limits of Winston-Salem and within a mile thereof, subdivided the property into lots, laid out streets and sidewalks, registered a plat thereof, and installed in and through the subdivision a water and sewer system for the service and benefit of those who purchased lots. The subdivision was named Konnoak Hills. Many lots have been sold and numerous residences have

been built thereon. By agreement with the owners of a subdivision known as Anderleigh lying between their subdivision and the southern limits of the city, the plaintiffs, with permission of the city, made physical connection with the water and sewer mains of the city in 1928.

January 1, 1949, the subdivision developed by plaintiffs and other populous suburban areas were annexed to and incorporated within the limits of the city, whereupon the city assumed exclusive control of the water and sewer system in Konnoak Hills and has continued to use and operate it in connection with the municipal water and sewer system. It was alleged in the complaint that the city had thus taken possession of property belonging to the plaintiffs and appropriated the same to its own use without compensating plaintiffs therefor, and that the reasonable value of the water and sewer system at the time it was taken over by the city was $52,000.

That the city, upon the extension of its corporate limits had assumed exclusive control of the water and sewer system which had been installed by the plaintiffs was not controverted, but the defendant set up as a defense and in denial of plaintiffs' right to recover that it was acting in accordance with secs. 218, 219, 220 and 730 of the Ordinances of the City of Winston-Salem; that in 1928 E. L. Anderson and wife entered into contract with the city under which the water and sewer lines in Anderleigh were connected with the sewer and water system of the city; that shortly thereafter plaintiffs secured permission to connect the water and sewer lines in Konnoak Hills with those in Anderleigh in order to provide purchasers of lots with these facilities, for the convenience and profit of plaintiffs and to promote the sale of plaintiffs' lots, and that plaintiffs thereby dedicated the water and sewer lines in Konnoak Hills to the use of the lot owners in that development; that the city thereafter furnished water and sewer service to the residents of Konnoak Hills, and since the city limits were extended has continued to furnish these facilities in the same manner to residents and lot owners in this subdivision. The defendant alleges that the plaintiffs have been fully compensated for the cost of installing these facilities by the sale of lots; that plaintiffs have dedicated the water and sewer lines to lot owners and prospective owners in the subdivision and have no property rights therein, and hence no property rights belonging to plaintiffs have been appropriated; and further the plaintiffs having connected their development with the city mains with knowledge of the provisions of the ordinances of the city that the water and sewer system and rights and easements pertaining thereto should become the property of the city whenever the territory was incorporated with the city limits, are now estopped to claim compensation therefor. The defendant admitted it has used and controlled said water and sewer system to the same extent as if it had been installed by it

originally, whereas prior thereto the defendant had recognized said lines as being the property of the plaintiffs.

The ordinances of the city which were introduced in evidence prescribe the method and requirement necessary for those outside the corporate limits of the city to obtain connection with the water and sewer system of the city, and contain this provision: "That the water system (of applicant) together with the fixtures, equipment, easements, rights and privileges pertaining thereto shall become the property of the city of Winston-Salem whenever the territory in which said system is located shall be incorporated within the city limits." Sec. 220. The same language was used with reference to sewer systems of owners of property outside the corporate limits who desire to connect with the city sewer system. Sec. 730.

Upon the pleadings and the stipulations entered into as result of pretrial conference, the cause was submitted to the jury under peremptory instructions from the court to answer "No" to the following issue: "Did the defendant, on and after January 1, 1949, wrongfully take possession of said sewer and water system and appropriate same to its own use?"

It was stipulated that this issue presented a matter of law to be answered under the peremptory instructions of the court, and that the word "wrongfully" in the issue referred to the failure of the city to pay just compensation therefor.

Judgment was rendered upon the verdict that plaintiffs recover nothing, and plaintiffs appealed.

Ralph M. Stockton, Jr., H. M. Ratcliff, John J. Ingle, and Richmond Rucker for plaintiffs, appellants.

Womble, Carlyle, Martin & Sandridge for defendant, appellee.

DEVIN, C. J. The plaintiffs claim compensation for the appropriation by the city of Winston-Salem of the water and sewer lines installed by them in the real estate development known as Konnoak Hills, consequent upon the extension of the corporate limits of the city to include the territory in which this development is situated. They base their claim upon the broad principle that the city having taken exclusive control of their property and denied compensation therefor, they have thus been deprived of property without due process of law in violation of rights assured them by the Constitution of the United States and the Constitution of North Carolina. 14th Amendment Const. U. S.; Art. I, sec. 17 Constitution of North Carolina. They rest their case on the sound principle that private property may not be taken even for a public use without compensation. *McKinney v. Deneen,* 231 N.C. 540, 58 S.E. 2d 107.

The facts in the main are not controverted. No issue of fact is raised. The case was decided below on an issue of law, and the question presented

by the appeal is whether the facts as they appear of record are sufficient to show a violation of plaintiffs' rights in the appropriation of their property as claimed for which the city should be held liable for compensation.

The plaintiffs present the view that their claim for compensation is supported by the decisions of this Court in *Abbott Realty Co. v. Charlotte,* 198 N.C. 564, 152 S.E. 686; *Stephens Co. v. Charlotte,* 201 N.C. 258, 159 S.E. 414, and *Construction Co. v. Charlotte,* 208 N.C. 309, 180 S.E. 573. The first of these cases, *Abbott Realty Co. v. Charlotte,* was decided in 1930. It appeared in that case that the Realty Co. owned lots within the corporate limits of Charlotte on streets to which sewer lines had not been extended. To enhance sale of these lots plaintiff proposed to the Commissioner of Public Works that it would construct the sewer lines if the city would reimburse plaintiff for the cost. This proposition was accepted by the Commissioner. Relying upon this agreement, plaintiff constructed the sewer lines and connected them with the municipal sewerage system at a cost of $16,000. The city paid a portion, but declined to pay the remainder. Plaintiff sued on the contract. The Court held the contract unenforceable but that plaintiff could proceed upon a *quantum meruit.* The Court in so deciding used this language: "Notwithstanding the failure of plaintiff to sustain its contention that defendant is liable to it on the contract alleged in the complaint, the defendant should be and is liable for the reasonable and just value of the sewers, if the jury shall find that after their construction, defendant took them over and incorporated them into its municipal sewerage system."

It is obvious that the facts in that case differ in material respects from those in the case at bar. The decision seems to have been based upon the view that services of value had been rendered and accepted by the city in reliance upon an unenforceable contract.

In *Stephens Co. v. Charlotte, supra,* plaintiff laid out a residential suburban development known as Myers Park, with paved streets and water and sewer lines, outside the corporate limits of the city. In 1916 the city permitted plaintiff to make connection with city mains. In 1928 the city extended its corporate limits so as to take in Myers Park. The city thereupon took over the water and sewer system. Plaintiff sued for compensation, and recovery had below was affirmed. The Court said: "The second contention made by the defendant is that the plaintiff had nothing to sell to the city or nothing of value for which the city would be liable for the appropriation so made. This contention is determined adversely to the defendant by the decision of this Court in (*Abbott*) *Realty Co. v. Charlotte,* 198 N.C. 564." *Chief Justice Stacy* dissented, but the ground of his dissent is not stated. This case seems to support

the plaintiffs' view in our case, but we observe that the decision was based solely on the *Abbott Realty Co. case,* and without further examination of the facts upon which that decision was predicated.

In *Construction Co. v. Charlotte, supra,* it appeared that plaintiff had constructed, paid for, and owned water mains in Charlotte. In 1934 the city under power of eminent domain took over the water mains and appropriated same to its use and refused to pay for same. There was evidence that pursuant to agreement the city had been in possession of the water lines of plaintiff with plaintiff's permission. The Court said: "This evidence is sufficient to sustain the finding by the court that on or about 15 August, 1934, under its right of eminent domain, the defendant took the water mains described in the complaint from the plaintiff, and thereafter appropriated the same to its use as part of its municipal water system." This case does not afford us much help in the determination of the particular questions now presented by the case at bar.

The defendant's position, on the other hand, is that at the time the city extended its corporate limits the plaintiffs had no private property rights capable of being segregated or susceptible of being appropriated by the city; that the plaintiffs having laid out a real estate development, registered a plan thereof, constructed streets underlaid with water and sewer lines, and sold lots for residential purposes fronting thereon in connection with these facilities and services, had dedicated the means of service of these facilities to the lot owners and residents and to the public. The defendant interposes the further defense that the plaintiffs' action in connecting their water and sewer lines with those of the city, in the light of the city ordinances declaring that in the event of the incorporation of the territory in the city limits the water and sewer system with all fixtures and rights pertaining thereto should become the property of the city, constituted a waiver of the right to recover therefor from the city. Note is made of the fact that since its limits were extended the city has continued to furnish water and sewer service to the residents of this development and collect therefor in the same manner as it had previously been doing for twenty years.

The defendant calls our attention to four cases from other jurisdictions in support of its position. The first of these, taking them in chronological order, is *Ford Realty & Cons. Co. v. Cleveland,* 30 Ohio App. 1, decided in 1928. In this case the plaintiff claimed compensation for water mains and fixtures installed in connection with its real estate division in the village of West Park which was subsequently annexed by the city of Cleveland. Plaintiff based its claim in part on an agreement whereby the village of West Park had the right to use these mains, and that no action taken by the village would be deemed an appropriation, and on the subsequent agreement on the part of the city of Cleveland to

become liable for the obligations of West Park, plaintiff claiming equitable assignment. The plaintiff also based its claim on the ground that the city had taken its property without due process of law. The Court held that whether plaintiff claimed by "equitable assignment where there was nothing to assign, or any other way, or whether it claims by virtue of the taking of property without due process of law," the plaintiff was not entitled to recover. The Court also observed that the pipes were laid to enhance the value of lots, and doubtless the enhanced value was charged against the purchasers and included in the price of the lots.

In *Real Estate Co. v. Silverton,* 31 Ohio St. 452, decided in 1929, the facts were similar to those in the case at bar. The Real Estate Co. sued the incorporated village of Silverton to recover compensation for water mains and service pipes which it had installed in a subdivision adjacent to and which was subsequently annexed to the village. Plaintiff claimed right to compensation by reason of the appropriation of the water mains. There was no special legislation, arrangement, contract, or reservation with reference to these water pipes. The village continued to furnish water to the residents of the subdivision through the mains which had been laid by the Real Estate Company. The Court said: "This use would not necessarily mean appropriation or conversion of the mains and pipes." The Court held the village not liable, citing *Ford Realty & Cons. Co. v. Cleveland, supra,* and used this language: "Let us suppose that before annexation, all of the lots in the subdivision had been sold to purchasers, none of whom would have purchased but for the installation of the water supply, and the purchasers had erected residences complete throughout the subdivision, could the Suburban Real Estate Company sell and transfer the mains and pipes, etc., thus depriving the purchasers of lots of the benefit of water? We are of the opinion that, having sold the lots on the representation of furnishing water, and a means having been provided therefor, the Real Estate Company would not be heard to claim ownership in the water mains, with right to remove the same."

In *Danville v. Forest Hills Development Corp.,* 165 Va. 425, 182 S.E. 548 (decided in 1935) the Development Corp. sued to recover for water and sewer mains installed by it prior to annexation by the city of Danville. Recovery was denied. It was said the improvements were constructed in order to make the lots in the development salable and to provide water and sewerage as an inducement to the purchase of its lots. The Court said: "The Development Corporation had sold at the time of annexation a large number of high-priced lots in the subdivision which were served by these facilities, in the sale price of which the enhancement in value representing the cost of the improvements had doubtless been included." The *Charlotte cases, supra,* were referred to but not

followed. The Court further said, "When the water mains, pipes, etc., were constructed by the plaintiff as an inducement to the purchase of the lots, the plaintiff thereby dedicated said mains and pipes to the use of the lot owners and has no right to claim adverse ownership or remove same without such lot owners' consent."

In *Country Club Dist. Service Co. v. Village of Edina,* 214 Minn. 26, decided in 1943, a real estate development had been laid out in the village of Edina near Minneapolis, Minnesota. Under contract with the village, plaintiff or its predecessor constructed and paid for water mains, pipes and hydrants. This was done for the purpose of promoting sale of lots. Suit was subsequently brought to recover the value of these improvements. Recovery was denied. In this case it affirmatively appeared that those who laid out the real estate development and sold lots, advertised that the improvements were fully paid for and there would be no assessment therefor. The Court, however, discussed the question of liability of the municipality for water pipes in a real estate subdivision and quoted with approval from the Virginia case, *Danville v. Forest Hills Development Corp., supra,* to the effect that the mains, pipes and means of service to the purchasers of lots had been dedicated to their use and there was no right to remove them or claim adverse ownership. The Ohio cases, *supra,* were also cited and quotations therefrom inserted. The Charlotte cases, *supra,* were cited but distinguished.

These are the only decided cases bearing on the questions presented in the case at bar which have been called to our attention by counsel.

From an examination of the cases cited and the decisions based on the particular facts of those cases, it is apparent that no comprehensive rule emerges, and that this case and others of like nature must be considered and determined in the light of the pertinent facts presented by the record in each case.

In our case the plaintiffs in 1928 subdivided their real property adjacent to the city of Winston-Salem into streets and lots suitable for residential purposes and underlaid the streets with pipes and appliances for water and sewer service as appurtenant to the lots sold and to be sold. To procure this service for their development and to promote the sale of lots, the plaintiffs, with the consent of the city, connected their system with the city mains through an adjoining development, and the city thereafter supplied the water from its mains and furnished service through its sewer system to the residents of Konnoak Hills, making collection therefor according to the city ordinances and prescribed regulations, and since January 1, 1949, when the city limits were extended to include this area, has continued to furnish water and sewer service to residents in the same manner as during the preceding twenty years. There was no agreement or assumption of obligation for compensation on the

part of the city. Numerous lots have been sold and it was stated in the complaint that "scores of residences have been built upon the subdivision and vacant lots therein are in demand as residence sites." The city ordinances were in force at the time advising those outside the city who were permitted to connect with the city mains that whenever the territory in which they were located was incorporated within the city limits the water and sewer lines and "fixtures, equipment, easements, rights and privileges pertaining thereto" should become the property of the city. The plaintiffs' subdivision having been laid out within one mile of the corporate limits of the city, knowledge of its ordinances in the respects set out in G.S. 160-203 would be presumed.

Upon these facts, we reach the conclusion that the court below has correctly ruled that the plaintiffs were not entitled to compensation for the water and sewer lines in Konnoak Hills now controlled and maintained by the city of Winston-Salem, and that plaintiffs have not been wrongfully deprived of property rights therein by the incorporation of these lines in the city system consequent upon the extension of the city limits.

No error.

BARNHILL, J., concurring: The ordinance relied on by defendant, when considered in connection with the contract between plaintiffs and defendant, is significant on the question of title to the water and sewer mains which are the subject matter of this controversy. Under the ordinance and the contract executed pursuant thereto, when the city limits were extended so as to incorporate plaintiffs' development, the mains immediately became the property of defendant. Apparently this is conceded.

The real controversy here is as to the right of plaintiffs to compensation for the property thus acquired by the city. On this question, in my opinion, the ordinance is of no consequence. It has no bearing on the question either one way or the other, for a governmental unit may not, by legislative fiat, appropriate private property without paying just compensation therefor. *Hildebrand v. Telegraph Co.,* 219 N.C. 402. It may enact a law declaring that upon the happening of a certain event the title to property shall pass to and vest in such governmental unit. But this does not relieve it of the obligation to pay just compensation for the property so taken.

The plaintiffs had the right to install water and sewer mains in the streets of their development, contract with the city for sewer outlets through its system, purchase water wholesale from the municipality, and then retail these services to the purchasers of their lots as a business undertaking independent of the land development. Had they pursued

this course, the extension of the corporate limits of defendant city so as to incorporate the *locus* might have served to vest in defendant title to the water and sewer system thus maintained by the plaintiffs under the terms of the ordinance and the terms of the contract executed pursuant thereto—assuming, of course, that the contract for sewer outlets and for the purchase of water wholesale contained the same provisions as the one actually executed. However, such was not the course pursued. No doubt the plaintiffs deemed that method of furnishing those services to the purchasers of their lots too costly.

Instead, they installed the water and sewer mains, contracted with the city to furnish the contemplated services, and immediately surrendered possession of the mains to the defendant city. Since that time, and for more than twenty years, the city has operated the mains installed by plaintiffs as a part of its own system. In turn, plaintiffs have profited by the assurance that this valuable public service was available to all purchasers of lots in their development. No doubt they assessed the additional expense as a part of the original cost just as they did the expense of laying out the streets, clearing the property, and developing it for sale as building lots, and priced the lots accordingly. In any event, in my opinion, the surrender of possession to the city under the contract executed by them constituted a dedication to public use and they are now estopped by their conduct from claiming compensation therefor, irrespective of the terms of the ordinance. For this reason and this reason alone, I vote to uphold the verdict and judgment.

STATE v. EDSEL MINTON AND BEN BULLIS.

(Filed 1 February, 1952.)

1. Homicide § 2—

The parties to homicides are divided into four classes: (1) principals in the first degree: (2) principals in the second degree; (3) accessories before the fact; (4) accessories after the fact.

2. Same—

A principal in the first degree in the commission of a homicide is the person who actually perpetrates the killing.

3. Same—

A principal in the second degree in the commission of a homicide is one who is actually or constructively present when a homicide is committed by another, and who aids or abets such other in its commission.

4. Homicide § 25—

In order to sustain conviction of defendant as a principal in the first degree in the commission of a homicide, the State must produce evidence sufficient to establish beyond a reasonable doubt that the death proximately resulted from defendant's unlawful act.

5. Same—

It is necessary that the causal relation between the wound and the death be established by medical expert testimony only in those cases where the cause of death is obscure and an average layman could have no well grounded opinion as to the cause, but where the facts in evidence are such that every person of average intelligence would know from his own experience or knowledge that the wound was mortal in character, expert medical testimony is not required.

6. Same—

The evidence tended to show that defendant intentionally shot deceased, who fell to the ground, that deceased was found the next morning lying on the ground, that there was a "blood spot" under the body, that the corpse was "frozen stiff" and had a bullet wound clear through the body to the left of the center of the chest and just above the heart. *Held:* The evidence is sufficient for the jury to find that the bullet wound caused the death, and it is immaterial whether the death was immediate or resulted from exposure after defendant had left his victim in a helpless condition on the ground during the frigid night.

7. Same—

The evidence tended to show that defendants together accosted their victim during the afternoon, that at that time one defendant in the presence of the other threatened to kill him, that that evening after the victim had stopped his car near another municipality in the county, defendants straightway appeared, alighted, engaged in an altercation with him, and that when he turned his back to return to his car, one of defendants pulled a pistol from his pocket and shot him, causing his death. *Held* sufficient to be submitted to the jury as to the other defendant's guilt as a principal in the second degree.

8. Homicide § 23—

In a prosecution for homicide it is competent for the State to introduce in evidence a pistol corresponding in caliber to the bullet inflicting the mortal wound when there is evidence that the pistol was in the possession of one of the defendants both before and after the homicide, notwithstanding the absence of testimony tending to show directly that this particular pistol was actually used in killing the deceased.

9. Criminal Law § 81c (3)—

A defendant waives his objection to testimony brought out on his cross-examination by thereafter testifying without objection to the same facts.

10. Criminal Law § 34h—

Statements made and correspondence written by defendant in an attempt to induce a material witness for the prosecution to testify falsely in his favor are competent against him as being in the nature of an admission of guilt.

11. Criminal Law § 42g—

On cross-examination of a State's witness, defendant, for the purpose of showing bias of the witness, brought out the fact that the witness and defendant had engaged in an altercation sometime prior to the trial. *Held:* The State is entitled upon redirect examination to bring out the facts in regard to the altercation even though such testimony would otherwise be incompetent.

12. Same—

Where a defendant introduces contradictory statements made prior to the trial by a witness for the prosecution, the State is entitled to show on redirect examination that the witness made the contradictory statements because of threats and bribery, even though such testimony would otherwise be incompetent.

13. Criminal Law § 81c (3)—

Where the evidence discloses that the victim and defendant lived in the same vicinity, testimony that sometime prior to the homicide defendant was seen driving his car along the public highway in the wake of an automobile operated by his victim, cannot be held prejudicial.

14. Criminal Law § 53f—

A charge that "the attempt" of defendant to prove an alibi does not shift the burden of proof, *held* not error as an expression of opinion by the court, there being nothing in the charge, construed contextually, intimating that the court was of the opinion that defendant had attempted but failed to prove an alibi.

15. Criminal Law § 53b—

The charge in this case *held* not subject to the criticism that it placed the burden of proving his alibi on defendant, but, to the contrary, correctly charged that it was incumbent upon the State to prove defendant's guilt beyond a reasonable doubt on the whole evidence and that if defendant's evidence of alibi, in connection with all the other testimony in the case, left the jury with reasonable doubt of defendant's guilt, defendant was entitled to an acquittal.

16. Criminal Law § 40a—

Where defendant testifies in his own behalf and also offers evidence of his good character, evidence of his character is competent as substantive evidence and also as bearing upon his credibility.

17. Criminal Law § 41e—

Character evidence of a witness not a defendant is competent solely on the question of his credibility.

APPEAL by defendants from *Gwyn, J.*, and a jury, at the August Term, 1951, of WILKES.

Criminal prosecution upon an indictment charging Edsel Minton and Ben Bullis with the murder of Felts Curtis.

The record reveals that the *dramatis personae* were Felts Curtis, a man of the age of forty-six years, who had a wife at home; Edsel Minton,

a man of maturity, who had fathered four children in wedlock; Ben Bullis, another man of maturity, who was keeping house with a paramour; Thelma Wyatt, a fifteen-year-old prostitute; and Mabel Brown, another fifteen-year-old prostitute.

When the cause was called for trial, the solicitor stated that he did not seek a conviction of first degree murder, but did ask a conviction of second degree murder or manslaughter.

The State's evidence was as follows:

1. On the afternoon of 16 December, 1949, Felts Curtis and the State's witnesses, Thelma Wyatt and Mabel Brown, traveled from North Wilkesboro to Elkin and back in a Ford car belonging to Curtis. They stopped at Roaring River on their way to Elkin. Here they were accosted by Edsel Minton and Ben Bullis, who drove up together in an automobile, and invited the girls to abandon Curtis and go with them. Thelma and Mabel declined the invitation on the advice of Curtis, and Minton immediately made this threat to Curtis in the presence of Bullis: "I will get even with you, Felts. I will kill you before midnight tonight." Curtis and the girls thereupon proceeded to Elkin in the Ford, leaving Minton and Bullis at Roaring River.

2. Sometime after 9:00 o'clock p.m. on the same date, Curtis, Thelma, and Mabel traveled in the Ford from North Wilkesboro to a rural section of Wilkes County, where they parked upon a dirt road leading from Highway No. 421 to Suncrest Orchard. Minton and Bullis straightway appeared on the scene in an automobile, which was brought to a stop nearby. Minton and Bullis alighted, and walked to the stationary Ford occupied by Curtis and the girls. Minton opened the door adjacent to Curtis' seat, and Curtis got out. Minton, Bullis, and Curtis went behind the Ford, where "they quarreled for a few minutes." Curtis then turned his back on Minton and Bullis, and undertook to return to his Ford. Minton thereupon pulled a pistol from his pocket and shot Curtis, who fell to the ground.

3. Thelma and Mabel fled the scene at this juncture. They were picked up a few minutes later a short distance away by the automobile used by Minton and Bullis, and stayed with Minton and Bullis from that time until about three o'clock on the morning of 17 December, 1949, when they parted company with these men at North Wilkesboro. At that time Minton made this statement to Thelma and Mabel in the presence of Bullis: "If anybody asks you girls if you saw us, tell them no; if they ask anything about what happened tonight, tell them you don't know anything about it."

4. At seven o'clock on the morning of 17 December, 1949, the dead body of Curtis was found lying beside his parked Ford on the road leading to Suncrest Orchard. The preceding night had been extremely cold, and

the corpse was "frozen stiff." The deceased's clothing was "wet with blood." There was a "blood spot" under the body. The State's witnesses, Sheriff C. G. Poindexter and Coroner I. M. Myers, examined the remains, and found "a bullet wound in Felts Curtis' body. That bullet had passed plumb through his body (to) the left of the center of the chest, just above the heart. The bullet hole in the back was smooth and round. The bullet hole in the front protruded out, and there were little rough edges round the hole." Sheriff Poindexter inserted "a 32 (caliber) bullet in the wound," and observed that it fitted "snugly." It was subsequently ascertained that Minton owned a pistol of foreign manufacture, whose caliber was slightly in excess of 30, as early as November, 1949. This pistol was found in Minton's home on 16 August, 1950, and was exhibited by the State at the trial.

5. Thelma and Mabel did not divulge the matters stated in paragraphs 1, 2, and 3 to the peace officers of Wilkes County until August, 1950. This prosecution was thereupon begun.

The State did not undertake to show by any medical witness that the death of Curtis was caused by the bullet wound described by Sheriff Poindexter and Coroner Myers.

Each defendant asserted his innocence, and presented testimony tending to establish an alibi.

The jury returned a verdict finding each defendant guilty of murder in the second degree, and the judge sentenced each defendant to confinement "in the State's prison for a period of not less than sixteen nor more than eighteen years." The defendants excepted and appealed, assigning errors.

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

Trivette, Holshouser & Mitchell and Whicker & Whicker for defendant, Edsel Minton, appellant.

Larry S. Moore and F. J. McDuffie for defendant, Ben Bullis, appellant.

ERVIN, J. The defendants make these assertions by their assignments of error:

1. That the court erred in refusing to dismiss the prosecution upon a compulsory nonsuit. G.S. 15-173.

2. That the court erred in the admission of testimony.

3. That the court erred in its instructions to the jury.

The parties to homicides are divided into four classes: (1) Principals in the first degree. (2) Principals in the second degree. (3) Accessories before the fact. (4) Accessories after the fact. *S. v. Powell,* 168 N.C. 134, 83 S.E. 310.

The State bottoms this prosecution on the theory that Minton is guilty as a principal in the first degree, and that Bullis is guilty as a principal in the second degree.

A principal in the first degree in the commission of a homicide is the person who actually perpetrates the killing, *i.e*,, the person whose unlawful act causes the death of the victim without the intervention of any responsible agent. A principal in the second degree in the commission of a homicide is one who is actually or constructively present when a homicide is committed by another, and who aids or abets such other in its commission. *S. v. Allison,* 200 N.C. 190, 156 S.E. 545; *S. v. Powell, supra.*

To warrant the conviction of an accused upon a charge of unlawful homicide on the theory that he participated in the killing as a principal in the first degree, the State must produce evidence sufficient to establish beyond a reasonable doubt that the death proximately resulted from his unlawful act. *S. v. Hendrick,* 232 N.C. 447, 61 S.E. 2d 349; *S. v. Palmer,* 230 N.C. 205, 52 S.E. 2d 908; *S. v. Ellison,* 226 N.C. 628, 39 S.E. 2d 824; *S. v. Peterson,* 225 N.C. 540, 35 S.E. 2d 645; *S. v. Everett,* 194 N.C. 442, 140 S.E. 22; *S. v. Johnson,* 193 N.C. 701, 138 S.E. 19. The defendants contend that the State failed to present any testimony at the trial sufficient to support the conclusion that the death of the deceased was caused by the criminal agency of Minton, and that by reason thereof the action ought to have been involuntarily nonsuited as to each of them. They concede that the State's evidence suffices to show that Minton purposely shot and wounded the deceased with a pistol. They insist, however, that the prosecution did not produce any testimony indicating that the deceased died from the pistol wound.

The State did not undertake to show any causal relation between the wound and the death by a medical expert. For this reason, the question arises whether the cause of death may be established in a prosecution for unlawful homicide without the use of expert medical testimony. The law is realistic when it fashions rules of evidence for use in the search for truth. The cause of death may be established in a prosecution for unlawful homicide without the use of expert medical testimony where the facts in evidence are such that every person of average intelligence would know from his own experience or knowledge that the wound was mortal in character. *Waller v. People,* 209 Ill. 284, 70 N.E. 681; *State v. Rounds,* 104 Vt. 442, 160 A. 249. See, also, in this connection: *S. v. Peterson, supra; S. v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606; *S. v. Johnson, supra; Brundage v. State,* 70 Ga. App. 696, 29 S.E. 2d 316; *James v. State,* 67 Ga. App. 300, 20 S.E. 2d 87; *Brown v. State,* 10 Ga. App. 216, 73 S.E. 33; *Commonwealth v. Sullivan,* 285 Ky. 477, 148 S.W. 2d 343; *People v. Jackzo,* 206 Mich. 183, 172 N.W. 557; *Franklin v.*

State, 180 Tenn. 41, 171 S.W. 2d 281; *Mayfield v. State,* 101 Tenn. 673, 49 S.W. 742; *Lemons v. State,* 97 Tenn. 560, 37 S.W. 552; *McMillan v. State,* 73 Tex. Cr. 343, 165 S.W. 576; *State v. Bozovich,* 145 Wash. 227, 259 P. 395. There is no proper foundation, however, for a finding by the jury as to the cause of death without expert medical testimony where the cause of death is obscure and an average layman could have no well grounded opinion as to the cause. *State v. Rounds, supra;* 41 C.J.S., Homicide, section 312d.

When it is tested by these rules, the evidence of the State at the trial suffices to show beyond a reasonable doubt that the death of the deceased was proximately caused by the pistol bullet fired by Minton and the resultant hemorrhage.

The defendants lay hold on the State's testimony that the corpse was "frozen stiff" on the morning of 17 December, 1949, and base this assertion on it: "Thus it appears from the State's witnesses that the deceased might well have come to his death by exposure." The assertion rests on mere conjecture and speculation. Still we deem it not amiss to observe that Minton would not necessarily be exonerated from criminal responsibility for the death of the deceased on the present record even if the assertion had foundation in fact. An accused who wounds another with intent to kill him and leaves him lying out of doors in a helpless condition on a frigid night is guilty of homicide if his disabled victim dies as the result of exposure to the cold. This is true because the act of the accused need not be the immediate cause of the death. He is legally accountable if the direct cause is the natural result of his criminal act. *Williams v. U. S.,* 20 F. 2d 269, 57 App. D. C. 253; *Gibson v. Commonwealth,* 106 Ky. 360, 50 S.W. 532, 20 Ky. L. 1908, 90 Am. S. R. 230; 40 C. J. S., Homicide, section 11b.

In passing from this phase of the appeal, we indulge the observation that good legal craftsmanship will undoubtedly prompt solicitors to offer expert medical testimony as to the cause of death in all prosecutions for unlawful homicide where such testimony is available.

Bullis takes this alternative and secondary position on the assignment of error based on the refusal of the court to enter a compulsory nonsuit: The action should have been involuntarily nonsuited as to him for insufficiency of evidence of aiding and abetting on his part even if the State's testimony is ample to prove that Minton intentionally inflicted a mortal wound upon the deceased in his presence. This position is insupportable. The State's evidence suffices to show beyond a reasonable doubt not only that Bullis was actually present when Minton fatally wounded the deceased, but also that he was present with intent to assist Minton in killing the deceased in case such assistance became necessary and that his presence and purpose were known to Minton, who was encouraged thereby to inflict the mortal wound. *S. v. Allison, supra; S. v.*

Cloninger, 149 N.C. 567, 63 S.E. 154; *S. v. Chastain,* 104 N.C. 900, 10 S.E. 519.

Many of the exceptions to the receipt of testimony tendered by the prosecution have been abandoned by the defendants under Rule 28 of the Rules of Practice in the Supreme Court. 221 N.C. 563; *S. v. Carter,* 233 N.C. 581, 65 S.E. 2d 9. Those which have been preserved are reviewed in the numbered paragraphs set forth below.

1. The State was properly permitted to exhibit to the jury the pistol of foreign manufacture identified by the witnesses Ezell Crysel and J. B. Edwards as having been possessed by the defendant Minton both before and after the homicide. Although the testimony did not directly show that this particular pistol was actually used to kill the deceased, the pistol corresponded in caliber with the bullet which inflicted the mortal wound, and might well have been the weapon employed for that purpose. *S. v. Brabham,* 108 N.C. 793, 13 S.E. 217; *Williams v. State,* 73 Fla. 1198, 75 So. 785; *People v. Sullivan,* 345 Ill. 87, 177 N.E. 733; *People v. Kircher,* 309 Ill. 500, 141 N.E. 151; *People v. Selkes,* 309 Ill. 113, 140 N.E. 852; *State v. Green,* 115 La. 1041, 40 So. 451.

2. The State elicited from the defendant Bullis on his cross examination testimony indicating that his paramour "was running around with Edsel Minton" while she was keeping house with him. The court received this evidence against Bullis but not against Minton. The woman was not a witness in the cause, and it is not altogether clear why this testimony was brought out or admitted. Be this as it may, the defendant Bullis waived the benefit of his original objection to its receipt by testifying without objection to the same facts in other portions of his examination. *S. v. Hudson,* 218 N.C. 219, 10 S.E. 2d 730. Besides, the defendant Minton gave exactly the same evidence without objection from Bullis at a subsequent stage of the trial. *S. v. Oxendine,* 224 N.C. 825, 32 S.E. 2d 648.

3. The State introduced in evidence a letter and oral statements of the defendant Minton promising Thelma Wyatt, who was detained in the county jail as a material witness for the prosecution, that he would procure her release from custody and take her anywhere she wanted to go if she would testify that she "didn't know who killed Felts Curtis" and thus "help get him free." The court rightly ruled that this testimony was admissible against Minton but not against Bullis. An attempt by an accused to induce a witness to testify falsely in his favor may be shown against him. Such conduct indicates a consciousness on his part that his cause cannot rest on its merits, and is in the nature of an admission that he is wrong in his contention before the court. *S. v. Smith,* 218 N.C. 334, 11 S.E. 2d 165; *U. S. v. Freundlich,* 95 F. 2d 376; *Doughty v. State,* 44 Ariz. 100, 33 P. 2d 991; *Drake v. Commonwealth,* 214 Ky. 147, 282 S.W. 1066; *Perfect v. State,* 197 Ind. 401, 141 N.E.

52; *Commonwealth v. Min Sing,* 202 Mass. 121, 88 N.E. 918; Wigmore on Evidence, (2d Ed.), section 278; Underhill on Criminal Evidence, (3rd Ed.), section 207. These authorities also support the ruling admitting as against Bullis alone the amatory letter written by him to Thelma Wyatt while he was in jail awaiting trial on the charge of murdering the deceased. When the letter is read in the light of the contemporary circumstances surrounding its author, it is plain that the letter was designed by Bullis to induce Thelma Wyatt, whom he knew to be a principal witness for the State, to fabricate evidence in his favor or to suppress evidence against him. Besides, the contents of the letter were brought out a second time on the cross examination of Bullis without objection from him. *S. v. Hudson, supra.*

4. The defendants undertook to discredit the State's witness Garfield Holloway by drawing from him on cross examination the admission that on some past occasion he endeavored to strike the defendant Minton with a pipe. The court allowed Holloway to testify on his re-direct examination to facts tending to show that he used the pipe merely to repel an unprovoked assault made on him by Minton. The court did not err in so doing. After a litigant brings out on cross examination specific acts of an adverse witness for the purpose of impeachment, the party by whom the witness is called may sustain the character of the witness by eliciting from him evidence explaining those acts, or mitigating their effect. *S. v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871; *S. v. Oxendine, supra; Keller v. Furniture Co.,* 199 N.C. 413, 154 S.E. 674; *Leonard v. Davis,* 187 N.C. 471, 122 S.E. 16; *S. v. Bethea,* 186 N.C. 22, 118 S.E. 800; *S. v. Orrel,* 75 N.C. 317; 70 C. J., Witnesses, section 1134, and cases cited; Wigmore on Evidence (2d Ed.), section 1117. This is true even though evidence otherwise inadmissible is thereby introduced. *Keller v. Furniture Co., supra; S. v. Orrel, supra.*

5. The State's witness Thelma Wyatt gave testimony on direct examination in substantial accord with paragraphs 1, 2, and 3 of the summary of the State's evidence. With a view to her impeachment by self contradiction, the defendants drew from this witness on cross examination admissions that shortly before the trial she made statements out of court denying knowledge of any facts tending to connect the defendants with the death of the deceased. The court permitted this witness to testify on her re-direct examination that her extra-judicial statements were not true, and that she had been induced to make them by threats and offers of bribes made to her by the parents of the defendant Minton. The court rightly ruled that the witness' explanation was competent for the consideration of the jury on the question of her veracity. After the opposing party has sought to impeach a witness by showing that he made statements out of court inconsistent with or contradictory of his testimony at the trial, the witness thus assailed is entitled to support his cred-

ibility by explaining the circumstances under which the statements were made and his reasons for making them. *Queen v. Insurance Co.,* 177 N.C. 34, 97 S.E. 741; *Phifer v. Erwin,* 100 N.C. 59, 6 S.E. 672; *Peck v. Manning,* 99 N.C. 157, 5 S.E. 743; Stansbury on North Carolina Evidence, section 46; Wigmore on Evidence (2d Ed.), section 1044; Underhill on Criminal Evidence (3rd Ed.), section 380. This is true even though evidence otherwise inadmissible is thereby introduced. 70 C. J., Witnesses, section 1332. In applying this rule, courts have held that it may be shown that the witness had been advised (*Watson v. Kentucky & Indiana Bridge & R. Co.,* 137 Ky. 619, 126 S.W. 146, 129 S.W. 341, *Ferris v. Hand,* 135 N.Y. 354, 32 N.E. 129, *Ross v. State,* 60 Tex. Cr. 547, 132 S.W. 793, *Spencer v. State,* 59 Tex. Cr. 217, 128 S.W. 118), or bribed (*People v. Nakis,* 184 Cal. 105, 193 P. 92), or intimidated by third persons to make the inconsistent or contradictory statements. *People v. Frugol,* 334 Ill. 324, 166 N.E. 129; *State v. Marsee,* 93 Kan. 600, 144 P. 833; *Hendrickson v. Commonwealth,* 23 Ky. L. 1191, 64 S.W. 954.

6. The defendant Minton complains of the reception of the testimony of Mrs. Felts Curtis that shortly before 16 December, 1949, she saw him driving a motor vehicle along a public highway in Wilkes County in the wake of an automobile operated by the deceased. Inasmuch as all the evidence in the case shows that the defendant Minton resided in the immediate vicinity, this testimony cannot be held prejudicial to him even if it be taken for granted that it was not relevant to the controversy.

The defendants assign as error the charge as to alibi. The instructions on this subject were as follows: "The defendants, in addition to their plea of not guilty, plead what the law calls an alibi. They rely not only upon their denial of the State's cause, contending that the State failed to prove its cause, but likewise rely upon what the law calls an alibi; and at this time I will instruct you as to what is meant by the term alibi. An alibi simply means that the accused was at another place at the time the crime was alleged to have been committed, and, therefore, could not have committed it. All the evidence should be carefully considered by the jury, and if the evidence on that subject, considered with all other evidence, is sufficient to raise a reasonable doubt as to the guilt of the defendant, you should acquit the defendant. The accused is not required to prove an alibi beyond a reasonable doubt, or by a preponderance of the evidence. It is sufficient to justify an acquittal if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged, if you should find that a crime was committed, and you will understand also that the attempt of the accused to prove an alibi does not shift the burden of proof to the defendant. The burden remains on the state to prove the defendant's guilt beyond a reasonable doubt and that at all times."

The defendants assert that these instructions are erroneous in two respects. They insist initially that the trial judge described the evidence offered by them for the purpose of establishing their alibis as mere attempts to prove alibis and in that way expressed an opinion that it was factually insufficient for that purpose contrary to G.S. 1-180 when he gave the instruction that "the attempt of the accused to prove an alibi does not shift the burden of proof to the defendant." This contention lacks validity. It ignores the truth embodied in the aphorism of *Justice Holmes* that "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 time in which it is used." *Towne v. Eisner,* 245 U.S. 418, 62 L. Ed. 372, 38 S. Ct. 158. An "attempt" includes a successful as well as a futile endeavor. *O'Brien v. U. S.,* 51 F. 2d 193. When the trial judge used the word "attempt" in the instruction under scrutiny, he did not intimate to the jury that he was of the opinion that either defendant had attempted but failed to prove an alibi. He merely declared and explained to the jury the sound legal proposition that the fact that a particular defendant had offered evidence for the purpose of establishing an alibi did not shift the burden of proof from the State to him. *Allen v. State,* 70 Ark. 337, 68 S.W. 28; *People v. Lang,* 142 Cal. 482, 76 P. 232.

The defendants assert secondarily that the trial judge erred in the instructions as to alibi because he separated their alibis from the general issue, and charged the jury, in substance, that the burden of proving their alibis rested on them. We do not deem the language of the trial judge reasonably susceptible of this construction. When he told the jury that "the defendants, in addition to their pleas of not guilty, plead what the law calls an alibi," the judge did not repudiate the settled doctrine that an alibi is not an affirmative defense, but is simply a denial of the commission of the crime by the accused. *S. v. Bridgers,* 233 N.C. 577, 64 S.E. 2d 867; *S. v. Sheffield,* 206 N.C. 374, 174 S.E. 105. The judge was merely pointing out these facts: That each of the defendants laid claim to the right to an acquittal on alternative grounds; that the first alternative was that the evidence for the State was insufficient to prove the *corpus delecti;* and that the second alternative was that the defendant was elsewhere at the time of the homicide and by reason of his absence could not have been the person who committed it even if the testimony for the State did suffice to establish the *corpus delecti.* The judge did not charge the jury that the burden of proving an alibi rests on the accused. Indeed, his language was calculated to impress upon the jurors that the State has, in effect, the burden of disproving an alibi. When all is said, the instructions as to alibi come to this:

An accused, who relies on an alibi, does not have the burden of proving it. It is incumbent upon the State to satisfy the jury beyond a reason-

able doubt on the whole evidence that such accused is guilty. If the evidence of alibi, in connection with all the other testimony in the case, leaves the jury with a reasonable doubt of the guilt of the accused, the State fails to carry the burden of proof imposed upon it by law, and the accused is entitled to an acquittal.

This being true, the charge as to alibi is in accord with approved precedents. *S. v. Bridgers, supra; S. v. Jaynes,* 78 N.C. 504.

The defendants also assign as error the instructions on character evidence. When these instructions are read aright, it appears that the court charged the jury as follows on this aspect of the case: (1) To consider the evidence of the character of each defendant as substantive evidence on the question of his guilt or innocence, and also as evidence bearing on his credibility as a witness; and (2) to consider the evidence of the character of any other witness simply as going to his credibility. Inasmuch as each defendant testified in his own behalf and also put his character in issue by offering evidence of his own good character, these instructions were proper. *S. v. Bridgers, supra; S. v. Nance,* 195 N.C. 47, 141 S.E. 47.

The remaining exceptions challenge the charge on the theory that the trial judge expressed opinions on the facts adverse to the defendants, and failed to explain the law arising in the case in an adequate manner. The charge is not justly subject to either of these criticisms. Since these exceptions raise no new or unusual questions, they require no elaboration.

This case illustrates anew the unrelenting truth that "the sin ye do by two and two ye must pay for one by one."

No error.

CHARLES E. WARNER v. J. HERMAN LEDER.

(Filed 1 February, 1952.)

1. Master and Servant § 41—

An employee riding in a car driven by the president and executive officer of the employer on a business trip in the course of their employment may not hold the driver liable as a third person tort-feasor in an action at common law for negligence resulting in an unintentional injury in a collision, since such driver is a person conducting the business of the employer within the purview of the immunity clause of G.S. 97-9.

2. Same—

While an employer or an employee conducting the business of the employer may be held liable at common law where injury to claimant employee is willfully and wantonly inflicted, claimant employee may not assert liability under this exception to the general rule when he admits that his injury was not intentionally inflicted.

3. Same—

While an employer or an employee conducting the business of the employer may be held liable at common law where injury to claimant employee is willfully and wantonly inflicted, claimant employee may not assert liability under this exception to the general rule when he has applied for and received medical expenses and compensation in accordance with the provisions of the North Carolina Workmen's Compensation Act.

APPEAL by defendant from *Burney, J.*, at March Term, 1951, of COLUMBUS.

This is a civil action, instituted on 1 April, 1950, to recover for personal injuries which the plaintiff alleges he sustained in an automobile collision, which occurred in the State of South Carolina, as a result of the negligence of the defendant.

The facts pertinent to the appeal are as follows:

1. The plaintiff is and was at the time of the collision an employee and manager of the shoe department in the Whiteville, North Carolina, department store owned and operated by Leder Brothers, Inc., a North Carolina corporation which owns and operates twelve department stores.

2. The defendant, J. Herman Leder, is and was at the time of the collision, the president and executive officer of the corporation. Kenneth Anderson, the other occupant of the automobile with the plaintiff and the defendant, at the time of the collision, was likewise an employee of Leder Brothers, Inc.

3. At the time of the accident complained of, the defendant, J. Herman Leder, the plaintiff, Charles E. Warner, and Kenneth Anderson were en route to Augusta, Georgia, to purchase shoes for Leder Brothers, Inc., at the Southeastern Shoe Show which opened in Augusta on the day of the accident. The sole reason for making the trip to Augusta was to attend the Shoe Convention and to purchase shoes. It was a customary business trip for both the plaintiff and the defendant on behalf of Leder Brothers, Inc. The car of the defendant had been used frequently on similar trips, and the corporation paid all the expenses on such trips, including mileage for the use of the car.

4. The defendant was driving his car, according to the plaintiff's testimony, at the time of the accident, at an excessive and unlawful rate of speed. According to the evidence of the defendant, he was driving his car at a rapid but safe speed, when the driver of a car he was approaching turned suddenly to the left across the road in front of him to enter what is known as Edna's Place, which establishment is located about two miles north of Marion, South Carolina, on U. S. Highway No. 76. The cars collided resulting in serious and permanent injury to the plaintiff.

5. Leder Brothers, Inc., and its employees were subject to and bound by the provisions of the North Carolina Workmen's Compensation Act.

6. It is conceded that the plaintiff's injury arose out of and in the course of his employment by Leder Brothers, Inc., and that the plaintiff filed claim for and was paid medical expenses and compensation for temporary total disability, and for permanent partial disability by Lumbermens Mutual Casualty Co., the insurance carrier for said corporation, in accordance with the provisions of the North Carolina Workmen's Compensation Act.

7. The defendant denied negligence and pleaded his immunity to suit and his nonliability under the provisions of the North Carolina Workmen's Compensation Act, and particularly under G.S. 97, sections 9 and 10 thereof.

8. It was admitted by the plaintiff and the defendant that the defendant did not intentionally injure the plaintiff, and the court so charged the jury.

9. The defendant offered in evidence the guest statute of the State of South Carolina, South Carolina Code of 1932, section 5908, as set forth in the case of *Peak v. Fripp*, 195 S.C. 324, 11 S.E. 2d 383, but the court submitted to the jury the usual issues of negligence and damages. The jury answered the issue of negligence in favor of the plaintiff, and assessed damages in the sum of $40,000.

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

Powell, Lee & Lee for plaintiff, appellee.

Edward K. Proctor, Helms & Mulliss, and James B. McMillan for defendant, appellant.

DENNY, J. The defendant presents for our consideration twenty-three exceptions and assignments of error. However, if his plea of immunity under the provisions of the North Carolina Workmen's Compensation Act, G.S. 97-9, is valid, the court below committed error in not sustaining his motion for judgment as of nonsuit, interposed at the close of plaintiff's evidence and renewed at the close of all the evidence. And since this plea, if sustained, will determine the appeal, we shall first consider the merits of such plea.

The plaintiff contends that the defendant is a third party within the meaning of G.S. 97-10, while the defendant contends he is immune from common law liability, since at the time of plaintiff's injury, he was on a business mission for the employer and that G.S. 97-9 limits the liability of the employer "or those conducting his business" to the payment only of such sum or sums as may be authorized under the provisions of the Workmen's Compensation Act.

G.S. 97-9 reads as follows: "Every employer who accepts the compensation provisions of this article shall secure the payment of compensation

to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee who elects to come under this article for personal injury or death by accident to the extent and in the manner herein specified."

The pertinent provisions of G.S. 97-10 are as follows: "The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this article, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, as against his employer at common law, or otherwise, on account of such injury, loss of service, or death: Provided, however, that in any case where such employee, his personal representative, or other person may have a right to recover damages for such injury, loss of service, or death from any person other than the employer, compensation shall be paid in accordance with the provisions of this chapter . . ."

We find a diversity of opinion with respect to the remedies against third parties for injuries to employees who are subject to the provisions of compensation acts due to the variances in such provisions. 58 Am. Jur., Workmen's Compensation, section 60, page 616. In such acts where there is no immunity clause, such as we have in G.S. 97-9, fellow workmen are generally treated as third parties within the meaning of the act. See Anno. 106 A.L.R. 1059.

However, with the exception of the decisions in *Tscheiller v. Weaving Co.*, 214 N.C. 449, 199 S.E. 623, and *McCune v. Manufacturing Co.*, 217 N.C. 351, 8 S.E. 2d 219, we find no decision in this or any other jurisdiction where, under an immunity clause similar to that contained in G.S. 97-9, it has been held that an injured employee may maintain an action at common law against a fellow employee who was responsible for his injury.

In the *Tscheiller case,* while the motion was made to dismiss the action on the ground that all the parties thereto were bound by the provisions of the Workmen's Compensation Act, the immunity provision in the statute with respect to the individual defendant was not raised. Neither was it raised in the *McCune case* where the court entered a judgment of involuntary nonsuit as to the defendant corporation and the plaintiff submitted to a voluntary nonsuit as to the individual defendant.

But, in the case of *Essick v. Lexington, et als.*, 232 N.C. 200, 60 S.E. 2d 106, the provision giving immunity to the employer "or those conducting his business," contained in G.S. 97-9, where the employer had accepted the provisions of the Workmen's Compensation Act, was expressly presented for construction by this Court. Harvey Essick, the plaintiff's intestate, at the time of his death, was employed as a carpenter by Dixie

Furniture Co. He was killed by coming in contact with a high voltage electric wire maintained by the defendant Lexington Utilities Commission, while working on the roof of a tramway running across South Salisbury Street in the City of Lexington. After the institution of the action against the City of Lexington and Lexington Utilities Commission, the Lexington Utilities Commission moved to have Dixie Furniture Co., H. T. Link, its treasurer, and A. F. Taylor, superintendent of its plant, made parties defendant. The motion was allowed. Whereupon, in a cross action filed by the Lexington Utilities Commission, it was alleged that the codefendants Dixie Furniture Co., H. T. Link, and A. F. Taylor, were guilty of primary negligence which was the proximate cause of the death of plaintiff's intestate, in that they ordered the construction of a roof over the tramway in willful disregard of the terms of their application to and permit obtained from the City of Lexington.

The defendants demurred *ore tenus* to the cross action of the Lexington Utilities Commission against them on the ground that it appears on the face of the record that the Dixie Furniture Co., and its employees, had accepted the provisions of the North Carolina Workmen's Compensation Act and were bound thereby and that the plaintiff had been paid in full pursuant to the provisions of the act. This Court held the *Tscheiller* and *McCune cases* were not controlling, and that: "Link, as treasurer, and Taylor as superintendent of the plant, were clearly within the pale of (G.S.) 97-9, as those who conduct the business and entitled to the immunity it gives." Whereupon, the Court directed a dismissal of the action as to the Dixie Furniture Co., H. T. Link, and A. F. Taylor.

In the case of *Bass v. Ingold,* 232 N.C. 295, 60 S.E. 2d 114, Lewis Bass brought an action for alleged injuries sustained as the result of a collision of a car driven by Bryan A. Dixon, in which he was a passenger, with that of the defendant, J. W. Weaver, driven by James A. Ingold. The plaintiff alleged that his personal injuries were proximately caused by the negligence of the defendant Ingold.

The car being driven by Bryan A. Dixon was owned by Westinghouse Electric Corporation, and was being operated in the course and scope of the employment of the plaintiff and Bryan A. Dixon. The car of the defendant, J. W. Weaver, at the time of the collision, was being operated by James A. Ingold as a duly authorized agent of Weaver and in the scope of his employment. The defendants Ingold and Weaver sought to bring in Dixon and the Westinghouse Electric Corporation as additional defendants for contribution as joint tort-feasors under G.S. 1-240.

The Westinghouse Electric Corporation made a special appearance and moved to dismiss, as to it, the cross action of the original defendants on the grounds that the rights and obligations of the plaintiff and the corporation arose out of and were exclusively controlled and defined by the

Workmen's Compensation Act (G.S. Ch. 97), such act being exclusive of all other rights and remedies between the plaintiff and the corporation; that plaintiff had made claim for compensation in accordance with the provisions of the Workmen's Compensation Act and that such compensation was duly paid after approval by the Industrial Commission; and that the corporation was not and could not be a joint tort-feasor with the original defendants within the meaning of G.S. 1-240. The motion was sustained and no appeal taken from the order sustaining the motion.

The additional defendant, Bryan A. Dixon, demurred to the answer and cross-action of the original defendants. The court overruled the demurrer and upon appeal to this Court the ruling was reversed on authority of *Essick v. Lexington, et als., supra.*

The decisions of this Court, in the *Essick* and *Bass cases,* are in accord with numerous decisions, in other jurisdictions, to the effect that an employee, subject to the provisions of a Workmen's Compensation Act, whose injury arose out of and in the course of his employment, cannot maintain an action at common law against his co-employee whose negligence caused the injury. *Cunningham v. Metzger,* 258 Ill. App. 150; *Bresnahan v. Barre,* 286 Mass. 593, 190 N.E. 815; *Caira v. Caira,* 296 Mass. 448, 6 N.E. 2d 431; *Murphy v. Miettinen,* 317 Mass. 633, 59 N.E. 2d 252; *Behan v. Maleady,* 249 App. Div. 912, 292 N.Y.S. 540; *Schwartz v. Forty-Second St., M. & St. N. Ave. Ry.,* 175 Misc. 49, 22 N.Y.S. 2d 752; *Pantolo v. Lane,* 185 Misc. 221, 56 N.Y.S. 2d 227; *Landrum v. Middaugh,* 117 Ohio 608, 160 N.E. 691; *Rosenberger v. L'Archer* (Ohio App.), 31 N.E. 2d 700; *Kowcun v. Bybee,* 182 Or. 271, 186 Pac. 2d 790; *Feitig v. Chalkley,* 185 Va. 96, 38 S.E. 2d 73; *Peet v. Mills,* 76 Wash. 437, 136 Pac. 685, L.R.A. 1916A 358, Ann. Cas. 1915D, 154.

We hold that an officer or agent of a corporation who is acting within the scope of his authority for and on behalf of the corporation, and whose acts are such as to render the corporation liable therefor, is among those conducting the business of the corporation, within the purview of G.S. 97-9, and entitled to the immunity it gives; *Essick v. Lexington, et als., supra; Peet v. Mills, supra; Hade v. Simmons,* 132 Minn. 344, 157 N.W. 506; *Rosenberger v. L'Archer, supra;* and that the provision in G.S. 97-10 which gives the injured employee or his personal representative "a right to recover damages for such injury, loss of service, or death from any person other than the employer," means any other person or party who is a stranger to the employment but whose negligence contributed to the injury. And we further hold that such provision does not authorize the injured employee to maintain an action at common law against those conducting the business of the employer whose negligence caused the injury. To hold otherwise would, in a large measure, defeat the very purposes for which our Workmen's Compensation Act was enacted. In-

stead of transferring from the worker to the industry, or business in which he is employed, and ultimately to the consuming public, a greater proportion of the economic loss due to accidents sustained by him arising out of and in the course of his employment, we would, under the provisions for subrogation contained in our Workmen's Compensation Act, G.S. 97-10, transfer this burden to those conducting the business of the employer to the extent of their solvency. The Legislature never intended that officers, agents, and employees conducting the business of the employer, should so underwrite this economic loss.

The plaintiff is relying on the cases of *Tscheiller v. Weaving Co., supra; McCune v. Manufacturing Co., supra;* and *Morrow v. Hume,* 131 Ohio St. 319, 3 N.E. 2d 39.

As to the *Tscheiller* and *McCune cases,* in so far as they are in conflict with the opinions in *Essick v. Lexington, et als., supra; Bass v. Ingold, supra;* and this decision, they are to such extent modified. And while it is true, as contended by the plaintiff, that the facts in the case of *Morrow v. Hume, supra,* are similar to those presented on this record, it must be kept in mind that the compensation law of Ohio contains no immunity clause similar to that contained in G.S. 97-9 of our act. The Workmen's Compensation Law of Ohio, by Adams and Edwards (1930); Workmen's Compensation Statutes, Schneider, Volume 4, section 1465-70, page 3021; *Feitig v. Chalkley, supra.*

The plaintiff insists, however, that should the Court decide that the *Tscheiller* and *McCune cases* are not controlling, and that G.S. 97-9 precludes a common law action against the defendant; such action is maintainable under the exception that an employer may be sued at common law where he has been guilty of willful and wanton conduct. Therefore, he contends that the conduct of the defendant Leder was such as to bring him within this exception.

There are two reasons why this contention is not maintainable in the present action. First, it was admitted in the trial below that the defendant did not intentionally injure the plaintiff. And, in the second place, it is admitted that the plaintiff has applied for and received medical expenses and compensation for temporary total disability, and for permanent partial disability, in accordance with the provisions of the North Carolina Workmen's Compensation Act. The acceptance of benefits under the act forecloses the right of the employee to maintain a common law action, under the exception pointed out, against the employer "or those conducting his business."

The general rule in this respect is given by Horovitz, "Injury and Death Under Workmen's Compensation Laws," page 336, as follows: "Where the employer is guilty of felonious or willful assault on an employee he cannot relegate him to the compensation act for recovery. It

would be against sound reason to allow the employer deliberately to batter his helper, and then compel the worker to accept moderate workmen's compensation benefits, either from his insurance carrier or from himself as self-insurer. The weight of authority gives the employee the choice of suing the employer at common law or accepting compensation." *Essick v. Lexington, et als., supra.*

Applying the applicable statutes and decisions to the facts disclosed on this record, we hold that the court below should have sustained the plaintiff's motion for judgment as of nonsuit. It follows, therefore, that the other questions raised and argued in the briefs, will not be considered.

The judgment of the court below is

Reversed.

MALCOM B. GRANDY v. DOUGLAS C. WALKER AND DR. GEORGE W. PASCHAL.

(Filed 1 February, 1952.)

1. **Appeal and Error § 22—**

   The Supreme Court is bound by the record as filed.

2. **Appeal and Error § 6c (4): Trial § 14—**

   Where a deposition is excluded on a general objection, the objection is a broadside objection to the *en masse* contents of the deposition, and on appeal the Supreme Court will not pronounce a ruling upon the competency and admissibility of each of the many questions and answers contained therein, but will sustain exception to the exclusion of the deposition if there is sufficient competent and relevant matter therein to render its exclusion prejudicial.

3. **Appeal and Error § 37—**

   It is the function of the Supreme Court to review alleged error and rulings of the trial court and not to chart the course of the lower court in advance of its rulings.

4. **Trial § 14—**

   In order to present the competency and relevancy of particular questions and answers in a deposition, a party must make specific objections in the trial court and secure rulings thereon and properly preserve his exceptions thereto, and a general objection to the deposition is a mere broadside objection to the *en masse* contents of the deposition.

5. **Appeal and Error § 40i—**

   Where competent evidence, erroneously excluded, when considered with the other evidence offered by plaintiff, is sufficient to take the case to the jury, judgment of involuntary nonsuit will be reversed.

APPEAL by plaintiff from *Bone, J.*, at March Term, 1951, of WAKE.

Civil action by plaintiff, former member of the Wake Forest College football squad, to recover damages for injuries alleged to have resulted from the negligent care and treatment of him by the defendants Douglas C. Walker, Head Coach, and Dr. George W. Paschal, team physician, following a knee injury sustained on the playing field in Chattanooga, Tennessee, on 1 November, 1946. A voluntary nonsuit was taken before trial as to Coach Walker.

The plaintiff alleges in substance that Dr. Paschal was negligent in failing to exercise proper professional skill and care both in respect to the manner of his treatment of the plaintiff after his removal from the playing field in Chattanooga and in connection with surgical operations later performed on the injured knee, resulting in alleged permanent injuries. Dr. Paschal in his answer specifically denies that he failed to exercise proper care or skill in any respect. In the trial below both parties offered evidence, sharply contradictory in nature, bearing on the issue of negligence. The defendant's motion for judgment of nonsuit, first made when the plaintiff rested his case and renewed at the conclusion of all the evidence, was allowed by the court.

From judgment of nonsuit based on the foregoing ruling the plaintiff appealed, assigning errors.

John W. Hinsdale and Sam J. Morris for plaintiff, appellant.

Smith, Leach & Anderson and J. Francis Paschal for defendant, appellee.

JOHNSON, J. The plaintiff emphasizes his exception to the action of the court in excluding the deposition of Dr. J. D. Eaddy, of Florence, South Carolina.

The record does not indicate the theory upon which the court below excluded the deposition. It nowhere appears that any objection or motion was directed to the form of the deposition or to the competency of Dr. Eaddy as a witness. The record merely sets forth that "Upon objections and motions of the defendant's attorney, the court excluded said deposition." If specific objection or motion was directed to each of the questions and answers appearing in the deposition and ruled upon by the court below, nothing of the sort has been made to appear. The record reflects nothing more than what amounts to a broadside objection to the deposition. Thus, upon this record, and we are bound by the record as it comes to us (*Dellinger v. Clark*, 234 N.C. 419, 67 S.E. 2d 448), the deposition stands excluded in much the same manner as if Dr. Eaddy had been called to testify in person but precluded from doing so upon mere general objection or motion interposed by the defendant and sustained by the court. This sort of *in limini* rejection of the deposition

upon general objection may be upheld only in the event some tenable ground exists for the exclusion of all material portions of the testimony given by Dr. Eaddy. Wigmore on Evidence, Third Edition, Vol. I, Section 18, pp. 338 and 339. Compare pp. 332 and 333; 4 C. J. S., Appeal and Error, Section 291,—compare with Section 290. See also 4 C. J. S., Appeal and Error, Section 295, p. 588; *Summerlin v. Railroad Co.,* 133 N.C. 550, 45 S.E. 898.

Here, upon the face of the record there appears to be no available ground of objection upon which all material portions of the deposition may be held inadmissible. Manifestly, much of the testimony given by the deponent is both admissible and pertinent to the issue.

In this state of the record, it is incumbent on us to examine the contents of the excluded deposition only for the purpose and to the extent of determining whether admissible portions of it contain testimony of sufficient materiality for its exclusion to amount to prejudicial, as distinguished from harmless, error. Wigmore on Evidence, Third Edition, Vol. I, Section 18, pp. 338 and 339. See also *Comstock v. Smith,* 23 Me. 202, bot. p. 209. It is not within the province of this Court, upon the record as here presented by broadside objection to the *en masse* contents of the deposition, to go through its forty pages and separate "the good from the bad" (*Nance v. Telegraph Co.,* 177 N.C. 313, p. 315, 98 S.E. 838) and pronounce a ruling upon the competency and admissibility of each of the many questions and answers contained in the deposition. This is so for the reason it does not appear on the record that the competency of the various questions and answers was either specifically challenged or ruled upon in the court below, and unless and until this is done, it is not given for us to make specific rulings thereon. It is the function of this Court to review alleged errors and rulings of the trial court, and not to chart the course of the lower court in advance of its rulings. *Woodard v. Clark,* 234 N.C. 215, 66 S.E. 2d 888; *Leggett v. College,* 234 N.C. 595, 68 S.E. 2d 263; *Clothing Store v. Ellis Stone & Co.,* 233 N.C. 126, bot. p. 131, 63 S.E. 2d 118.

If a litigant would avail himself of specific rulings of this Court on the competency of various challenged questions and answers in a deposition, he must first make specific objections in the court below, secure rulings thereon, and see that these rulings are properly placed in the record and brought forward for review. See *Jeffords v. Waterworks,* 157 N.C. 10, 72 S.E. 624.

Our examination of the excluded deposition for the limited purpose indicated leads us to the conclusion that its exclusion was materially prejudicial to the plaintiff.

We have reviewed the evidence offered by the plaintiff, and conclude that it is sufficient, when considered with the admissible portions of the excluded deposition, to take the case to the jury. This necessitates a

reversal of the judgment of nonsuit entered below, to the end that the plaintiff's cause may be retried in accordance with the decision here reached. Therefore, the judgment below is

Reversed.

DONALD A. McQUEEN, TRUSTEE UNDER THE WILL OF ANNIE McARTHUR, DECEASED; DONALD A. McQUEEN, LEGATEE; DONALD A. McQUEEN, HEIR AT LAW OF ANNIE McARTHUR, DECEASED; DONALD A. McQUEEN AND WIFE, BLANCHE R. McQUEEN, INDIVIDUALLY; ELIZABETH McARTHUR GORE; ARTHUR D. GORE, JR.; A. D. GORE, SR.; CAROLINE McQUEEN BAKER AND HUSBAND, W. W. BAKER; MARGARET McQUEEN THORNTON; ALEXANDER McQUEEN; ADAM McARTHUR; LOUISE McARTHUR HERNDON AND HUSBAND, WILLIAM HERNDON; MARGARET MARSH McARTHUR; MARGARET McARTHUR; SARAH C. McARTHUR WEISIGER AND HUSBAND, JESSE WEISIGER; ELIZABETH M. MALLORY AND HUSBAND, ROSWELL MALLORY; CHARLES N. McARTHUR, SR., AND WIFE, NELL McARTHUR; DOROTHY McARTHUR; CHARLES N. McARTHUR III AND ANNE BYRD McARTHUR v. BRANCH BANKING & TRUST COMPANY, AND W. E. McARTHUR, TRUSTEES UNDER THE WILL OF ANNIE McARTHUR, DECEASED; W. E. McARTHUR AND WIFE, BESSIE McARTHUR; NEILL McQUEEN; N. H. McGEACHY, JR.; CATHERINE McG. WARD AND HUSBAND, HERMAN WARD; N. H. McGEACHY, SR., AND WIFE, KATIE McA. McGEACHY; A. G. McARTHUR, ADMINISTRATOR C. T. A. OF D. W. McARTHUR, DECEASED; NELLIE McARTHUR; D. W. McARTHUR, JR., AND WIFE, SUSAN McARTHUR; A. G. McARTHUR AND WIFE, MABEL McARTHUR; NEILL McARTHUR AND WIFE, FRANCES McARTHUR; MARY McA. EWING AND HUSBAND, W. E. EWING.

(Filed 1 February, 1952.)

1. **Wills §§ 33a, 33d—Date of commencement of the period of the trust held sufficiently certain.**

The will provided that the period of the trust therein set up should begin at the death of the life tenant or from the date of the filing of the will for probate, whichever was later. The will was promptly probated, and the life tenant survived several years thereafter. *Held:* Title vested in the trustees immediately upon the death of testatrix, and the right of possession and the beginning of the period of the trust was, under the facts of the case, definite and certain, and therefore a holding that the devise in trust was too uncertain, vague, and indefinite to be enforceable is erroneous. *Semble:* "the date of filing" the will for probate meant the date of the death of testatrix and the performance of the formalities which would entitle the trustees to assert their rights, and was also sufficiently definite and certain.

2. **Wills § 33h—**

Under the rule against perpetuities, if there is a possibility that a future interest may not vest within twenty-one years and ten lunar months after the life or lives of persons in being the devise is void, but the rule relates

to the time of the vesting of an estate and not to the period during which the right to full enjoyment may be postponed.

3. Same—

While the rule against perpetuities may not be avoided by the creation of a private trust, such trust does not violate the rule if title vests during the prescribed time even though the right of full enjoyment be postponed beyond that period.

4. Same: Wills § 33c—Beneficial interest held to vest at time of testatrix' death, and therefore rule against perpetuities is not applicable.

The will in question devised the residuary property, subject to a prior life estate, to trustees with direction that they pay designated sums to named beneficiaries after the death of the life tenant, give financial assistance to a grand niece and a grand nephew if either or both should desire to attend a university or college, and divide the net quarterly income and pay same to named beneficiaries in stated proportions, with further provision that at the expiration of twenty-five years after the commencement of the period of the trust, the *corpus* should be divided among the beneficiaries of the income in the same proportion. *Held:* The beneficial title to the *corpus* of the trust vested in the beneficiaries designated immediately upon death of testatrix, subject to the life estate and the right of the trustees to make use of a part thereof in their discretion for the other designated purposes, with only the right of full enjoyment postponed for the twenty-five year period, and therefore the rule against perpetuities has no application.

5. Wills § 33i—

The creation of a trust postponing the right to full enjoyment of the vested interests of the beneficiaries for the twenty-five year period of the trust is not an unreasonable restraint upon alienation.

APPEALS by plaintiffs and defendants from *Williams, J.*, May Term, 1951, CUMBERLAND. Reversed.

Civil action under the Declaratory Judgment Act to have the court determine the validity of a trust created by the will of Annie McArthur, deceased, and to adjudicate the rights, title, and interest of the parties to this action in and to the property devised or attempted to be devised in the trust provisions of said will.

Annie McArthur, late of Cumberland County, died testate, without issue, 15 May, 1943, leaving a substantial estate consisting of both valuable real and personal property. Her will was probated 17 May 1943 and is now of record in the office of the Clerk of the Superior Court of said county.

After making provision for her sister, Eliza McArthur Newton, she devised "all the rest and residue of the property" of which she should die seized and possessed to her sister Margaret McArthur for life. She then devised said property "after the death of my sister, Margaret McArthur, or in the event she shall predecease me" to the Branch Bank-

ing & Trust Company, W. E. McArthur, and Donald A. McQueen, "in trust for the sole and specific uses and purposes hereinafter set forth and no other."

The trustees are directed (1) to collect the income from her property and to pay taxes, assessments, and like charges; (2) to give financial assistance to a named grandnephew and grandniece in the event either or both of them should desire to attend a university or college; (3) to pay, after the death of the life tenant, certain sums to named beneficiaries; and (4) to divide the net income quarterly and pay the same to named nephews and nieces, a grandnephew and grandniece in the proportions designated in Item V, subsection 4 of the will.

She then provides in Item V, subsection 7, that "The trust herein and hereby created and imposed shall continue for a period of twenty-five (25) years from the date of filing this, my last will and testament for probate in the office of the Clerk . . . or from the date of the death of my sister, Margaret McArthur, whichever may be the later date" and that the trust shall terminate at the expiration of said period and the "trustees . . . shall within one (1) year thereafter fully account for, pay over, deliver and convey all of the assets and property belonging to said trust absolutely, unconditionally and in fee simple" to the same nephews and nieces, grandnephew and grandniece, who are to receive the income during the existence of the trust and in the same proportions.

The trustees are vested with unconditional authority to sell, lease and otherwise convey, and to invest and reinvest, any of the assets of the estate and with "sufficient power and authority to properly conduct and manage" the trust property to the best interests of the trust and the beneficiaries thereof.

When the cause came on for hearing in the court below, the parties waived trial by jury and submitted the cause to the judge upon the pleadings and such facts as he might deem it necessary to find in order to sustain a declaratory judgment. The court found the facts as to the date of the death of the testatrix, and the date of the probate of her will, and that Margaret McArthur, the life tenant, was living at the time of the death of the testatrix but died 26 January 1950, prior to the institution of this action.

Upon a consideration of the facts found, the pleadings, and the will of the testatrix, the court concluded that the trust created by the will offends the rule against perpetuities (1) for that the property devised to the trustees does not vest with certainty within a life in being and twenty-one years and ten lunar months thereafter, (2) for that the same constitutes an unlawful restraint against alienation, and (3) for that the trust is uncertain, vague, and indefinite, and therefore void.

It thereupon decreed that said purported trust is null and void and that title to the property attempted to be devised and bequeathed in trust

is vested in the heirs at law and next of kin of Annie McArthur, deceased. Plaintiffs excepted to so much of said judgment as adjudges that title to the property is vested in the heirs and next of kin of the testatrix rather than in them, and the other devisees named in Item V (7), as devisees under the will, and appealed. The defendants excepted to the judgment as entered and appealed.

N. H. Person, Malcolm McQueen, Clark & Clark, and Robert H. Dye for plaintiffs.

McLean & Stacy for W. E. McArthur and wife, Bessie McArthur, and W. E. McArthur, as trustee.

N. H. McGeachey, Jr., and Nance & Barrington for other defendants named.

BARNHILL, J. Is the devise in trust contained in the will of Annie McArthur too uncertain, vague, and indefinite to be enforceable, or does it offend the rule against perpetuities, or does it constitute an unlawful and unreasonable restraint against alienation? These are the three questions posed by the appeal of the defendants.

The plaintiffs take the position that the provision in the will that the trust shall continue for a period of twenty-five years from the date of the filing of the will for probate, or from the date of the death of the life tenant, "whichever may be the later date" makes the date of the commencement of the twenty-five year period so uncertain as to render the devise too vague and indefinite to be enforceable, and that it also brings the devise within the condemnation of the rule against perpetuities. On this record the contention thus advanced in support of the judgment entered in the court below is untenable.

The testatrix first devised the property in question to her sister for life, and then to the named trustees for the uses and purposes therein named. The devise to the trustees is unequivocal and constitutes a devise of the remainder subject to the life estate of Margaret McArthur. Legal title vested in the trustees immediately upon the death of the testatrix. Their right of possession, and the beginning of the twenty-five year period during which the trust shall remain active, was necessarily dependent upon whether the life tenant survived the testatrix. The provision in the will in this respect is merely expressive of the law which, in the absence of such provision, would have fixed the identical date as the date upon which the right of the trustees to assume possession of the trust property accrued.

Unquestionably the testatrix used the expression "the date of filing this, my last will and testament for probate" to mean upon her death and the performance of the formalities in respect to her will which would entitle the trustees to assert the rights accruing to them under the

terms of the trust. In any event we are dealing with the situation as it is, not as it might have been under other circumstances which did not and cannot arise. The will was promptly admitted to probate, and the date of the death of the life tenant marks the beginning of the twenty-five year period of the trust. So then, we find no vagueness or uncertainty here such as would render the devise to the trustees void and unenforceable.

In so holding, we are not inadvertent to the Illinois case, *Johnson v. Preston,* 226 Ill. 447, 10 L.R.A. ns 564, cited by plaintiffs. But that case is clearly distinguishable. There title was to vest in the trustees upon the probate of the will. Here it vested at the date of the death of the testatrix and the probate of the will merely fixes the beginning date of the trust. Neither is *Closset v. Burtchaell,* 230 P. 554, in conflict with what is here said.

But the status of the devisees and their present interest, if any, in the property devised in trust is determinative of the question whether the devise is violative of the rule against perpetuities.

The right to create contingent interests in property, title to which is to vest at some time in the future, and to postpone the full enjoyment of vested interests, has always been recognized. Even so, the creation of a future interest in property necessarily fetters the estate and tends to affect its marketability. The courts therefore, at an early date, recognized that a rule which would hold the exercise of this right within reasonable bounds was imperative. To this end the rule against perpetuities was devised. While modified by statute in some states, it has been consistently followed in this and a majority of the other jurisdictions in this country.

It is concededly a rule which draws an arbitrary line of demarcation between what shall be deemed reasonable and what unreasonable. No other type of rule would have sufficed to accomplish the purpose in mind.

It prescribes the time within which title to a future interest in property must vest. Under this rule, no devise or grant of a future interest in property is valid unless title thereto must vest, if at all, not less than twenty-one years, plus the period of gestation, after some life or lives in being at the time of the creation of the interest. If there is a possibility such future interest may not vest within the time prescribed, the gift or grant is void. Gray On Perpetuities, 4th Ed., p. 191, sec. 201; *Mercer v. Mercer,* 230 N.C. 101, 52 S.E. 2d 229; *Trust Co. v. Williamson,* 228 N.C. 458, 46 S.E. 2d 104; *Springs v. Hopkins,* 171 N.C. 486, 88 S.E. 774; *Re Friday,* 91 A.L.R. 766; *Trust Co. v. Scott,* 110 A.L.R. 1442; Anno, *ibid.,* p. 1450; 41 A.J. 53, sec. 6, sec. 23, p. 67, sec. 29, p. 73.

It does not relate to and is not concerned with the postponement of the full enjoyment of a vested estate. The time of vesting of title is its sole subject matter. *Springs v. Hopkins, supra; Trust Co. v. Scott, supra; Re Friday, supra;* 41 A.J. 73, sec. 29; *ibid,* sec. 23, p. 67.

A mere statement of the rule demonstrates its inapplicability here. The will under consideration creates no contingent future interest. The beneficiaries of the trust are named in the will and are persons who were in being at the time the will took effect and the estate was created. They are, under the terms of the will, to have and receive the income from the property quarterly, subject to the right of the trustees to make use thereof in their discretion for other designated purposes; and upon the termination of the trust they are to receive their respective shares, freed of the trust provisions. Thus there is no postponement of the vesting of their title to the property. Instead, title thereto vested in them, subject to the life estate and the terms of the trust, immediately upon the death of the testatrix. The trust served merely to postpone their right to the full enjoyment of the estate devised until the termination of the trust.

"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 the 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." *Carter v. Kempton,* 233 N.C. 1, 62 S.E. 2d 713; *Priddy & Co. v. Sanderford,* 221 N.C. 422, 20 S.E. 2d 341; *Weill v. Weill,* 212 N.C. 764, 194 S.E. 462; *Trust Co. v. Williamson, supra; Jackson v. Langley,* 234 N.C. 243, and cases cited; *Curtis v. Maryland Baptist Union Asso.,* 121 A.L.R. 1516. The devise here comes clearly within this rule.

"An estate is vested when there is either an immediate right of present enjoyment or a present fixed right of future enjoyment." *Patrick v. Beatty,* 202 N.C. 454, 163 S.E. 572; *Curtis v. Maryland Baptist Union Asso., supra.*

That the trustees are vested with authority to use income or a part thereof for other purposes does not affect this conclusion. *Jackson v. Langley, supra.*

In the *Jackson case* the trustee was authorized not only to use the income but also to invade the *corpus* of the estate for other purposes if, in his discretion, he deemed it necessary so to do. Yet we held that the equitable title to the property vested in the beneficiary of the trust immediately upon the death of the testatrix.

Denny, J., speaking for the Court in that case says:

"Furthermore, the mere fact that John Alfred Langley, Sr., the trustee, was given the right to use the income from or *corpus* of the trust

estate for his own benefit in the event certain enumerated emergencies arose, did not in any way affect or delay the vesting of the estate in John Alfred Langley, Jr., to any greater extent than if the trustee had been given a life estate with the power to use the *corpus*, or any part thereof, for his own use.

"The overwhelming weight of authority, including our own decisions, supports the view that in such cases the estate vests in the ultimate beneficiary upon the death of the testator, subject to be divested of such portion thereof as may be required to meet the authorized needs of the life tenant or other designated person. (citing cases)"

The only limitation of the right of alienation imposed upon the devise is such as arises out of the creation of the trust and the postponement of the right of full enjoyment of the estate devised. As these provisions of the will are not violative of the rule against perpetuities, they do not constitute an unreasonable restraint upon the right of alienation.

The plaintiffs rely on what is said in *Trust Co. v. Williamson, supra,* and *Mercer v. Mercer, supra,* respecting the rule against perpetuities as applied to private trusts. Perhaps the language used in the *Williamson case* and adopted in the *Mercer case* is not as full and complete as it might have been. In any event, the language used must be interpreted in the light of the facts in those cases and the authorities cited. In the *Williamson case* there was a power of appointment which, if exercised by the trustee, would be violative of the rule against perpetuities, and in the *Mercer case* there was a future interest which might not vest within the time prescribed by the rule.

The rule may not be evaded by the creation of a private trust. It "applies to the time when the legal interest will vest in the trustees, as well as to the time when the equitable or beneficial interest will vest in the beneficiaries." 41 A.J. 86. The question is not the length of the trust but whether title vested within the required time. 41 A.J. 86.

"Courts and writers sometimes state in a rather loose fashion that every express private trust must be limited in duration to a period not longer than lives in being when the trust starts and twenty-one years thereafter . . . This is incorrect, except in a very few states where trusts in general, or certain trusts, have been limited in their duration by statute." 1A Bogert, Trusts and Trustees, 405.

"An interest is not obnoxious to the Rule against Perpetuities if it begins within lives in being and twenty-one years, although it may end beyond them. If it were otherwise, all fee-simple estates would be bad. The law is the same with lesser estates." Gray On Perpetuities, 4th Ed., p. 237, sec. 232 (see cases cited in notes); 1A Bogert, Trusts and Trustees, sec. 214 (pp. 346 and 362).

The plaintiffs likewise cite and rely on *Carter v. Kempton, supra,* but that decision is not in point here. There the will contained no disposi-

tive words or other language disclosing an intent of the testator that his children should take his property other than the direction for a division at the termination of the trust. The devise here comes within the rule followed in the first line of cases there cited.

The disposition made of the appeal by defendants renders academic the question posed by plaintiffs on their appeal.

For the reasons stated the judgment entered in the court below is Reversed.

DONALD A. McQUEEN, Legatee and Beneficiary Under the Will of MARGARET McARTHUR, Deceased; DONALD A. McQUEEN and Wife, BLANCHE R. McQUEEN, Individually; ELIZABETH McARTHUR GORE; ARTHUR D. GORE, JR.; A. D. GORE, SR.; CAROLYN McQUEEN BAKER and Husband, W. W. BAKER; MARGARET McQUEEN THORNTON; ALEXANDER McQUEEN; ADAM McARTHUR; LOUISE McARTHUR HERNDON and Husband, WILLIAM HERNDON; MARGARET MARSH McARTHUR; MARGARET McARTHUR, by Her Next Friend, E. MAURICE BRASWELL; SARAH McARTHUR WEISIGER and Husband, JESSE WEISIGER; ELIZABETH N. MALLORY and Husband, ROSWELL MALLORY; CHARLES N. McARTHUR and Wife, NELL McARTHUR; CHARLES N. McARTHUR III, by His Next Friend, E. MAURICE BRASWELL; ANNE BYRD McARTHUR MEREDITH and Husband, DAVID S. MEREDITH, v. BRANCH BANKING & TRUST COMPANY, a North Carolina Corporation, W. E. McARTHUR, N. H. McGEACHY, JR., KATE McARTHUR McGEACHY, Trustee Under the Will of MARGARET McARTHUR, Deceased: W. E. McARTHUR and Wife, BESSIE McARTHUR; NEILL McQUEEN; N. H. McGEACHY, JR.; CATHERINE McG. WARD and Husband, HERMAN WARD; N. H. McGEACHY, SR., and Wife, KATE McA. McGEACHY; A. G. McARTHUR, Administrator c. t. a. of D. W. McARTHUR, Deceased; NELLIE McARTHUR; D. W. McARTHUR, JR., and Wife, SUSAN McARTHUR; A. G. McARTHUR and Wife, MABLE McARTHUR; NEILL McARTHUR and Wife, FRANCES McARTHUR; MARY McARTHUR EWING and Husband, W. E. EWING.

(Filed 1 February, 1952.)

Wills § 33h—

A devise in trust for a period of twenty-five years from the date of testatrix' death with discretionary power to the trustees to use the income of a part of the *corpus* to aid designated beneficiaries, with further provision that upon the expiration of the trust period the *corpus* of the trust be distributed to named beneficiaries *in esse* in stated proportions, *held* not to violate the rule against perpetuities, since the beneficial interests vest in the ultimate takers immediately upon the death of testatrix.

Appeal by plaintiffs and defendants from *Williams, J.*, May Term, 1951, Cumberland. Reversed.

This is a companion case to *McQueen v. Trust Co., ante,* p. 737. It involves the will of Margaret McArthur, sister of the testatrix in the other case and life tenant under her will. The facts, including the wording of the will, the creation of the trust, the beneficiaries of the trust and the proportions they are to receive are substantially the same, except that in this case the life tenant of the property devised in trust predeceased the testatrix, the devise to the beneficiaries is more direct and specific, the powers of the trustees are spelled out in more detail, and the trustees are vested with discretionary authority to use so much of the income of the trust as they may deem necessary for the benefit of needy relatives, and "servants who have been regularly employed by my family or me." There are directions as to how this last provision shall be executed. The indefiniteness of those to be aided is not at issue.

There is no specific requirement that the income be distributed during the continuance of the trust. Instead, the will, in Item Fifth (e) (6), authorizes the trustees "To make any distributions or divisions of income or principal hereunder wholly or partially in kind or in cash as my said Trustees may elect, and in every such distribution or division my said Trustees' determination of values shall be binding and conclusive upon all interested parties."

Item Fifth (g) is as follows:

"This Trust shall continue for a period of twenty-five (25) years from the date of my death, and at the expiration of the said 25 years, the Trust shall terminate and the entire principal and all accumulations of income is hereby given and shall be distributed to the following of my nephews and nieces, grandnephews and grandnieces, their heirs, legal representatives or assigns, each of whom shall receive an undivided interest therein as follows:" (Beneficiaries here named and the proportion they are to take is set opposite their respective names.)

Judgment was entered as in the Annie McArthur will case, *ante,* p. 737. Both plaintiffs and defendants appealed.

N. H. Person, Malcolm McQueen, Clark & Clark, and Robert H. Dye for plaintiffs.

McLean & Stacy for W. E. McArthur and wife, Bessie McArthur, and W. E. McArthur, as Trustee.

N. H. McGeachey, Jr., and Nance & Barrington for other defendants named.

BARNHILL, J. In the will here under consideration there is a direct and unequivocal gift of the trust property to the named beneficiaries who were persons then in being. They are to receive their respective shares at the expiration of the twenty-five year period, freed of the trust pro-

visions. The will creates no future interest. Hence *McQueen v. Banking & Trust Co., ante,* p. 737, is controlling here. What is there said requires a reversal of the judgment entered in the court below.

The disposition made of the appeal by defendants renders academic the question raised by plaintiffs on their appeal.

Reversed.

MEMORANDUM ORDER.

STATE v. JAMES COTTLE AND EDGAR RENFROW.

(Filed 16 October, 1951.)

APPEAL by defendants from *Stevens, J.,* February Term, 1951, of SAMPSON.

Appeal dismissed without written opinion upon authority of *S. v. Lea,* 203 N.C. 316.

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

APPENDIX

W. A. HALL, FOR HIMSELF AND OTHER CREDITORS WHO MAY MAKE THEMSELVES PARTIES AND JOIN IN THIS SUIT, v. SHIPPERS EXPRESS, INC., J. S. GAUL AND R. W. MOSELEY, RECEIVER, AND INDIVIDUALLY.

(Filed 19 September, 1951.)

PETITION to rehear this case, reported *ante,* 38, 65 S.E. 2d 333.

Isaac C. Wright for plaintiff, appellant.

John H. Small and J. Laurence Jones for defendants, appellees.

DENNY, J. The case was brought back with the thought that the allegations of fraud were perhaps broad enough to invoke the principle announced in *McCoy v. Justice,* 199 N.C. 602, 155 S.E. 452; and approved in *Horne v. Edwards,* 215 N.C. 622, 3 S.E. 2d 1, and *Yancey v. Yancey,* 230 N.C. 719, 55 S.E. 2d 468; also discussed in Pomeroy's Equity & Jurisprudence, 5th Ed., Section 919b, page 608, *et seq.,* and counsel were notified to submit briefs on this question. The briefs filed on rehearing afford little or no assistance with respect to the question suggested or raised. A careful consideration of plaintiff's allegations, however, leaves us with the impression that they are insufficient to disturb the opinion heretofore written.

The petition to rehear will, therefore, be dismissed without prejudice to the further rights of the parties to proceed as they may be advised.

Petition dismissed.

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

COPPEDGE v. COPPEDGE.

(Filed 15 November, 1951.)

1. Wills § 16—

The probate of a will in common form is conclusive and may be attacked only in a direct proceeding upon the issue of *devisavit vel non.*

2. Wills § 39—

In an action to construe a will probated in common form, the issue of *devisavit vel non* is not before the court and the will may not be collaterally attacked therein.

L. L. Davenport and Cooley & May for petitioners.

BARNHILL and ERVIN, JJ. On petition to rehear.

The petitioners misapprehend the force and effect of the decision herein. This Court has not adjudged that the paper writing referred to in the pleadings is the last will and testament of J. W. Coppedge, deceased. It was so adjudged by the clerk of the Superior Court when the paper writing was probated in common form. That adjudication is conclusive and binding on this Court and the parties in this action. *Holt v. Holt,* 232 N.C. 497; *Brissie v. Craig,* 232 N.C. 701. It may not be collaterally attacked as here attempted, for the Superior Court cannot determine whether an instrument is or is not a will except upon an issue of *devisavit vel non* duly raised in a caveat proceeding as provided by law. *Brissie v. Craig, supra; Holt v. Holt, supra.* Therefore, the defendants have no standing in this action to assert and maintain their defense that Exhibit A attached to and made a part of the complaint is not in fact the last will and testament of the deceased. That claim must be asserted, if asserted at all, in another and different proceeding. *Holt v. Holt, supra.*

The sole purpose of the action is to have the court construe the will, duly established by probate, and instruct the administrator *c.t.a.* as to the proper distribution of the assets of the estate. After careful consideration, we are constrained to adhere to the construction placed on the paper writing in the original opinion herein, *Coppedge v. Coppedge, ante,* p. 173.

Petition denied.

COTTON MILL CO. v. TEXTILE WORKERS UNION.

(Filed 1 February, 1952.)

1. Contempt of Court § 2b—

Original parties who are served with summons, complaint, and temporary restraining order and order to show cause, may not contend that they had no notice of the restraining order at the time their alleged acts of contempt were committed.

2. Trial § 14—

A general objection to the admission in evidence of an affidavit in due form merely challenges the competency of the subject matter of the affidavit *en masse* and does not draw into issue the authority of the officer who administered the oath.

3. Appeal and Error § 8—

A question not raised during the trial and not presented by exceptions duly taken may not be presented for the first time in the Supreme Court on appeal.

Robert S. Cahoon for petitioners.

BARNHILL and JOHNSON, JJ. On petition to rehear.

We adhere to the conclusion in the original opinion on the question of jurisdiction of the State courts, *ante,* 545.

The certified copy of the record filed in this Court by respondents affirmatively discloses that the respondents are original parties defendant in this cause and that the summons, complaint, temporary restraining order, and order to show cause were served on them. Hence there is no merit in their contention they had no notice of the restraining order herein at the time their alleged acts of contempt were committed.

There is competent evidence in the record, other than the affidavits acknowledged before the assistant clerk of the recorder's court of Wake Forest, sufficient to sustain the findings of the trial judge. Even so, these affidavits were admitted in evidence, and it may be that at least one of them was considered by the court in making its finding of fact No. 8. The facts there found are substantially the facts set forth in the affidavit of Dock Carter. However, on this record, this is not sufficient to invalidate the hearing and entitle respondents to a new trial.

When a hearing is had before a Superior Court judge on affidavits and a general objection is entered to what purports to be an affidavit in due form, the objection merely challenges the competency of the subject matter of the affidavit *en masse. Grandy v. Walker, ante,* p. 734. It does not draw into issue the authority of the officer who administered the oath. If the objecting party wishes to raise this question, he must do so specifically so that the judge may rule thereon and thus afford the party injured by the ruling an opportunity to enter his exception thereto.

The record before us fails to disclose anything more than a general objection to the several affidavits acknowledged before the assistant clerk of the recorder's court of Wake Forest. It does not appear that respondents challenged her authority to administer oaths such as the one here administered, or that the trial court's attention was directed to any such contention, or that he undertook to rule thereon. The first reference to any want of authority of said assistant clerk is contained in the assignments of error.

Ours is an appellate court. We only review alleged error in the rulings of the trial court, presented by exceptions duly entered. If the question presented was not raised before and ruled upon by the trial judge, it may not be considered by us on appeal. *R. R. v. Horton,* 176 N.C. 115; *Woodard v. Clark, ante,* 215; *Leggett v. College, ante,* 595.

It follows that the question respondents have so stressfully presented on the original appeal and on this petition to rehear is not before us for consideration and decision. The affidavits are in due form and were admitted in evidence as affidavits by the trial judge. The authority of the officer who administered the oaths was not challenged. Their validity may not be attacked for the first time in this Court. *Seligson v. Klyman,* 227 N.C. 347.

The petition is denied.

REMARKS OF CHIEF JUSTICE DEVIN FROM THE BENCH, TUESDAY, SEPTEMBER 18, 1951, CONCERNING THE DEATH OF THE LATE CHIEF JUSTICE WALTER PARKER STACY.

Before proceeding with the usual work of the Court we pause to express the loss which has come to us in common with the people of North Carolina in the death of Chief Justice Walter Parker Stacy.

Elected a member of this Court in 1920, he became Chief Justice in 1925, the youngest to attain that distinction, and served as such for 26 years, the longest period in the annals of this Court.

His labors here have been abundant. The opinions he has written for the Court are contained in Volumes 181 to 234, inclusive, of the Supreme Court Reports of North Carolina. To these 53 Volumes he has contributed the richness of his mind, the sound judgment of one who sought only to do justice, and the legal learning of a master craftsman in stating the law.

His opinions reveal literary excellence and an unusual capacity for terse, accurate statement. A master of rhetoric, he used his skill only to make his decisions definite and unmistakable, with a singular vigor of expression.

These judicial writings will remain for all time as a fitting memorial of his valuable contribution to the thought of his time. He had a passion for truth and justice, and his supreme desire was to safeguard the liberties of the people under the constitution and to preserve unimpaired the purity of the Court, and respect for its decisions in the hearts of all the people.

Those who had the privilege of being associated with him on the Court are overwhelmed with the sense of the loss to the State in the passing of this great jurist. But the loss is more keenly felt by his associates whose respect for him was sweetened by an affectionate regard. We shall miss his wise counsel and loyal friendship.

History will justly give him rank unsurpassed by any of North Carolina's sons who have held unshaken the balances of human justice in this high office.

In recognition of his services, the Court when it adjourns today will do so in respect of his memory.

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APPEAL AND ERROR.

§ 1. Nature and Extent of Appellate Jurisdiction of Supreme Court.

The Supreme Court has no original jurisdiction to declare and define an estate conveyed by will, but is limited to a review of the decisions of the Superior Courts of the State. *Woodard v. Clark*, 215.

There is no inherent or inalienable right of appeal from Superior Court to Supreme Court. *In re Employment Security Com.*, 651.

§ 2. Judgments Appealable—Premature Appeals.

An order *in personam* directing defendant wife to bring the children of the marriage into this jurisdiction, entered in an action for divorce and for custody of the children, is appealable, since if the wife delay her appeal until the final determination of the action she would have no election but to comply with the order or subject herself to contempt proceedings. *Sadler v. Sadler*, 49.

Where the trial court grants a new trial limited to a single issue upon which he set the verdict aside as being contrary to the weight of the evidence, and orders that final judgment should await the result of the partial new trial, appeal from this order is premature and will be dismissed. *Muse v. Muse*, 205.

Appeal does not lie from interlocutory order unless substantial right would be lost if order is not reviewed before final judgment. *Raleigh v. Edwards*, 528.

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§ 6c (3). Form and Sufficiency of Exceptions to Findings of Fact. (Review of findings see hereunder, § 40d.)

A broadside exception and assignment of error to the findings of fact and conclusions of law as set out in the judgment presents only whether the facts found support the judgment. *Dillingham v. Blue Ridge Motors*, 171.

An exception to the "foregoing findings of fact" without pointing out any specific finding to which exception is taken is a broadside exception and is insufficient to challenge the sufficiency of the evidence to support the findings or any one or more of them. *S. v. Brock*, 391.

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to support the order setting aside the judgment under G.S. 1-220. *Pate v. Hospital*, 637.

§ 6c (4). Form and Sufficiency of Objections and Exceptions to Evidence.

The privilege of objecting to evidence if the ground of objection is known is waived if not seasonably taken. *Lambros v. Zrakas*, 287.

Where a deposition is excluded on a general objection, the objection is a broadside objection to the *en masse* contents of the deposition, and on appeal the Supreme Court will not pronounce a ruling upon the competency and admissibility of each of the many questions and answers contained therein, but will sustain objection to the exclusion of the deposition if there is sufficient competent and relevant matter therein to render its exclusion prejudicial. *Grandy v. Walker*, 734.

§ 6c (5). Form and Sufficiency of Objections and Exceptions to Charge.

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§ 6c (6). Requirement That Misstatement of Evidence and Contentions Be Brought to Trial Court's Attention in Apt Time.

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§ 8. Theory of Trial.

A claimant may not contend in the Supreme Court for a higher priority for the payment of its claim than it asserted either before the receiver or the Superior Court on appeal, since the appeal to the Supreme Court *ex necessitate* follows the theory of the trial in the lower court. *Leggett v. College*, 595.

A question not raised during the trial and not presented by exceptions duly taken may not be presented for the first time in the Supreme Court on appeal. *Cotton Mill Co. v. Textile Workers Union*, 748.

§ 19. Necessary Parts of Record.

On appeal from judgment dismissing an appeal for failure to serve statement of case on appeal in apt time, record containing only the judgment of dismissal, notice of the motion, the motion, affidavit filed, and appeal entry, is insufficient, there being nothing in the record to show date of termination of the term at which the original judgment was entered or record from which time for serving case on appeal may be calculated in determining the validity of the judgment of dismissal. Rule of Practice in the Supreme Court 19 (1). *Smoak v. Newton*, 451.

§ 22. Conclusiveness and Effect of Record.

The record on appeal imports verity, and the Supreme Court is bound by what it contains. *Dellinger v. Clark*, 419; *Hagan v. Jenkins*, 425; *Grandy v. Walker*, 734.

§ 37. Scope and Extent of Review in General.

It is the function of the Supreme Court to review alleged error and rulings of the trial court and not to chart the course of the lower court in advance of its rulings. *Grandy v. Walker*, 734.

§ 39b. Error Cured by Verdict.

Assignments of error relating to an issue answered in appellant's favor can afford no ground for new trial. *Williams v. Raines*, 452.

APPEAL AND ERROR—*Continued.*

§ 39e. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The fact that expert testimony is technically in excess of the permissive bounds of such evidence will not be held for reversible error when it could not have prejudiced appellant. *Bruce v. Flying Service*, 79.

Rulings of the court in the reception of evidence do not justify a new trial when they are not prejudicial. *Lambros v. Zrakas*, 287.

The exclusion of evidence cannot be held prejudicial when the record discloses that the answer of the witness, had he been permitted to testify, would not have been favorable or that the witness had already testified that he had no knowledge of the matter. *Freeman v. Ponder*, 294.

The exclusion of a single item of evidence competent only for the purpose of corroborating a witness on one minute point will not be held prejudicial in a protracted trial with voluminous testimony, since upon such record its exclusion could not have affected the verdict of the jury. *Ibid.*

The admission of evidence over objection cannot be held prejudicial when evidence of the same import is theretofore or thereafter admitted without objection. *Woodard v. Mordecai*, 463.

The admission of immaterial evidence in a trial by the court under agreement of the parties will not be held for reversible error when its admission could not have affected the decision of the court. *Woodard v. Mordecai*, 463.

§ 39f. Harmless and Prejudicial Error in Instructions.

The use of the word "plaintiff" instead of the technically correct term "plaintiff's intestate" in several portions of the charge will not be held for prejudicial error when the charge construed contextually could not have confused or misled the jury. *Hansley v. Tilton*, 3.

Where there is insufficient evidence to justify the issue of contributory negligence, any error in the charge relating to this issue cannot be held prejudicial on defendant's appeal. *Bruce v. Flying Service*, 79.

The charge will not be held for error when it is not prejudicial when read contextually. *Freeman v. Ponder*, 294.

Error in placing the burden upon caveators to show conjunctively the absence of each of the essential elements of testamentary capacity *held* not cured by contextual construction with another portion of the charge correctly defining testamentary capacity, since upon this record the erroneous instruction was repeated in the last part of the charge and caveators had undertaken to show that testatrix was lacking in single, specific elements of mental capacity to make a will. *In re Will of Kemp*, 495.

Failure to charge as to burden of proof on one of issues is prejudicial. *Tippite v. R. R.*, 641.

§ 40b. Matters Reviewable.

Action of trial court in setting aside verdict in its discretion is not reviewable; its action in doing so for error of law is reviewable. *Ward v. Cruse*, 388.

§ 40c. Review in Injunction Proceedings.

On appeal in injunction cases the findings of fact in the lower court are not conclusive, and the Supreme Court may review the evidence, but this will be done in the light of the presumption that the judgment and proceedings below were correct, with the burden on appellant to assign and show error. *Clinard v. Lambeth*, 410.

APPEAL AND ERROR—*Continued.*

§ 40d. Review of Findings of Fact. (Sufficiency of exceptions to, see *ante*, § 6c (3).)

The findings of fact of the lower court are conclusive on appeal when supported by evidence. *Briggs v. Briggs*, 450.

§ 40i. Review of Rulings on Motions to Nonsuit.

Where competent evidence, erroneously excluded, when considered with the other evidence offered by plaintiff, is sufficient to take the case to the jury, judgment of involuntary nonsuit will be reversed. *Grandy v. Walker*, 734.

§ 51a. Law of the Case.

Where it is determined on appeal that the evidence was sufficient to overrule nonsuit, the decision is the law of the case, and upon a subsequent trial nonsuit is correctly denied upon evidence which, though varying in minor details, is substantially the same as that upon the first hearing. *Bruce v. Flying Service*, 79.

§ 51b. Stare Decisis.

A rule established by decisions of the Supreme Court should not be departed from save for clear and compelling reasons, certainly not when the prevailing rule is as sound and free from objectionable features as the proposed rule. *Ward v. Cruse*, 388.

§ 51c. Interpretation of Decisions.

The conclusion as to the law as expressed in an opinion of the Supreme Court is the guide and not the reasoning by which the conclusion is reached. *Hagan v. Jenkins*, 425.

§ 52. Proceedings in Lower Court After Remand.

Where the question of defendants' right to nonsuit is not presented on the appeal, but the judgment of the lower court is modified to the extent that it allowed a compulsory continuance pending the determination of another action upon different issues pending in the Federal Court between a stranger to the present action and the defendants herein, the decision does not justify dismissal of the action in the lower court after remand, but leaves the case pending in substantially the same status as if the case had been submitted to a jury and mistrial ordered. *Goldston Bros. v. Newkirk*, 279.

APPEARANCE.

§ 2a. Acts Constituting General Appearance.

Filing demurrer on ground that complaint fails to state cause of action is a general appearance. *Hospital v. Joint Committee*, 673.

§ 2b. Effects of General Appearance.

A general appearance waives any defects of service. *Hospital v. Joint Committee*, 673.

ARBITRATION AND AWARD.

§ 1. Distinction Between Common Law and Statutory Arbitration.

The Uniform Arbitration Act does not apply to an agreement to arbitrate differences under contract when the arbitration agreement is executed at the time of the contract, since the Act applies only to agreements to arbitrate executed after controversy has arisen. *Skinner v. Gaither Corp.*, 385.

ARBITRATION AND AWARD—*Continued.*

§ 2. Agreements as Bar to Action.

An agreement to arbitrate all disputes, claims and questions arising in performance of the work is not an agreement to arbitrate the contract price for the construction of the building, and therefore action by the contractor to recover balance due on the contract in addition to amount due for labor and materials used in repairing and replacing plastering which fell, is not barred by the arbitration agreement as to the action for balance of contract price, at least, and demurrer for failure of the complaint to state a cause of action is properly overruled. *Skinner v. Gaither Corp.*, 385.

An agreement to arbitrate all disputes or questions arising under a contract incorporated into the contract as a part thereof cannot bar either party from maintaining an action for breach of the contract, since the courts will not decree specific performance of the agreement to arbitrate either directly or indirectly by refusing to entertain suit prior to arbitration. *Ibid.*

ARREST AND BAIL.

§ 1b. Right of Officer to Arrest Without Warrant.

When a misdemeanor or other criminal offense is committed in the presence of an officer, he may forthwith arrest the offender without a warrant, and this rule applies to drunken driving. *S. v. Pillow*, 146.

§ 2. Force Permissible in Making Arrest.

Charge as to right to overcome resistance in making arrest *held* without error in this homicide prosecution. *S. v. Brannon*, 474.

§ 5. Right to Bail.

Where there is evidence that defendant was intoxicated when he was arrested for drunken driving, a delay of some two hours in procuring a warrant and admitting defendant to bail fails to show any infringement of defendant's constitutional rights, the matter being largely in the discretion of the officer and no abuse of discretion being made to appear, and the temporary incarceration in no way depriving defendant of the benefit of any witnesses in his behalf. *S. v. Pillow*, 146.

§ 8. Liabilities on Bail Bonds.

The fact that a mistrial has been ordered does not relieve the defendant of his obligation to appear at a later term after personal notice to do so, and will not support his contention that he had theretofore been put in jeopardy and was under no obligation to appear because the court had no further jurisdiction over him or the case, and forfeiture of his bail may be had for his failure to appear at the later term. *S. v. Brock*, 391.

Subsequent arrest of defendant on a capias and the filing of a new bond does not relieve the surety on the previous bond of liability for failure of defendant to appear as required by law. *Ibid.*

ARSON.

§ 1. Intent.

The burning or procuring to be burned a dwelling house must be done willfully and wantonly, or for a fraudulent purpose, in order to constitute the offense defined by G.S. 14-65, and therefore an instruction to the effect that the jury was required to find beyond a reasonable doubt only that the dwelling was burned and that it was burned at the instance or request of defendant, must be held for prejudicial error. *S. v. Cash*, 292.

ASSAULT.

§ 13. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence *held* sufficient to show that defendant was present and gave active encouragement to perpetrator of assault. *S. v. Holland*, 354.

ASSOCIATIONS.

§ 1. Nature and Existence.

At common law, an unincorporated association is but a body of individuals acting together, and has no legal entity or existence independent of its members, and therefore may not take, hold, or transfer property, or sue or be sued. *Stafford v. Wood*, 622.

§ 5. Actions.

Under the provisions of G.S. 1-97 (6) any unincorporated association, including an unincorporated labor union, whether resident or nonresident, which does business in North Carolina by performing any of the acts for which it was formed, is subject to suit as a separate legal entity, and may be served with process in the manner prescribed by the statute. *Stafford v. Wood*, 622.

If labor union does in this State acts for which it was organized it is subject to service of process under G.S. 1-97 (6). *Ibid.*

ATTORNEY AND CLIENT.

§ 7. Duties and Liabilities to Client.

An attorney, since he occupies a fiduciary relationship, will not be allowed, as a matter of public policy, to represent both parties in an adversary proceeding, and a judgment or decree so affected will be set aside upon motion in the cause. *Hall v. Shippers Express*, 38.

AUTOMOBILES.

§ 8c. Starting and Turning.

The statutory requirement that a motorist upon hearing a siren must drive his vehicle to the right side of the street and stop, G.S. 20-157, does not relieve such motorist of the duty to ascertain before turning to his right that such movement can be made in safety or the duty to signal any vehicle approaching from his rear, G.S. 20-154. *Anderson v. Office Supplies*, 142.

§ 8d. Stopping, Parking and Lights.

Complaint alleged that plaintiff's car struck defendant's unlighted truck parked on highway, that while plaintiff was in dazed condition from injuries, he walked out into highway and was struck by another car. *Held:* Not demurrable on ground of want of proximate cause in that injury could not have been anticipated, or on the ground of independent intervening acts of third person. *Hall v. Coble Dairies*, 206.

Evidence that defendant, driving without proper tail lights, suddenly stopped on highway without giving signal, resulting in rear-end collision, *held* for jury on issues of negligence and contributory negligence. *Powell v. Lloyd*, 481.

Plaintiff may not be charged with contributory negligence as a matter of law merely because of failure to stop when the lights of oncoming traffic partially blind him and interfere with his vision of the road ahead. *Ibid.*

AUTOMOBILES—*Continued.*

§ 8i. Intersections.

It is unlawful for a motorist to fail to stop in obedience to a highway sign before entering upon an intersection with a through street, and while such failure does not constitute negligence or contributory negligence *per se*, it is evidence to be considered with other evidence in the case upon the issue of negligence or contributory negligence, as the case may be. *Johnson v. Bell*, 522.

The operator of an automobile along a through street who has knowledge that signs had been erected along the intersecting street requiring motorists thereon to stop before entering the intersection, is entitled to assume, and to act upon the assumption, even to the last moment, that the operator of a vehicle on the servient street will stop in obedience to the sign before entering the intersection. *Ibid.*

Where two vehicles are traveling in opposite directions along the same street and meet as one of them attempts to make a left turn at an intersection, the rules relating to the entering upon the intersection from a side street are not applicable, G.S. 20-155 (a), but the applicable statutes are G.S. 20-155 (b) and G.S. 20-154. *Fowler v. Atlantic Co.*, 542.

The collision in suit occurred when defendant's vehicle, first entering the intersection, attempted to turn left without giving the statutory signal and hit plaintiff's vehicle, which had been traveling in the opposite direction along the same street, as it had been brought to a standstill six feet within the intersection. *Held:* Conflicting evidence as to whether plaintiff's driver, in the exercise of due care, should have seen defendant's vehicle in the act of turning in time to have stopped short of the intersection and thus avoided the collision, takes the case to the jury upon the issue of plaintiff's contributory negligence. *Ibid.*

Evidence tending to show that plaintiff was first in intersection *held* for jury on issue of negligence. *Donlop v. Snyder*, 627.

That defendant's car approached intersection from plaintiff's right at approximately same time *held* not sole reasonable inference from evidence. *Ibid.*

§ 9b. Lights.

Instruction that driving vehicle wider than eighty inches at nighttime without having clearance lights burning is negligence *per se*, *held* without error. *Hansley v. Tilton*, 3.

§ 14a. Passing Vehicles Traveling in Same Direction—Traffic Lanes.

Where half of a street at an intersection is marked for three lanes of traffic, the left lane for left turns, the center lane for through traffic and the right lane for right turns, a motorist traveling in the center lane may assume that a vehicle standing in the left lane awaiting change of the traffic signal, will turn left, G.S. 20-153, and has the right and duty to pass such vehicle on its right, since G.S. 20-152 does not apply in such circumstance. *Anderson v. Office Supplies*, 142.

§ 14b. Passing Vehicles Traveling in Same Direction—on Curves.

Neither G.S. 20-150 (b) nor G.S. 20-150 (d) applies unless the driver is proceeding upon a curve, in which event if the curve is marked by a center line the driver is forbidden to drive to the left thereof, and if the curve is not so marked he may not drive to the left of the highway to pass an overtaken vehicle unless his view is unobstructed for a distance of 500 feet. *Walker v. Bakeries Co.*, 440.

Where there is conflicting evidence as to whether the accident occurred on a curve and whether there was a center line on the highway, an instruction to

AUTOMOBILES—*Continued.*

the effect that if plaintiff had an unobstructed view for 500 feet or more the law did not prohibit him from driving to the left of the center line, must be held for prejudicial error. *Ibid.*

Although G.S. 20-150 (b) and G.S. 20-150 (d) are designed primarily to prevent a vehicle, in passing an overtaken vehicle, from colliding with another vehicle approaching from the opposite direction, the statutes are germane in an action involving a collision between overtaking and overtaken vehicles, since the driver of the overtaken vehicle is not required to anticipate that the other vehicle will attempt to pass in violation of statute. *Ibid.*

§ 18a. Pleadings in Auto Accident Cases.

Complaint *held* not demurrable on ground that on facts alleged injury was not foreseeable or ground that injury resulted from independent acts of third person. *Hall v. Coble Dairies*, 206.

§ 18b. Negligence and Proximate Cause.

That plaintiff, in dazed condition from injuries resulting from defendant's negligence, should walk out on highway and be struck by another car *held* not unforeseeable so as to negate proximate cause. *Hall v. Coble Dairies*, 206.

§ 18d. Concurring and Intervening Negligence.

A complaint alleging that immediately after a collision caused by the negligence of the intestate of one defendant, and while plaintiff was injured and unable to extricate herself from the car in which she was riding, another defendant negligently ran his truck into the rear of her car causing further injury, and that shortly thereafter the third defendant ran into the side of the car in which she was riding as it was standing immobilized sidewise on the road causing further injuries to plaintiff, and that the defendants were jointly, concurrently and successively negligent in proximately causing plaintiff's injuries, *is held* good as against demurrer for misjoinder of parties and causes, since the complaint alleges a sequence of events which successively, concurrently and jointly produced plaintiff's injuries, for which defendants may be held liable as joint tort-feasors. *Barber v. Wooten*, 107. And, of course, are jointly liable for death of another passenger killed in the accident. *McHoney v. Wooten*, 110.

Plaintiff, in dazed condition from injuries resulting from defendant's negligence, walked out on highway and was struck by another car. *Held:* Defendant's negligence was not insulated, since his negligence acted through normal response and continued up to time plaintiff was struck. *Hall v. Coble Dairies*, 206.

§ 18h (2). Sufficiency of Evidence and Nonsuit on Issue of Negligence.

Evidence favorable to plaintiff tending to show that defendant drove a school bus after dark on the approaches to a narrow bridge at thirty-seven miles per hour without clearance lights indicating the width of the bus, and that, in attempting to clear the bridge ahead of a vehicle approaching from the opposite direction, defendant pressed his accelerator to the floor and met the other vehicle near his end of the bridge, failed to keep the bus to its right so as to give such other vehicle one-half the traveled portion of the bridge as near as possible, and struck the car, *is held* sufficient to be submitted to the jury on the question of defendant's negligence and proximate cause. *Hansley v. Tilton*, 3.

Whether defendant was guilty of actionable negligence in failing to bring vehicle to stop before entering intersection with through street *held* for jury.

AUTOMOBILES—*Continued.*

Johnson v. Bell, 522. Evidence that defendant was driving at nighttime without tail lights and stopped without signal *held* for jury on issue of negligence. *Powell v. Lloyd,* 481.

Whether defendant was guilty of actionable negligence in failing to bring vehicle to stop before entering intersection with through street *held* for jury. *Johnson v. Bell,* 522. Evidence that defendant was driving at nighttime without tail lights and stopped without signal *held* for jury on issue of negligence. *Powell v. Lloyd,* 481.

Evidence that defendant turned left at intersection in front of plaintiff's car, without giving statutory signal, resulting in collision with plaintiff's vehicle, which was traveling in opposite direction, *held* for jury on issue of negligence. *Fowler v. Atlantic Co.,* 542.

Evidence tending to show that plaintiff was first in intersection *held* for jury on issue of negligence. *Donlop v. Snyder,* 627.

§ 18h (3). Nonsuit on Ground of Contributory Negligence.

Defendants' evidence of negligence on the part of plaintiff's intestate in the operation of his car upon a narrow bridge, causing the collision between intestate's car and the bus driven by defendant, cannot justify nonsuit when in conflict with plaintiff's evidence. *Hansley v. Tilton,* 3.

Evidence in this case tending to show that a police officer, in attempting to control traffic, was driving at a speed up to thirty-five miles per hour with his siren sounding and was injured when a vehicle standing in a lane of traffic for a left turn suddenly turned to its right, causing the collision in suit, *is held* not to show contributory negligence as a matter of law. *Anderson v. Office Supplies,* 142.

Evidence *held* not to show contributory negligence as matter of law on part of motorist hitting vehicle that had stopped before him on highway. *Powell v. Lloyd,* 481. Evidence *held* not to show contributory negligence as matter of law on part of motorist hitting vehicle turning left at intersection. *Fowler v. Atlantic Co.,* 542. Whether plaintiff was guilty of contributory negligence in driving along through street without slackening speed at intersection *held* for jury. *Johnson v. Bell,* 522.

That defendant's car approached intersection from plaintiff's right at approximately same time *held* not sole reasonable inference from evidence. *Donlop v. Snyder,* 627.

§ 20b. Imputing Negligence to Passenger.

Guests in a car who have no control over its movements are not responsible for the negligence of the driver. *Price v. Monroe,* 666.

§ 21. Actions by Guests and Passengers—Parties Liable.

Defendant was the owner of a truck involved in a collision with a car. A passenger in the car sued defendant. *Held:* Defendant was entitled to allege that the negligence of the driver of the car was the sole proximate cause of the accident and also that the negligence of the driver of the car was concurrent, and have the driver of the car joined for contribution. *Read v. Roofing Co.,* 273.

Passengers may hold city liable for unguarded excavation notwithstanding negligence of driver provided driver's negligence did not insulate city's negligence. *Price v. Monroe,* 666.

AUTOMOBILES—*Continued.*

§ 24½b. Actions Against Owner—Parties.

Where the driver of a car is killed in a collision with a truck, the truck owner may sue the owner of the car individually on the theory of *respondeat superior* or, when the car owner has qualified as administrator of the driver, as administrator, either jointly or separately. *Evans v. Morrow*, 600.

Where the injured party elects to sue the administrator of the tort-feasor in his individual capacity upon the theory of *respondeat superior* and not in his capacity as administrator, the defendant is bound by plaintiff's election, and is powerless in law to compel plaintiff to sue him in his representative capacity. *Ibid.*

§ 24½c. Actions Against Owner—Declarations of Driver.

Where the owner of a vehicle is sought to be held solely on the doctrine of *respondeat superior*, a declaration of the driver immediately after the accident which tends to establish negligence on the part of the driver is competent, and since such negligence will be imputed to the master when the doctrine is applicable, the fact that such declaration is admitted only as against the driver does not affect the result as to the master. *Anderson v. Office Supplies*, 142.

§ 28a. Homicide—Culpable Negligence.

Where the violation of the provisions of G.S. 20-140 is committed in such a reckless and careless manner as to evince a complete and thoughtless disregard for the rights and safety of others, it amounts to culpable negligence, and when such violation proximately results in the death of another, it constitutes manslaughter or even murder, dependent upon the degree of negligence. *S. v. McLean*, 283.

§ 28e. Homicide—Sufficiency of Evidence and Nonsuit.

Evidence tending to show that a person was riding on the running board of defendant's car with defendant's knowledge and acquiescence, that defendant drove the car forty to fifty miles per hour along a dirt road through a cloud of dust of sufficient density to interfere with his vision, swinging his car back and forth across the highway, and that the car sideswiped another car traveling in the opposite direction, in which collision the passenger on the running board was fatally injured, *is held* sufficient to be submitted to the jury in a prosecution for manslaughter, irrespective of the question of defendant's intoxication even though it may have been a contributing factor in defendant's reckless driving, since defendant in the exercise of ordinary prevision could have foreseen that the passenger on the running board might be seriously injured or killed as a result of such reckless operation of the car, regardless of whether it came into contact with another vehicle or not. *S. v. McLean*, 283.

§ 30d. Prosecutions for Drunken Driving.

Evidence of defendant's guilt of drunken driving *held* sufficient to overrule his motion for nonsuit. *S. v. Pillow*, 146; *S. v. Kirkman*, 670.

AVIATION.

§ 7. Injury to Gratuitous Passengers.

In an action to recover for death of a gratuitous passenger in an airplane killed as a result of an accident allegedly caused by the negligence of the pilot, it is competent for expert witnesses who saw the accident and were personally familiar with the type of plane used, to testify that in their opinion the accident was caused by the pilot's attempt to make more turns in the spin than

AVIATION—*Continued.*

were safe from the altitude attained, since the testimony relates to composite facts based upon the witnesses' knowledge, skill and experience as experts from observation of the movements and actions of the airplane, and comes within an exception to the rule that opinion evidence may not invade the province of the jury. *Bruce v. Flying Service*, 79.

In an action to recover for the death of a gratuitous passenger in an airplane upon allegations that the fatal accident was caused by negligence of the pilot, defendant's allegations that the fatal maneuver was inherently dangerous and that intestate acquiesced in the operation of the plane cannot justify the submission of the issue of contributory negligence to the jury when all the evidence is to the effect that the maneuver was not dangerous when properly done and that under the circumstances even an experienced pilot should not have attempted, while a passenger, to have interfered with the controls during the maneuver by the pilot in command. *Ibid.*

BAILMENT.

§ 4. Care and Custody of Property.

Ordinarily a bailee is not liable for loss or damage to the property bailed unless he is at fault, and therefore a provision of the contract that the bailee should not be liable for theft or destruction of the property by fire is a provision relieving the bailee from liability for his own negligence. *Ins. Asso. v. Parker*, 20.

The duty of a bailee to exercise due care to protect the property bailed against loss, damage or destruction, is a duty imposed by law from the relationship of the parties and not a duty implied under the bailment contract, and a breach of this duty gives rise to an action in tort for negligence rather than one on the contract. *Ibid.*

Proprietor of public parking lot may not contract against liability for negligence resulting in loss of car by fire or theft. *Ibid.*

BASTARDS.

§ 1. Willful Failure to Support—Elements of Offense.

In a prosecution under G.S. 49-1, 49-2, the State must not only show that defendant is the father of the child and has neglected and refused to support it, but also that such refusal is willful, *i.e.*, intentional and without just cause, excuse or justification, and this element of the offense cannot be supported by evidence of willful failure supervening between the time the charge was laid and the time of trial. *S. v. Sharpe*, 154.

§ 6. Sufficiency of Evidence and Nonsuit in Bastardy Prosecutions.

Evidence that defendant acknowledged paternity of prosecutrix' child by paying an obstetrician before the child's birth, and by paying the hospital bill incidental to the child's birth, and by furnishing prosecutrix money for baby clothes, etc.; is sufficient to be submitted to the jury on the issue of paternity. *S. v. Sharpe*, 154.

Evidence tending to show that defendant furnished certain sums to pay the hospital bill incident to the birth of prosecutrix' child and gave prosecutrix money for clothes for the child, without evidence that the amount furnished was inadequate as of that time, and that upon her later statement that she would have to have more money, promised to provide more, *is held* insufficient to support the issue of defendant's willful failure and refusal to support the

BASTARDS—*Continued.*

child, evidence of prosecutrix' demand and defendant's refusal to provide support after the issuance of the warrant being incompetent upon the issue. *Ibid.*

BOUNDARIES.

§ 1. General Rules for Ascertainment of Boundaries.

While the location of boundaries is a question of fact for the jury, what are the boundaries is a question of law for the court, it being for the court to construe its terms as to what land the deed intended to cover, and to this end the court may correct an inadvertence when it plainly appears upon the deed itself. *Moore v. Whitley*, 150.

§ 2. General and Specific Descriptions.

The specific description in a deed controls the general description and it is only where the specific description is ambiguous or insufficient or reference is made to a fuller and more accurate description, that resort may be had to the general description. *Moore v. Whitley*, 150.

§ 3c. Reversing Calls.

Ordinarily a line should be run in its regular order from a known beginning, and it is only when a corner cannot be ascertained by running forward and may be fixed with certainty by running reversely that the call may be reversed. *Plemmons v. Cutshall*, 506.

§ 5a. When Evidence Aliunde Is Competent.

Description of land in a deed must be certain in itself or capable of being reduced to certainty by matters *aliunde* pointed out in the deed itself. *Plemmons v. Cutshall*, 506.

§ 5h. Location of Corners of Contiguous Tracts.

A deed describing the land by reference to corners and lines of the adjacent lands is sufficient to admit proof of such adjacent corners and lines, the call for another's line being considered one to a natural boundary, and the best evidence thereof being the record of a deed covering such corners, or lines followed by the fitting of the description to the land in accordance with appropriate rules. *Plemmons v. Cutshall*, 506.

§ 6. Nature of Processioning Proceeding.

In a processioning proceeding, what constitutes the true dividing line is a question of law for the court, its location is a question of fact for the jury under correct instructions based upon competent evidence. *Plemmons v. Cutshall*, 506.

Question of title is not involved. *Ibid.*

§ 9. Burden of Proof in Processioning Proceeding.

The burden of proof on the issue as to the true location of the dividing line is upon petitioners. *Plemmons v. Cutshall*, 506.

§ 10. Nonsuit and Directed Verdict.

A processioning proceeding may not be dismissed as in case of nonsuit, but peremptory instructions may be requested in appropriate cases. *Ibid.*

§ 11. Issues in Processioning Proceeding.

Where in a processioning proceeding each side admits that the other owns adjoining land, and respondents further adver adverse possession of the land

BOUNDARIES—*Continued.*

owned by them, *held* no issue of title is raised, the sole issue being as to the true location of the dividing line between the lands of the respective parties. *Ibid.*

BURGLARY.

§ 10. Competency and Relevancy of Evidence.

In a prosecution for breaking and entering and larceny, the admission in evidence of search warrants reciting the theft of articles not recovered and reciting affiants' belief that they were concealed on the premises of defendants, which recitals are not in corroboration of the testimony of the affiants upon the trial, *held* prejudicial. *S. v. Kimmer*, 448.

CARRIERS.

§ 5. Franchises.

Chap. 1132, Session Laws of 1949, has no application in determining the validity of an order of the Utilities Commission entered 30 July, 1947. *Utilities Com. v. Coach Co.*, 489.

Under the provisions of Chap. 440, Session Laws of 1933, amending Chap. 136, Session Laws of 1927 (G.S. 62-105 (f)), the Utilities Commission has jurisdiction upon a showing of public convenience and necessity therefor to grant to a city bus carrier authority to operate over a public highway for a distance of .7 of a mile outside the city, without finding that the operations of an interurban bus company under franchise along said highway were not providing sufficient service, or that thirty days notice had been given it and it had failed to provide the service required by the Commission. *Ibid.*

What constitutes public convenience and necessity is primarily an administrative question and involves determination, among other things, of whether there is a substantial public need for the service, whether existing carriers meet this need, and whether it would impair the operation of existing carriers contrary to the public interest. *Ibid.*

An accepted franchise creates a contractual relation under which, in consideration of the granting of the privilege, the grantee usually obligates itself to express conditions and stipulations as to the standard of service, etc. *Cab Co. v. Charlotte*, 572.

City may not levy franchise tax on taxicabs. *Ibid.*

CONSPIRACY.

§ 1. Civil Conspiracy.

An action for civil conspiracy lies when there is an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way, resulting in injury inflicted by one or more of the conspirators pursuant to the common scheme. *Muse v. Morrison*, 195.

§ 2. Actions for Civil Conspiracy.

Civil liability of conspirators is joint and several, and each conspirator is deemed a party to every act done by any of them in furtherance of the common design. *Muse v. Morrison*, 195.

Complaint *held* sufficient to allege civil conspiracy among defendants, members of licensing board and town clerk, etc., to deprive plaintiff of livelihood as journeyman plumber. *Ibid.*

CONSPIRACY—*Continued.*

§ 3. Nature and Elements of Criminal Conspiracy.

A criminal conspiracy is an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful manner, the crime being the illegal agreement and not its execution. *S. v. Parker,* 236.

§ 5. Competency of Evidence.

While the acts and declarations of one conspirator in furtherance of the unlawful agreement is competent against the coconspirator, the existence of the conspiracy and defendant's participation therein at that time must be established by evidence *aliunde,* and in the absence of such evidence such declarations are incompetent as hearsay. *S. v. Benson,* 263.

§ 6. Sufficiency of Evidence and Nonsuit in Prosecutions for Conspiracy.

While a criminal conspiracy may be shown by circumstantial evidence, evidence tending to show merely that defendant was guilty of a criminal offense, but leaves in the realm of conjecture the question of his unlawful agreement with others to commit the offense, nonsuit on the charge of conspiracy should be granted. *S. v. Parker,* 236.

Evidence failing to show defendant's connection with violation of prohibition law by defendant's employee *held* insufficient to withstand nonsuit. *S. v. Benson,* 263.

CONSTITUTIONAL LAW.

§ 11. Scope of Police Power in General.

The constitutional inhibition on the part of the several states to regulate interstate commerce is subject to exception where the regulations are in the exercise of the police power reserved to the several states, but in order to come within the exception it is necessary that the exercise of the police power be real and *bona fide* and accomplished in some plain, appreciable and appropriate manner an objective within the police power, and that its bearing upon interstate commerce be incidental thereto. Art. I, Sec. 8, clause 3, of the Constitution of the United States. *S. v. Mobley,* 55.

A statute requiring the posting of bond in each and every county in which a photographer does business in this State through canvassers, solicitors or agents who issue coupons for photographic products, which bond should be liable for any loss or damage by reason of the failure of the photographer or its soliciting agent to fully perform any contract, representation or obligation in connection with the sale of any coupon, cannot be upheld as a burden on interstate commerce incidental to the exercise of a police regulation designed to prevent frauds, since the bonding requirement has no substantial relation to the prevention of frauds, but places a direct and unwarranted burden upon interstate commerce. *Ibid.*

While the regulation of peaceful strikes in industries engaged in interstate commerce is in the exclusive jurisdiction of the Federal Government, 29 USCA, section 141, *et seq.,* our State Court in the exercise of the State's inherent police power has jurisdiction of an action to restrain mass picketing, obstructing or interfering with factory entrances, and the threatening and intimidation of employees in the conduct of a strike. *Erwin Mills v. Textile Workers Union,* 321; *Cotton Mill Co. v. Textile Workers Union,* 545.

§ 17. Exclusive Emoluments and Privileges.

Ch. 1078, Session Laws of 1949 (G.S. 97-53 (26)), which provides that as to active firemen of cities and towns of the State heart disease is an occupational

CONSTITUTIONAL LAW—*Continued.*

disease *per se* and thus dispenses with the necessity of proof of a causel connection between heart disease and the employment, *is held* unconstitutional as providing separate and exclusive emoluments or privileges to the group specified not accorded to other municipal employees or to employees in private industry, in contravention of Art. I, sec. 7, of the State Constitution. *Duncan v. Charlotte*, 86.

§ 21. Due Process of Law; Law of the Land—What Constitutes Due Process.

Art. I, sec. 17, of the Constitution of N. C., guarantees a litigant in every kind of judicial proceeding the right to an adequate and fair hearing before an impartial tribunal where he may contest the claim set up against him and be allowed to meet it on the law and on the facts, and show if he can that it is unfounded. *In re Estate of Edwards*, 202.

§ 28. Full Faith and Credit to Foreign Judgments.

Husband invoking jurisdiction of sister state is bound by its decree awarding custody of children. *Sadler v. Sadler*, 49.

Decree for support of child of marriage is enforceable here as to installments due, and is not subject to modification here. *Laughridge v. Lovejoy*, 663.

§ 29. Distinction Between Interstate and Intrastate Commerce.

The solicitation of orders by an agent in this State is an integral part of interstate commerce when the filling of the orders and the delivery of the goods require their transportation to this State from another state, especially where the orders are subject to acceptance or rejection by the out of state principal. *S. v. Mobley*, 55.

Where agents solicited business in this State, taking a dollar deposit entitling the customer to one unmounted photograph subject to the right of the photographer to accept or reject orders, and the pictures are taken here but the processing of the pictures is done at the photographers' out of state plant, the proofs returned here and delivered to the customer by another agent who takes any orders for additional photographs, which are mailed to the customer direct from the out of state plant, *held:* The solicitation of such orders is an integral part of interstate commerce. *Ibid.*

§ 31. Transactions Constituting Burden on Interstate Commerce.

The fact that a statute applies alike to all the people whether within or without the boundaries of the State is not determinative of whether it places an undue or discriminatory burden upon interstate commerce, but such statute may be discriminatory in applying to only one branch of a business or in imposing sanctions having no relationship to the volume of business transacted. *S. v. Mobley*, 55.

Statute requiring bond of photographers soliciting business through agents *held* void as to interstate business as discriminatory burden on interstate commerce, and cannot be upheld as exercise of police power to prevent fraud. *Ibid.*

CONTEMPT OF COURT.

§ 2a. Contempt of Court in General.

A proceeding for contempt under G.S. 5-1 and a proceeding as for contempt under G.S. 5-8 are distinct, the first relating to acts or omissions having a direct tendency to interrupt the proceedings of the court or to impair the respect due

CONTEMPT OF COURT—*Continued.*

its authority, and the latter to acts or neglects tending to defeat, impair, impede, or prejudice the rights or remedies of a party to an action pending in the court, the distinction being important because of difference in procedure, punishment and the right of review. *Luther v. Luther*, 429.

§ 2b. Willful Disobedience of Court Order.

Where a temporary order is issued against defendants and also against all others to whom notice and knowledge of its contents might come, such others who violate its provisions after notice and knowledge of the contents of the order may be held in contempt to the same extent as if they had been formally served. *Erwin Mills v. Textile Workers Union*, 321.

Original parties who are served with summons, complaint, and temporary restraining order and order to show cause, may not contend that they had no notice of the restraining order at the time their alleged acts of contempt were committed. *Cotton Mill Co. v. Textile Workers Union*, 748.

§ 2d. Acts Tending to Delay, Impair or Prejudice Rights or Remedies of Party to Action Pending in the Court.

Where the parties to litigation agree to a settlement, but one of them refuses to sign the consent judgment embodying the terms of the agreement, such party may not be held as for contempt under G.S. 5-8, since such party is not a person selected or appointed to perform a ministerial or judicial service. *Luther v. Luther*, 429.

In a suit for alimony without divorce the parties agreed to settlement. Thereafter plaintiff wife refused to sign the consent judgment incorporating the agreement, which included relinquishment of her dower. *Held:* She may not be held as for contempt in refusing to sign the judgment, since parol promises to surrender dower are unenforceable, G.S. 22-2, and since contracts between husband and wife made during coverture must be reduced to writing and adjudged not to be injurious to the wife, G.S. 52-12, G.S. 52-13, and therefore she cannot be held guilty of misconduct in refusing to execute a contract outlawed by the Legislature. *Ibid.*

Contempt proceedings will not be entertained at the instance of a person attempting to coerce his adversary into making a contract. *Ibid.*

A breach of contract, even though it be a refusal to sign a consent judgment embodying settlement of matters in litigation, cannot be held punishable as for contempt under G.S. 5-8. *Ibid.*

§ 4. Orders to Show Cause.

An order to show cause why named persons should not be held in contempt of court for willful violation of a court order is not required to be based upon a petition, but such order may be issued upon affidavit or other verification charging violation of the order. *Erwin Mills v. Textile Workers Union*, 321.

§ 7. Appeal and Review.

Punishment for refusing to sign a consent judgment upon the court's finding that the consent judgment incorporated the agreement of the parties to settle the matters in litigation and that the refusal to sign same consituted misconduct by which the rights or remedies of the other party were defeated, impaired, delayed or prejudiced, is a punishment as for contempt under G.S. 5-8, and is appealable, G.S. 5-2 having no application. *Luther v. Luther*, 429.

The payment of a fine imposed in proceedings as for contempt to prevent having to go to jail is not a waiver of the right to appeal from the order. *Ibid.*

CONTEMPT OF COURT—*Continued.*

The findings of fact of the judge in contempt proceedings, when supported by any competent evidence, notwithstanding that incompetent evidence may have been admitted also in support thereof, are binding and conclusive on appeal. *Cotton Mill Co. v. Textile Workers Union*, 545.

Respondents are entitled to appeal from judgment for contempt not committed in the immediate presence of the court. *Ibid.*

CONTRACTS.

§ 1. Nature and Essentials in General.

A contract is an agreement, upon a sufficient consideration, to do or not to do a particular thing. *Campbell v. Campbell*, 188.

§ 7e. Contracts Against Public Policy.

Under the fundamental freedom to contract, a party may stipulate against liability for his own negligence provided such provision is not violative of law or contrary to some rule of public policy. *Ins. Asso. v. Parker*, 20.

Operator of public parking lot may not contract against negligence resulting in loss of car by theft or fire. *Ibid.*

§ 9. Entire and Divisible Contracts.

Where contract is entire, breach of material provision entitles other party to restore *status quo ante* and recover his consideration. *McLawhon v. Briley*, 394.

§ 19. Parties Who May Sue.

Person not a party to contract may sue for injury proximately resulting from negligent breach of duty arising out of the contract. *Jones v. Elevator Co.*, 512.

CONVICTS AND PRISONERS.

§ 1. Status and Rights in General.

A person sentenced to imprisonment for a term of years retains his property rights unless otherwise provided by statute, the doctrine of *civiliter mortuus* not being recognized in this State. *Bullock v. Insurance Co.*, 254.

CORPORATIONS.

§ 8. Stockholders—Rights and Powers in General.

The majority stockholders of a corporation exercise complete control, but such power imposes the correlative duty to protect the interests of minority stockholders, in relation to whom they occupy a position in the nature of a fiduciary. *Gaines v. Mfg. Co.*, 340.

§ 10. Stockholders—Right to Sue Corporation.

A stockholder may maintain an action against the corporation to redress a corporate wrong when he alleges facts sufficient to show that he has exhausted all reasonable efforts to obtain relief within the corporate management. *Gaines v. Mfg. Co.*, 331.

§ 12. Issuance of Stock.

Allegations of a minority stockholder to the effect that the corporation had a large surplus, including cash sufficient to pay an outstanding obligation of the corporation, that additional capitalization was not necessary, and that the

CORPORATIONS—*Continued.*

majority stockholders had passed a resolution authorizing the issuance of additional stock to pay the outstanding obligation with pre-emptive rights to the then stockholders to purchase the additional stock proportionately, but that plaintiff was financially unable to exercise his pre-emptive right, that the issuance of such additional stock would greatly decrease the book value of his stock to his irreparable injury and that the majority stockholders were acting arbitrarily for the sole purpose of "freezing" plaintiff out of his just rights, *is held* sufficient to state a cause of action as against demurrer of the majority stockholders. *Gaines v. Mfg. Co.*, 340.

Where, in a minority stockholder's suit to restrain the corporation and the majority stockholders from issuing additional stock, the conflicting evidence raises a serious controversy as to whether additional capitalization was necessary or whether the issuance of the additional stock was authorized by defendants arbitrarily for the sole purpose of "freezing" plaintiff minority stockholder out of his lawful interest in the corporation, the temporary order is properly continued to the hearing. *Ibid.*

§ 16. Surplus, Dividends and Working Capital.

Granting that the stockholders of a corporation have the discretionary power to set aside any part of its earned surplus for working capital, G.S. 55-115, such discretion is not unlimited but must be exercised in good faith and not in arbitrary disregard of the rights of minority stockholders, and courts of equity may grant relief against arbitrary action resulting in injury to minority stockholders, even in the absence of actual fraud, since it amounts in effect to a breach of trust. *Gaines v. Mfg. Co.*, 331.

Allegations in an action by a minority stockholder alleging that the corporation had a large earned surplus, that the majority stockholders passed a resolution setting aside the entire surplus as working capital and authorizing the issuance of additional stock in a large amount, and that the action was arbitrary and taken for the single purpose of defeating the minority stockholder's right to dividends and to lessen the book value of his stock and "freeze" him out of his rightful interest in the corporation, together with allegations of fact disclosing that plaintiff had exhausted all efforts to obtain relief from within the corporation, *is held* sufficient to state a cause of action, and demurrer thereto is properly overruled. *Ibid.*

COURTS.

§ 2. Jurisdiction and Powers in General.

A court must observe the limits of its own authority, and stay or dismiss a legal proceeding of its own motion in case it lacks power to try the cause. *Stafford v. Wood*, 622.

§ 4a. Superior Courts—Appellate Jurisdiction in General.

There is no inherent or inalienable right of appeal from an inferior court to a Superior Court or from a Superior Court to the Supreme Court. *In re Employment Security Com.*, 651.

§ 4e. Superior Courts—Appeals from Administrative Boards or Commissioners.

Right of appeal from administrative agencies or special statutory tribunals is purely statutory, and the statutory requirements are mandatory and not directory and must be complied with to avoid dismissal. *In re Employment Security Com.*, 651.

COURTS—*Continued.*

§ 5. Jurisdiction After Orders or Judgments of Another Superior Court Judge.

Order appointing a receiver by a court of competent jurisdiction in a proceeding regular upon its face may not be interfered with by order of another Superior Court judge. *Hall v. Shippers Express*, 38.

§ 12. Conflict of Laws—Federal and State Courts.

Under the power of the Federal Government to borrow money, its regulations control title and succession by survivorship of Federal Savings bonds irrespective of the succession laws of the State. Federal Constitution, Art. I, Sec. 8, Clauses 2 and 18. *Watkins v. Shaw*, 96.

While the regulation of peaceful strikes in industries engaged in interstate commerce is in the exclusive jurisdiction of the Federal Government, 29 USCA, section 141, *et seq.*, our State Court in the exercise of the State's inherent police power has jurisdiction of an action to restrain mass picketing, obstructing or interfering with factory entrances, and the threatening and intimidation of employees in the conduct of a strike. *Erwin Mills v. Textile Workers Union*, 321; *Cotton Mill Co. v. Textile Workers Union*, 545.

An Act of Congress adopted within the field of legislative powers granted to the United States Government by the Constitution is a part of the supreme law of the land, and constitutional and statutory provisions of the State in conflict therewith cannot be given effect. *Leggett v. College*, 595.

§ 15. Conflict of Laws—Actions in Tort.

The laws of the state in which plaintiff's injury occurred governs the substantive rights of the parties in an action for negligence. *Jones v. Elevator Co.*, 512.

A cause of action for wrongful death resulting from an accident occurring in another state is governed as to all matters of substantive law by the laws of such other state. *Evans v. Morrow*, 600.

CRIMINAL LAW.

§ 8a. Aiders and Abettors.

Persons present at the scene who aid, abet, assist or advise the commission of the offense, or who are present for such purpose to the knowledge of actual perpetrator, are principals and are equally guilty. *S. v. Holland*, 354; *S. v. Minton*, 716.

§ 9. Accessories After the Fact.

Where defendants aided felon to escape arrest through fear of the felon and not voluntarily, defendants may not be held guilty. *S. v. Sherian*, 30.

§ 12f. Jurisdiction Where Two Courts Have Concurrent Jurisdiction.

In those instances in which the Recorder's Court and the Superior Court are given concurrent jurisdiction, that court which first takes cognizance of the offense acquires the case, and when defendant enters a plea in abatement in that court which later issues process for the same offense, such plea should be sustained. *S. v. Parker*, 236.

§ 14. Appeals to Superior Courts from Inferior Courts.

Under the provisions of G.S. 15-177.1, trial in the Superior Court upon appeal from an inferior court is *de novo* without regard to the plea, the trial, the verdict or the judgment of the inferior court, and therefore the Superior Court

CRIMINAL LAW—*Continued.*

in all instances, including those in which the defendant pleads guilty in both the inferior court and in Superior Court, has power to impose sentence lighter or heavier than that imposed by the inferior court, provided the sentence is within the limit prescribed by law. *S. v. Meadows*, 657.

§ 17c. Plea of Nolo Contendere.

The law does not sanction a conditional plea of *nolo contendere*. *S. v. Horne*, 115.

While plea is ordinarily sufficient to support sentence, under facts of this case the conditional plea *is held* insufficient. *Ibid.*

§ 17d. Plea of Former Jeopardy.

Defendant interposed a written plea alleging that the indictment charged the same offense as that charged in a prior indictment upon which defendant had been acquitted. *Held:* The sustaining of the plea on the theory alleged is sustaining a plea of former acquittal, and provision in the order calling the plea a motion to quash will be disregarded, since the law regards the substance and not the form. *S. v. Wilson*, 552.

§ 17e. Plea in Abatement.

Plea in abatement should be allowed when another court having concurrent jurisdiction first takes cognizance of prosecution. *S. v. Parker*, 236.

§ 22. Former Jeopardy—Mistrials and New Trials.

Where, in a prosecution for assault with a deadly weapon, a mistrial is ordered, defendant's plea of former jeopardy upon the subsequent trial is properly denied. *S. v. Brock*, 390.

§ 31i. Fingerprints.

Photographs of fingerprints and of the glass at the scene from which they were taken, and of other related objects, are competent for the purpose of explaining the testimony of the State's fingerprint expert witness. *S. v. Tew*, 612.

Fingerprint testimony *held* sufficient to take case to jury. *Ibid.*

§ 33. Confessions.

The competency of a confession is a primary question for the trial court, and the court's ruling that the confession was voluntary and competent is not subject to review when supported by competent evidence upon the preliminary hearing. *S. v. Marsh*, 101.

A confession must be taken in its entirety, giving defendant the benefit of that part favorable to him as well as giving to the State the benefit of that part which militates against him. *Ibid.*

§ 34h. Attempt by Defendant to Procure False Testimony as Implied Admission.

Statements made and correspondence written by defendant in an attempt to induce a material witness for the prosecution to testify falsely in his favor are competent against him as being in the nature of an admission of guilt. *S. v. Minton*, 716.

§ 35. Hearsay Evidence.

Hearsay evidence is properly considered by jury in absence of objection to its admission. *S. v. Fuqua*, 167.

CRIMINAL LAW—*Continued.*

Testimony of a declaration by a person to the effect that he was an employee of the defendant and that defendant had whiskey in his possession, is incompetent as hearsay. *S. v. Benson*, 263.

§ 38d. Photographs.

Photographs *held* competent to explain testimony of fingerprint expert. *S. v. Tew*, 612.

§ 40a. Character Evidence of Defendant in General.

Where defendant testifies in his own behalf and also offers evidence of his good character, evidence of his character is competent as substantive evidence and also as bearing upon his credibility. *S. v. Minton*, 716.

§ 40d. Competency of Evidence of Defendant's Bad Character.

Evidence creating inference that defendant had criminal record *held* harmless in view of defendant's own evidence to like effect. *S. v. Tew*, 612.

§ 41e. Character Evidence of Witnesses.

Character evidence of a witness not a defendant is competent solely on the question of his credibility. *S. v. Minton*, 716.

§ 42g. Rebuttal of Matter Brought Out on Cross-Examination.

On cross-examination of a State's witness, defendant brought out the fact that the witness and defendant had engaged in an altercation sometime prior to the trial for the purpose of showing bias of the witness. *Held:* The State is entitled upon redirect examination to bring out the facts in regard to the altercation even though such testimony would otherwise be incompetent. *S. v. Minton*, 716.

Where a defendant introduces contradictory statements made prior to the trial by a witness for the prosecution, the State is entitled to show on redirect examination that the witness made the contradictory statements because of threats and bribery, even though such testimony would otherwise be incompetent. *Ibid.*

§ 43. Evidence Obtained by Unlawful Means—Defective Search Warrants.

Chap. 644, Session Laws of 1951, has no application to evidence obtained by search prior to 9 April, 1951. *S. v. Jenkins*, 112.

§ 44. Time of Trial and Continuance.

A motion for continuance is addressed to the sound discretion of the trial court and its ruling thereon is not reviewable when no abuse of discretion appears upon the face of the record. *S. v. Parker*, 236.

§ 48f. Objection to Evidence. (Sufficiency of objections to preserve right to renew see hereunder, § 78.)

Where there is no objection to admission of hearsay evidence it is properly considered by jury. *S. v. Fuqua*, 167.

§ 50g. Conduct and Actions of Witnesses and Spectators.

The preservation of order and the prevention of unfair tactics and behavior on the part of witnesses is within the sound discretion of the presiding judge, and sounds or coughing made by a deputy sheriff during the testimony of another witness *held* not prejudicial upon the facts of this case. *S. v. Kirkman*, 670.

CRIMINAL LAW—*Continued.*

§ 52a (1). Consideration of Evidence Upon Motion to Nonsuit.

On motion to nonsuit, only the State's evidence will be considered, except such of the defendant's evidence as tends to explain or make clear that which has been offered by the State. *S. v. Clark*, 192.

On motion to nonsuit, the evidence must be taken in the light most favorable to the State. *S. v. Holland*, 354.

§ 52a (2). Sufficiency of Evidence to Overrule Nonsuit in General.

Evidence which raises a mere conjecture or suspicion of guilt, or a mere possibility of the existence of an essential element of the offense, is insufficient to be submitted to the jury. *S. v. Ellers*, 42.

§ 52a (3). Sufficiency of Circumstantial Evidence to Overrule Nonsuit.

When the State relies upon circumstantial evidence, the circumstances must be such as to produce in the minds of the jurors a moral certainty of defendant's guilt, and exclude any other reasonable hypothesis. *S. v. Parker*, 236.

Circumstantial evidence is a recognized instrumentality in the ascertainment of truth, and where the circumstances fall into a pattern which clearly indicates that defendant was present and acted in concert with the perpetrator of the offense, it makes out a *prima facie* case and is properly submitted to the jury. *S. v. Holland*, 354.

In order to be sufficient to be submitted to the jury, circumstantial evidence must exclude any reasonable hypothesis of innocence, and circumstances which merely show an opportunity for defendant to have committed the offense but raise a mere conjecture of his guilt are insufficient. *Ibid.*

Expert testimony to the effect that defendant's fingerprints corresponded with those taken at the scene of the crime, together with evidence tending to show that the prints found at the scene could have been impressed only at the time the offense was committed, *is held* sufficient to show that defendant was either the perpetrator or was present and participated in the commission of the crime, and therefore is sufficient to withstand motion to nonsuit. *S. v. Tew*, 612.

§ 52a (8). Form and Necessity of Motions to Nonsuit to Present Question of Sufficiency of Evidence.

Where motion for nonsuit is not limited to a particular count in the bill of indictment or to any one degree of the crimes charged, but is addressed to the entire bill or both counts as a whole, the motion cannot be allowed in the face of evidence sufficient to support any count or any degree of any count. G.S. 15-173. *S. v. Marsh*, 101.

A general motion to nonsuit in a prosecution upon an indictment containing several counts does not present the question of the sufficiency of the evidence as to one particular count. *S. v. Benson*, 263.

§ 53b. Charge on Burden of Proof.

The charge in this case *held* not subject to the criticism that it placed the burden of proving his alibi on defendant, but, to the contrary, correctly charged that it was incumbent upon the State to prove defendant's guilt beyond a reasonable doubt on the whole evidence and that if defendant's evidence of alibi, in connection with all the other testimony in the case, left the jury with reasonable doubt of defendant's guilt, defendant was entitled to an acquittal. *S. v. Minton*, 716.

CRIMINAL LAW—*Continued.*

§ 53d. Instructions—Statement of Evidence and Explanation of Law Arising Thereon.

Where defendants admit that they aided a person who had committed a felonious assault in their presence to escape and avoid arrest and punishment, but contended that they acted under compulsion and through fear of death or great bodily harm at the hands of the felon, it is reversible error for the court to fail to charge the jury adequately upon this defense arising upon their testimony, G.S. 1-180, and a charge to the effect that such aid must have been willful and with a felonious intent to aid the felon to escape arrest and punishment without specific instructions on the question of compulsion, is insufficient. *S. v. Sherian*, 30.

Where the charge fully instructs the jury as to the evidence and the contentions of the parties and defines the law applicable thereto, it complies with G.S. 1-180, and a defendant desiring further elaboration and explanation of the law must tender prayers for instructions. *S. v. McLean*, 283.

G.S. 1-180 requires the presiding judge to declare and explain the law as it relates to the different aspects of the evidence on each side of the case, so as to bring into focus the relations between the different phases of the evidence and the applicable principles of law. *S. v. Washington*, 531.

The failure of the court to charge the jury not to consider testimony to which the court had sustained defendants' objections will not be held for error when the record discloses no objections were made to the eliciting questions, no request to strike the answers interposed, and no request made that the court instruct the jury not to consider the answers. *S. v. Brannon*, 474.

§ 53f. Instructions—Expression of Opinion on Evidence.

A charge which, in effect, instructs the jury that the State contended that nonresidents not subject to subpoena were good enough friends of defendant to have appeared in his behalf if he had been wrongfully accused, *held* prejudicial as burdening defendant with the indifference or disloyalty of his friends, nor would such contention have been a proper subject of comment by the solicitor. *S. v. Pillow*, 146.

A charge which, in effect, instructs the jury that the State contended that the prosecuting attorney talked to defendant about two hours after his arrest and would not have had the warrant for drunken driving issued if he had not been satisfied from his conversation with defendant that defendant was guilty and then changed his mind when he found out the penalty for his offense, and for prejudicial error. *Ibid.*

It is prejudicial error for the court to charge that the State contended that defendant's character was not so good because he had offered to plead guilty aud then changed his mind when he found out the penalty for his offense, and pleaded not guilty. *Ibid.*

In a prosecution for violation of the liquor laws upon evidence obtained by an investigator for the State ABC Board, an instruction to the effect that it was commendable for a law enforcement officer to use all reasonable and proper means in the apprehension of violators and that his acts in so doing were to his credit rather than to his discredit, *is held* reversible error as an expression of opinion by the court as to the court's estimate of the witness. *S. v. Shinn*, 397.

The court's reference to the place where defendant was arrested as a "hangout" in stating the State's contentions *held* not prejudicial in view of defendant's admission on cross-examination of previous convictions constituting a lengthy catalogue of criminal offenses. *S. v. Kirkman*, 670.

CRIMINAL LAW—*Continued.*

A charge that "the attempt" of defendant to prove an alibi does not shift the burden of proof, *held* not error as an expression of opinion by the court, there being nothing in the charge, construed contextually, intimating that the court was of the opinion that defendant had attempted but failed to prove an alibi. *S. v. Minton*, 716.

§ 53n. Instructions on Right to Recommend Life Imprisonment.

An instruction that the jury "may for any reason and within your discretion" recommend life imprisonment upon conviction of first degree murder will not be held for error as requiring the jury to have a reason for such recommendation when in other portions of the charge the court had placed the matter in the unrestricted discretion of the jury and the charge construed contextually could not have been misleading. *S. v. Marsh*, 101.

§ 57b. Setting Aside Verdict for Newly Discovered Evidence.

Where after verdict but before judgment a State's witness makes a repudiation of his testimony upon which the State relied for conviction and without which there would have been insufficient evidence to be submitted to the jury, the court should allow defendant's motion to set verdict aside. *S. v. Ellers*, 42.

§ 60b. Conformity of Sentence to Verdict, Plea or Indictment.

Where the record discloses that a defendant, appearing *in propria persona*, entered a plea of *nolo contendere* under the impression that it was a conditional plea under which the court would find the facts and determine the question of guilt, and that thereafter defendant was given opportunity to withdraw the plea only upon intimation by the court that he would be charged with another distinct offense which the evidence tended to support, *held* the record does not support sentence upon the adjudication by the court that the defendant was guilty of the offense charged. *S. v. Horne*, 115.

Where the bill of indictment to which defendant pleaded *nolo contendere* is with certainty referred to by number, error in the caption of the case and in the judgment in referring to the charge does not render the plea void as not supported by a bill of indictment, there being no uncertainty in the identity of the bill to which the plea was made. *In re Sellers*, 648.

§ 62a. Severity of Sentence.

Sentence in excess of that allowed by law does not entitle defendant to his discharge, but only to have cause remanded for proper judgment. *In re Sellers*, 648.

Superior Court on appeal from recorder's court may impose more severe sentence even though defendant enters pleas of guilty in both counts. *S. v. Meadows*, 657.

§ 62e. Concurrent and Cumulative Sentences.

Provision in a judgment upon an indictment containing two counts that the sentence on each count should begin at the expiration of the sentence on the other, does not render the sentences void for ambiguity, the sentence imposed on each count being the essential part of the judgment and the provision with respect to the time of execution being merely directory. *In re Sellers*, 648.

§ 62f. Suspended Judgments and Sentences.

The trial court has the discretionary power to suspend judgments for a reasonable length of time conditioned upon defendant's obedience to the law. *S. v. Stallings*, 265.

CRIMINAL LAW—*Continued.*

Prior to the effective date of Chap. 1038, Session Laws of 1951, a defendant's sole remedy to test the validity of an order of the Recorder's Court executing a suspended sentence was by *certiorari* or *recordari* challenging the order upon the ground that there was no sufficient evidence to support the finding of condition broken or the ground that the conditions were unreasonable or unenforceable or for an unreasonable length of time. *Ibid.*

Review of an order executing a suspended sentence upon a writ of *recordari* from the Superior Court to the Recorder's Court is limited to the facts as they appear of record and the Superior Court may not hear evidence and determine the matter *de novo.* *Ibid.*

Where the sole fact of record forming a basis of the recorder's order executing a suspended judgment is a statement by the defendant to an officer that the officer would not have to worry about catching him as he had already been arrested, the record evidence is insufficient to support a finding that defendant had violated the conditions of the suspended sentence that he remain law abiding for the period of suspension, and the affirmance of the recorder's order is reversed. *Ibid.*

§ 67a. Nature and Grounds of Appellate and Supervisory Jurisdiction in General.

Where the record discloses a patent invalidity in the judgment pronounced which works a substantial injustice, the Supreme Court will take cognizance thereof and correct it regardless of how the cause reaches the Court. *In re Sellers*, 648.

§ 68a. Right of State to Appeal.

The State has no right of appeal from an order sustaining a plea of former acquittal. G.S. 15-179. *S. v. Wilson*, 552.

§ 73a. Duty to Make Up, Serve and Transmit.

It is the duty of appellant to see that the record is properly made up and transmitted. G.S. 15-180. *S. v. Jenkins*, 112.

§ 77a. Necessary Parts of Record.

On appeal in criminal cases, the indictment and warrant and plea on which the case is tried, the verdict and the judgment appealed from, are all essential parts of the transcript. Rule of Practice 19, Sec. 1. *S. v. Jenkins*, 112.

Where the record contains no warrant or indictment the appeal will be dismissed for want of essential parts of the record. *S. v. Dobbs*, 560.

§ 78d (1). Form and Requisites of Objections and Exceptions to Evidence.

Where there is no objection to the admission of evidence, a motion to strike is addressed to the sound discretion of the trial court. *S. v. Jenkins*, 112.

Where there is no objection to the admission of evidence, but only a motion to strike, Chap. 150, Session Laws of 1949, is inapplicable. *Ibid.*

§ 78e (2). Requirement That Misstatement of Contentions Be Brought to Court's Attention in Apt Time.

Misstatement of the contentions of the State or of the defendants must be brought to the court's attention in apt time. *S. v. Brannon*, 474.

§ 81c (2). Harmless and Prejudicial Error in Instructions Generally.

Where inexact expressions in the charge are readily reconcilable under the rule of contextual construction, they will not be held for reversible error. *S. v. Marsh*, 101.

CRIMINAL LAW—*Continued.*

A charge will not be held for reversible error when it is not prejudicial upon a contextual construction. *S. v. Jenkins*, 112; *S. v. Brannon*, 474.

The fact that in the beginning of the charge the court stated generally the language of the bill of indictment does not cure subsequent error in the charge in omitting an essential element in defining the offense. *S. v. Cash*, 292.

§ 81c (3). Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The admission of testimony to the effect that the deceased was very weak at the time the fatal shot was fired will not be held for prejudicial error when there is competent expert medical testimony tending to show that of necessity deceased was in a weakened condition at that time. *S. v. Brannon*, 474.

Admission of evidence inferring that defendant had criminal record *held* not prejudicial in view of defendant's evidence to like effect. *S. v. Tew*, 612.

Exception to the admission of evidence cannot justify a new trial in the absence of prejudice. *S. v. Kirkman*, 670.

A defendant waives his objection to testimony brought out on his cross-examination by thereafter testifying without objection to the same facts. *S. v. Minton*, 716.

Where the evidence discloses that the victim and defendant lived in the same vicinity, testimony that sometime prior to the homicide defendant was seen driving his car along the public highway in the wake of an automobile operated by his victim, cannot be held prejudicial. *Ibid.*

§ 83. Determination and Disposition of Cause.

Where separate judgment is entered on conviction of each count in the bill of indictment, and conviction on one or more of the counts cannot be sustained, the cause will be remanded to the trial court for proper judgment on the remaining counts. *S. v. Parker*, 236.

While error relating to one count alone will not vitiate conviction on other counts upon which the trial was free from error, where, under the charge, prejudicial error is made to relate to all of the counts, a new trial will be awarded. *S. v. Benson*, 263.

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent. *S. v. Brock*, 390.

Where the court imposes a sentence in excess of the limit prescribed by law the prisoner is not entitled to a discharge or to a new trial, but the judgment will be vacated and the cause remanded for proper sentence, with allowance for the time already served. *In re Sellers*, 648.

CURTESY.

§ 1. Nature and Essentials of Estate.

The common law right of curtesy is declared and defined by statute in this State. G.S. 52-16. *Blankenship v. Blankenship*, 162.

§ 4. Forfeiture and Release of Right.

A husband may forfeit or release his right to curtesy. *Blankenship v. Blankenship*, 162.

Where husband and wife enter into a deed of separation in which she releases all rights in certain lands to him, including her dower right, and he

CURTESY—*Continued.*

releases "all rights" that he might have "in any estate" in the lands allotted to her or belonging to her at her death, the instrument is sufficient to constitute a valid and effective release of his right of curtesy in her lands, notwithstanding the fact his right of curtesy was not specifically named, the word "estate" as used being comprehensive enough to include lands. *Ibid.*

DAMAGES.

§ 10. Pleading of Damages.

Special damages, which are the natural but not the necessary result of the wrongful act of defendant, must be pleaded with sufficient particularity to put defendant on notice. *Oberholtzer v. Huffman*, 399.

Where punitive damages are sought, evidence of the financial condition of defendant or of its imputed wealth is competent, and therefore motion to strike allegations of the reputed wealth of defendant is properly denied. *Taylor v. Bakery*, 660.

DEATH.

§ 5a. Wrongful Death—Parties Who May Sue.

Under the laws of South Carolina, only the executor or administrator may maintain an action for wrongful death. *Evans v. Morrow*, 600.

Suit by administrator in another state may not be enjoined on ground that action involving same fatal collision was first instituted in this State. *Evans v. Morrow*, 600.

§ 5b. Actions for Wrongful Death—Parties Liable.

Where death is the result of the sum total of the torts, neglects and defaults of several parties, all may be joined in the action for wrongful death. G.S. 28-173. *McHorney v. Wooten*, 110.

DEDICATION.

§ 3. Implied Dedication by Selling Lots With Reference to Map.

The act of selling lots by reference to a map which shows streets and alleys is a dedication of such streets and alleys to the public use, and gives each purchaser of a lot the right to have all and each of the streets and alleys kept open, regardless of whether dedication of such streets and alleys is accepted by the municipality within which they lie. *Lee v. Walker*, 687.

§ 4. Acceptance or Rejection.

The act of selling lots with reference to a map showing streets and alleys is but a revocable offer of dedication as far as the public is concerned, and neither imposes burdens nor confers benefits upon the public unless and until the public accepts the dedication. *Lee v. Walker*, 687.

Lots in a subdivision were sold by reference to a map showing streets and alleys. The municipality in which the subdivision now lies never opened up any of the alleys but duly passed a recorded resolution relinquishing any title that it might have to the alleys to avoid its statutory duty to keep same in repair, and thereafter recognized them as private property, issued permits for the construction of buildings upon and across the alleys, required them to be listed for taxes, assessed them for paving, and permitted the original dedicator and his successors in title to use and convey the alleys as private property without objection for more than fifty-eight years. *Held:* The municipality is

DEDICATION—*Continued.*

estopped from asserting any right to the alleys in its own behalf or in behalf of the public or any other party or parties. *Ibid.*

While the mere collection of taxes on dedicated property ordinarily will not estop a municipality from asserting the public character of the land dedicated, it is a factor which may be considered in connection with the other circumstances upon the question of estoppel. *Ibid.*

§ 5. Title and Rights Acquired.

The owners of lots who have purchased same by deeds which refer to a map showing streets and alleys may lose their rights in such streets and alleys by allowing them to be occupied and used adversely for more than twenty years. *Lee v. Walker*, 687.

The rights of purchasers of lots to the use of streets and alleys shown on a map referred to in their deeds may not be enforced by the municipality in which the subdivision lies. *Ibid.*

§ 6. Revocation of Dedication.

The easement acquired by those who purchase lots by deeds which refer to a map showing streets and alleys cannot be defeated without their consent by a withdrawal of the dedication except in the manner provided by G.S. 136-96. *Lee v. Walker*, 687.

DEEDS.

§ 16b. Restrictive Covenants.

The lapse of some nine or ten years before instituting suit to compel defendant to comply with restrictive covenants by reconverting his house from a two-family to a one-family dwelling, *held* not barred by laches, since defendant was in no way prejudiced by the delay. *East Side Builders v. Brown*, 517.

Plaintiff's evidence that a single block in a subdivision was developed as a unit and all lots therein conveyed by deeds containing restrictive covenants pursuant to a general scheme of development, is sufficient to withstand nonsuit in a suit to restrain defendant from violating one of the restrictive covenants. *Ibid.*

Where plaintiff's evidence in his suit to restrain violation of restrictive covenants tends to show that the particular block in the subdivision in question was developed as a unit in accordance with a general scheme, the fact that numerous lots in other blocks of the subdivision were sold without restrictive covenants does not entitle defendant to nonsuit when it does not appear that a key map of the entire development had ever been placed on record or that any lots in the subdivision had been sold in reference thereto. *Ibid.*

DESCENT AND DISTRIBUTION.

§ 9a. Persons Entitled to Inherit—Parents.

Testatrix left property in trust to her husband for the use of her son, with further provision that the son should take the property free from the trust upon attaining the age of twenty-five years. The son died before his twenty-fifth year and the father died thereafter leaving a child by a subsequent marriage. *Held:* The property vested in testatrix' son as of the date of her death, and upon the death of the son without issue, the father took the property under the canons of descent, G.S. 29-1 (6), and upon the father's death intestate the property passed to his child by the second marriage under G.S. 29-1 (1) subject to the dower rights of his surviving widow. *Jackson v. Langley*, 243.

DIVORCE AND ALIMONY.

§ 2a. Grounds for Absolute Divorce—Separation.

Divorce under G.S. 50-6 may be granted only when the parties (1) have lived apart physically for an uninterrupted period of two years and (2) their physical separation is accompanied by an intention on the part of one of them, at least, to cease matrimonial cohabitation. *Mallard v. Mallard*, 654.

Where there is evidence that at time of physical separation, parties mutually intended to resume cohabitation, court must charge law on such evidence in suit for divorce on ground of separation. *Ibid.*

§ 5d. Pleadings in Actions for Alimony Without Divorce.

Where, in an action for alimony without divorce, G.S. 50-16, several causes of action for divorce *a mensa* are alleged, G.S. 50-7, a general demurrer to the complaint must be overruled if any one of the causes is sufficiently stated. *Deaton v. Deaton*, 538.

§ 8d. Sufficiency of Evidence and Nonsuit in Actions for Alimony Without Divorce.

Where, in an action for alimony without divorce, G.S. 50-16, there is more than a scintilla of evidence to support any one of several causes of action for divorce *a mensa* alleged, defendant's general motion to nonsuit is properly overruled, since plaintiff is entitled to relief if she establishes any one of the causes and such motion does not present the sufficiency of the evidence as to any particular cause. *Deaton v. Deaton*, 538.

§ 12. Alimony Pendente Lite.

In the absence of proof of any ground for divorce either *a vinculo* or *a mensa*, the court correctly denies motion for alimony *pendente lite*. *Briggs v. Briggs*, 450.

Upon denial of motion for alimony *pendente lite* for want of proof of a cause for divorce either *a vinculo* or *a mensa*, the court has no authority to dismiss the action as in case of nonsuit, since the cause is not before the court on final hearing on the merits. *Ibid.*

§ 14. Alimony Without Divorce.

Where plaintiff states the existence of a cause for divorce on the ground of adultery, G.S. 50-5 (1), she may maintain her action for alimony without divorce without waiting until she could institute an action for absolute divorce on that ground, and it is not required that she file the affidavit provided in G.S. 50-8. G.S. 50-16. *Cunningham v. Cunningham*, 1.

§ 17. Jurisdiction and Procedure to Award Custody of Children.

Where subsequent to decree of divorce, hearing for the custody of the children of the marriage is heard before the resident judge in another county on motion of defendant, and both parties appear there with counsel and join issue, defendant may not thereafter object on the ground that the court was without jurisdiction to hear the motion outside the county. *Heuser v. Heuser*, 293.

§ 21. Effect, Validity and Attack of Foreign Decrees.

Where, after agreement that neither party would remove the children from the State without notice to the other, the wife takes the children and goes to live with them in another state, and plaintiff institutes proceedings in such other state to regain their custody, *held*, the husband, having invoked the jurisdiction of a court of a sister state in respect to matters within its authority, is bound by its decree awarding their custody to the mother, at least so

DIVORCE AND ALIMONY—*Continued.*

long as the children remain in that state, and such judgment will be given full faith and credit here, and our courts have no jurisdiction to alter its terms in an action instituted here by the husband upon the contention that the wife's domicile is here under the fiction of the unity of persons of husband and wife. *Sadler v. Sadler*, 49.

Unpaid installments for the support of the child of the marriage past due under a decree of another state may not be modified by our court in action here to enforce payment, and defendant is not entitled to allege as a defense the wife's violation of a provision of the decree that he should be allowed to visit the child at reasonable times and places, such matter being proper only in a petition for modification of the original decree in the court of its rendition. *Laughridge v. Lovejoy*, 663.

DOWER.

§ 2. Lands to Which Dower Attaches.

A widow is entitled to dower in all lands of which her husband was seized during coverture, unless she forfeits her rights or voluntarily relinquishes same, G.S. 30-4, subject to all liens legally created by the husband prior to the marriage. G.S. 30-5. *Gay v. Exum & Co.*, 378.

Whether dower attached to husband's transmissible interest *held* not necessary to be decided in this case. *Trust Co. v. Waddell*, 454.

§ 3. Conveyance or Encumbrance of Land by Husband.

Except for purchase money mortgages and deeds of trust, G.S. 30-6, conveyance or encumbrancing of land by the husband without the joinder of his wife does not affect the wife's right to dower. *Gay v. Exum & Co.*, 378.

§ 8e. Allotment by Agreement Between Widow and Heirs.

Where trusts are affected and controverted questions of law have arisen upon the dissent of the widow from her husband's will, the executor and trustee may petition the Superior Court to approve a settlement with the widow for her dower, and the court has jurisdiction to approve in its sound discretion a settlement with her in an amount less than the value of her dower right, G.S. 28-147, G.S. 30-5, upon its finding that such settlement is to the best interests of the estate and all the beneficiaries. *Trust Co. v. Waddell*, 454.

§ 9. Waiver, Forfeiture and Bar of Dower.

Ordinary statutes of limitation, even though they bar the husband's rights, do not run against the wife's right to assert her dower upon his death unless they so provide, since until his death she has no right to act to protect her dower, and his non-action cannot adversely affect her interests any more than a conveyance by him. Moreover, she has ten years to petition for allotment of dower in lands not in actual possession following his death. *Gay v. Exum & Co.*, 378.

The mortgagee in an instrument executed prior to the mortgagor's marriage went into possession without foreclosure. The husband's right to redeem was barred by such possession for more than ten years after such right accrued. G.S. 1-47 (4). *Held:* The wife's right to dower was not barred. *Ibid.*

DRAINAGE DISTRICTS.

§ 5. Nature and Validity of Assessments in General.

Proceedings to levy drainage assessments are *in rem* and can be brought forward from time to time upon notice to all of the parties for orders in the cause,

DRAINAGE DISTRICTS—*Continued.*

and are not highly technical but are to be molded from time to time by the orders of the court as may best promote the results contemplated by the statutes. *Canal Co. v. Keys*, 360.

§ 9. Additional Assessments.

Owner constructing ditch draining into canal may be assessed proportionate expense for necessary improvements to canal. *Canal Co. v. Keys*, 360.

A drainage corporation petitioned the clerk to pass upon and approve its acts in making improvements and to declare the assessments levied to be judgments *in rem* against the lands drained. The clerk entered judgment refusing to approve the certificate of assessment. Appeal therefrom was dismissed in the Superior Court on the ground that the appeal had not been perfected in accordance with statutory requirements. Appeal from judgment of dismissal was not perfected. *Held:* The clerk's judgment is *res judicata*, and bars a subsequent petition by the corporation upon substantially identical allegation. *In re Canal Co.*, 374.

ELECTIONS.

§ 18. *Actions Contesting Elections*—Quo Warranto.

When private relators institute action, allocation of peremptory challenges is properly made on basis of parties as constituted. *Freeman v. Ponder*, 294.

The issues of fact in a civil action in the nature of *quo warranto* to determine conflicting claims to a public office are to be determined by the jury and not the court, G.S. 1-172, and therefore a motion by one party that the judge declare him to be the duly elected officer is properly refused, *a fortiori* when the evidence as of that time tends to establish the election of his adversary. *Ibid.*

In a civil action in the nature of *quo warranto* to determine conflicting claims to a public office the returns made by the registrars and judges of election, G.S. 163-85, and the abstract of votes prepared by the county board of elections, G.S. 163-88, are official documents containing data germane to the issue, and are properly admitted as substantive evidence upon proper authentication. *Ibid.*

A tally sheet of a person who assisted in counting the ballots at a particular precinct is competent to corroborate his testimony to like effect upon the trial. *Ibid.*

In an action in the nature of *quo warranto* to determine conflicting claims to a public office, a party is precluded from offering evidence in direct conflict with a positive averment contained in his pleading. *Ibid.*

Nor may party introduce evidence having no relevancy to the issues raised by the allegations of his pleading. *Ibid.*

Testimony of statements made by third persons is incompetent as hearsay. *Ibid.*

In an action in the nature of *quo warranto* to determine the election to public office as between two claimants, separate issues as to whether each party was duly elected to the office at the general election in question are sufficient to present all controverted matters to the jury and are proper. *Ibid.*

ELECTRICITY.

§ 1. Nature and Extent Regulatory Power in General.

Municipality is not required to obtain certificate of public convenience and necessity to construct power lines outside of its limits. *Grimesland v. Washington*, 117.

ELECTRICITY—*Continued.*

§ 7. Condition of Wires, Poles and Equipment.

Intestate felled a tree across a tap line maintained by defendant power company under a written easement, and was electrocuted when he came in contact with the wire while attempting to disengage the tree top from the line. The wire was not insulated and was 18 feet or more above the ground. *Held:* Nonsuit was proper since defendant could not have reasonably foreseen injury under the circumstances, and therefore was not guilty of actionable negligence. *Deese v. Light Co.*, 558.

EMINENT DOMAIN.

§ 18b. Parties.

The court is not required to determine the validity of a claim of interest in lands sought to be condemned before permitting claimant to intervene for the purpose of asserting his claim. *Raleigh v. Edwards*, 528.

EQUITY.

§ 3. Laches.

Ordinarily, laches will not bar relief when the delay has not worked an injury to the prejudice or disadvantage of those adversely interested. *East Side Builders v. Brown*, 517.

ESCROW.

§ 5. Actions for Breach of Escrow Agreement.

In action to recover money paid on certain checks on ground that papers were wrongfully obtained by defendants in breach of escrow agreement, *held*, allegations as to purpose and intent of delivery in escrow, and that defendants altered contracts before terms of conditional delivery were fulfilled, are essential to the cause of action and are improperly stricken on defendants' motion. *Guy v. Baer*, 276.

ESTATES.

§ 16. Survivorship in Personalty.

Survivorship in personalty may be provided for by agreement. *Bunting v. Cobb*, 132.

EVIDENCE.

§ 7a. Burden of Proof in General.

The general rule that plaintiff in a civil action, even though the issue include a criminal charge, has the burden of proving his case by the preponderance or the greater weight of the evidence *held* not altered or modified by the language of the indemnity contract sued on obligating insurer to make good inventory shortage which "insured shall conclusively prove to have been caused by the dishonesty of any employee." *Hat Shops v. Ins. Co.*, 698.

§ 18. Evidence Competent to Corroborate Witness.

Evidence otherwise incompetent may be competent for the purpose of corroborating the sworn testimony of the witness at the trial. *Woodard v. Trust Co.*, 463.

§ 19. Evidence Competent to Impeach Witness.

Impeaching testimony must be introduced or offered again after the witness challenged has testified. *Freeman v. Ponder*, 294.

EVIDENCE—*Continued.*

§ 24. Relevancy and Materiality in General.

In order to be competent as substantive evidence testimony must be relevant and its reception must not be forbidden by any specific rule of law. *Freeman v. Ponder*, 294.

Testimony is relevant if it reasonably tends to establish the probability or the improbability of a fact in issue raised by the pleadings in the action. *Ibid.*

§ 26. Similar Facts and Transactions.

The exclusion of testimony that clearance lights were seen burning on the bus in question three nights before the collision, offered to obtain the inference that they were in working order on the night in question, will not be held prejudicial when there is evidence that at the time in question the lights were neither burning nor were capable of burning because not connected with any electric circuit, since such evidence rebuts any possible inference of the continuance of the prior state. *Hansley v. Tilton*, 3.

§ 26½. Rebuttal of Facts or Inferences Adduced by Adverse Party.

Where plaintiffs introduce evidence tending to show they had been harassed by litigation over the trust estate, defendants are entitled to introduce judicial records tending to show that plaintiffs themselves had instituted such litigation in order to rebut plaintiffs' implication. *Woodard v. Mordecai*, 463.

§ 37. Best and Secondary Evidence.

Where documents are introduced in evidence, oral testimony of their contents is properly excluded. *Freeman v. Ponder*, 294.

A party may not object that the original record was not introduced in evidence when it is disclosed that such record was in his own possession. *Quevedo v. Deans*, 618.

§ 39. Parol Evidence Affecting Writings.

Prior negotiations are merged into the written contract, and parol evidence is not competent to contradict, vary or add to the terms as expressed in the writing. *McLawhon v. Briley*, 394.

If only a part of the agreement has been reduced to writing, parol evidence is competent to establish the unwritten part provided it does not contradict that part which has been written. *Ibid.*

The signing of a receipt for machinery delivered does not preclude the purchaser from introducing parol evidence that the entire agreement was that the seller would deliver such machinery and also equipment to be used with it and without which the machinery delivered would be practically useless. *Ibid.*

Negotiations leading up to the execution of a written instrument are considered as varied by and merged in the writing. *Bost v. Bost*, 554.

The rule that consideration for a written contract may be shown by parol and that the recital of a monetary consideration is but *prima facie* evidence of payment and may be rebutted by parol proof, *held* not to permit the introduction of parol testimony which seeks to incorporate into the agreement property not therein set out, and thus vary the terms of the writing. *Ibid.*

While parol evidence is competent to explain a written contract, it is not competent to vary the terms of an unambiguous agreement. *Ibid.*

§ 41. Hearsay Evidence in General.

When hearsay evidence is admitted without objection it is properly considered by jury. *Lambros v. Zrakas*, 287.

EVIDENCE—*Continued.*

In an action in the nature of *quo warranto* to determine conflicting claims to a public office, testimony of statements made by third persons tending to establish irregularity in the casting or counting of ballots is properly excluded as hearsay. *Freeman v. Ponder*, 294.

§ 42d. Admissions and Declarations of Agents.

Declaration of agent tending to show negligence is competent on the issue of negligence, and perforce tends to establish liability of principal. *Anderson v. Office Supplies*, 142.

§ 43e. Declarations as to Mental State.

Where the mental state of trustee in refusing to exercise a discretionary power is in issue, a letter written by him to his co-trustee setting forth his motives and reasons for refusing to exercise the power upon the original application of the beneficiaries *is held* competent even though the letter was never mailed, since it is a relevant circumstance tending to show his state of mind at the time in question. *Woodard v. Mordecai*, 463.

§ 46b. Opinion Evidence—Handwriting Experts.

Caveator admitted that the body of the will was in testator's handwriting, it being controverted by the parties only as to whether an interlineation therein was written by testator. Photostatic copies of the instrument in natural size were given the jury in order to enable them to follow the testimony. *Held:* Testimony by an expert, in undertaking to point out the reasons for his opinion in respect of the interlineation, that testator (calling his name) would make a particular letter in a certain manner, etc., was merely the witness' method of referring to the letters of the writing admitted to be in testator's handwriting, for the purpose of comparison, and cannot be held prejudicial. *In re Will of Gatling*, 561.

§ 49. Opinion Evidence—Invasion of Province of Jury.

Expert may be allowed to invade jury's province as to ultimate facts in regard to matters of science, art, or skill. *Bruce v. Flying Service*, 79.

EXECUTORS AND ADMINISTRATORS.

§ 2b. Persons Entitled to Be Appointed Administrator.

The right to appointment as administrator of an estate is entirely statutory, and the only child of a decedent who leaves no widow is entitled to the entire surplus of descendant's personal estate, G.S. 28-149 (4), and therefore is the sole "next of kin" of decedent within the meaning of G.S. 28-6, and upon his timely application to the proper clerk has an absolute right to receive letters of administration unless he is disqualified. G.S. 28-8. *In re Estate of Edwards*, 202.

A finding by the clerk that the next of kin entitled to appointment as administrator is disqualified because of want of understanding, G.S. 28-8 (4), must be based upon evidence received by the clerk in open court, and where the record shows that the conclusion of the clerk was based upon undisclosed and unrecorded information obtained by him from third persons outside of court and in the absence of petitioner and his counsel without opportunity for cross-examination, the proceedings will be remanded so that the matter may be determined in accordance with due process of law. *Ibid.*

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 12b. Sale of Assets Under Provisions of Will.

A testator may confer on his executor by his will the power to sell his real property for any lawful purpose to which the testator wishes the proceeds of his real property to be applied. *Doub v. Harper*, 14.

A testamentary power to sell real property generally continues as long as there remains an unfulfilled object or purpose of testator in aid of which it was intended that the power should or might be exercised. *Ibid.*

Whether a testamentary power to sell real property extends beyond the period that the executor is to perform his ordinary legal duties in settling the personal estate depends on the intention of the testator as expressed in the will. *Ibid.*

Power of disposition *held* not terminated upon completion of administration of personalty and the filing and approval of final account. *Ibid.*

§ 13a. Sale of Property to Make Assets to Pay Debts.

A court of equity has jurisdiction of an action by the personal representative to obtain approval of the court for the sale of assets of the estate to pay debts and to effectuate the purposes of the trust set up by the will, all beneficiaries of the estate being made parties. *Miller v. Bank*, 309.

§ 15g. Widow's Year's Support.

Superior Court has jurisdiction to approve settlement with widow for year's support. *Trust Co. v. Waddell*, 454.

§ 24. Jurisdiction of Superior Court to Approve Settlements.

Superior Court has jurisdiction to approve settlement with widow for year's support and dower upon her dissent from will. *Trust Co. v. Waddell*, 454.

§ 26. Final Account and Settlement.

An executor does not abrogate a testamentary provision giving him power to sell the realty after the completion of the administration of the personal estate by making a final settlement, but neither the final account nor its approval by the clerk and discharge of the executor can affect matters not included or necessarily involved in the account. *Doub v. Harper*, 14.

§ 31. Actions to Surcharge and Falsify Account.

It appeared from the complaint and the judgment rolls attached thereto that the judgment authorizing the executor to sell to the issuing corporation certain stock constituting personal assets of the estate was entered in an action in which the minor beneficiary was represented by a competent guardian *ad litem*, who made full investigation, that the sale of the assets was necessary to pay debts of the estate and to effectuate the purposes of the trust set up by the instrument, that interested persons *sui juris* sold their stock upon identical terms, that the stock at that time was not marketable, and that a comparable sum could not be obtained by forced liquidation of the corporation. The complaint further alleged that the trustee negligently failed to sell the stock at an earlier date when the stock had a ready market, that the later sale was made necessary by the trustee's own mismanagement, that the trustee was interested in the corporation purchasing the stock by reason of interlocking directorates and business associations, and that such sale was for less than the value of the stock and against the interest of the minor. *Held:* Even though the complaint be sufficient to allege constructive fraud it is insufficient to allege extrinsic fraud in the procurement of the judgment so as to render the judgment subject to collateral attack. *Miller v. Bank*, 309.

FRAUD.

§ 1. Acts Constituting Fraud—Constructive Fraud.

Constructive fraud is based upon breach of a fiduciary obligation, and intent to deceive and actual dishonesty are not requisite. *Miller v. Bank*, 309.

FRAUDS, STATUTE OF.

§ 9. Contracts Affecting Realty in General—Application.

Statute precludes oral evidence of contract to convey for purpose of specific performance, but not for purpose of recovery of damages for breach of the contract. *Rochlin v. Construction Co.*, 443.

Description in deed must be certain in itself or capable of being reduced to certainty by matters *aliunde* pointed out in the deed itself. *Plemmons v. Cutshall*, 506.

GIFTS.

§ 1. Gifts Inter Vivos.

The fact that the wife has access to United States Savings Bonds, Series E, made payable to either her or her husband, but bought with the husband's funds, is insufficient delivery to establish a gift to her *inter vivos*. *Watkins v. Shaw*, 96.

HIGHWAYS.

§ 3b. Rights of Owners Along Abandoned Road.

A complaint alleging that upon relocation by the State Highway and Public Works Commission of an old county road which had been maintained by the Commission, a segment of the old road was abandoned, and that defendants closed both ends of the segment of the old road running through their lands so as to leave plaintiff without ingress or egress to his lands, and praying mandatory injunction requiring defendants to reopen the road, *is held* not subject to demurrer on the ground that the cause of action was within the exclusive jurisdiction of the clerk of the Superior Court under the statutes relating to neighborhood public roads. *Clinard v. Lambeth*, 410.

Where plaintiff alleges that the segment of road in question had been used for a highway for a period of twenty-eight years as a matter of right, and that upon abandonment of this segment of the road in its relocation by the State Highway and Public Works Commission, defendants closed both ends of the segment of road abandoned so that plaintiff was cut off from his farm with no way of ingress or egress, the complaint is sufficient to state a cause of action for mandatory injunction to compel defendants to reopen the segment of road notwithstanding the fact that plaintiff does not allege that he has a dwelling on his property. *Ibid.*

But evidence *held* not to show imminent injury justifying preliminary mandatory injunction. *Ibid.*

§ 4b. Injury to Motorists During Construction or Repair.

Barriers along ditch are solely for purpose of warning motorists and it is not required that they be strong enough to deflect car. *Presley v. Allen & Co.*, 181.

Where fact that repair work is in progress is evident, presumption that street is safe does not obtain. *Ibid.*

§ 6. Road Signs.

Allegation and evidence to the effect that there was a sign erected along a street requiring a motorist to stop before entering upon an intersection with

HIGHWAYS—*Continued.*

another street is sufficient to raise the inference that such sign was erected pursuant to competent authority notwithstanding the absence of allegation that it was so erected. *Johnson v. Bell,* 522.

§ 11. Neighborhood Public Roads—Nature and Grounds of Procedure to Establish.

Suit to compel contiguous owners to take down barriers across abandoned State Highway so that plaintiff have ingress and egress along the abandoned road is not action to establish neighborhood public road, and demurrer on ground that clerk had exclusive jurisdiction is bad. *Clinard v. Lambeth,* 410.

HOMICIDE.

§ 2. Parties and Offenses.

The parties to homicides are divided into four classes: (1) principals in the first degree; (2) principals in the second degree; (3) accessories before the fact; (4) accessories after the fact. *S. v. Minton,* 716.

A principal in the first degree in the commission of a homicide is the person who actually perpetrates the killing. *Ibid.*

A principal in the second degree in the commission of a homicide is one who is actually or constructively present when a homicide is committed by another, and who aids or abets such other in its commission. *Ibid.*

§ 10c. Mental Capacity as Affected by Intoxication.

An instruction to the effect that if defendant did not have the mental capacity because of drunkenness to deliberate and premeditate he could not be guilty of murder in the first degree, and that the burden of establishing premeditation and deliberation beyond a reasonable doubt was upon the State, *held* to give defendant the full benefit of his defense of inebriacy. *S. v. Marsh,* 101.

§ 11. Self-defense.

Person subjected to murderous assault may stand his ground and is not required to retreat. *S. v. Washington,* 531.

§ 23. Demonstrative Evidence—Pistol.

In a prosecution for homicide it is competent for the State to introduce in evidence a pistol corresponding in caliber to the bullet inflicting the mortal wound when there is evidence that the pistol was in the possession of one of the defendants both before and after the homicide, notwithstanding the absence of testimony tending to show directly that this particular pistol was actually used in killing the deceased. *S. v. Minton,* 716.

§ 25. Sufficiency of Evidence and Nonsuit.

Where evidence shows intentional killing with deadly weapon, nonsuit may not be entered on second degree charge on defense that defendant was attempting to arrest deceased. *S. v. Brannon,* 474.

Evidence *held* sufficient for jury as to one defendant on charge of being principal in first degree, and as to other defendant on charge of being principal in second degree to murder. Medical expert testimony that wound caused death not necessary when conclusion is matter of common knowledge from the facts. *S. v. Minton,* 716.

HOMICIDE—*Continued.*

§ 27c. Instructions on Questions of Premeditation and Deliberation.

Instruction on intoxication as affecting premeditation and deliberation *held* without error. *S. v. Marsh*, 101.

An instruction to the effect that the jury might take into consideration defendant's conduct before and after as well as at the time of the homicide and all attendant circumstances in determining the questions of premeditation and deliberation will not be held for error as permitting the jury to consider defendant's flight the morning after the homicide or attempted suicide sometime thereafter in determining the questions when it is apparent from the record that the charge referred to attendant circumstances at the time of the homicide as indicative of the purpose and intent in defendant's mind at that time, which immediate circumstances were sufficient to support an affirmative finding. *Ibid.*

§ 27f. Instructions on Defenses.

Exception to the charge for the court's failure to explain the difference between self-defense as applied to ordinary persons and as applied to officers attempting to make a lawful arrest cannot be sustained when the record discloses that the court fully charged the jury as to defendants' right in making a lawful arrest to be the aggressors and to use all reasonable force apparently necessary to overcome any resistance, even to the taking of life, in discharging their duty to arrest deceased. *S. v. Brannon*, 474.

Evidence *held* to require charge on defendant's right of self-defense where murderous assault is made upon her. *S. v. Washington*, 531.

§ 27i. Charge on Right to Recommend Life Imprisonment.

An instruction that the jury "may for any reason and within your discretion" recommend life imprisonment upon conviction of first degree murder will not be held for error as requiring the jury to have a reason for such recommendation when in other portions of the charge the court had placed the matter in the unrestricted discretion of the jury and the charge construed contextually could not have been misleading. G.S. 14-17. *S. v. Marsh*, 101.

Upon a finding that defendant is guilty of murder in the first degree, the jury has the unbridled discretion to recommend life imprisonment, and no rule is prescribed for the guidance of the jury in coming to a decision as to whether or not it should do so, G.S. 14-17, and therefore an instruction to the effect that the jury should determine whether it was its duty to recommend life imprisonment must be held for prejudicial error. *S. v. Simmons*, 290.

§ 30. Appeal in Homicide Prosecutions.

Any error in the submission of the question of guilt of murder in the second degree is rendered harmless by a verdict of manslaughter. *S. v. Brannon*, 474.

HOSPITALS.

§ 6. Duties and Liabilities of Charitable Hospitals to Patients.

A charitable hospital is not liable for injuries to a patient caused by the negligence of its employees but may be held liable for its negligence in failing to use due care in the selection of its employees. *Williams v. Hospital Asso.*, 536.

Where, in a suit against a hospital for injury to a patient, there are allegations of negligence on the part of the employees of the hospital, *held* defendant's answer alleging that it is a nonprofit corporation operated as an eleemosy-

HOSPITALS—*Continued.*

nary or charitable institution states a germane defense, and plaintiff's demurrer to such defense is properly overruled. *Ibid.*

§ 8. Duties and Liabilities of Private Hospitals to Patients.

In this action for malpractice, nonsuit as to defendant hospital is affirmed on authority of *Wilson v. Hospital,* 232 N.C. 362. *Jackson v. Sanitarium,* 222.

§ 9. Licensing and Regulation of Nursing Profession.

Plaintiff hospital alleged that it had corrected all deficiencies and criticisms pointed out by the joint accrediting boards as being necessary to comply with the requirements for approval as an accredited school for nurses, that it had met all minimum requirements for accreditation, that the boards had arbitrarily refused to accredit plaintiff, and that plaintiff would suffer irreparable damage by the removal of its school from the accredited list. *Held:* The facts alleged, taken as true upon demurrer, are sufficient to state a cause of action for *mandamus* to compel defendants to accredit plaintiff's school of nursing. *Hospital v. Joint Committee,* 673.

§ 10. Duties and Liabilities of Nurses and Technicians to Patients.

In this action for malpractice, nonsuit as to the anesthetist affirmed on authority of *Byrd v. Hospital,* 202 N.C. 337. *Jackson v. Sanitarium,* 222.

HUNTING AND FISHING.

§ 1. Licensing and Regulation.

An indictment charging that defendant entered and hunted upon property leased by a gun club without written permission from the owner or lessee in violation of Chap. 539, Public-Local Laws 1933, does not charge the offense defined by the statute, since the statute refers to hunting and fishing on "reservations" without written permission from the owner, and the indictment is properly quashed upon motion. *S. v. Gibbs,* 259.

HUSBAND AND WIFE.

§ 5. Husband's Duty to Support Wife and Children.

Husband is under primary duty to support child of marriage, and wife's agreement to maintain child will support his agreement to pay her periodic sums. *Campbell v. Campbell,* 188.

A husband is under legal duty to furnish adequate support for his wife, which means support sufficient to meet the requirements of her personal maintenance in supplying food, clothing and housing suitable to their position in life and commensurate with the husband's ability, and medical assistance reasonably required for the preservation of health. *S. v. Clark,* 192.

In order to support a conviction under G.S. 14-325 it is necessary for the State to show that the husband failed to supply adequate support for his wife and also that such failure was willful, *i.e.*, purposely omitted without just cause in violation of law, and the statute may not be extended to include cases not clearly within its terms. *Ibid.*

Failure of the husband to give his wife the affectionate consideration he should manifest for her is not sufficient to constitute the offense defined by G.S. 14-325. *Ibid.*

Evidence tending to show that defendant provided for the personal maintenance of his wife according to his condition in life while she was living with

HUSBAND AND WIFE—*Continued.*

him, including medical and hospital expenses, but that he failed to give her as much spending money as she thought she should have had and failed to give her the affectionate consideration she deemed proper in the relationship, *is held* insufficient to warrant a conviction in a prosecution under G.S. 14-325. *Ibid.*

§ 12d (2). Construction and Operation of Deeds of Separation.

A deed of separation between husband and wife which purports to make a complete property settlement between the parties in contemplation of permanent separation precludes the wife from testifying to the effect that the husband, prior to the execution of the agreement, verbally promised that in the event he thereafter sold his business he would give her half the sale price, there being no allegation that anything was left out of the separation agreement through fraud or mutual mistake. *Bost v. Bost*, 554.

§ 12d (4). Revocation of Deeds of Separation.

A deed of separation between husband and wife is annulled, avoided and rescinded, at least as to the future, by the act of the spouses in subsequently resuming conjugal cohabitation, and is not revived by a later separation. *Campbell v. Campbell*, 188.

§ 15a. Nature and Incidents of Estates by Entirety.

Since each tenant by entirety is deemed seized of the whole estate, either of them alone may move to cancel an unauthorized notice of *lis pendens* against property. *McGurk v. Moore*, 248.

INDEMNITY.

§ 2d. Proof of Loss Within Coverage of Contract.

The evidence favorable to plaintiff insured tended to show not only an inventory shortage on the part of its store manager, but also that the manager admitted his responsibility for the shortage, that he had failed to follow instructions that he keep the cash register tickets constituting the only record evidence which would conclusively show whether he had properly accounted for merchandise sold, that he requested one of his clerks to overcharge customers, that his asserted prior report of inventory shortage had not been received by insured, and that he kept reporting inventories which he knew he did not have on hand. *Held:* Although contradicted in material respects by the testimony of the manager, the evidence shows more than a mere possibility or opportunity on the part of the manager to misappropriate the property or a mere equal opportunity for others to have abstracted the goods, and is sufficient to be submitted to the jury in an action on a contract indemnifying the insured against loss arising from misappropriation or wrongful act of the manager. *Hat Shops v. Ins. Co.*, 698.

The general rule that plaintiff in a civil action, even though the issue include a criminal charge, has the burden of proving his case by the preponderance or the greater weight of the evidence *held* not altered or modified by the language of the indemnity contract sued on obligating insurer to make good inventory shortage which "insured shall conclusively prove to have been caused by the dishonesty of any employee." *Ibid.*

INDICTMENT AND WARRANT.

§ 8. Joinder of Counts.

The better practice is to try capital cases on single-count bills or bills containing only capital charges. *S. v. Marsh*, 101.

INDICTMENT AND WARRANT—*Continued.*

§ 9. Charge of Crime.

An indictment for a statutory offense must contain averments of all essential elements of the crime created by the statute, and merely charging a breach of the statute in general terms and referring to it in the indictment is not sufficient. *S. v. Gibbs*, 259.

The statutory directive that an indictment shall not be quashed for informality or refinement does not dispense with the requirement that each essential element of the offense must be charged. G.S. 15-153. *Ibid.*

§ 13. Nature and Grounds of Quashal.

Order sustaining plea that indictment charged same offense as that of prior indictment is sustaining plea of former jeopardy notwithstanding that order denominates it a quashal. *S. v. Wilson*, 552.

§ 17. Nature and Scope of Bill of Particulars.

A bill of particulars is for the purpose of providing information not required to be set out in the indictment, and can never supply matter required to be charged as an essential ingredient of the offense. *S. v. Gibbs*, 259.

INJUNCTIONS.

§ 1. Nature and Grounds of Injunctive Relief.

Restraining orders may be prohibitory, to preserve the *status quo* until the rights of the parties can be determined, or mandatory, to require the party enjoined to do a positive act. *Clinard v. Lambeth*, 410.

§ 4f. Subjects of Injunctive Relief—Institution or Prosecution of Civil Action.

Our courts will not interfere with the right of a resident of this State to institute and prosecute an action in another state except for compelling equities. *Evans v. Morrow*, 600.

A citizen of this State will not be enjoined from instituting and prosecuting a suit in another state merely because (1) of convenience or economy, (2) a difference in rules of practice and procedure, (3) distrust of the competency of the courts of the other state to do justice in cases within its jurisdiction. *Ibid.*

A resident of this State cannot be enjoined from prosecuting an action in another state in an equitable manner in accordance with his legal rights on the ground of an asserted inequitable intent. *Ibid.*

§ 6. Issuance of Preliminary Orders.

Upon motion for the issuance of a temporary restraining order, both parties are entitled to a hearing on their respective affidavits. *Clinard v. Lambeth*, 410.

A mandatory injunction will not be issued as a temporary or preliminary order except where the threatened injury is immediate, pressing, irreparable and clearly established or the party sought to be restrained has done a particular act in order to evade injunction which he knew had been or would be issued, a mandatory injunction being ordinarily in the nature of an execution to compel compliance with the final judgment upon the merits. *Ibid.*

In an action for *mandamus*, a motion for a temporary restraining order to preserve the *status quo* pending hearing upon the merits is controlled by G.S. 1-581 and not by G.S. 1-513, and the court may set the hearing less than ten days after notice of the order to show cause. *Hospital v. Joint Committee*, 673.

INJUNCTIONS—*Continued.*

In an action for *mandamus*, a court of equity may issue a mandatory preliminary injunction in proper instances upon a showing that plaintiff would suffer irreparable loss and injury unless the *status quo* be preserved until the hearing upon the merits. *Ibid.*

§ 8. Continuance of Temporary Orders.

Where, upon the return of a temporary restraining order, the conflicting evidence raises serious question as to whether plaintiff is entitled to the relief sought, the continuance of the order to the final hearing upon the merits is proper. *Gaines v. Mfg. Co.*, 340.

§ 9. Hearings on Merits.

Where a temporary restraining order is issued in an action and the cause comes on to be heard in the Superior Court upon the merits without any further order to continue or dissolve the temporary restraining order, the presiding judge has full power and authority to determine the cause and properly refuses to remand the question of continuing the restraining order to the judge before whom it had been pending. *Grimesland v. Washington*, 117.

INSURANCE.

§ 13a. Construction and Operation of Policies in General.

Unambiguous insurance contracts will be construed according to the meaning of the terms used, while ambiguous terms will be interpreted according to their usual, ordinary and commonly accepted meaning, but when an ambiguous term is reasonably susceptible to two interpretations, the courts will adopt that construction imposing liability. *Johnson v. Casualty Co.*, 25.

§ 19a. Construction of Fire Policies in General.

The word "completed" as used in describing the terms of a builder's risk fire policy must be construed in its plain and ordinary sense, and means brought to an end or to a final and intended condition. *Cuthrell v. Ins. Co.*, 137.

The word "occupied" as used in describing the term of a builder's risk fire policy must be construed in its plain and ordinary sense, and means a continuing tenure for a reasonable time, and does not embrace a mere transient or trivial use. *Ibid.*

§ 23d. Fire Policies—Term of Builders' Risk Policy.

The evidence in this case introduced by plaintiff insured *held* sufficient to show that plaintiff's building had not reached that stage in its construction when it could be put to the use for which it was intended at the time it was destroyed by fire, and therefore was sufficient to withstand insurer's motion to nonsuit based upon the theory that plaintiff's evidence was insufficient to show that at the time of the fire the term of the builder's risk policy sued on had not terminated under its provision that its term should not extend beyond the completion of the building. *Cuthrell v. Ins. Co.*, 137.

Plaintiff insured's evidence that he permitted his building covered by the builder's risk policy sued on to be used gratuitously on one occasion, for one dance, kegs and building materials being moved to one side of the floor for the occasion, and the roof garden, restaurant, picnic terrace, and other parts of the building not being used prior to the fire which destroyed the building, *is held* sufficient to withstand insurer's motion to nonsuit based upon the theory that insured's evidence was insufficient to show that the policy had not termi-

INSURANCE—*Continued.*

nated under its provision that the term should not extend beyond the time the building was occupied in whole or in part. *Ibid.*

§ 25b. Pleadings in Actions on Fire Policies.

Insurer is not entitled to introduce evidence supporting its contention of cancellation or termination of the policy on any ground not supported by allegation. *Cuthrell v. Ins. Co.*, 137.

§ 26. Life Insurance—Insurable Interest.

The assignee of an insurance policy pledged as additional security for a loan is entitled to pay premiums on the policy to protect his rights, and it is not necessary that he have an insurable interest in the life of the insured. *Thompson v. Ins. Co.*, 434.

§ 36b (1). Persons Entitled to Payment of Life Policies—Beneficiaries Named in Policy Generally.

The person entitled to the proceeds of a life insurance policy must be determined in accordance with the contract between the insurer and the insured, and the courts have no power to write into the contract any provision that is not there in fact or by implication of law in order to effectuate a presumed intent of insured. *Bullock v. Ins. Co.*, 254.

The policy in suit provided that the proceeds should be paid to insured's wife if living or to the insured's foster son if insured's wife predeceased insured. The insured was feloniously slain by his wife, and she was sentenced to imprisonment for manslaughter. *Held:* The foster son is not entitled to the proceeds of the policy even though insured's wife forfeited her right thereto, since under the terms of the policy his interest was contingent upon the wife predeceasing insured, and the proceeds should be paid to insured's administrator for payment of his debts and distribution of the surplus to his next of kin. *Ibid.*

§ 36b (3). Assignees and Pledgees.

Mortgage and policy were security for insured's debt. In pledgee's action for proceeds of policy, executor could not maintain that debt was paid by receipt of rents and profits from land after wrongful foreclosure. *Thompson v. Ins. Co.*, 434.

§ 36b (4). Persons Entitled to Payment—When Beneficiary Kills Insured.

When the wife feloniously kills her husband she is not entitled to receive the proceeds of an insurance policy on his life, even though she be named beneficiary therein. G.S. 28-10, G.S. 30-4, G.S. 52-19. *Bullock v. Ins. Co.*, 254.

§ 43b. Liability Insurance—Coverage of Policy.

The fact that the franchise permitting the operation of a truck in the carriage of goods for hire is limited to the jurisdiction of the issuing authority, does not of itself limit the coverage of a liability policy to use of the truck in such territory. *Johnson v. Casualty Co.*, 25.

Where a policy of liability insurance stipulates that the customary use of the vehicle is confined to a stipulated radius, coverage is not affected by an occasional use beyond the radius specified; but an agreement that the vehicle is to be operated entirely or exclusively within a specified radius confines the coverage to the radius stipulated. *Ibid.*

The policy in suit provided that the vehicle insured was customarily used within a fifty mile radius of the city where the vehicle was principally garaged

INSURANCE—*Continued.*

and that no trips were customarily made beyond such radius or "within the area of cities and towns designated herein. Cities and towns excluded: State of North Carolina." *Held:* The policy covers liability for a collision occurring in a rural section of North Carolina within a fifty mile radius of where the vehicle was principally garaged, notwithstanding that at the time vehicle was returning from a trip beyond this radius. *Ibid.*

§ 43½. Auto Insurance—Collision and Upset.

A policy covering collision and upset may not be avoided by insurer on the ground that at the time of the loss the driver of the car insured was endeavoring to escape arrest while transporting intoxicating liquor in violation of law, the policy containing no exception on this ground and there being nothing to show that the insurance promoted the commission of the unlawful act. *Blackwell v. Ins. Co.*, 559.

INTOXICATING LIQUOR.

§ 4a. Possession in General.

It is illegal for a person to possess in a dry county any intoxicating liquor for any purpose not sanctioned by the Turlington Act of 1923 or by the provisions of the Alcoholic Beverage Control Act of 1937. *S. v. Fuqua*, 167.

Possession of any quantity of nontax-paid liquor is unlawful anywhere in this State without exception. G.S. 18-48. *S. v. Parker*, 236.

§ 4b. Constructive Possession.

A person has possession of intoxicating liquor within the purview of G.S. 18-2 when he has the power and intent to control its disposition or use, either alone or in combination with others. *S. v. Fuqua*, 167; *S. v. Parker*, 236.

§ 9b. Presumptions and Burden of Proof.

Illegal possession of intoxicating liquor is *prima facie* evidence that its possession is for the purpose of sale. *S. v. Parker*, 236.

§ 9c. Competency and Relevancy of Evidence.

Hearsay testimony that defendant sold intoxicating liquor may be considered by jury in absence of objection to its admission. *S. v. Fuqua*, 167.

§ 9d. Sufficiency of Evidence and Nonsuit in Prosecutions for Violation of Liquor Laws.

Evidence to the effect that officers with search wararnt found a half gallon of nontax-paid whiskey in a kettle on the kitchen table in defendant's home is sufficient to sustain conviction of illegal possession of intoxicating liquor in violation of G.S. 18-48. *S. v. Jenkins*, 112.

Evidence to the effect that defendant's employee went from defendant's store in North Carolina across the road to a barn in Virginia and returned to the store with a cup, that immediately thereafter an officer entered the store, saw the cup on the counter, that a third person, who immediately thereafter disclaimed any interest therein, picked it up, and that the officer took possession of the cup and discovered that it was filled wtih intoxicating liquor diluted by Coca-Cola, *held* sufficient to sustain defendant's conviction of illegal possession of the intoxicating liquor. *S. v. Fuqua*, 169.

Evidence tending to show that defendant had ninety-six gallons of intoxicating liquor in the basement of the tenant house on defendant's farm, and that defendant alone had the key to the door to the basement, is sufficient to support constructive possession. *S. v. Parker*, 236.

INTOXICATING LIQUOR—*Continued.*

Evidence to the effect that nontax-paid whiskey was found in the room in defendant's store in which defendant's employee slept, and that the employee sold some liquor to an officer, *is held* insufficient to show a conspiracy between defendant and his employee to violate the prohibition law. *S. v. Benson*, 263.

JUDGMENTS.

§ 1. Judgments by Consent.

A consent judgment is merely a contract between parties to litigation entered on the records of the court with its approval. *Luther v. Luther*, 429.

§ 9. Judgments by Default in General.

The contention that petitioners are entitled to recover *pro confesso* against plaintiffs because of their failure to answer the petition within thirty days after it was filed, is not presented when it appears that the petition and notice were not served upon plaintiffs and that plaintiffs filed answer before the return date designated in the notice. *Wilmington v. Merrick*, 46.

§ 19. Time and Place of Rendition.

Where subsequent to decree of divorce, hearing for the custody of the children of the marriage is heard before the resident judge in another county on motion of defendant, and both parties appear there with counsel and join issue, defendant may not thereafter object on the ground that the court was without jurisdiction to hear the motion outside the county. *Heuser v. Heuser*, 293.

Judgment may not be rendered out of the county except upon statutory authority or by consent of the parties appearing upon the face of the record. *Dellinger v. Clark*, 419.

But jurisdiction of court is coextensive with consent of parties, and where there is no limitation on consent, a party may not maintain that the power to determine matters out of the county was limited to question of costs and that judge could not change findings he had already dictated to reporter. *Dellinger v. Clark*, 419.

§ 20a. Modification and Correction by Trial Court.

After term, the presiding judge may not vacate a judgment entered during the term or substitute another therefor except in conformity with a proper proceeding brought for that purpose. *Dellinger v. Clark*, 419.

Where the judge dictates his findings of fact and judgment during term time, and it is agreed the stenographer should mail her transcript to him under consent of the parties that he might render judgment out of term and out of the district, the matter is *in fieri* until final rendition of the judgment, and the judge has the power to alter his findings as contained in the transcript and to correct the judgment for error of law. *Ibid.*

§ 23½. Judgment Liens—Claims of Third Persons.

When not made parties to partition proceedings, holders of judgment liens on undivided interest of tenant in common are not affected by decree or sale for partition, and purchaser at sale takes subject to judgment lien. *Washburn v. Washburn*, 370.

§ 25. Procedure to Attack Judgments.

Fact that same attorney represented both parties in receivership proceedings does not warrant collateral attack on order of receivership, the proper procedure being by motion in the cause. *Hall v. Shippers Express*, 38.

JUDGMENTS—*Continued.*

Mere irregularities in the rendition of a judgment within the jurisdiction of the court does not subject the judgment to collateral attack by independent action, the remedy being by motion in the cause. *Miller v. Bank*, 309.

Judgment may be collaterally attacked for fraud only if the fraud is extrinsic. *Ibid.*

A judgment which is void for want of service of process may be attacked in any proceeding. *Quevedo v. Deans*, 618.

§ 27a. Motions to Set Aside Default Judgments.

The court's findings that plaintiff had failed to establish mistake, surprise, inadvertence or excusable neglect, and that he had failed to show a meritorious defense, sustains the court's judgment denying plaintiff's motion under G.S. 1-220 to set aside the judgment by default against him on defendant's counterclaim. *Dillingham v. Blue Ridge Motors*, 171.

Findings *held* insufficient predicate for conclusion that neglect was excusable. *Pate v. Hospital*, 637.

In the absence of excusable neglect the question of meritorious defense is immaterial. *Ibid.*

Parties who have been duly served with summons are required to give their defense that attention which a man of ordinary prudence usually gives his important business, and failure to do so is not excusable within the meaning of G.S. 1-220. *Ibid.*

§ 27e. Attack of Judgments for Fraud.

In order to be ground for collateral attack of a judgment, fraud must be extrinsic and relate to the manner in which the judgment was procured and be such fraud as prevents the court from considering the cause on its merits. *Miller v. Bank*, 309.

Allegations *held* insufficient to show extrinsic fraud in obtaining judgment authorizing sale of assets of estate. *Ibid.*

§ 30. Matters Concluded.

In order allowing party to intervene, provisions undertaking to specify in advance what legal position interveners should take are *obiter dicta* and not binding. *Raleigh v. Edwards*, 528.

§ 32. Estoppel by Judgment—Pleading Estoppel.

While ordinarily estoppel by judgment must be pleaded, where all the facts necessary to constitute the estoppel are set out in the complaint for the purpose of attack, and defendant moves to strike the allegations on the ground that the matters alleged were precluded by the judgment, the question of estoppel by judgment is properly presented. *Miller v. Bank*, 309.

§ 33b. Operation of Judgments as Bar to Subsequent Action—Consent Judgments.

A consent judgment, as well as a judgment on trial of issues, is *res judicata* as between the parties upon all matters embraced therein. *Herring v. Coach Co.*, 51.

§ 33e. Operation of Judgments as Bar to Subsequent Action—Judgments of Clerk.

A judgment of the clerk of the Superior Court in a special proceeding in which such clerk has jurisdiction is *res judicata* as to the matters presented by

JUDGMENTS—*Continued.*

the allegations of the petition in the absence of appeal, and failure to perfect an appeal has the same effect as if no appeal had been attempted. *In re Canal Co.*, 374.

JURY.

§ 2. Peremptory Challenges.

In a civil action each side is entitled to not in excess of six peremptory challenges regardless of how numerous the parties on either side may be, subject only to the statutory exception that the trial judge has the discretionary power to increase the number of peremptory challenges so as to allow each defendant or class representing the same interest not more than four peremptory challenges, G.S. 9-23, in which instance the trial court's decision is final. *Freeman v. Ponder*, 294.

LABORERS' AND MATERIALMEN'S LIENS.

§ 6. Contractors' Liens.

A contractor's lien for work done and materials furnished is inchoate until perfected by the filing of proper notice of lien in the office of the Clerk of the Superior Court of the proper county within six months after completion of the work, G.S. 44-38, 44-39, and by bringing action to enforce the lien within six months of the date of the filing of notice of claim of lien, G.S. 44-43, G.S. 44-48 (4). *Assurance Society v. Basnight*, 347.

§ 8. Date of Attachment of Lien and Priorities.

A contractor's lien for work done and materials furnished, when notice thereof is properly filed within six months of the completion of the structure, relates back to the time when claimant began the performance of the work and the furnishing of materials and has priority over a deed of trust executed and recorded subsequent to that date but prior to the date of the filing of the notice, the doctrine of relation back not only being established by uniform decisions but also being inherent in the statute granting such lien. G.S. 44-1. *Assurance Society v. Basnight*, 347.

§ 10. Enforcement of Lien.

Subsequent encumbrancers are not necessary but are proper parties in action to enforce contractor's lien. *Assurance Society v. Basnight*, 347.

In a materialman's suit to enforce his lien asserted in accordance with statutory requirements, the owner may allege as a defense that because of defective materials and unworkmanlike construction she had been damaged to such extent that she owes the contractor nothing, and the striking of the allegations of the answer setting up such defense is error, since the materialman's lien is based on the substitution of his claim to the rights of the contractor against the owner. *Widenhouse v. Russ*, 382.

LANDLORD AND TENANT.

§ 10. Duty to Repair.

Landlord voluntarily paying for repairs requested by sublessee without notice to lessee may not recover against lessee on covenant to repair. *Guerry v. Trust Co.*, 644.

LARCENY.

§ 6. Competency and Relevancy of Evidence.

In a prosecution for breaking and entering and larceny, the admission in evidence of search warrants reciting the theft of articles not recovered and reciting affiants' belief that they were concealed on the premises of defendants, which recitals are not in corroboration of the testimony of the affiants upon the trial, *held* prejudicial. *S. v. Kimmer*, 448.

LIBEL AND SLANDER.

§ 1. Nature and Essentials of Cause of Action in General.

Ordinarily a person may not maintain an action for a slander invited or procured by plaintiff himself or by a person acting for him, certainly when induced for the purpose of bringing suit thereon. *Taylor v. Bakery*, 660.

§ 5. Publication.

In order to form the basis of an action for slander it is necessary that the defamatory matter be communicated to some person or persons other than the person defamed. *Taylor v. Bakery*, 660.

§ 10. Pleadings.

In an action for slander allegedly uttered by defendant's route supervisor while acting in the course of his employment, the court correctly refuses defendant's motions to strike allegations of the complaint that plaintiff's discharge by the supervisor was wrongful and without justification or excuse, the defamatory matter being related to the asserted reason for plaintiff's discharge. *Taylor v. Bakery*, 660.

In an action for slander, allegations to the effect that upon plaintiff's inquiry as to the reasons he had been discharged, defendant's vice-president stated to him that he had been short in his deliveries of merchandise to customers which amounted to stealing, should be stricken on motion, there being no allegation that the defamatory words were communicated to any other person or that the vice-president authorized anyone to publish the statement made by him to plaintiff. *Ibid.*

LIS PENDENS.

§ 1. Nature and Effect of Notice in General.

A notice of *lis pendens* can be filed against real property only in an action affecting its title. *McGurk v. Moore*, 248.

Creditor *held* not entitled to declaration of constructive trust, and therefore action did not affect title to realty so as to warrant *lis pendens*. *Ibid.*

§ 6. Motions to Cancel Notice.

Wife *held* entitled to move to cancel notice on *lis pendens* on property held by entirety. *McGurk v. Moore*, 248.

A motion to cancel as unauthorized a notice of *lis pendens* admits as true the factual averments of the complaint but not its legal conclusions. *Ibid.*

MALICIOUS PROSECUTION.

§ 7. Pleadings.

In an action for malicious prosecution, plaintiff's allegations to the effect that the account of his arrest and the nature of the charges made against him were published in a newspaper having a wide circulation in the section and particularly in plaintiff's county, are proper allegations of special damage and are improperly stricken on defendant's motion. *Oberholtzer v. Huffman*, 399.

MANDAMUS.

§ 2a. Ministerial Duty.

Mandamus lies to compel a public official to perform a purely ministerial duty imposed by law, and will issue at the instance of the person who has a present, clear, legal right to insist upon performance and who is without other adequate remedy. *Hospital v. Joint Committee*, 673.

§ 2b. Discretionary Duty.

Ordinarily, *mandamus* will not lie to control the exercise of discretion, but may lie to compel a public official to act in a matter within his discretion without in any manner controlling such action. *Hospital v. Joint Committee*, 673.

Mandamus will lie to control or review discretionary acts when it is made to appear that the discretion has been abused, as where the action complained of has been arbitrary or capricious. *Ibid.*

Where the sole discretion of a public official is to determine the existence of facts imposing upon him the right and duty to perform an act, proof of the existence of such basic facts renders the act purely ministerial, and *mandamus* will lie to compel its performance. *Ibid.*

Mandamus will lie to compel the officials of a municipality to issue a building permit at the instance of an applicant who has performed all acts necessary and required by law to entitle him to its issuance. *Lee v. Walker*, 687.

§ 4. Procedure.

Mandatory temporary order may issue in action for *mandamus* when necessary to preserve *status quo*, and hearing on order to show cause why such temporary order should not issue may be had less than ten days after notice. *Hospital v. Joint Committee*, 673.

MASTER AND SERVANT.

§ 2b. Construction and Operation of Contracts of Employment.

Upon acceptance of employment the law implies a promise or covenant on the part of employee to render in good faith efficient service and not to give legal ground for dismissal or discharge during the term of the employment, but an instruction to the effect that the law implies that the employee would fulfill his obligations in this respect is erroneous. *Hagan v. Jenkins*, 425.

§ 6f. Actions for Wrongful Discharge.

In this action by an employee for wrongful discharge, plaintiff's evidence *held* not to show that he voluntarily terminated his employment or was guilty of such derelictions of duty as would justify his discharge, and nonsuit was properly overruled. *Hagan v. Jenkins*, 425.

Plaintiff was employed at a stipulated weekly salary plus additional incentive pay to accrue if he remained with the employer twelve months and planned to continue with the company thereafter. *Held:* In plaintiff's action for wrongful discharge, an instruction to the effect that plaintiff was not obligated to serve any specified time but that he would forfeit his right to incentive pay if he voluntarily quit or was discharged for inefficient service or other legal grounds, before the twelve month period, is erroneous, since the incentive pay would not accrue unless he remained in the employment for twelve months at least, and he cannot forfeit a right which had not accrued. *Ibid.*

Where the contract of employment of plaintiff is at a weekly wage with incentive pay to accrue if he remained with the company twelve months and planned to continue in its employment thereafter, it is necessary upon the trial

MASTER AND SERVANT—*Continued.*

that it be determined whether the contract was one of employment from year to year or a hiring at will from week to week with the understanding that the employee was to receive the incentive pay if he remained with the company for at least twelve months, since until this question is determined the rights of the parties cannot be correctly adjudicated. *Ibid.*

§ 14a. Common Law Liability of Employer for Injury to Employee.

Where an employer has exempted himself from the Workmen's Compensation Act, the defenses of contributory negligence, assumption of risk and that injury was due to the negligence of a fellow servant are not available to him in an employee's action against him for negligent injury. G.S. 97-14. *Muldrow v. Weinstein*, 587.

In common law actions by an employee to recover for personal injury a mere showing that the injury occurred while the employee was in the performance of the duties of his employment is insufficient, but he must show some breach of duty on the part of the employer proximately causing the injury. *Ibid.*

An employer is not an insurer of the safety of the employee but is required only to exercise the care of an ordinarily prudent man under like circumstances to provide a reasonably safe place to work and reasonably safe implements and appliances. *Ibid.*

Whether the employer is under duty to provide guard rails depends upon the nature of the work, and an employer is not required to provide guard rails around an opening when the danger is apparent and known and guard rails would interfere materially with the practical use of the premises and there is nothing to show special circumstances rendering the place or the method of work dangerous to an employee possessing average intelligence. *Ibid.*

Evidence *held* insufficient to show negligence on part of employer resulting in fall of employee into scrap metal compress. *Ibid.*

§ 40c. Workmen's Compensation—Whether Accident "Arises Out of the Employment."

Evidence tending to show that the employee was fatally injured when he attempted to move a tractor which was in his way in the performance of his duties, that there was a rule of the employer, not submitted to or approved by the Industrial Commission as a safety rule, that only employees specifically directed to do so should operate the tractors but that the employee had theretofore moved similar tractors as had also other employees in the plant, *is held* sufficient to sustain the findings of the Industrial Commission that the employee was injured in an accident arising out of and in the course of his employment. *Parsons v. Swift & Co.*, 580.

§ 40e. Causal Connection Between Accident and Disability or Death.

The rule that there must be a causal relation between the employment and the injury in order for the injury to be compensable under the Workmen's Compensation Act is fundamental and necessary to effectuate the intent of the Act to provide benefits for industrial injuries rather than to set up general health insurance benefits. *Duncan v. Charlotte*, 86.

§ 40f. Workmen's Compensation Act—Decreases.

The 1925 Amendment to the Workmen's Compensation Act which provides for compensation for occupational diseases does not obviate the necessity of claimant showing that the disease resulted from the employment. Indeed, the definition of an occupational disease is one which is the natural result of the particular employment. *Duncan v. Charlotte*, 86.

MASTER AND SERVANT—*Continued.*

Heart disease is not ordinarily considered either an occupational disease or as one arising out of and in the course of the employment, and recovery therefor must be based upon evidence that it resulted from some unusual exertion or strain undergone in the discharge of the duties of the employment. G.S. 97-2 (f). *Ibid.*

Act providing that as to firemen heart disease should be compensable regardless of absence of causal connection between duties and the attack, *held* unconstitutional. *Ibid.*

The provisions of the Workmen's Compensation Act providing for compensation only for injuries resulting by accident arising out of and in the course of the employment has been extended to provide compensation for those occupational diseases which are enumerated in the Act. G.S. 97-2 (f), G.S. 97-52, G.S. 97-53. *Henry v. Leather Co.*, 126.

An occupational disease is a disease caused by a series of events of a similar or like nature occurring regularly or at frequent intervals over an extended period of time in the discharge of the duties of the employment. *Ibid.*

Tenosynovitis attributable to repeated strain or stress on the extensor tendons of claimant's arms incident to the performance of the duties of his employment *is held* "caused by trauma in employment" and is an occupational disease compensable under the provisions of G.S. 97-53, since "trauma" in its technical sense is not limited to injuries resulting from external force or violence. *Ibid.*

§ 41. Compensation Act—Right to Maintain Action Against Third Person Tort-Feasor.

An employee riding in a car driven by the president and executive officer of the employer on a business trip in the course of their employment may not hold the driver liable as a third person tort-feasor in an action at common law for negligence resulting in an unintentional injury in a collision, since such driver is a person conducting the business of the employer within the purview of the immunity clause of G.S. 97-9. *Warner v. Leder*, 727.

While an employer or an employee conducting the business of the employer may be held liable at common law where injury to claimant employee is willfully and wantonly inflicted, claimant employee may not assert liability under this exception to the general rule when he admits that his injury was not intentionally inflicted. *Ibid.*

While an employer or an employee conducting the business of the employer may be held liable at common law where injury to claimant employee is willfully and wantonly inflicted, claimant employee may not assert liability under this exception to the general rule when he has applied for and received medical expenses and compensation in accordance with the provisions of the North Carolina Workmen's Compensation Act. *Ibid.*

§ 43. Workmen's Compensation Act—Notice and Filing of Claim.

Evidence *held* to sustain finding that claimant was first advised he had silicosis shortly before filing of claim. *Autry v. Mica Co.*, 400.

Where claimant is first advised that he had silicosis by competent medical authority some two and one-half years after he quit his employment because of disability, and he files claim for compensation with his employer a month after having been so advised, claimant's claim is filed in apt time. *Ibid.*

MASTER AND SERVANT—*Continued.*

§ 47. Jurisdiction of Industrial Commission.

The retention of jurisdiction by the Industrial Commission for a period of 300 weeks from the date of the accident for the purpose of showing decreased earning capacity due to permanent partial disability, is error. *Hill v. DuBose,* 446.

§ 53b (1). Workmen's Compensation Act—Amount of Recovery for Injury—Disability.

Compensation for partial permanent disability should be based upon the loss of wage-earning power rather than the amount actually earned by the employee after maximum recovery from the injury, and where it is apparent that the recovery was based upon the amount actually earned, the cause will be remanded. *Hill v. DuBose,* 446.

§ 53d. Workmen's Compensation Act—Persons Entitled to Payment of Award.

Where the employee is survived only by his mother and his minor brother, his mother is his sole next of kin within the meaning of G.S. 97-40. *Parsons v. Swift & Co.,* 580.

Where the employee's mother and minor brother are partial dependents, the mother being the sole next of kin as defined in G.S. 97-40, the mother and minor brother may not elect to take as next of kin rather than as partial dependents, since both are not next of kin, and it is necessary under the provisions of G.S. 97-38 that all the partial dependents be next of kin in order to be entitled to make the election. *Ibid.*

§ 55d. Workmen's Compensation Act—Appeal and Review.

Where the record fails to show that the Superior Court ruled on any of the specific exceptions made by appellant to the findings of the Industrial Commission and fails to show any exception to the failure of the judge to make such specific rulings, the exceptions taken on appeal from the Industrial Commission are not presented on the appeal to the Supreme Court notwithstanding that such exceptions are listed following the appeal entries from the judgment of the Superior Court. *Parsons v. Swift & Co.,* 580.

An exception to the ruling of the Superior Court sustaining the findings of fact and conclusions of law of the Industrial Commission is a broadside exception, and is insufficient to bring up for review the findings of fact or the evidence upon which they are based. *Ibid.*

Exceptions to the affirmance of the decision and award of the Industrial Commission and to the judgment and signing thereof constitute no more than an exception to the signing of the judgment and raise only the question of whether the facts found by the Industrial Commission and approved by the judge of the Superior Court are sufficient to support the judgment. *Ibid.*

§ 58. Employing Unit Within Meaning of Employment Security Act.

What is an employing unit within the meaning of the Employment Security Act is not predicated upon the common law definition of master and servant or employer and independent contractor, but is determinable by the definitions set out in the statute. *Employment Security Com. v. Monsees,* 69.

Where the owner of sawmills contracts with the owner of timber to deliver to him lumber cut in accordance with specifications furnished, and thereafter contracts with individuals to operate the sawmills and other individuals as loggers upon an agreed price per thousand board feet, which individuals employ

MASTER AND SERVANT—*Continued.*

others to assist them in their work to the knowledge of the owner of the sawmills, who testifies that cutting and delivering lumber under the contracts is a part of his usual business, *held:* the sawmill owner is an employing unit within the meaning of the Employment Security Act. G.S. 96-8 (e), prior to the amendment of Session Laws of 1949. *Ibid.*

Under a contract by which consignor agrees to deliver such quantity of its products as consignee might desire for sale at consignee's place of business at the price stipulated by the consignor, but which does not require consignee to devote all of his efforts to the sale of consignor's products or to sell any specific amount thereof, nor restrict consignee's right to sell other products which are noncompetitive with the products of consignor, *held:* the consignee is engaged in an individual business of his own free from control by the consignor and conducted outside consignor's places of business, and therefore the consignee, having in his employ less than eight individuals, cannot be held an employing unit as an independent contractor under the consignor. G.S. 96-8 (f) (8) prior to its repeal 18 March, 1947. *Employment Security Com. v. Tinnin,* 75.

§ 60. Right to Unemployment Compensation.

Findings supported by evidence that the unemployment of claimants-employees for the period in question was due to vacation and that they were not available for work during such period supports order denying claimants compensation for the time in question. *In re Employment Security Com.,* 651.

§ 62. Appeals from Employment Security Commission.

The findings of fact of the Employment Security Commission are binding upon appeal when supported by competent evidence. G.S. 96-4 (m). *Employment Security Com. v. Monsees,* 69; *In re Employment Security Com.,* 651.

The requirement of G.S. 96-15 (i) that the party appealing from the Employment Security Commission file statement of grounds upon which review is sought and the particulars in which it is claimed the Commission was in error is a condition precedent to the right of appeal, and failure to file such statement within the time allowed by the statute for appeal requires dismissal. *In re Employment Security Com.,* 651.

MONEY RECEIVED.

§ 1. Nature and Essentials of Right of Action.

The voluntary payment of money by a person who has full knowledge of all the facts cannot be recovered. *Guerry v. Trust Co.,* 644.

MORTGAGES.

§ 16b. Right to Redeem—Limitations.

Wife's right to redeem dower right from mortgagee in possession is not barred until ten years after dower becomes consummate, notwithstanding husband's right is barred. *Gay v. Exum & Co.,* 378.

§ 17c. Duty of Mortgagee in Possession to Account for Rents and Profits.

Where the widow asserts her dower right in the equity of redemption in lands in possession of the mortgagee, she is entitled to an accounting for the rents and profits from the death of her husband up to the assignment of dower, but an accounting for the period prior to her husband's death is competent

MORTGAGES—*Continued.*

solely for the purpose of ascertaining the value of the equity of redemption to which her dower right attaches. *Gay v. Exum & Co.*, 378.

Accounting for rents and profits cannot be demanded until foreclosure is set aside. *Thompson v. Ins. Co.*, 434.

§ 35b. Who May Purchase at Sale—Trustees.

Purchase by *cestui* in sale conducted in effect by himself as trustee renders foreclosure voidable and not void, and may be avoided only by mortgagor or his heirs, and not his executor. *Thompson v. Ins. Co.*, 434.

§ 39e (2). Parties in Suit to Set Aside Foreclosure.

Right to attack foreclosure for that *cestui* bid in property at own sale as trustee accrues only to mortgagor or his heirs. *Thompson v. Ins. Co.*, 434.

MUNICIPAL CORPORATIONS.

§ 5. Powers and Functions—Legislative Control.

The General Assembly has authority to create municipal corporations, N. C. Constitution, Art. VIII, sec. 4, and municipalities created by it have only such powers as are expressly conferred by statute and those necessarily implied therefrom, which powers the General Assembly may enlarge, diminish or altogether withdraw at its will. *Grimesland v. Washington*, 117.

General Assembly may grant municipality corporate or private powers for a public purpose and for the public benefit. *Ibid.*

§ 7. Governmental Powers—Taxation.

Under the provisions of G.S. 20-97 (a) (b) a municipality is limited to a total annual levy of $16.00 on each taxicab operated within its limits, which limitation is not affected by the later enacted provision of G.S. 160-200 (36a) authorizing it to grant franchises to taxicab operators on such terms as it deems advisable, it being evident that the word "terms" as used in the statute refers to regulations in regard to service rather than to fees or taxes, and this result is consonant with legislative policy as gathered from the history and statutory changes. *Cab Co. v. Charlotte*, 572.

§ 8a. Private Powers in General.

The General Assembly may confer not only governmental powers upon a municipality but may also grant it corporate powers for a public purpose and for the public benefit; but in the exercise of such corporate powers a municipality is liable in contract and in tort as in case of private corporations and may be made subject to regulations and supervisions imposed by the general law upon other corporations so engaged, but the legislative will to make the municipality subject to such regulations must be expressed and will not be inferred. *Grimesland v. Washington*, 117.

§ 8b (2). Public Utilities Outside Limits.

The power of a municipality to own and operate transmission lines for the sale of current to consumers beyond its corporate limits confers no exclusive franchise upon it and it is not entitled to enjoin lawful competition within the territory outside its limits served by it, there being no contention that the competing line caused physical interference with its lines or created any hazard thereto. *Grimesland v. Washington*, 117.

MUNICIPAL CORPORATIONS—*Continued.*

The General Assembly has authority under the Constitution to authorize a municipality to build and operate lines for the transmission of electric current beyond its corporate boundaries within reasonable limits. *Ibid.*

§ 14a. Defects or Obstructions in Streets.

A contractor excavating a ditch along a city street with the sanction and permission of the governing board of the municipality is under the same legal duty to the traveling public as the municipality would owe if it were in direct charge of the work, which is the duty to exercise due care commensurate with the surrounding dangers and circumstances to warn travelers of the existence of the excavation and otherwise to protect them against injury therefrom. *Presley v. Allen & Co.*, 181.

Where the physical facts are sufficient to give the traveling public notice of a work project along a street, the usual rule that a traveler may assume a street to be in safe condition has no application in the use of that part of the street left open to traffic. *Ibid.*

Barriers or guard rails at an excavation along a street are solely for the purpose of warning the traveling public and it is not required that they be sufficient to repel vehicles that may deviate from the traveled portion of the street into the zone of danger, or even that they be erected in the daytime when the excavation is plainly visible. *Ibid.*

Where plaintiff motorist's own testimony is to the effect that he had knowledge of an excavation along a municipal street and the conditions extant, he may not maintain that the contractor was negligent in failing to provide adequate signs and barricades warning of the danger, since he had knowledge thereof and no one needs notice of what he already knows. *Ibid.*

Evidence *held* to show contributory negligence as matter of law on part of motorist skidding into excavation. *Ibid.*

Defendant municipality dug a ditch entirely across the street leaving loose dirt piled along the eastern edge of the excavation to a height of from one and one-half to five feet. No barriers or lights were placed along the ditch. Plaintiff, traveling westward after dark, drove his car over the loose dirt and into the ditch. *Held:* Plaintiff was guilty of contributory negligence as a matter of law. *Price v. Monroe*, 666.

Plaintiffs, who were passengers in a car, were injured when the driver drove the car after dark over loose dirt and into a ditch. The municipality had left the loose dirt from the excavation piled along the side of the ditch, but had placed no barriers or lights along the excavation. *Held:* Probable injury resulting from the absence of barriers or lights could have been reasonably foreseen, and therefore the negligence of the city in failing to maintain proper warnings is not insulated by the negligence of the driver. *Ibid.*

§ 15a. Appropriation of Private Water and Sewer Systems.

The rights of owners of water and sewer systems in a subdivision to compensation upon the taking over of the systems consequent to the annexation of the territory by a municipality must be determined in accordance with the facts of each particular case. *Spaugh v. Winston-Salem*, 708.

Under the facts of this case, owners of subdivision *held* not entitled to compensation for water and sewer systems taken over by city. *Ibid.*

§ 25b. Control and Regulation of Streets.

In the absence of evidence to the contrary, it will be assumed that an excavation along a street for the purpose of placing underground telephone wires

MUNICIPAL CORPORATIONS—*Continued.*

and cables was made with the sanction and permission of the municipal authorities. *Presley v. Allen & Co.*, 181.

It will be presumed that traffic signs erected along street were erected pursuant to competent authority. *Johnson v. Bell*, 522.

A municipality has the right to determine where its streets and alleys shall be and may not be forced to maintain a street or alley by dedication. *Lee v. Walker*, 687.

§ 36. Nature and Extent of Police Power in General.

Knowledge of a municipal ordinance relating to water and sewer systems is presumed within one mile of its corporate limits. *Spaugh v. Winston-Salem*, 708.

§ 37. Building Permits.

Mandamus will lie to compel issuance of building permit at instance of applicant who has complied with all conditions for its issuance. *Lee v. Walker*, 687.

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence.

In order for a person injured in a fall down an elevator shaft to recover against the company under contractual duty to the owner of the building to keep the safety devices on the elevator in reasonably safe condition and in proper repair, the injured person must show a negligent breach of the legal duty arising out of the contract and that such breach of duty was the proximate cause or one of the proximate causes of the injury. *Jones v. Elevator Co.*, 512.

§ 2. Sudden Emergency.

Where sudden emergency is created by the negligence of defendant, plaintiff is not required to choose the wisest conduct, but only to choose such conduct as a person of ordinary care and prudence, similarly situated, would have chosen. *Powell v. Lloyd*, 481.

§ 3½. Res Ipsa Loquitur.

The doctrine of *res ipsa loquitur* does not apply in the State of Virginia to a case of an unexplained accident which may be attributable to one of several causes, some of which are not under the control of the defendant. *Jones v. Elevator Co.*, 512.

§ 4b. Dangerous Conditions and Attractive Nuisances.

Ponds, pools, lakes, streams, reservoirs, and other bodies of water do not *per se* constitute attractive nuisances, and while the owner of land upon which there is an artificial body of water may be guilty of negligence in failing to provide reasonable safeguards against injuries to children when he has notice, actual or constructive, that children of tender years frequent the place, no such duty arises in regard to a branch or stream flowing in its natural state. *Fitch v. Selwyn Village*, 632.

§ 4f. Liability of Proprietor for Fall of Patron.

The proprietor of a dance hall is not an insurer of the safety of its patrons and invitees, but is under legal duty to exercise ordinary care to keep its premises, and all parts thereof to which persons lawfully present may go, in a safe condition for the use for which they are designed and intended, and to give

NEGLIGENCE—*Continued.*

warning of hidden dangers and unsafe conditions in so far as they can be ascertained by reasonable inspection and supervision. *Revis v. Clark,* 158.

The duty of a proprietor to warn invitees of dangerous conditions or instrumentalities upon the premises is based upon the proprietor's superior knowledge concerning them, and it is only when such dangers are known to proprietor, or should be known to him in the exercise of due care, that the duty to warn obtains. *Ibid.*

Evidence which fails to show that proprietor knew or should have known of danger is insufficient to withstand nonsuit. *Ibid.*

§ 6. Concurring Negligence.

Where the acts or omissions of persons operating independently of each other join and concur in proximately producing the injury complained of, even though originating from separate and distinct sources, the author of each is liable for the resulting injury, and action may be brought against any one or all as joint tort-feasors. *Barber v. Wooten,* 107.

Drivers successively hitting plaintiff's car may be liable for concurring negligence. *Ibid. A fortiori,* when accidents cause death. *McHorney v. Wooten,* 110.

§ 7. Intervening Negligence.

An independent intervening cause is one which could not have been reasonably anticipated and which breaks the causal connection between the primary negligence and the injury, but if the intervening act might have been anticipated in the natural and ordinary course of things, including those acts which constitute a normal response to the stimulus of the situation created by the primary negligence, such intervening act does not insulate the primary negligence, even though it be a contributing cause of the injury. *Hall v. Coble Dairies,* 206.

If the intervening act is of such character that it could have been reasonably foreseen, it does not break the sequence of events put in motion by the primary negligence, and the primary negligence remains a proximate cause of the injury. *Price v. Monroe,* 666.

§ 9. Proximate Cause—Anticipation of Injury.

Foreseeability is essential element of proximate cause. *Deese v. Light Co.,* 558.

Ordinarily, foreseeability is an essential element of proximate cause, but this does not require that the tort-feasor be able to anticipate the particular consequences ultimately resulting from his negligence, but only that by the exercise of reasonable care he might have foreseen consequences of a generally injurious nature, and that the injuries actually sustained be such as in ordinary circumstances were likely to have ensued. *Hall v. Coble Dairies,* 206.

Party is not required to anticipate negligence on part of others. *Johnson v. Bell,* 522.

§ 15. Parties.

Where injured party sues owner of car in his individual capacity, such defendant cannot compel plaintiff to sue him also in his capacity as administrator of driver of the car. *Evans v. Morrow,* 600.

§ 16. Pleadings in Negligence Actions.

Contributory negligence must be pleaded by alleging facts to which the law attaches contributory negligence as a conclusion. *Bruce v. Flying Service,* 79.

NEGLIGENCE—*Continued.*

§ 17. Burden of Proof in Negligence Actions.

Burden of proving contributory negligence is on defendant. *Bruce v. Flying Service*, 79; *Powell v. Lloyd*, 481.

§ 19b (1). Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

Evidence *held* insufficient for jury in this action to recover for fall down elevator shaft, the doctrine of *res ipsa loquitur* not being applicable. *Jones v. Elevator Co.*, 512.

§ 19c. Nonsuit for Contributory Negligence. (In auto accident cases see Automobiles § 18h (3).)

Nonsuit is properly entered when plaintiff by his own testimony makes out a clear case of contributory negligence, and thus proves himself out of court. *Sawyer v. R. R.*, 164; *Presley v. Allen & Co.*, 181.

Nonsuit on the ground of contributory negligence cannot be granted unless plaintiff's own evidence, taken in the light most favorable to him, establishes contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. *Powell v. Lloyd*, 481; *Price v. Monroe*, 666.

Nonsuit on the ground of contributory negligence may be allowed when, and only when, no other inference is reasonably deducible from the evidence. *Fowler v. Atlantic Co.*, 542; *Donlop v. Snyder*, 627.

Evidence must be considered in light most favorable to plaintiff. *Donlop v. Snyder*, 627.

Nonsuit for contributory negligence may not be allowed even if a phase of plaintiff's own evidence tends to establish this defense as a reasonable inference, when such evidence, construed contextually with plaintiff's other evidence, supports the opposite conclusion with equal logic. *Ibid.*

§ 21. Issues.

A defendant relying on contributory negligence must prove facts from which the inference of contributory negligence may be drawn by men of ordinary reason, and evidence which raises a mere conjecture is insufficient. *Bruce v. Flying Service*, 79.

In an action to recover for the death of a gratuitous passenger in an airplane upon allegations that the fatal accident was caused by negligence of the pilot, defendant's allegations that the fatal maneuver was inherently dangerous and that intestate acquiesced in the operation of the plane cannot justify the submission of the issue of contributory negligence to the jury when all the evidence is to the effect that the maneuver was not dangerous when properly done and that under the circumstances even an experienced pilot should not have attempted, while a passenger, to have interfered with the controls during the maneuver by the pilot in command. *Ibid.*

PARENT AND CHILD.

§ 5. Liability for Support of Child. (Bastardy proceedings see Bastards.)

Father is under primary legal duty to support child, and mother's promise to maintain child of marriage will support father's agreement to pay her stipulated periodic sums. *Campbell v. Campbell*, 188.

PARTIES.

§ 3. Necessary Parties Defendant.

Necessary parties are those whose rights must be ascertained and settled before the rights of the parties to the suit can be determined. *Assurance Society v. Basnight*, 347.

Holders of judgment liens on undivided interest of tenant in common are not necessary parties to partition proceedings. *Washburn v. Washburn*, 370.

§ 4. Proper Parties Defendant.

Subsequent encumbrancers are not necessary but are proper parties in action to enforce contractor's lien. *Assurance Society v. Basnight*, 347.

Holders of judgment liens on undivided interest of tenant in common are proper parties to partition proceedings. *Washburn v. Washburn*, 370.

§ 7. Interveners.

Court is not required to determine validity of claim before permitting claimant to intervene, and order permitting intervention is interlocutory and not appealable. *Raleigh v. Edwards*, 528.

PARTITION.

§ 1a. Right to Partition.

A vested remainderman in real estate as a joint tenant or tenant in common is entitled to partition of the land provided partition or sale for partition does not interfere with the possession of the life tenants during the existence of their estates. G.S. 46-23. *Bunting v. Cobb*, 132.

A child of one life tenant in common who takes vested remainder in fee upon the death of her parent is entitled to partition as against the surviving life tenants and the contingent remaindermen, and the right to such partition is not affected by the fact that she might later inherit the fee in a part of the remainder in which other life tenants hold their respective life estates. *Ibid.*

§ 4a. Parties and Procedure.

Holders of judgment lien on undivided interest of tenant in common are proper but not necessary parties to partition proceedings. *Washburn v. Washburn*, 370.

§ 4e. Distribution of Proceeds of Sale.

Holders of judgment liens on the undivided interest of a tenant in common who are not made parties to the proceedings for sale for partition may not interfere after final decree of sale to have the debtor's share of the proceeds paid to them and may not maintain that the officer making the sale committed a wrong against them by distributing the proceeds of sale in conformity with the decree without applying their debtor's share to the payment of the judgment liens. *Washburn v. Washburn*, 370.

§ 4f. Operation and Effect of Judgment for Partition.

Grantor conveyed the land in question to his daughter and her husband for life and to her heirs "during the term of the natural life of her heir or heirs." Grantor died intestate, and in later partition proceedings the identical land conveyed to the daughter for life was allotted to her as her entire share. *Held:* The judgment in the partition proceedings, though not passing title, vested in severalty the title to each of the tracts to the respective tenants and operates as an estoppel as to any reversion, and upon the death of the daughter and her

PARTITION—*Continued.*

husband intestate without having disposed of any interest in the land, their children take a fee simple. *Southerland v. Potts*, 268.

The holders of judgment liens on the undivided interest of a tenant in common, while proper parties, are not necessary parties to a proceeding to partition the land by sale, but when not made parties the purchaser at the partition sale takes the land subject to the judgment liens which are not affected in any degree by the partition sale. *Washburn v. Washburn*, 370.

PARTNERSHIP.

§ 1a. Creation and Existence.

Where an agreement is in writing, whether the parties thereto are partners depends upon its legal effect under the provisions of the uniform partnership act. *McGurk v. Moore*, 248.

An agreement under which one party makes loans and advances of money to the other for use in a business conducted by such other, with provision of equal division of the profits between the parties, with further provision that the first party might withdraw all advances upon notice for the purpose of liquidation and that after payment of such advances and the payment of all expenses, the net profits remaining should be equally divided, *is held* not to create a partnership, since the indispensable requisite of co-ownership is lacking, G.S. 59-36 (1), G.S. 59-37, and the relationship of the parties is simply that of creditor and debtor. *Ibid.*

§ 4. Rights and Remedies of Partners as Between Themselves.

When one partner wrongfully takes partnership funds and uses them to buy or improve property, his co-partners may compel him to account to the partnership for the funds and enforce the resulting claim as an equitable lien on the property, or may charge the property with a constructive trust in favor of the partnership to the extent of the partnership funds used in its purchase or improvement. *McGurk v. Moore*, 248.

PHYSICIANS AND SURGEONS.

§ 13. Compensation and Remedies of Physician or Surgeon.

Evidence to the effect that the patient's son consulted plaintiff surgeon in regard to an operation upon her, together with testimony by plaintiff without objection that the son said he was acting as agent for both his mother and father, *is held* sufficient to warrant the jury in finding the issue of agency against the mother, and overrule her motion to nonsuit in plaintiff's action to recover the balance due for professional services in performing the operation. *Lambros v. Zrakas*, 287.

§ 14. Malpractice—Duties of Physician or Surgeon in General.

A physician or surgeon must (1) possess the degree of learning, skill, and ability which others similarly situated possess; (2) must exert his best judgment in the treatment and care of his patient; (3) and must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case. *Jackson v. Sanitarium*, 222.

§ 16. Application and Use of Knowledge and Skill.

Where plaintiff, in an action for wrongful death resulting from alleged malpractice, relies upon the failure of defendant surgeon to exercise reasonable care and diligence in the application of his knowledge and skill, plaintiff must

PHYSICIANS AND SURGEONS—*Continued.*

not only show that defendant was negligent in this respect but also that such negligence was the proximate cause, or one of the proximate causes, of the death of his intestate. *Jackson v. Sanitarium*, 222.

Ordinarily the standard of care required of a physician or surgeon can be established only by expert testimony, but when such standard is established by expert testimony, nonexpert witnesses may testify in most cases as to a departure therefrom. *Ibid.*

Where the evidence is to the effect that a person allergic to ether dies from its use almost immediately, and that in the instant case plaintiff's intestate lived approximately twenty hours after ether was administered, the question of whether intestate died as the result of an abnormal reaction to the ether is eliminated. *Ibid.*

In proper instances the jury may determine question of proximate cause from facts and circumstances without aid of expert testimony. *Ibid.*

PLEADINGS.

§ 3a. Complaint—Statement of Cause of Action in General.

The complaint must contain a plain and concise statement of every material, essential, and ultimate fact which constitutes the cause of action without unnecessary repetition and with each material allegation distinctly numbered, but it should not contain allegations of evidentiary facts tending to establish the ultimate and issuable facts. *Guy v. Baer*, 276.

Allegations of a first cause of action may not be incorporated into that part of the complaint stating the second cause of action merely by referring to the number of the particular paragraphs of the first cause of action considered pertinent. *Ibid.*

§ 5. Complaint—Prayer for Relief.

The relief to which plaintiff is entitled is to be determined by the allegations of the complaint and not by the specific relief for which he prays. *Lamb v. Staples*, 166.

§ 10. Cross-Actions.

In suit by bus passengers to recover for injuries in a bus-car collision, bus company may not join administratrix of driver of car as joint tort-feasor in face of consent judgment against bus company in favor of administratrix in action in which issue of contributory negligence of intestate was raised by the pleadings. *Herring v. Coach Co.*, 51.

Right of plaintiff to sue defendants as joint tort-feasors see *Barber v. Wooten*, 107.

Right of defendant to maintain cross-action against third person on allegation that negligence of such third person, if not sole proximate cause, was contributing cause see *Read v. Roofing Co.*, 273.

In action between executor and assignee of life policy pledged as additional security, executor may not set up cross-action on allegations that pledgee's debt was paid by receipt of rents and profits from land after wrongful foreclosure of mortgage primarily securing the debt, since there is want of mutuality of parties and want of sufficient connection with plaintiff's cause. *Thompson v. Ins. Co.*, 434.

What may be set up as a cross-action, G.S. 1-137 (1), is subject to the same rules governing the joinder of causes, G.S. 1-123 (1), and it is required that the

PLEADINGS—*Continued.*

matters alleged in the cross-action be so related to those alleged in the complaint that an adjustment of both is necessary to a full determination of the controversy, and be so related that the parties must be assumed to have had the matters alleged in the cross-action in view when they dealt wtih each other, and further that there be a mutuality of parties. *Ibid.*

§ 15. Office and Effect of Demurrer.

On demurrer the case will be taken as made by the complaint. *Barber v. Wooten,* 107.

Upon demurrer the facts alleged in the complaint will be taken as true. *Muse v. Morrison,* 195; *Hall v. Coble Dairies,* 206; *Gaines v. Mfg. Co.,* 331; *Clinard v. Lambeth,* 410.

Sufficiency of new matter alleged in answer to constitute defense may be tested by demurrer. *Williams v. Hospital Asso.,* 536.

The sufficiency of the answer to state a defense may be raised by demurrer. *Guerry v. Trust Co.,* 644.

§ 18c. Defects Appearing on Face of Pleading and "Speaking Demurrers."

Matter not appearing on face of pleading is not presented by demurrer. *Barber v. Wooten,* 107.

§ 19b. Demurrer for Misjoinder of Parties and Causes.

Where allegations are sufficient to state cause against defendants as joint tort-feasors, demurrer for misjoinder is properly overruled. *Barber v. Wooten,* 107.

A complaint alleging that defendants, the executive secretary of the State Board of Examiners of Plumbing and Heating Contractors, licensees of the Board, the town clerk and members of the board of aldermen, conspired together to drive plaintiff out of his work, trade and business, and alleging numerous wrongful acts maliciously and unlawfully done by certain of the alleged conspirators in furtherance of the common design, resulting in damage to plaintiff, *is held* not subject to demurrer for misjoinder of parties and causes. *Muse v. Morrison,* 196.

§ 19c. Demurrer for Failure of Pleading to State Cause of Action or Defense.

A demurrer admits the truth of every material fact properly alleged. *Hall v. Coble Dairies,* 206; *Gaines v. Mfg. Co.,* 331; *Gaines v. Mfg. Co.,* 340.

Upon demurrer the complaint will be liberally construed in favor of the pleader. *Hall v. Coble Dairies,* 206; *Hospital v. Joint Committee,* 673.

A pleading will be liberally construed upon demurrer, and the pleading will be upheld if in any portion or to any extent it presents facts sufficient to constitute a cause of action. *Read v. Roofing Co.,* 274; *Skinner v. Gaither Corp.,* 385; *Clinard v. Lambeth,* 410.

A pleading will be liberally construed upon demurrer, giving the pleader every reasonable intendment, and the demurrer will be overruled if the pleading to any extent or in any portion presents facts sufficient to constitute a cause of action. *Gaines v. Mfg. Co.,* 331.

Where a complaint alleges several causes of action, a general demurrer must be overruled if any one of the causes of action is sufficiently stated. *Deaton v. Deaton,* 538.

Upon demurrer to the answer, its allegations will be liberally construed, admitting for the purpose of truth all allegations of fact as well as all relevant

PLEADINGS—*Continued.*

inferences of fact reasonably deducible therefrom, and the demurrer must be overruled if the answer is sufficient in any part or to any extent to state facts constituting one or more defenses. G.S. 1-151. *Guerry v. Trust Co.*, 644.

§ 23. Amendment After Decision on Appeal.

The court rendered judgment under agreement of the parties that the court should find the facts from the evidence and stipulations of the parties. On appeal the judgment was modified and the cause remanded. *Held:* After remand the cause was pending in the Superior Court, and the Superior Court had authority to permit amendment within the purview of G.S. 1-163, and the refusal of the court to permit amendment on the ground that it was without authority to entertain the motion will be reversed on appeal. *Goldston Bros. v. Newkirk*, 279.

§ 24c. Proof Without Allegation.

Evidence in support of defense not supported by allegation is incompetent. *Cuthrell v. Ins. Co.*, 137.

Evidence in support of matter not alleged in pleading is incompetent as being irrelevant. *Freeman v. Ponder*, 294.

A party is precluded from offering proof in direct conflict with his positive allegation. *Ibid.*

§ 31. Motions to Strike.

In an action against a bus company, consent judgment was entered in favor of the administratrix of the driver of the car involved in the collision, in which action the issue of intestate's contributory negligence was raised by the pleadings. Consent judgments were also entered in her favor individually and as next friend of a passenger in the car. In a later action involving the same collision instituted by passengers in the bus against the bus company, it sought to join the administratrix on the theory that her intestate was a joint tort-feasor. *Held:* The administratrix was entitled to plead the consent judgment in her favor as administratrix in bar to the right of contribution, since it adjudicated the question of intestate's contributing negligence as between the parties, but the other consent judgments have no proper relation to the bus passengers' action, and the administratrix' allegations setting them up should have been stricken on motion. *Herring v. Coach Co.*, 51.

Allegations of facts and circumstances which allegedly induced one of defendants to approach plaintiffs for the purpose of making the agreement attacked are properly stricken on motion for irrelevancy, the cause being founded solely on transactions subsequent to that time. *Guy v. Baer*, 276.

Where, in an action attacking the validity of contracts and to recover money paid thereunder, the complaint states one cause of action based upon delivery of the contracts in breach of escrow agreement, and a second cause of action based upon fraud in obtaining the execution of the contracts, motion to strike the allegations constituting the second cause of action on the ground that they are repetitious is properly denied. *Ibid.*

While the insufficiency of the complaint to state a cause of action must be raised by demurrer, where certain paragraphs thereof are precluded by prior judgment between the parties, objection to such portions may be raised by motion to strike, since in such case they are "irrelevant" for the purpose for which they were inserted. *Miller v. Bank*, 309.

Motion to strike owner's defense that she owed nothing to contractor improperly allowed in materialman's suit to enforce lien. *Widenhouse v. Russ*, 382.

PLEADINGS—*Continued.*

Allowance of motion to strike allegations of special damages *held* error. *Oberholtzer v. Huffman*, 399.

Matters alleged in the answer which are incompetent as a cross action or as an offset to plaintiff's cause are properly stricken upon motion for irrelevancy. *Thompson v. Ins. Co.*, 434.

Sufficiency of new matter alleged in answer to constitute defense may be tested by motion to strike. *Williams v. Hospital Asso.*, 536.

Allegations that defendant is charitable hospital *held* proper in its answer to complaint charging negligence. *Ibid.*

In this action for slander, allegations of defendant's financial worth and allegations that plaintiff's discharge was wrongful were proper, but allegations of unpublished slander should have been stricken on motion. *Taylor v. Bakery*, 660.

PRINCIPAL AND AGENT.

§ 13c. Relevancy and Competency of Evidence of Agency.

When agent's declaration of agency is not objected to, it is properly considered by jury. *Lambros v. Zrakas*, 287.

PROCESS.

§ 8a. Process Agent.

Service of process on a foreign unincorporated labor union by service on an individual named its "agent" is a nullity, since it is not accordant with the manner prescribed by statute for service of process upon such association. *Stafford v. Wood*, 622.

§ 8d. "Doing Business" in This State for Purpose of Service on Secretary of State.

A finding that a foreign, unincorporated labor union had an affiliated local union in a county of this State, without any finding as to the connection between the nonresident union and the resident local union, is insufficient to sustain the conclusion that the nonresident union was doing business in this State by performing acts for which it was formed so as to justify the service of process on it under G.S. 1-97 (6). *Stafford v. Wood*, 622.

PUBLIC LANDS.

§ 1. Definition.

The word "reservation" as descriptive of land has the definite and specific meaning of public land reserved for some special use, such as parks, forests, Indian lands, etc. *S. v. Gibbs*, 259.

PUBLIC OFFICERS.

§ 8. Civil Liabilities to Individuals.

Immunity of a public officer to civil liability to individual in discharge of public duty does not extend to mere employee in performance of a mechanical task, such as driving school bus. *Hansley v. Tilton*, 3.

RAILROADS.

§ 4. Accidents at Grade Crossings.

Evidence tending to show that forty-five feet from the tracks at a grade crossing the headlight of a train approaching from the right could be seen several hundred feet, with greater vision up the track as one came closer to the rails, and that intestate stopped three or four feet from the first rail and then drove upon the track and was hit by an engine a second thereafter, *is held* to show contributory negligence on the part of intestate constituting a proximate cause of the accident as a matter of law, and nonsuit was proper. *Herndon v. R. R.*, 9.

Plaintiff's evidence *held* to show, as a matter of law, contributory negligence constituting a proximate cause of the crossing accident in suit. *McRoy & Co. v. R. R.*, 672.

§ 5. Injuries to Person on or Near Track.

Plaintiff's testimony was to the effect that he saw the headlight of defendant's train backing toward him, that he knew the train would continue on the sidetrack or turn onto a spur track, that he acted on an assumption that the train would turn aside on the spur and placed his hand on a boxcar or got between boxcars standing on the sidetrack, and was injured when the train crashed into them. *Held:* Plaintiff's testimony clearly establishes contributory negligence barring recovery notwithstanding that there was no light or trainmen on the rear of the backing train. *Sawyer v. R. R.*, 164.

Where a railroad company rents to its employees houses along its right of way a short distance from its tracks, with knowledge that the employees' families include small children, such children are not trespassers while playing around the premises, and the railroad company is under duty to exercise reasonable care and diligence to keep a proper and sufficient lookout along its tracks in front of these residences so as to avoid injuring the children of its tenants. *Tippite v. R. R.*, 641.

Evidence *held* sufficient to be submitted to jury on question of defendant's failure to keep proper lookout resulting in death of child on track. *Ibid.*

RECEIVERS.

§ 8. Proceedings and Appointment of Receiver.

An order appointing a receiver by a court of competent jurisdiction in a proceeding regular upon its face may not be interfered with by order of another Superior Court judge, and an independent action instituted to have the receivership proceeding declared void is properly dismissed as being a collateral attack upon the order of receivership. *Hall v. Shippers Express*, 38.

The fact that the debtor admits the allegations of the complaint and joins in the prayer for the appointment of a receiver, if done in good faith, is insufficient in itself to show fraud or collusion and does not deprive the proceeding of its adversary character. *Ibid.*

Appointment of receiver may not be collaterally attacked on ground that same attorney represented both parties, the proper remedy being by motion in the cause. *Ibid.*

§ 12c. Priorities of Payment of Creditors.

Claim of United States for income taxes *held* to have priority over employees' lien for wages. *Leggett v. College*, 595.

RECEIVING STOLEN GOODS.

§ 6. Sufficiency of Evidence and Nonsuit.

Evidence to the effect that after the commission of a larceny the perpetrators of the offense told defendant about it and gave him a dollar, but that when asked if he gave defendant a dollar that had been stolen, the witness stated that he had other money of his own, *is held* insufficient to be submitted to the jury on a charge of receiving stolen goods with knowledge that they had been stolen. *S. v. Ellers*, 42.

Evidence to the effect that after committing a larceny the perpetrators of the offense told defendant about it, counted the stolen money in his presence and agreed to divide it among themselves, that thereafter one of them hid the money in defendant's yard, and that defendant in company with several officers went to search for it and found it in defendant's yard, *is held* sufficient to be submitted to the jury on the charge of receiving stolen goods with knowledge that they had been stolen, since constructive possession as well as actual possession, is sufficient predicate for the offense. *Ibid.*

REFERENCE.

§ 10. Duties and Powers of Court on Appeal from Referee.

Upon the hearing upon exceptions to the referee's report, the trial judge in his supervisory power has authority to amend, modify, set aside, confirm, or disaffirm the report, which authority includes the power to make such additional findings of fact as the court deems advisable. *Quevedo v. Deans*, 618.

§ 14a. Preservation of Right to Jury Trial.

Where a party objects to a compulsory reference and thereafter excepts to numerous findings of the referee, tenders an issue in respect to each, and demands a jury trial thereon, and excepts to various conclusions of law by the referee and tenders an issue arising upon the pleadings, such party has preserved the right to trial by jury. *Moore v. Whitley*, 150.

§ 14d. Competency of Proceedings Before Referee in Trial Upon Exceptions.

The jury trial upon exceptions to the report of the referee upon the issues of fact arising on the pleadings is solely upon the written evidence taken before the referee, but the findings of fact and conclusions of law of the referee are incompetent as evidence before the jury. *Moore v. Whitley*, 150.

The trial court must pass upon exceptions to the admission of evidence by the referee before the question of the competency of such evidence upon the trial is presented for review. *Ibid.*

ROBBERY.

§ 1b. Robbery With Firearms.

G.S. 14-87 merely provides a more severe punishment for robbery when committed with firearms, without adding to or subtracting from the common law offense of robbery. *In re Sellers*, 648.

§ 3. Prosecution.

Evidence tending only to show that defendant had opportunity to commit the crime is insufficient to be submitted to the jury. *S. v. Holland*, 354.

ROBBERY—*Continued.*

§ 4. Punishment.

Upon conviction of defendant of robbery and not of robbery with firearms as charged, a judgment of twenty-five to thirty years in the State's Prison is in excess of the statutory maximum. G.S. 14-2; G.S. 14-87. *S. v. Marsh*, 101.

Where the indictment charges highway robbery and not robbery with firearms, sentence in excess of ten years exceeds the limit permitted by law. G.S. 14-2, G.S. 14-87. *In re Sellers*, 648.

SALES.

§ 25. Remedies of Buyer—Recovery of Purchase Price.

Where the jury finds that the agreement of the seller to deliver certain machinery together with equipment without which the machinery would be practically useless constituted an entire and indivisible contract, the delivery of the machinery alone because of the seller's inability to deliver the equipment contracted for entitles the purchaser to return the machinery delivered and to recover the partial payments made under the contract. *McLawhon v. Briley*, 394.

SCHOOLS.

§ 5½. Transportation of Pupils and Liability for Negligent Injury in Transportation.

A driver of a school bus in carrying out a mission for the county board of education owning the bus, is not immune from liability for the negligent operation of the bus notwithstanding that the county board of education, as an agency of the State, enjoys such immunity, since immunity of a public officer does not extend to a mere employee in the performance of a mechanical task. *Hansley v. Tilton*, 3.

An instruction that the driver of a school bus with a width in excess of eighty inches would be chargeable with negligence if he drove same on the highway at nighttime without displaying burning clearance lights, is without error, G.S. 20-129 (e), notwithstanding that the duty of keeping the lighting system of the bus in good working order may have rested upon the county board of education. *Ibid.*

§ 10h. Allocation and Expenditures of School Funds.

Where the bond order and notice of election for school bonds list the erection of a senior high school in a section of the city, the plans for which include a physical educational plant for use of the pupils of that school and also the pupils of a junior high school in the vicinity, *held* the Board of County Commissioners upon proper findings has the discretionary power to authorize the diversion of a portion of the funds for the erection of a physical education plant at the junior high school so that each school would have a physical educational plant suitable for its own pupils, the reallocation of the funds being in accord with the general purposes stated in the bond resolution and notice. *Mauldin v. McAden*, 501.

STATUTES.

§ 5a. General Rules of Construction.

Ordinarily technical terms of a statute must be given their technical connotation in its interpretation. *Henry v. Leather Co.*, 126.

Subsections of an act should be read together so as to harmonize them and give effect to each without repugnancy or inconsistency if possible. *Walker v. Bakeries Co.*, 440.

STATUTES—*Continued.*

Ordinarily, words of a statute will be given their natural, approved and recognized meaning. *Cab Co. v. Charlotte*, 572.

In construing an ambiguous statute, its language must be read contextually and with reference to the matters dealt with and the objects and purposes sought to be accomplished. *Ibid.*

In construing an ambiguous statute, earlier statutes on the subject and the history of legislation in regard thereto, including statutory changes over a period of years, may be considered in connection with the object, purpose and language of the statute. *Ibid.*

§ 5d. Statutes in Pari Materia.

Related statutes should be construed so as to give full force and effect to each of them if they can be reconciled and harmonized by reasonable interpretation. *Cab Co. v. Charlotte*, 572.

§ 13. Repeal by Implication and Construction.

A local statute is not repealed or affected by the subsequent enactment of a general statute which makes no reference to the local act. *Grimesland v. Washington*, 117.

Where provisions of related statutes are irreconcilable by any reasonable interpretation, ordinarily the last in point of enactment will prevail. *Cab Co. v. Charlotte*, 572.

Repeals by implication are not favored and will not be indulged if there is any other reasonable construction. *Ibid.*

TAXATION.

§ 18. Definitions and Distinctions—Inheritance, Estate and Gift Taxes.

An inheritance or succession tax is a burden imposed by government upon all gifts, legacies, inheritances and successions passing by will, intestate law, or deed or instrument *inter vivos* intended to take effect at or after the death of the grantor, and is not a tax on the property itself. *Watkins v. Shaw*, 96.

§ 28. Levy and Assessment of Inheritance Taxes.

Liability for inheritance taxes must be decided in the first instance by the State and Federal collectors, subject to the right of review provided by law, and therefore where neither collector is a party to an action to obtain the advice and instruction of the court in respect to the administration of the estate, the question of liability for inheritance taxes cannot be determined therein. *Trust Co. v. Waddell*, 34.

United States Savings Bonds, Series E, bought with the funds of the purchaser and made payable to the purchaser or his wife as co-owners, and kept in a place accessible to both, but without a gift *inter vivos* of the bonds to the wife, are subject to state inheritance taxes upon the death of the husband, G.S. 105-2, since the wife acquires title to the bonds by succession as survivor under the Treasury regulations. *Watkins v. Shaw*, 96.

A law imposing an inheritance tax is to be liberally construed to effectuate the intent of the Legislature, and all property fairly and reasonably coming within the provisions of such law may be taxed. *Ibid.*

§ 30. Levy and Assessment of License, Franchise and Excise Taxes.

City may not assess fee for franchise operations of taxicabs. *Cab Co. v. Charlotte*, 572.

TAXATION—*Continued.*

§ 38c. Recovery of Tax Paid Under Protest.

The provisions of G.S. 105-267 must be strictly complied with, and a taxpayer may recover from a municipality an amount paid under an unauthorized levy only in those cases in which the tax is paid under written protest with later written demand for its return. *Cab Co. v. Charlotte*, 572.

G.S. 105-407 applies solely to State taxes and not to taxes of local units. *Ibid.*

§ 40d. Limitation of Actions Attacking Sale for Taxes.

No statutes of limitation bar the right of the owners of land to assert their title as against a tax foreclosure in which they were not made parties or served with process in any manner sanctioned by law. *Quevedo v. Deans*, 618.

§ 40g. Validity and Attack of Tax Foreclosure.

Where at time of suit, persons named as owners are dead, and heirs at law are served by publication as "all those having interest in lands," foreclosure is not binding on them and they may recover land from purchasers from county after foreclosure. *Quevedo v. Deans*, 618.

The commissioner's deed to the county as purchaser at a tax foreclosure sale and the county's subsequent deed to the purchaser of the land from it, conveying the interest conveyed to it by the commissioner's deed, are no more than quitclaim deeds, and the purchaser from the county can acquire no better title than that conveyed in the commissioner's deed. *Ibid.*

§ 42. Tax Deeds and Titles.

A prospective purchaser at a tax foreclosure is under duty to investigate the records, and the principle of *caveat emptor* applies to his purchase of the land, the tax deed being in effect a quitclaim deed without warranty, and therefore upon adjudication that a tax deed failed to pass the interest of certain owners who were not served with process, the purchaser at the tax sale is not entitled to a refund of his purchase money from the taxing units but is remitted to his right to enforce, as equitable assignee of the taxing units, such tax liens as he may have acquired. G.S. 105-414. *Wilmington v. Merrick*, 46.

TENANTS IN COMMON.

§ 3. Survivorship.

G.S. 41-2 does not preclude the parties from providing for survivorship in realty by written contract or in personalty by verbal agreement. *Bunting v. Cobb*, 132.

TORTS.

§ 1. Nature and Definition of Tort.

The exercise of a legal right in an equitable manner cannot be converted into a tort by a supposed wrongful intent. *Evans v. Morrow*, 600.

§ 6. Joinder of Joint Tort-Feasors.

Consent judgment in action against bus company was entered in favor of administratrix of driver of car. The issue of intestate's contributory negligence was raised by the pleadings in that action. In a later action by passengers in the bus against the bus company, it sought to join the administratrix on the theory that her intestate was a joint tort-feasor. *Held:* The administratrix was entitled to allege the consent judgment in bar to the right of contribution, since it was *res judicata* on the question of the contributing negligence of the driver of the car. *Herring v. Coach Co.*, 51.

TORTS—*Continued.*

Where the acts or omissions of persons operating independently of each other join and concur in proximately producing the injury complained of, even though originating from separate and distinct sources, the author of each is liable for the resulting injury, and action may be brought against any one or all as joint tort-feasors. *Barber v. Wooten*, 107.

Drivers successively hitting plaintiff's car may be liable as joint tort-feasors. *Barber v. Wooten*, 107. *A fortiori* when accidents result in death of passenger. *McHorney v. Wooten*, 110.

An answer alleging that the driver of the car in which intestate was riding was guilty of negligence constituting the sole proximate cause of the collision with defendant's truck, and that intestate and the driver of the car were engaged in a joint enterprise so that the driver's negligence barred recovery against defendant for intestate's death, but further alleging that if the facts so set up as a defense be found aaginst defendant, then the negligence of the driver of the car concurred with that of defendant, and demanding contribution against the driver of the car, *held* good as against demurrer interposed by the driver of the car. *Read v. Roofing Co.*, 273.

The purpose of the statute permitting the joinder of a third party as a joint tort-feasor against whom the defendant seeks contribution, is to enable the litigants to determine in one action all matters in controversy growing out of the same subject of action. *Ibid.*

TRESPASS TO TRY TITLE.

§ 3. Actions.

The fact that the general description of the land as set out in the complaint states that it lies upon the "west side" of a certain creek does not justify demurrer in plaintiff's action to establish title to land on the east side of said creek, since plaintiff may nevertheless claim land on the east side of the creek if it be covered in the specific description as set forth in the complaint. *Moore v. Whitley*, 150.

TRIAL.

§ 14. Objections and Exceptions to Evidence.

In order to present the competency and relevancy of particular questions and answers in a deposition, a party must make specific objections in the trial court and secure rulings thereon and properly preserve his exceptions thereto, and a general objection to the deposition is a mere broadside objection to the *en masse* contents of the deposition. *Grandy v. Walker*, 734.

A general objection to the admission in evidence of an affidavit in due form merely challenges the competency of the subject matter of the affidavit *en masse* and does not draw into issue the authority of the officer who administered the oath. *Cotton Mill Co. v. Textile Workers Union*, 748.

§ 17. Admission of Evidence Competent for Restricted Purpose.

Error in the exclusion of evidence competent for a restricted purpose is not cured because the evidence was offered generally, it being the duty of the opposing party to request that its admission be restricted if he so desires. *Jackson v. Sanitarium*, 222.

Where testimony competent solely to impeach the later testimony of a witness is not offered a second time after the witness has testified, its exclusion cannot be held for error. *Freeman v. Ponder*, 294.

TRIAL—*Continued.*

§ 21. Office, Effect and Form of Motion to Nonsuit.

Where several causes of action are alleged, a general motion to nonsuit does not present the sufficiency of the evidence as to any particular cause, and must be overruled if the evidence is sufficient as to any one of the causes. *Deaton v. Deaton*, 538.

§ 21½. Necessity of Motion to Nonsuit and Renewal of Motion.

Where no exception is noted to the refusal of defendant's motion to nonsuit when plaintiff rested its case, and thereafter, upon agreement that the court find the facts upon the evidence and stipulations of the parties, the parties place in the record a series of stipulations covering numerous pertinent facts, *held*, the case is reopened to receive such stipulations, and the motion of nonsuit not being renewed, the question of defendants' right to nonsuit is not presented on the appeal. *Goldston Bros. v. Newkirk*, 279.

§ 22a. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, evidence supporting plaintiff's claim must be considered in the light most favorable to him, giving him the benefit of every reasonable inference and intendment. *Powell v. Lloyd*, 481; *Hat Shops v. Ins. Co.*, 698.

On motion to nonsuit, plaintiff's evidence will be taken as true and considered in the light most favorable to her, giving her every reasonable inference and intendment therefrom. *Deaton v. Deaton*, 538; *Donlop v. Snyder*, 627; *Tippite v. R. R.*, 641.

§ 22b. Consideration of Defendant's Evidence on Motion to Nonsuit.

Defendant's evidence in conflict with that of plaintiff is rightly ignored in ruling on defendant's motion to nonsuit. *Hansley v. Tilton*, 3; *Cuthrell v. Ins. Co.*, 137; *Donlop v. Snyder*, 627.

§ 22c. Contradictions and Discrepancies in Plaintiff's Evidence.

Discrepancies and contradictions, even in plaintiff's evidence, are for the jury and not for the court. *Fowler v. Atlantic Co.*, 542; *Donlop v. Snyder*, 627.

§ 23a. Sufficiency of Evidence to Overrule Nonsuit in General.

If there is more than a scintilla of evidence in support of any one of the several causes of action alleged, a general motion to nonsuit is properly denied. *Deaton v. Deaton*, 538.

If there is more than a scintilla of evidence in support of plaintiff's contentions it should be submitted to the jury. *Tippite v. R. R.*, 641.

§ 23e. Sufficiency of Circumstantial Evidence to Be Submitted to Jury.

In a civil action it is not required that circumstantial evidence preclude any other reasonable hypothesis in order to be sufficient to be submitted to the jury upon the issue, but only that it be sufficient reasonably to establish the facts in issue. *Hat Shops v. Ins. Co.*, 698.

§ 25. Voluntary Nonsuit.

Upon intimation of opinion by the court adverse to plaintiff on the law upon which the action is founded, or the exclusion of evidence offered by plaintiff which is necessary to make out his case, plaintiff may submit to nonsuit and appeal. *Rochlin v. Construction Co.*, 443.

TRIAL—*Continued.*

§ 26. Form and Time of Rendition of Judgment of Nonsuit.

The court may not dismiss the action for insufficiency of the evidence by judgment as of nonsuit after the jury has rendered its verdict. *Ward v. Cruse.* 388.

§ 31b. Instructions—Statement of Evidence and Application of Law Thereto.

It is not always proper or permissible for a trial judge to charge in the language used by the Supreme Court in discussing the reasons for its conclusion in the case. *Hagan v. Jenkins,* 425.

In an action for wrongful discharge in which defendant offers evidence of justification for the discharge for inefficient service, the court should define the terms "legal justification," "sufficient cause," and "wrongful discharge." *Ibid.*

§ 31d. Instructions on Burden of Proof.

Failure of court to charge as to burden of proof on one of issues is reversible error. *Tippite v. R. R.,* 641.

§ 48½. Discretionary Power to Set Aside Verdict.

The action of the trial court in setting aside the verdict in the exercise of its discretion is not reviewable. *Ward v. Cruse,* 388.

§ 49. Setting Aside Verdict as Contrary to Weight of Evidence.

The setting aside of the verdict on one issue because contrary to the weight of the evidence, and the granting of a new trial limited to that issue in instances in which the issues may be separated, is within the sound discretion of the trial judge, G.S. 1-207, no matter of law or legal inference being involved. *Muse v. Muse,* 205.

Objection that there was no sufficient evidence to support a verdict cannot be taken for the first time after the verdict has been returned, and motion to set aside the verdict for insufficiency of the evidence as a matter of law is properly denied. *Deaton v. Deaton,* 538.

Court may not dismiss action on ground that court was in error in refusing to grant timely motions to nonsuit. *Ward v. Cruse,* 388.

§ 51. Setting Aside Verdict for Error of Law.

The action of the trial court in setting aside a verdict for error of law committed in the trial is reviewable. *Ward v. Cruse,* 388.

§ 52½. Dismissal of Action After Verdict.

After verdict the trial judge may dismiss the action only for want of jurisdiction or for failure of the complaint to state a cause of action. *Ward v. Cruse,* 388.

§ 55. Findings and Judgment in Trial by Court by Agreement.

Upon trial by the court upon agreement, the court is required to find the facts on all issues of fact joined on the pleadings, to declare his conclusions of law upon the facts found in such manner as to render them distinguishable from the findings of fact, and to enter judgment accordingly. *Woodard v. Mordecai,* 463.

In a trial by the court under agreement of the parties, the trial court is required to find and state only the ultimate facts and not the evidentiary facts. *Ibid.*

TRUSTS.

§ 5b. Transactions Creating Constructive Trusts.

Where the relationship between the parties is that of debtor and creditor and not that of partners, the creditor is not entitled to a declaration of a constructive trust in realty paid for or improved with money borrowed for the debtor's business. *McGurk v. Moore*, 248.

§ 14a. Control and Management of Estate—Authority of Trustee in General.

When the instrument commands the trustee to perform some positive act the power is mandatory, when the instrument provides that the trustee may either exercise a power or refrain from exercising it, or leaves the time, manner, and extent of its exercise in the discretion of the trustee, the power is discretionary. *Woodard v. Mordecai*, 463.

The court will always compel the trustee to exercise a mandatory power; but will not undertake to control the exercise of a discetionary power except to prevent abuse of discretion. *Ibid.*

A trustee abuses his discretion in exercising or failing to exercise a discretionary power if he acts dishonestly, or if he acts with an improper motive even though not a dishonest one, or if he fails to use his judgment, or if he acts beyond the bounds of a reasonable judgment. *Ibid.*

§ 19b. Distribution of Corpus of Estate.

A provision in a will that the trustee might convey any part or all of the share of the *corpus* of a beneficiary to the beneficiary if in the trustee's judgment it is necessary or best for the welfare of the *cestui* and consistent with the welfare of trustor's family and estate, confers a discretionary power. *Woodard v. Mordecai*, 463.

§ 27. Modification Upon Sanction of Court of Equity.

Construction of will to end that widow's dissent should not divert remainder from its course of distribution except in so far as *corpus* is affected does not involve jurisdiction of court of equity to modify trust. *Trust Co. v. Waddell*, 454.

A court of equity has jurisdiction to authorize trustees of a charitable trust to sell the property devised and reinvest the proceeds in other property when necessary to accomplish the purpose of the trust, which otherwise would be defeated because of changed conditions not contemplated by trustor, and this notwithstanding provision in the trust forbidding the trustees to mortgage or sell the property. *Brooks v. Duckworth*, 549.

UTILITIES COMMISSION.

§ 2. Jurisdiction.

A municipal corporation authorized by general and local statute to maintain transmission lines for the sale of current outside its corporate limits and within reasonable limitations, G.S. 160-255; Ch. 31, Public-Local Laws of 1931, is not amenable to G.S. 62-101 and is not required first to obtain a certificate of public convenience and necessity from the Utilities Commission. *Grimesland v. Washington*, 117.

§ 3. Hearings, Judgments and Orders.

Utilities Commission may permit intra-city bus company to operate .7 mile outside city limits along route of inter-urban bus company without finding that service rendered by inter-urban company was unsatisfactory. *Utilities Com. v. Coach Co.*, 489.

UTILITIES COMMISSION—*Continued.*

§ 5. **Appeal and Review.**

An order of the Utilities Commission is *prima facie* just and reasonable. *Utilities Com. v. Coach Co.*, 489.

VENDOR AND PURCHASER.

§ 24. **Remedies of Purchaser—Recovery of Purchase Money Paid.**

While in the face of denial of liability parol evidence is not competent to establish an oral contract to convey realty for the purpose of obtaining specific performance, G.S. 22-2, it is competent for the purpose of determining whether the purchaser is entitled to recover the amount paid under such parol agreement which has been breached by the seller, and conversely whether the seller is entitled to retain the payment made for breach by the purchaser. *Rochlin v. Construction Co.*, 443.

VENUE.

§ 2a. **Subject of Action—Actions Involving Realty.**

An action for damages for breach of contract to convey timber upon allegation that defendants had breached the contract by conveyance of a part of the timber to another, without the joinder of the grantee of the timber, *is held* not an action for the recovery of real property within the purview of G.S. 1-76, since specific performance could not be decreed, and defendants' motion to remove to the county in which the timber is situate is properly denied. *Lamb v. Staples*, 166.

WAIVER.

§ 2. **Acts Constituting Waiver.**

A waiver is the voluntary and intentional relinquishment of a known right. *Luther v. Luther*, 429.

Waiver is the voluntary relinquishment of a known right express or implied from acts and conduct naturally and justly leading the other party to believe that the right has been intentionally foregone. *Guerry v. Trust Co.*, 644.

WILLS.

§ 5a. **Contracts to Devise—Breach and Right of Action.**

Allegations to the effect that decedent contracted, in consideration of personal services rendered, to devise property to plaintiffs, and that decedent did so devise them the property but that the will was lost or destroyed and never admitted to probate, *held* not to state a cause of action against decedent's heirs for specific performance, since, according to the complaint, decedent did not breach the agreement but complied therewith by devising the land to them, and specific performance does not lie until there has been a breach of contract. *Anderson v. Atkinson*, 271.

§ 6. **Signature of Testator.**

A will may be signed by testator, or by another person in his presence and by his direction, at any place in the instrument, since the statute does not require that the signature be "subscribed." G.S. 31-3, and therefore testimony to the effect that the instrument was written at the direction of testarix and in her presence and in accordance with her wishes, and that her name appeared thereon in the beginning in the words "will of Hannah Williams, Sr.," and that after it was written it was read to her and she stated that it was correct, *is held* sufficient to support a finding by the jury that the paper writing was

WILLS—*Continued.*

signed in the name of testatrix by the draftsman in her presence and at her request. *In re Will of Williams*, 228.

Holographic codicil must be signed in some manner. *In re Will of Gatling*, 561.

§ 9½. Holographic Codicils.

In order to be effective, an interlineation or alteration substantially changing the provisions of a holographic will must be executed in conformity with G.S. 31-5. *In re Will of Gatling*, 561.

§ 16. Nature and Effect of Probate.

Probate of a will is in the exclusive jurisdiction of the clerk of the Superior Court, and therefore the Superior Court has no original jurisdiction of an action to have plaintiffs declared the owners of land upon allegations that decedent devised it to them but that the will had been lost or destroyed and never admitted to probate, nor do such facts constitute a cause of action, since the will is wholly ineffectual until it is admitted to probate in the proper court. *Anderson v. Atkinson*, 271.

The probate of a will in common form is conclusive and may be attacked only in a direct proceeding upon the issue of *devisavit vel non*. *Coppedge v. Coppedge*, 747.

§ 17. Nature and Effect of Caveat.

A caveat proceeding is *in rem* to ascertain whether the paper writing purporting to be a will is in fact a testamentary disposition of property, and caveatórs may attack any part of the will or attack it *in toto* upon the grounds set forth. *In re Will of Morrow*, 365.

§ 21c. Fraud, Duress and Undue Influence.

To constitute undue influence which will vitiate a will it is necessary that the mind of testator be overpowered by the influence of another amounting to restraint akin to coercion, so that the instrument does not express the intent of the maker but rather that of the person exerting the influence. *In re Will of Kemp*, 495.

§ 22. Burden of Proof in Caveat Proceedings.

In caveat proceedings, propounder has the burden of proving the due execution of the instrument, *i.e.*, that it was written in testator's lifetime, signed by him or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least. G.S. 31-3. *In re Will of Morrow*, 365.

Propounders have burden of showing absence of any one of essential elements of testamentary capacity and not all of them conjunctively. *In re Will of Kemp*, 495.

§ 24. Sufficiency of Evidence, Nonsuit and Directed Verdict.

The issue of *devisavit vel non* must be determined by the jury and may not be determined by the court even upon agreement of the parties, nor may the case be submitted upon an agreed statement of facts, nor may either party take a nonsuit. *In re Will of Morrow*, 365.

Since the propounder has the burden of proving the due execution of the instrument, he cannot be entitled to a directed verdict in his favor on the issue of due execution, the weight and credibility of propounder's testimony being for the determination of the jury. *Ibid.*

WILLS—*Continued.*

Testatrix lived with her brother until his death, and was the beneficiary of his will. Her will was executed some thirteen days after his death and testatrix lived more than three years after its execution without intimation that its terms were not in accord with her wishes. The only evidence of undue influence was testimony of her statements that she and her brother had discussed their affairs and decided that they were going to leave their property for the benefit of orphan children of the county. *Held:* There was no sufficient evidence of undue influence on the part of testatrix' brother to require the submission of the issue to the jury. *In re Will of Kemp,* 495.

§ 25. Instructions in Caveat Proceedings.

A charge placing the burden upon propounders to show conjunctively the absence of each of the essential elements of testamentary capacity must be held for error, since it suffices if they negative any one of such essential elements. *In re Will of Kemp,* 495.

And error in charge in this respect *held* not cured by contextual construction. *Ibid.*

Instructions as to requirements of holographic codicil *held* without error. *In re Will of Gatling,* 561.

§ 31. General Rules of Construction.

A phrase in a will should not be given a significance which clearly conflicts with the evident intent and purpose of the testator as gathered from the four corners of the instrument. *Doub v. Harper,* 14.

The intent of testator as gathered from the four corners of the instrument is the polar star in its interpretation, and will be given effect unless contrary to some rule of law or to public policy. *Coppedge v. Coppedge,* 173; *Efird v. Efird,* 607.

In order to effectuate testator's intent, the courts may transpose or supply words, phrases or clauses when the context manifestly requires it, and may disregard or supply punctuation. *Coppedge v. Coppedge,* 173.

In construing a will every word or clause will be given effect if possible, and apparent repugnancies reconciled, and irreconcilable repugnancies resolved by giving effect to the general prevailing purpose of testator. *Ibid.*

The objective of construction is to effectuate the intent of the testator as expressed in his will, for his intent as so expressed is his will. *Woodard v. Clark,* 215.

All rules of construction, as distinguished from rules of law governing construction, serve only as an aid and guide in the discovery of the intention of testator which, as expressed in the instrument, is the will. *Trust Co. v. Waddell,* 454.

§ 32. Presumption Against Partial Intestacy.

Where there is a will there is a presumption against partial intestacy, and the courts will adopt that construction which will uphold the will in all its parts if consistent with established rules of law and the intention of testator. *Trust Co. v. Waddell,* 454.

§ 32½. Transmittible Estates.

Testator was devised under another instrument a remainder in the event the first taker should die without issue. The first taker died without issue subsequent to the death of testator. *Held:* Testator had a transmittible estate, G.S. 31-40, but whether his widow is entitled to dower therein is not necessary to

be decided in this case, since the widow had agreed to a settlement in lieu of dower, and therefore the property passed under the residuary clause of testator's will. *Trust Co. v. Waddell,* 454.

§ 33a. Estates and Interests Created in General.

While a devise is to be construed to be in fee simple unless a contrary intent plainly appear from the instrument, G.S. 31-38, and a devise generally and indefinitely, standing alone, constitutes a devise in fee simple, where the clause devising property generally to a beneficiary expressly states that it should be "subject to the other provisions of my will, both hereinbefore and hereinafter contained," another item which clearly expresses testator's intention to transfer an estate of less dignity than a fee simple becomes incorporated therein and is controlling. *Woodard v. Clark,* 215.

Where, after a general devise, a later item stipulates that in the event the beneficiary should die without issue her surviving, the property given to her should pass to such of her kindred as are of testator's blood, and that the property should "be divided" and certain of testator's kindred as ascertained in the manner set forth in the will "shall have such part" as should be ascertained under the provisions of the instrument, the later item makes a positive disposition of the property in the event the first beneficiary should die without issue, and, with other portions of the will in this case, clearly expresses testator's intent that the first beneficiary should take less than a fee absolute. *Ibid.*

The law favors the early vesting of estates, and when a devise contains no limitation over in the event of the death of the devisee or legatee the estate will vest at the time of the death of testator in the absence of an express intention to the contrary. *Ibid.*

Title to one of the lots constituting the home place was in testator's name individually. In two items he referred to the property as held by him and his wife as tenants by entirety and stated that she would automatically own the estate, and gave her all furniture and household effects therein, and also bequeathed to her a part of his general estate. By later item he stated that "after the above properties which have been given to my wife" the remainder should be divided equally among his four children. *Held:* There was not merely an incorrect description of an instrument extrinsic to the will but also language evincing the unmistakable intent of testator that his wife should have the home place, and such intent must be given effect. *Efird v. Efird,* 607.

Time of beginning of trust period *held* sufficiently definite, and devise was not void for uncertainty. *McQueen v. Trust Co.,* 737.

§ 33c. Vested and Contingent Interests and Defeasible Fees and Time of Vesting of Estate.

Where there is a limitation over to the "bodily heirs" surviving upon the death of the last surviving life beneficiary, the roll must be called as of the date of the death of the last surviving life beneficiary, G.S. 41-4, and the persons who can answer the roll as of that date take as devisees under the will and not by representation. *Trust Co. v. Waddell,* 34.

Under terms of this will, children of each life tenant, upon the death of the life tenant, took vested fee in that part of remainder in which life tenant held life estate. *Bunting v. Cobb,* 132.

A devise to testator's grandson for life and after his death to testator's "male children or their bodily heirs," *is held* to create a life estate in the grandson with remainder vesting at the time of testator's death in testator's sons, and therefore a deed from all of testator's sons to the life tenant vests a good and

WILLS—*Continued.*

indefeasible fee simple estate in him. Furthermore, the deed of testator's son would estop them and all who may claim through or from them. *Pridgen v. Tyson*, 199.

As a general rule remainders vest at the death of testator unless some later time for the vesting is clearly expressed in the will, or is necessarily implied therefrom, and adverbs of time and adverbial clauses designating time do not create a contingency but rather indicate a time when the enjoyment of the estate shall begin. *Ibid.*

Where property is devised in trust for named beneficiary, with provision that he take in fee upon reaching age of 25, the beneficiary takes equitable title vesting at time of testator's death. *Jackson v. Langley*, 243.

Right of trustee to use part of estate upon enumerated emergencies does not prevent vesting of equitable title, but merely makes it subject to be divested of such portion as trustee may use. *Ibid.*

Such interest of beneficiary passes to his heirs under canons of descent. *Ibid.*

The will in question devised the residuary property, subject to a prior life estate, to trustees with direction that they pay designated sums to named beneficiaries after the death of the life tenant, give financial assistance to a grand niece and a grand nephew if either or both should desire to attend a university or college, and divide the net quarterly income and pay same to named beneficiaries in stated proportions, with further provision that at the expiration of twenty-five years after the commencement of the period of the trust, the *corpus* should be divided among the beneficiaries of the income in the same proportion. *Held:* The beneficial title to the *corpus* of the trust vested in the beneficiaries designated immediately upon death of testatrix, subject to the life estate and the right of the trustees to make use of a part thereof in their discretion for the other designated purposes, with only the right of full enjoyment postponed for the twenty-five-year period, and therefore the rule against perpetuities has no application. *McQueen v. Trust Co.*, 737.

§ 33d. Estates in Trust.

The will provided that the period of the trust therein set up should begin at the death of the life tenant or from the date of the filing of the will for probate, whichever was later. The will was promptly probated, and the life tenant survived several years thereafter. *Held:* Title vested in the trustees immediately upon the death of testatrix, and the right of possession and the beginning of the period of the trust was, under the facts of the case, definite and certain, and therefore a holding that the devise in trust was too uncertain, vague, and indefinite to be enforceable is erroneous. *Semble:* "the date of filing" the will for probate meant the date of the death of testatrix and the performance of the formalities which would entitle the trustees to assert their rights, and was also sufficiently definite and certain. *McQueen v. Trust Co.*, 737.

§ 33f. Devises With Power of Disposition.

Power of executor to sell realty for designated purposes see *Doub v. Harper*, 14.

Where a beneficiary is granted power to sell and convey any part of the property devised to her, but such power is connected with discretionary authority to exchange, convert, invest and reinvest any part of the property as changing conditions might require, and there is a positive disposition of the property to others in the event the first beneficiary should die without issue her surviving, and not a mere disposition of what might be left, the first beneficiary is

WILLS—*Continued.*

not given an unrestricted power of disposition, but only the power to sell or exchange for reinvestment, and she does not take the fee absolute. *Woodard v. Clark*, 215.

§ 33h. Rule Against Perpetuities.

The rule against perpetuities prescribes that if there is a possibility that a future interest may not vest within twenty-one years and ten lunar months after the life or lives of persons in being the devise is void, but the rule relates to the time of the vesting of an estate and not to the period during which the right to full enjoyment may be postponed. *McQueen v. Trust Co.*, 737.

While the rule against perpetuities may not be avoided by the creation of a private trust, such trust does not violate the rule if title vests during the prescribed time even though the right of full enjoyment be postponed beyond that period. *Ibid.*

§ 33i. Restraint on Alienation.

The creation of a trust postponing the right to full enjoyment of the vested interests of the beneficiaries for the twenty-five-year period of the trust is not an unreasonable restraint upon alienation. *McQueen v. Trust Co.*, 737.

§ 34c. Devises to a Class.

Upon a devise in trust with direction that the trustee pay the income to testator's sister for life and then pay the income to his named nephew and niece, with further provision that upon the death of the survivor of the life beneficiaries the fund should be distributed per capita among the "bodily heirs" of the said nephew and niece then surviving, *held*, the term "bodily heirs" is used as *descriptio personarum* and embraces children, grandchildren and other lineal descendants who must be represented in order to be bound by a decree involving the estate. *Trust Co. v. Waddell*, 34.

Testator left him surviving a brother, a half brother, children of a deceased sister, children of a deceased brother, and grandchildren of a deceased sister. Testator directed that the remainder of his estate "be divided among my legal heirs, . . . equally, share and share alike as provided by laws of North Carolina . . ." *Held:* The beneficiaries take *per capita* and not *per stirpes*, this result being necessary to give effect to the words "equally, share and share alike" and the phrase "as provided by laws of North Carolina" being given effect as ascertaining who are his legal heirs. *Coppedge v. Coppedge*, 173.

§ 34g. Estate and Inheritance Taxes.

Testator has the power to direct that all taxes, including estate and inheritance taxes, be paid before the distribution to the beneficiaries, and conversely to direct that the beneficiaries of certain specific legacies be liable for inheritance taxes. *Trust Co. v. Waddell*, 454.

§ 38. Residuary Estate.

Testator left the residue of his estate one-third to his widow and one-third each to two trusts set up by the instrument. The widow dissented from the will. *Held:* After settlement with the widow for her year's allowance and dower, all the residue of the estate fell into the trusts, one-half to each, and the direction of the will that one-third of the residue should be set up as a trust fund for each trust will not be allowed to defeat the intent of testator and render him intestate as to one-third of the residue devised and bequeathed to the widow. *Trust Co. v. Waddell*, 454.

WILLS—*Continued.*

§ 39. Actions to Construe Wills.

Liability for inheritance taxes cannot be determined in action in which collector is not a party. *Trust Co. v. Waddell*, 34.

Where, in an action to construe a will, the parties request the court to define the exact measure of plaintiff's title and fix and declare the force and effect of conditions and qualifications annexed thereto, plaintiff is entitled to such adjudication, and where the trial court fails to so adjudicate the cause will be remanded. *Woodard v. Clark*, 215.

Supreme Court has no original jurisdiction to determine and define estate conveyed by will, but is limited to review. *Ibid.*

In an action to construe a will probated in common form, the issue of *devisavit vel non* is not before the court and the will may not be collaterally attacked therein. *Coppedge v. Coppedge*, 747.

§ 40. Right of Widow to Dissent and Effect Thereof.

Upon filing her dissent to her husband's will, the widow becomes *eo instante* vested with title to all property of her deceased husband allowed her by statute as surviving spouse. *Trust Co. v. Waddell*, 454.

Where widow dissents, will must be construed to effect testator's intent as to disposition of remainder as near as possible. *Ibid.*

GENERAL STATUTES CONSTRUED.

(For convenience in annotating.)

G.S.

1-45. Rule that statute does not run against streets does not apply when dedication of street has never been accepted. *Lee v. Walker*, 687.

1-76. Action for damages for breach of contract to convey does not affect realty within purview of statute. *Lamb v. Staples*, 166.

1-97 (6). Fact that foreign labor union has affiliated local union in this State insufficient to support finding it was doing business here. *Stafford v. Wood*, 622.

1-103. Filing of demurrer for failure of complaint to state cause of action is general appearance waiving any defect of service. *Hospital v. Joint Committee*, 673.

1-116. Allegations *held* insufficient for declaration of resulting trust, and *lis pendens held* improper. *McGurk v. Moore*, 248.

1-122. Complaint must contain every ultimate fact but not evidentiary facts. *Guy v. Baer*, 276.

1-126. Sufficiency of new matter alleged in answer to constitute defense may be challenged by motion to strike. *Williams v. Hospital Asso.*, 536.

1-137 (1). Cross action *held* improperly alleged because of want of mutuality of parties and sufficient connection with plaintiff's cause of action. *Thompson v. Ins. Co.*, 434.

1-141. Sufficiency of new matter alleged in answer to constitute defense may be challenged by demurrer. *Williams v. Hospital Asso.*, 536.

1-151. Pleading will be liberally construed upon demurrer. *Clinard v. Lambeth*, 410; *Guerry v. Trust Co.*, 644.

1-153. Objection to paragraphs precluded by prior judgment may be made by motion to strike. *Miller v. Bank*, 309.

1-163. Superior Court has power to allow amendment after decision of Supreme Court. *Goldston Bros. v. Newkirk*, 279.

1-172. Issue must be determined by jury. *Freeman v. Ponder*, 294.

1-180. Defendant desiring elaboration must tender prayers for instructions. *S. v. McLean*, 283. Error for court to fail to charge upon defense, supported by evidence, that defendants aided felon to escape because of fear of death or great bodily harm. *S. v. Sherian*, 30. Evidence *held* to require charge on defendant's right to kill in self-defense without retreating when murderous assault is made upon him. *S. v. Washington*, 531. Charge that entrapment by law enforcement officers was to their credit *held* error as expression of opinion on weight of their testimony. *S. v. Shinn*, 397.

1-185. Judgment *held* based on findings of ultimate facts rather than conclusions of law, and findings and conclusions were sufficiently distinguished. *Woodard v. Mordecai*, 463.

1-189. Appellant *held* to have preserved right to jury trial. *Moore v. Whitley*, 150.

1-207. Setting aside verdict because contrary to evidence is within discretion of court and not reviewable. *Muse v. Muse*, 205.

1-220. Findings *held* insufficient predicate for conclusion that neglect was excusable. *Pate v. Hospital*, 637. Findings *held* to sustain setting aside of judgment. *Dillingham v. Blue Ridge Motors*, 171.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

1-240. Rights of defendants as among themselves is not presented by demurrer when not appearing on face of complaint. *Barber v. Wooten*, 107. Drivers successively hitting plaintiff's car may be held jointly liable. *Ibid.; McHorney v. Wooten*, 110. In guest's action, defendant driver may join other driver for contribution. *Read v. Roofing Co.*, 273.

1-277. Appeal does not lie from order allowing party to intervene. *Raleigh v. Edwards*, 528.

1-516. When private relators institute action, allocation of peremptory challenges is properly made on basis of parties as constituted. *Freeman v. Ponder*, 294.

1-Art. 45. Does not apply to agreement to arbitrate executed in original contract. *Skinner v. Gaither Corp.*, 385.

1-581; 1-513. Motion for temporary mandatory injunction in *mandamus* proceedings may be heard less than ten days from notice. *Hospital v. Joint Committee*, 673.

2-16; 28-1; 28-2; 31-12. Will is wholly ineffectual until probated, and probate is in exclusive jurisdiction of clerk. *Anderson v. Atkinson*, 271.

5-2; 5-8. Wife may not be held in contempt for refusing to sign judgment to which she had verbally assented in suit for alimony without divorce, and judgment as for contempt is appealable. *Luther v. Luther*, 429.

5-7. Order may be based upon affidavit or other verification. *Erwin Mills v. Textile Workers Union*, 321.

7-64. Court first taking jurisdiction ousts jurisdiction of the other. *S. v. Parker*, 236.

8-40. Expert's reference to manner in which testator made certain letters *held* not prejudicial as personifying testator. *In re Will of Gatling*, 561.

9-23. Court may allow each class of defendants four peremptory challenges. *Freeman v. Ponder*, 294.

14-2; 14-87. Conviction of robbery not with firearms does not support judgment of twenty-five to thirty years. *S. v. Marsh*, 101. Sentence in excess of ten years for robbery not with firearms is in excess of legal limit. *In re Sellers*, 648.

14-17. Jury has unbridled discretion to recommend life imprisonment. *S. v. Simmons*, 290; *S. v. Marsh*, 101.

14-32. Circumstantial evidence *held* sufficient to show that defendant was present and gave active encouragement to perpetrator of assault. *S. v. Holland*, 354.

14-65. Burning must be with fraudulent intent or willfully to constitute arson. *S. v. Cash*, 292.

14-87. Circumstantial evidence *held* insufficient to show that assailants robbed victim. *S. v. Holland*, 354.

14-325. State must show that failure to support was willful. *S. v. Clark*, 192.

15-143. Cannot supply essential element of offense. *S. v. Gibbs*, 259.

15-153. Does not dispense with necessity that each essential element of offense be charged. *S. v. Gibbs*, 259.

15-173. General motion to nonsuit does not test sufficiency of evidence as to any particular count. *S. v. Marsh*, 101.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

15-177.1. Superior Court may impose heavier sentence on appeal notwithstanding that defendant in both courts pleads guilty. *S. v. Meadows*, 657.

15-179. State may not appeal from order sustaining plea of former acquittal notwithstanding it is denominated quashal. *S. v. Wilson*, 552.

15-180. It is duty of appellant to see that record is properly made up and transmitted. *S. v. Jenkins*, 112.

18-2. Possession may be constructive. *S. v. Fuqua*, 168.

18-2; 18-11; 18-49; 18-58. Illegal to possess in dry county liquor for any purpose not sanctioned by law. *S. v. Fuqua*, 168.

18-11. Illegal possession raises presumption of possession for sale. *S. v. Parker*, 236.

18-48. Possession of any quantity of nontax-paid liquor in any part of State is illegal. *S. v. Parker*, 236. Finding of nontax-paid whiskey in kettle on kitchen table in defendant's home sufficient for conviction. *S. v. Jenkins*, 112.

20-97 (a) (b); 160-200 (36a). Municipality is limited to tax of $16 per vehicle and may not impose franchise tax on cabs. *Cab Co. v. Charlotte*, 572.

20-129; 20-154. Evidence of driving without proper tail lights and stopping suddenly without warning *held* sufficient on issue of negligence. *Powell v. Lloyd*, 481.

20-138. Officer may arrest for misdemeanor committed in his presence without warrant. *S. v. Pillow*, 146.

20-141 (a); 20-129 (a) (e); 20-148. Evidence of negligence in operation of school bus on narrow bridge *held* sufficient for jury. *Hansley v. Tilton*, 3.

20-150 (b) (d). Construed together; driver may not pass on curve if center line is marked, or, if unmarked, unless he can see for 500 feet or more; applies in accident with vehicle traveling in same direction. *Walker v. Bakeries Co.*, 440.

20-153. Motorist may assume that car in left-turn lane will turn left; G.S. 20-149 does not apply. *Anderson v. Office Supplies*, 142.

20-154; 20-157. Person hearing siren may not turn right until he has seen that movement can be made in safety and has given warning. *Anderson v. Office Supplies*, 142.

20-155 (a). That defendant's car approached intersection from plaintiff's right at approximately same time *held* not sole reasonable inference from evidence and nonsuit for contributory negligence properly denied. *Donlop v. Snyder*, 627.

20-155 (a) (b); 20-154. Where vehicles traveling in opposite directions meet at intersection and collide when one makes left turn, G.S. 20-155 (b) and 20-154 apply and not G.S. 20-155 (a). *Fowler v. Atlantic Co.*, 542.

20-155 (b). Evidence that plaintiff was first in intersection *held* for jury on issue of negligence. *Donlop v. Snyder*, 627.

20-158 (a). Failure to stop before through highway intersection is not negligence *per se*, but is evidence of negligence. *Johnson v. Bell*, 522.

22-2. Does not apply in action to recover amount paid under parol agreement. *Rochlin v. Construction Co.*, 443.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

28-8 (4); 28-6; 28-149 (4). Only child of decedent leaving no widow is entitled to administer unless found incompetent after judicial hearing. *In re Estate of Edwards*, 202.

28-10; 30-4; 52-19. Wife feloniously killing husband not entitled to proceeds of policy even though named beneficiary. *Bullock v. Ins. Co.*, 254.

28-147. Superior Court has jurisdiction to approve settlement for dower in amount less than value of dower right. *Trust Co. v. Waddell*, 454.

29-1 (1) (6). Where son having beneficial interest dies during trust, his father inherits estate. *Jackson v. Langley*, 243.

30-4; 30-5; 1-47 (5). Widow may redeem dower right against mortgagee in possession and statute does not begin to run against her until husband's death. *Gay v. Exum & Co.*, 378.

30-27. Superior Court has jurisdiction to approve settlement for widow's year's support in amount less than maximum under statute. *Trust Co. v. Waddell*, 454.

31-3. Propounder has burden of showing due execution of will. *In re Will of Morrow*, 365. Will may be signed by testator, or for him by another, at any place in the instrument. *In re Will of Williams*, 228.

31-5. Interlineation in holographic will must be executed in conformity with statute. *In re Will of Gatling*, 561.

31-38. Where intent to convey less than fee appears from instrument, such intent controls. *Woodard v. Clark*, 215.

40-12. Court is not required to determine validity of claim before allowing party to intervene. *Raleigh v. Edwards*, 528.

41-2. Does not prevent parties from providing for survivorship by agreement. *Bunting v. Cobb*, 132.

44-1; 44-38; 44-39; 44-43; 44-48 (4). Subsequent encumbrancers are not necessary but are proper parties in action to enforce contractor's lien. *Assurance Society v. Basnight*, 347.

44-6. Owner may allege against materialmen's claim that because of defective materials and unworkmanlike construction, he owes contractor nothing. *Widenhouse v. Russ*, 382.

46-23. Vested remainderman *held* entitled to partition. *Bunting v. Cobb*, 123.

46-30. Judgment lienors are not necessary parties to partition, but when not made parties, sale does not affect their interests. *Washburn v. Washburn*, 370.

49-1; 49-2. State must show that refusal is willful. *S. v. Sharpe*, 154.

50-6. Separation with mutual intent to resume marital cohabitation is not separation within purview of statute. *Mallard v. Mallard*, 654.

50-8; 50-16. Action for alimony without divorce may be instituted without waiting until action for absolute divorce could be maintained and without filing affidavit. *Cunningham v. Cunningham*, 1.

50-16; 50-7. In action for alimony without divorce, statement and evidence of any cause for divorce precludes general demurrer or general motion to nonsuit. *Deaton v. Deaton*, 538.

52-13; 52-16. Husband may forfeit or release right to curtesy. *Blankenship v. Blankenship*, 162.

55-115. Discretionary power to set aside surplus for working capital is not unlimited. *Gaines v. Mfg. Co.*, 331.

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55-136. Lien is subject to lien for Federal taxes. *Leggett v. College,* 595.

59-36 (1) ; 59-37. Loan for part of profits does not create partnership. *McGurk v. Moore,* 248.

62-105 (f). Utilities Commission may allow city bus company to operate .7 mile outside city limits upon showing of public convenience and necessity, notwithstanding duplication of interurban bus route. *Utilities Com. v. Coach Co.,* 489.

66-Art. 12. Unconstitutional as violating interstate commerce clause. *S. v. Mobley,* 55.

90-159. Facts alleged *held* sufficient to entitle plaintiff to *mandamus* to compel defendants to accredit its nursing school. *Hospital v. Joint Committee,* 673.

96-4 (m). Findings of Employment Security Commission binding on appeal when supported by evidence. *Employment Security Com. v. Monsees,* 69.

96-8 (e). Prior to Amendment of 1949. Sawmill owner, contracting with individuals to operate sawmills, and as loggers, *held* employing unit. *Employment Security Com. v. Monsees,* 69.

96-8 (f) (8). Prior to its repeal. Consignee of oil products for filling station *held* not employing unit. *Employment Security Com. v. Tinnin,* 75.

96-15 (i). Statutory provisions for appeal are mandatory and not directory. *In re Employment Security Com.,* 651. Findings of Commission are conclusive when supported by evidence. *Ibid.*

97-2 (f) ; 97-52 ; 97-53. Tenosynovitis from repeated strain *held* caused by trauma and compensable. *Henry v. Leather Co.,* 126.

97-2 (i) ; 97-30. Compensation should be based upon loss of wage earning power rather than amount actually earned. *Hill v. DuBose,* 446.

97-9. Defendant employee *held* conducting business of employer within protection of Compensation Act. *Warner v. Leder,* 727.

97-14. When employer exempts himself from Act, defenses of negligence of fellow servant, contributory negligence and assumption of risks are not available. *Muldrow v. Weinstein,* 587.

97-38 ; 97-40. Where mother is sole next of kin and mother and minor brother are partial dependents, dependents may not elect to take as next of kin. *Parsons v. Swift & Co.,* 580.

97-53 (26). Unconstitutional as providing separate and exclusive emoluments. *Duncan v. Charlotte,* 86.

97-58 (a). Claim for silicosis *held* filed within time. *Autrey v. Mica Co.,* 400.

105-2. Federal Savings Bonds, bought with husband's funds and payable to husband or wife are subject to State inheritance taxes upon death of husband. *Watkins v. Shaw,* 96.

105-267. Tax must be paid under written protest with later written demand for return. *Cab Co. v. Charlotte,* 572.

105-391. Publication is not service as to persons not named therein. *Quevedo v. Deans,* 618.

105-407. Applies to State and not local taxes. *Cab Co. v. Charlotte,* 572.

105-414. Upon adjudication that tax deed failed to pass title of those owners not served with summons, purchaser at tax sale is not entitled to re-

GENERAL STATUTES CONSTRUED—*Continued.*

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cover purchase money from taxing unit, but is remitted to enforcement of lien as equitable assignee. *Wilmington v. Merrick*, 46.

136-67, *et seq.* Action alleging that defendants had wrongfully closed segment of abandoned highway not in exclusive jurisdiction of clerk. *Clinard v. Lambeth*, 410.

136-96. Rights of purchasers of lots cannot be defeated by withdrawal from dedication except in manner provided by statute. *Lee v. Walker*, 687.

153-107. School authorities have limited discretion to reallocate funds in accord with general purposes stated in bond order and notice. *Mauldin v. McAden*, 501.

156-sub-chap. 1. Owner constructing ditch draining into canal may be assessed proportionate expense of necessary improvements. *Canal Co. v. Keys*, 360.

160-203. Knowledge of municipal ordinance relating to water system presumed within one mile of limits. *Spaugh v. Winston-Salem*, 708.

160-222. It will be presumed that excavation along street was with permission of municipality. *Presley v. Allen & Co.*, 181.

160-255; 62-30 (3); 62-65; 62-101. Municipality is not required to obtain certificate of public convenience and necessity to build transmission lines outside its limits. *Grimesland v. Washington*, 117.

163-85; 163-88. Returns and abstracts are competent in evidence. *Freeman v. Ponder*, 294.

CONSTITUTION OF NORTH CAROLINA SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART.

I, sec. 7. Act making heart disease occupational disease of firemen *held* unconstitutional. (G.S. 97-53 (26)) *Duncan v. Charlotte*, 86.

I, sec. 17. Appropriation of private water system not violation of law of land under facts of this case. *Spaugh v. Winston-Salem*, 708. Guarantees every person judicial hearing before his rights may be affected. *In re Estate of Edwards*, 202.

VIII, sec. 4. General Assembly may authorize municipality to construct power lines outside its limits. *Grimesland v. Washington*, 117.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART.

I, sec. 8, clauses 2, 18. Title and succession of Federal Savings Bonds are governed by Federal regulations, but savings bonds bought with funds of husband and made payable to husband or wife are subject to state inheritance taxes upon death of husband. *Watkins v. Shaw*, 96.

I, sec. 8, clause 3. Police power of states, in order to be exercised in derogation of interstate commerce must be *bona fide* and accomplish in plain and appreciable manner objective within police power, and statute requiring photographers soliciting orders in this State to file bond *held* unconstitutional. *S. v. Mobley*, 55.

VI, sec. 2. State law in conflict with Federal cannot be given effect. *Leggett v. College*, 595.

14th Amendment. Appropriation of private water system not violation of due process of law under facts of this case. *Spaugh v. Winston-Salem*, 708.